Annex 617

Certain Phosphate Lands in Nauru (Nauru v Australia), Judgment of 26 June 1992, I.C.J Reports 1992, p. 240, Separate Opinion of Judge Shahabuddeen

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

A major point on which the Court has divided is whether Australia may be sued in the absence of New Zealand and the United Kingdom. I propose to give my reasons for agreeing with the decision of the Court on the point. Before proceeding, there is, however, an introductory matter to which I must refer. It concerns the principle of equality of States before the Court. It arises in the following way.

Nauru is one of the smallest States in the world; Australia is one of the larger. In his opening remarks, the Solicitor-General for the Commonwealth observed:

> "There is no need for emotive arguments. It is not a case of David and Goliath, or of a tiny island and a large metropolitan power . . . Before this Court, of course, the equality of the Parties will be preserved. Rich or poor, large or small, the Court will ensure that their legal rights have equal protection." (CR 91/15, p. 42, Solicitor-General Gavan Griffith, Q.C.)

Counsel for Nauru in his turn referred to the contrasting sizes of the Parties and said:

> "Being a small democratic State, Nauru has firm faith in the rule of law in the affairs of nations. It has firm faith in this Court as the dispenser of international justice." (CR 91/18, p. 31, Professor Mani.)

It seems to me that, whatever the debates relating to its precise content in other respects, the concept of equality of States has always applied as a fundamental principle to the position of States as parties to a case before the Court (*Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, P.C.I.J., Series A/B, No. 65*, p. 66, Judge Anzilotti). In the words of President Basdevant, "Before this Court, there are no great or small States . . ." (*I.C.J. Yearbook 1950-1951*, p. 17). States of all kinds and sizes may bring their cases before the Court on a basis of perfect equality. Big States have a right to value this aspect as much as small. In the *Mavrommatis Concessions* case, Greece sued the United Kingdom before the Permanent Court of International Justice. At one stage in a lively debate, counsel for the United Kingdom found himself remarking that "even the great Powers are entitled to justice at the hands of this Tribunal" (*P.C.I.J., Series C, No. 5-I*, p. 64). So indeed they are; so are all States. The matter has never been in doubt.

To return to the question under examination, as to whether Australia may be sued alone, I consider that an affirmative answer is required for three reasons. First, the obligations of the three Governments under the Trusteeship Agreement were joint and several. Second, assuming that the obligations were joint, this did not by itself prevent Australia from being sued alone. Third, a possible judgment against Australia will not amount to a judicial determination of the responsibility of New Zealand and the United Kingdom. These propositions are developed below. I begin, however, with the initial question, over which the Parties also joined issue, as to whether the objection should be declared to be one which does not possess an exclusively preliminary character. Similar questions arose in relation to other Australian objections, but it is not proposed to deal with those. I would add, by way of general caveat, that any reference in this opinion to the obligation, or liability, or responsibility of Australia should be understood as resting on an assumption made for the purposes of argument. Whether or not Australia had any obligation, or liability, or responsibility is a matter for the merits.

PART I. WHETHER THE OBJECTION DOES NOT POSSESS AN EXCLUSIVELY PRELIMINARY CHARACTER

As is shown by the *Military and Paramilitary Activities in and against Nicaragua* case, where the Court declares that an objection does not possess, in the circumstances of the case, an exclusively preliminary character, the objection is not finally disposed of; the Court, at the merits stage, will return to the point and deal with it (see *I.C.J. Reports 1984*, pp. 425-426, and *I.C.J. Reports 1986*, pp. 29-31). That being so, a question would seem to arise as to how far Article 79, paragraph 7, of the existing Rules of Court is, in its practical operation, different from the earlier provisions of Article 62, paragraph 5, of the Rules of Court 1946 relating to joinder to the merits (see S. Rosenne, *Procedure in the International Court, A Commentary on the 1978 Rules of the International Court of Justice*, 1983, pp. 164-166; and Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 1986, Vol. IV, p. 617). Because of the textual changes made in the Rules in 1972, the Court no longer says in terms that it is joining a preliminary point to the merits; but, the Court's functions not being activated by the use of formulae, the fact that the Court no longer says so does not by itself affect the substance of what it does.

Nor would it be right to suppose that prior to 1972 the Court considered that it had an unfettered discretion to order a preliminary objection to be joined to the merits. The use of the disjunctive "or" in the first sentence of Article 62, paragraph 5, of the Rules of Court 1946 conveyed no such

notion. Speaking of its power to make such an order, in 1964 the Court expressly stated that it would

> "not do so *except for good cause*, seeing that the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, p. 44; emphasis added).

That view reached back a long way (*Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 76*, p. 24, Judges De Visscher and Rostworowski). The actual results may have been debatable in some cases, but I hesitate to imagine that the Court did not recognize that, in principle, wherever reasonably possible a preliminary objection should be determined at the preliminary stage. In the *Barcelona Traction* case, after reviewing the previous jurisprudence on the subject, the Court indicated the circumstances in which it would order a joinder. It said it would do so where

> "the objection is so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits (which the Court cannot do while proceedings on the merits stand suspended under Article 62), or without prejudging the merits before these have been fully argued" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, p. 43).

What, however, is scarcely open to dispute is that the new Rules were intended to stress the need to decide a preliminary objection at the preliminary stage wherever reasonably possible, the well-known object being to avoid a repetition of the kind of situation which ultimately arose in the *Barcelona Traction* case and the criticisms attendant thereon (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3). Fresh urgency has been imparted to the operation of the old criteria, particularly in respect of the Court's earlier thinking that a joinder should not be ordered "except for good cause" ("pour des motifs sérieux"). To the limited extent necessary to enable the Court to determine the objection, the merits may be explored, provided, always, that the issue raised is not so inextricably linked to the merits as to be incapable of determination without determining or prejudging the merits or some part thereof.

These considerations no doubt account for the caution observed by the Court in declaring an objection to be not exclusively preliminary in character. Since the introduction of the new provisions in 1972, the Court has made such a declaration in one case only, namely, the *Military and Paramilitary Activities in and against Nicaragua* case. There, certain objections, although not presented by the respondent as preliminary objections, were

considered in the light of the procedural provisions relating to preliminary objections (*I.C.J. Reports 1984*, p. 425, para. 76). The Court declared one of the objections to be not exclusively preliminary in character *(ibid.)*. At the merits stage this objection, which related to jurisdiction, was upheld (*I.C.J. Reports 1986*, p. 38, para. 56). Had it not been for the fact that other grounds of jurisdiction existed, the result would have been a replay of the *Barcelona Traction* situation. Possibly, any criticisms could have been met in the circumstances of the case. In the case at bar, I am not confident that this would be so if the particular objection under consideration were declared to be not exclusively preliminary in character but ultimately came to be upheld at the merits stage. In that event (unlike the position in the *Military and Paramilitary Activities in and against Nicaragua* case), the consequence would be the immediate and total collapse of Nauru's case. Unless it could be convincingly shown that the point could not have been determined at the preliminary stage, it would be difficult to parry criticisms about waste of time, expense and effort, not to mention evasion of the Court's responsibilities.

Nauru's position was that Australia's objection did not have an exclusively preliminary character and could not be determined now, but that, if it had that character, it should be rejected. Australia countered that the objection did have an exclusively preliminary character and should be upheld. By implication, the Court has agreed with Australia's contention that the objection did have an exclusively preliminary character. In my view, the Court was right.

What is Nauru's case? Though variously stated, it comes to this: Nauru is saying that Australia was administering Nauru pursuant to the Trusteeship Agreement; that this Agreement (read with the Charter and in the light of general international law) required Australia to use the governmental powers exercised by it under the Agreement to ensure the rehabilitation of worked-out phosphate lands; but that, in administering the Territory, Australia breached this obligation.

Australia's objection is this: the obligation to ensure rehabilitation (if it existed) was, by virtue of the terms of the Trusteeship Agreement, a joint obligation of Australia, New Zealand and the United Kingdom, with the result that Australia alone could not be sued because

(i) a party to a joint obligation cannot be sued alone;
(ii) a judgment against Australia in respect of the joint obligation would amount to an impermissible determination of the responsibility of New Zealand and the United Kingdom (both non-parties) in relation to the same obligation (see Judgment, para. 48).

It will be argued below that the existence of the particular obligation to ensure rehabilitation has at this stage to be assumed. Clearly also no ques-

tion arises at this point as to whether there was in fact a breach of the obligation. The remaining questions are questions of law which can be answered now. They are clearly of a preliminary character.

With respect to the question whether the particular obligation under the Trusteeship Agreement was joint, it seems to me that it is open to the Court to take the position, as I think it in effect has, that whatever the precise juridical basis of the obligations of the three Governments under the Trusteeship Agreement, Nauru is not precluded from suing Australia alone. On this approach, the Court is not called upon to say, and has not said, whether or not the particular obligation was joint, as asserted by Australia (see Judgment, para. 48).

However, if the Court were called upon to determine whether the obligation was joint, this determination could be made by considering the terms of the Trusteeship Agreement and those terms alone. Previous or subsequent facts could not make the obligation joint if it was not joint under the Trusteeship Agreement. Correspondingly, if the obligation was joint under the Trusteeship Agreement, previous or subsequent facts could not make it other than joint.

I do not intend to suggest that none of the facts may be considered. The facts are useful, but their utility lies in the assistance they provide in understanding how the Trusteeship Agreement came to be constructed in the way it was and how it worked in practice. In this respect, an abundance of facts has been presented by both sides, and I shall be referring to some of these. But the facts do not themselves constitute the foundation of the particular issues of law now calling for decision. The situation is materially different from one in which the question whether a case against a State is maintainable in the absence of other States may conceivably depend directly on facts which could only be explored and ascertained at the merits (cf. arguments in *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, Memorial of Nicaragua, p. 141, Section "C"; CR 84/19, p. 47, Mr. J. N. Moore; and L. F. Damrosch, "Multilateral Disputes", in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 1987, pp. 391-393).

I must now explain why I consider that it has to be assumed at this stage that Australia had an obligation to ensure rehabilitation under the Trusteeship Agreement, as alleged by Nauru. The reason is that the question whether the obligation existed is part of the merits and, these being preliminary proceedings, the elements of the merits have to be assumed (see *Nottebohm, I.C.J. Reports 1955*, p. 34, Judge Read, dissenting); they cannot be determined now.

In some national systems, a wide range of points of law relating to the merits may be set down for argument in advance of the normal hearing on the merits, provided that all the relevant material is before the Court. The governing criterion is that the point (which might for convenience be

called a preliminary objection on the merits) must be one which, if decided in one way, will be decisive of the litigation or at any rate of some substantial issue in the action[1]. The object is, of course, to save time, effort and cost. There have been arguments (though not in this case) as to whether preliminary objections on the merits may competently be made before this Court[2]. However, while reserving my opinion on that point, I would note that the Court's jurisprudence (including paragraphs 36, 38, 56 and 68 of today's Judgment) has proceeded on the basis of a long-standing distinction between preliminary objections and the merits, even though one may argue as to whether the distinction, itself rather general and never easy to draw, was accurately applied in particular cases.

What are the merits? Broadly speaking

> "the merits of a dispute consist of the issues of fact and law which give rise to a cause of action, and which an applicant State must establish in order to be entitled to the relief claimed" (*Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952*, p. 148, Judge Read, dissenting).

To establish its case on the merits, Nauru must prove, *inter alia*, first, that Australia had an obligation under the Trusteeship Agreement to ensure rehabilitation and, second, that Australia was in breach of that obligation. An argument that Australia did not have that substantive obligation would accordingly concern the merits and lack a preliminary character. It would touch the substance, as amounting to an assertion that there was no obligation under international law which Australia could have breached in relation to Nauru (see the general reasoning in *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, pp. 82-83; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, pp. 44-46, and Judge Morelli, dissenting, at pp. 110-112; *ibid., Second Phase, I.C.J. Reports 1970*, pp. 226 ff., Judge Morelli, concurring; and *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 19, para. 7). An argument of that kind would go not to the

[1] See, as to English law, *The Supreme Court Practice, 1979*, Vol. 1, London, 1978, pp. 282-284, Order 18/11/1-4. And see *Northern Cameroons, I.C.J. Reports 1963*, separate opinion of Judge Fitzmaurice, pp. 106-107; *Nuclear Tests (Australia* v. *France), Interim Protection, I.C.J. Reports 1973*, dissenting opinion of Judge Gros, p. 121; and *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, separate opinion of Judge Gros, p. 292.

[2] See, generally, and compare Judge Morelli, in *Rivista di diritto internazionale*, Vol. 47, 1964, p. 3; Vol. 54, 1971, p. 5; Vol. 58, 1975, pp. 5 and 747; Giuseppe Sperduti, *ibid.*, Vol. 53, 1970, p. 461; Vol. 57, 1974, p. 649; Vol. 58, 1975, p. 657; Roberto Ago, *Comunicazioni e studi*, Vol. 14, 1975, p. 1, at p. 11, footnote 22; Ugo Villani, *Italian Yearbook of International Law*, 1975, Vol. 1, p. 206, at p. 207; and S. Rosenne, *op. cit.*, p. 160, as to Article 79 of the new Rules "implying a re-definition of the qualification *preliminary*".

question whether Australia could be sued alone, but to the question whether Australia could be adjudged liable, even if it could be sued alone.

Consequently, the question whether Australia had the obligation to ensure rehabilitation cannot be determined in this phase of the proceedings; it can only be determined at the merits stage. The existence of the obligation has simply to be assumed at this point. This being so, the only issues now open are the issues of law referred to above, that is to say, whether the obligation (if it existed) was joint, and, if it was, whether the propositions at (i) and (ii) above are well founded. These issues can be determined now and cannot justifiably be reserved for the merits. Nothing relating to the establishment at the merits stage of the existence of the alleged obligation to ensure rehabilitation can provide a reason for not dealing with those issues now.

In my opinion, the Court acted correctly in refraining from declaring that the objection as to the absence from the proceedings of New Zealand and the United Kingdom does not possess an exclusively preliminary character. So I pass to the objection itself, beginning with a background reference to Australia's position under the Trusteeship Agreement.

PART II. AUSTRALIA'S POSITION UNDER THE TRUSTEESHIP AGREEMENT

An appreciation of Australia's position under the Trusteeship Agreement should take account of two factors, first, the evolution of Australia's international personality during the Mandate period, and, second, the legal character of a trusteeship agreement.

The first factor relates to the external aspects of the constitutional evolution of the relations between component units of the British Empire (see, generally, Sir Ivor Jennings, *Constitutional Laws of the Commonwealth*, Vol. 1, *The Monarchies*, 1957, pp. 18 ff.). It is probable that the underlying doctrine of the unity of the British Crown, which was then current, explains the fact that, although Nauru was in practice administered by Australia under the 1920 Mandate, the latter was conferred simply on "His Britannic Majesty". Traces of the doctrine are perhaps discernible even in the case of the Mandate for New Guinea, in which the Mandatory was described as "His Britannic Majesty for and on behalf of the Government of the Commonwealth of Australia (hereinafter called the Mandatory)" (Art. 1 of the Mandate, 17 December 1920, Procès-Verbal of the Eleventh Session of the Council of the League of Nations, held at Geneva, p. 102; see also the second and third preambular paragraphs, and A. C. Castles, "International Law and Australia's Overseas Territories", in *International Law in Australia*, ed. D. P. O'Connell, 1965, pp. 294-295).

By contrast, Article 2 of the 1947 Trusteeship Agreement for Nauru

made a separate reference to each of the three Governments when speaking of the "Governments of Australia, New Zealand and the United Kingdom" as having been "designated as the joint Authority which will exercise the administration of the Territory". Further, as will be shown below, by the Agreement itself Australia was given the leading role. The material before the Court makes it clear that during the Mandate period Australia had been moving in the direction of securing a progressively greater degree of practical control over the administration of Nauru, an aspiration which had been earlier manifested in the expression of a desire by Australia to annex the Island before the granting of the Mandate. Correspondingly, by 1947, what Chief Justice Sir Garfield Barwick elegantly called the "imperceptible and, in relative terms, the uneventful nature of the progress of Australia from a number of separate dependent colonies to a single independent and internationally significant nation" had run its full course[1].

With respect to the second factor, trusteeship agreements exhibit peculiarities which have left the precise legal character of such agreements open to some degree of speculation, as is evidenced by an interesting literature on the subject. Professor Clive Parry's conclusion is this:

> "As actually achieved in the form of treaties between the United Nations and the several administering authorities, the trusteeship agreements are legal acts distinct from the Charter. They possess, however, a dispositive (or conveyancing) as well as a contractual character. In their 'dispositive' aspect they are not independent of the Charter. Together with the relevant provisions of the Charter they constitute a quasi-statutory basis for the trusteeship system as in fact applied to specific territories. They have, as has the régime which they inaugurate and govern, an objective character. This is perhaps their most important aspect." (Clive Parry, "The Legal Nature of the Trusteeship Agreements", *British Year Book of International Law*, Vol. 27, 1950, p. 164, at p. 185.)

These remarks may be borne in mind, in conjunction with the evolution of Australia's international personality, in considering Article 4 of the Trusteeship Agreement relating to Nauru, which provided as follows:

> "The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this

[1] See generally, D. P. O'Connell, "The Evolution of Australia's International Personality", in *International Law in Australia*, ed. D. P. O'Connell, 1965, Chap. 1, and the foreword by Sir Garfield Barwick; D. P. O'Connell and James Crawford, "The Evolution of Australia's International Personality", in *International Law in Australia*, 2nd ed. by K. W. Ryan, 1984, p. 21; and W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed., p. 56.

> purpose, in pursuance of an Agreement made by the Governments of Australia, New Zealand and the United Kingdom, the Government of Australia will, on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory."

As a result of the dual contractual and "quasi-statutory" character of a trusteeship agreement, and whatever might have been the earlier implications of the first factor mentioned above, it is possible to read this provision, which came into force in 1947, as providing (with the approval of the General Assembly), first, for full powers of administration to be vested in the three Governments as constituting the Administering Authority, and, second, for these powers to be delegated by them to Australia. This interpretation is supported by other elements of the Trusteeship Agreement. It is difficult, therefore, to resist Australia's argument that, however extensive was its administrative authority over Nauru, that authority fell to be regarded in law as having been exercised by it on behalf of all three Governments.

But, although form is not unimportant, international law places emphasis on substance rather than on form (*Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2*, p. 34; *Interhandel, I.C.J. Reports 1959*, p. 60, Judge Spender; *Barcelona Traction, Light and Power Company Limited, Preliminary Objections, I.C.J. Reports 1964*, pp. 62-63, Judge Koo; and, *ibid., Second Phase, I.C.J. Reports 1970*, p. 127, Judge Tanaka). Some notice may, therefore, be taken of the extent and exclusiveness of the powers enjoyed by Australia, and, in particular, of certain differences between its position and that of New Zealand and the United Kingdom which could have a bearing on some of the issues to be examined.

The provisions of the Trusteeship Agreement do not readily yield up the reality of the actual power structure which they laid down. The first part of Article 4 of the Agreement had the effect of vesting plenary powers of government in the three Governments as constituting the Administering Authority; but the second part of the provision made it clear that, for all practical purposes, those powers could be exercised only by Australia, which was given the right to "continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory". The authority so conferred on Australia could be revoked by subsequent agreement by the three Governments, but, clearly, there could be no such revocation without the consent of Australia. In fact, there was no revocation: the Agreement made by the three Governments in 1965, while providing for a measure of subordinate governmental authority to be exercised by the Nauruans, had the effect of further diminishing the role of New Zealand and the United Kingdom in relation to that of Australia. Thus, Australia had exclusive authority to administer Nauru for all practi-

cal purposes, as well as the even more significant power to prevent any diminution or withdrawal of that authority. Australia's controlling position continued unimpaired right up to independence.

The implications for an appreciation of the real power structure established by the Trusteeship Agreement are important. Take Article 5, paragraph 1, of the Trusteeship Agreement. This recorded an undertaking by the "Administering Authority" that

> "It will co-operate with the Trusteeship Council in the discharge of all the Council's functions under Articles 87 and 88 of the Charter."

Or, consider Article 5, paragraph 2 *(b)*, of the Trusteeship Agreement, under which the "Administering Authority" undertook to

> "Promote, as may be appropriate to the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants."

It is not clear to me that the Administering Authority could do any of these things without an appropriate exercise by Australia of its "full powers of legislation, administration and jurisdiction in and over the Territory". However, the Trusteeship Agreement did not reserve to the Administering Authority any competence to direct or control the way in which Australia chose to exercise its "full powers", and the evidence does not suggest that Australia acknowledged that the Administering Authority had any such competence as of right. In so far as the Administering Authority had any functions under the Trusteeship Agreement that could be discharged without an exercise by Australia of its "full powers of legislation, administration and jurisdiction in and over the Territory" (which seems doubtful), such functions had nothing to do with the substance of the claims presented by Nauru. And this is apart from the consideration that, in the first place, the Administering Authority could not act without the concurrence of Australia. The Parties to the case were agreed that the Administering Authority was not a separate subject of international law or a legal entity distinct from its three member Governments. These could act only by agreement, and there could be no agreement if Australia objected.

Australia submitted that it acted with the concurrence of New Zealand and the United Kingdom in appointing Administrators of the Trust Territory (Preliminary Objections of the Government of Australia, Vol. I, paras. 36, 45, 334 ff., and 341). However, none of the pertinent documents suggests that New Zealand and the United Kingdom had any legal basis on which to demand to be consulted as of right, let alone demand that their concurrence be obtained. New Zealand and the United Kingdom participated in the negotiations and ensuing agreement for the transfer of the phosphate undertaking to Nauruan control; but the real basis on which they were acting there was the commercial one which they occupied as part-owners of the undertaking and future purchasers of Nauruan phosphates. In so far as the negotiations embraced the subject of rehabili-

tation, this did not show that New Zealand and the United Kingdom had any control of the actual administration of the Trust Territory: under the Trusteeship Agreement their responsibility for non-rehabilitation could exist without such control. The law is familiar with situations in which a party may become contractually liable for the acts of another though having no power of direction or control over them. Possibly, the concurrence of New Zealand and the United Kingdom was legally required in respect of a proposal, such as that relating to resettlement, which premised a modification of the fundamental basis of the original arrangements, or that relating to independence, which premised the termination of the Trusteeship Agreement itself; but I am unable to see that there was any such requirement, as a matter of law, where the normal administration of the Territory was concerned.

The first preamble of the Trusteeship Agreement recalled that, under the Mandate, the Territory of Nauru had "been administered . . . by the Government of Australia on the joint behalf of the Governments of Australia, New Zealand, and the United Kingdom of Great Britain and Northern Ireland". Thus, the Trusteeship Agreement itself recognized that the administration of the Island had in practice been in the hands of Australia during the Mandate. This, of course, continued under the Trusteeship (see para. 43 of the Judgment). The position was, I think, correctly summed up by counsel for Nauru as follows:

> "Nauru was administered as an integral portion of Australian territory. Its administration bore no relation to the territory of any other State. As far as can be discovered, no governmental official of either New Zealand or the United Kingdom lived on Nauru during the period from 1920 to early 1968, or performed governmental acts there. Throughout the whole of that period, the government officials on Nauru, the Administrator and the persons responsible to him, were Australian public servants, answerable to other Australian public servants in Canberra, and in no sense subject to the direction or control of any other Government. Article 22 of the Covenant referred to administration 'under the laws of the Mandatory': in fact, those laws were Australian. No British or New Zealand law was ever applied to Nauru." (CR 91/20, pp. 75-76, Professor Crawford.)

The international agreements which applied to Nauru were a selection of international agreements to which Australia was a party (*ibid.*, p. 78). Although independence had been agreed to by all three Governments, the Nauru Independence Act 1967 was an Australian enactment; no counterpart legislation was enacted by New Zealand or the United Kingdom. Until independence the flag — the only one — which flew in Nauru was the Australian flag.

I am not persuaded by Australia's argument that its governmental

authority was excluded from the phosphate industry by reason of Article 13 of the Nauru Island Agreement 1919, reading:

> "There shall be no interference by any of the three Governments with the direction, management, or control of the business of working, shipping, or selling the phosphates, and each of the three Governments binds itself not to do or to permit any act or thing contrary to or inconsistent with the terms and purposes of this Agreement."

Referring to this provision, in the case of *Tito* v. *Waddell*, Megarry, V-C., observed — correctly, if I may say so — that:

> "This article established the independence of the British Phosphate Commissioners as against any one or two of the three governments, though not, of course, against all three acting in concert." ([1977] 3 All ER 129, at p. 166.)

Article 13 of the Nauru Island Agreement could not apply to Australia as Administrator for the reason that, in administering Nauru under authority delegated by all three Governments, its acts would in substance have been the acts of all three Governments "acting in concert", and not the acts of Australia alone.

It is not possible to conceive of the major industry of a Territory (irrespective of ownership) being entirely beyond the competence of the legislative, executive and judicial powers of the Territory, in whomsoever these are vested. Consequently, to hold that the governmental powers of the Australian-appointed Administrator did not extend to the phosphate industry and that this was exclusively within the competence of the three Governments acting through the British Phosphate Commissioners (BPC) is effectively to hold that governmental powers concerning all matters relating to the industry were exercisable by the three Governments acting through BPC. This in turn amounts to saying that there were two governments in Nauru, namely, an economic government administered by the three Governments acting through BPC with exclusive responsibility for the Territory's main industry, and another government administered by Australia with responsibility for residual matters. I cannot read the Trusteeship Agreement as meaning that the régime which it introduced in Nauru in 1947 consisted of two such governments. It is, I think, unquestionable that all governmental power must derive from the Trusteeship Agreement (see, as to a mandate, *International Status of South West Africa, I.C.J. Reports 1950*, p. 133). BPC (whose undertaking could equally have been carried on by an ordinary commercial company as, indeed, had been earlier the case) did not profess to be exercising governmental powers under the Trusteeship Agreement: it simply had no standing under that Agreement. On the other hand, as the legislative and other evidence shows, Australia did not consider that its Administrator was wholly without competence over the industry. The Trusteeship Agree-

ment was concluded on the basis that all governmental functions in Nauru, though formally vested in all three Governments, would be exercised by Australia alone. It is untenable to suppose that the "full powers of legislation, administration and jurisdiction in and over the Territory", which were conferred on Australia by the Trusteeship Agreement, were not "full" enough to extend to the overwhelming bulk of the Territory's economy.

Part of the problem concerns the correct appreciation of Nauru's case. There could be an impression that Nauru's claims directly concern Australia's part in the commercial operations of the phosphate industry. That impression would not be accurate. No doubt, Nauru's case has many branches; but the essence of the case — whether it is well founded or not being a matter for the merits — is that Australia, while having under the Trusteeship Agreement "full powers of legislation, administration and jurisdiction in and over the Territory", failed to exercise these comprehensive governmental powers so as to regulate the phosphate industry in such a way as to secure the interests of the people of Nauru (CR 91/20, p. 83, and CR 91/22, p. 45, Professor Crawford). In particular, says Nauru, there was failure to institute the necessary regulatory measures to ensure the rehabilitation of worked-out areas, not in the case of mining in any country, but in the case of large-scale open-cast mining in the minuscule area of this particular Trust Territory. The consequence, according to Nauru, was that the Territory became, or was in danger of becoming, incapable of serving as the national home of the people of Nauru, contrary to the fundamental objectives of the Trusteeship Agreement and of the Charter of the United Nations. In this respect, the question, as I understand it, is not simply whether rehabilitation was required by such environmental norms as were applicable at the time; the question is whether rehabilitation was required by an implied obligation of Australia under the Trusteeship Agreement not to allow the destruction of the small national homeland of the Nauruan people, or any substantial part of it, through an unregulated industrial process which went so far as to result at one stage in the making and consideration of serious proposals for resettlement of the Nauruan people altogether outside of Nauru. That, I think, is Nauru's case.

There is no basis for suggesting that New Zealand and the United Kingdom had any capacity, as of right, to require Australia to use the governmental powers, which it alone could exercise, for the purpose of legally ensuring rehabilitation. No doubt, having accepted that Australia was acting on their behalf, with the possibility that they could in consequence be liable for its acts, New Zealand and the United Kingdom had an interest in seeing that Australia discharged the responsibilities of the Administering Authority in a satisfactory way. But "the existence of an 'interest' does not

of itself entail that this interest is specifically juridical in character" (*South West Africa, Second Phase, I.C.J. Reports 1966*, p. 34, para. 50). An interest is not always a right (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, pp. 36, 38, and Judge Morelli at pp. 235-237): in this case, given the terms of Article 4 of the Trusteeship Agreement, New Zealand and the United Kingdom had no capacity as of right to control the course of Australia's conduct of the administration of the Island. Presumably, they had some influence; but, as Jenks remarked, even where influence is considerable, "influence is less than power" (C. W. Jenks, *The World Beyond the Charter*, 1969, p. 99).

Judge Hudson once warned that "[a] juristic conception must not be stretched to the breaking-point" (*Lighthouses in Crete and Samos, P.C.I.J., Series A/B, No. 71*, p. 127). In the circumstances of that case, he had occasion to add that "a ghost of a hollow sovereignty cannot be permitted to obscure the realities of [the] situation" in Crete. No questions of sovereignty arise here; nevertheless, those remarks may be borne in mind in considering the realities of the situation in Nauru. In law, Australia was acting on behalf of all three Governments; and Australia is right in saying that this circumstance was consistently reflected in the positions taken by the United Nations and by Nauru. But it would be erroneous to suppose that New Zealand and the United Kingdom were also administering Nauru in the sense of having any real say in its administration; they had none.

PART III. THE OBLIGATIONS OF THE THREE GOVERNMENTS WERE JOINT AND SEVERAL, WITH THE CONSEQUENCE THAT AUSTRALIA COULD BE SUED ALONE

I come now to the question whether the obligations of the three Governments were joint, as contended by Australia, or whether they were joint and several, as contended by Nauru.

I understood counsel for Australia to be accepting that the international case-law does not support the Australian view that the obligations of the three Governments were joint, even if he considered that neither does it support the Nauruan view that the obligations were joint and several (CR 91/21, pp. 63-64, Professor Pellet, stating that "le match est nul").

As regards the work produced by the International Law Commission, which was laid by either side before the Court, the statement of counsel for Australia was this:

> "the International Law Commission has never expressly adopted a position on the problem under consideration, displaying great reticence as regards the very idea of joint and several liability" (*ibid.*, p. 65).

But reticence is not resistance. The Parties disputed the precise meaning of paragraph 2 of the commentary on Article 27 of the Commission's Draft Articles on State Responsibility of 1978. That paragraph states in relevant part:

> "A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts. It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those States in an internationally wrongful act committed by the other." (*Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, p. 99.)

It is not necessary to enter into the general aspects of the difficult question carefully examined by the Commission as to when a State is to be regarded as participating in the internationally wrongful act of another State. It suffices to note that the Commission considered that, where States act through a common organ, each State is separately answerable for the wrongful act of the common organ. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded technically as a common organ.

Judicial pronouncements are scarce. However, speaking with reference to the possibility that a non-party State had contributed to the injury in the *Corfu Channel* case, Judge Azevedo did have occasion to say:

> "The victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim, in the purely economic field; whereas a criminal judge cannot, in principle, pronounce an accomplice or a principal guilty without at the same time establishing the guilt of the main author or the actual perpetrator of the offence." (*I.C.J. Reports 1949*, p. 92.)[1]

On the facts, the *Corfu Channel* case allows for a number of distinctions.

[1] As to the last point, however, compare, in English law, *Archbold, Pleading, Evidence and Practice in Criminal Cases*, 40th ed., p. 1898, para. 4136; *Halsbury's Laws of England*, 4th ed., Vol. 11 (1), pp. 49-50, para. 50; and *R* v. *Howe* [1987] 1 All ER 771 HL.

However, it is to be observed that Judge Azevedo's basic view of the general law was that the right to sue "one only of the responsible parties, *in solidum*" was available to the injured party "in accordance with the choice which is *always* left to the discretion of the victim, in the purely economic field . . ." (emphasis added). This approach would seem to be consistent with the view that Nauru does have the right to sue Australia alone.

If domestic analogies are to be considered, the most likely area lies within the broad principles of the law of trust in English law and of cognate institutions in other systems. A United Nations Trusteeship must not, of course, be confused with a trust as understood in any specific system of municipal law; but, used with discretion, the principles relating to the latter are not unhelpful in elucidating the nature of the former. As Judge McNair said, in relation to Mandates, it "is primarily from the principles of the trust that help can be obtained on the side of private law" (*International Status of South West Africa, I.C.J. Reports 1950*, p. 151; and see, *ibid.*, pp. 148, 149, 152, and the *Namibia* case, *I.C.J. Reports 1971*, p. 16, at p. 214, Judge de Castro). Now, the applicable rule in the English law of trusts has been stated thus:

> "Where several trustees are implicated in a breach of trust, there is no primary liability for it between them, but they are all jointly and severally liable to a person who is entitled to sue in respect of it." (*Halsbury's Laws of England*, 4th ed., Vol. 48, p. 522, para. 939; see also, *ibid.*, p. 539, para. 971, and *ibid.*, Vol. 35, para. 68.)

This being so, I do not find it surprising that, in regard to Nauru, the view has been expressed "that the three countries are jointly and severally responsible under international law for the administration of the territory" (A. C. Castles, "International Law and Australia's Overseas Territories", in *International Law in Australia*, ed. D. P. O'Connell, 1965, p. 332). I think this view is to be preferred to the view that the responsibility was exclusively joint.

This conclusion, that the obligation to ensure rehabilitation (if it existed) was joint and several, disposes of Australia's contention that proceedings will not lie against one only of the three Governments. It should also dispose of Australia's contention that any judgment against Australia will amount to a judgment against New Zealand and the United Kingdom. But Australia does not think so; it considers that, even if the obligation was joint and several, a judgment against it would still imply a determination of the responsibility of New Zealand and the United Kingdom. The issue concerning the implications of a possible judgment against Australia for New Zealand and the United Kingdom is not being examined here; it will be examined in Part V. However, to anticipate the conclusion reached there, even if the obligation was joint, a judgment

against Australia will not amount to a determination of the responsibility of New Zealand and the United Kingdom. This conclusion, if correct, would apply *a fortiori* if the obligation was joint and several.

PART IV. EVEN IF THE OBLIGATIONS OF THE THREE GOVERNMENTS WERE JOINT, THIS BY ITSELF DID NOT PREVENT AUSTRALIA FROM BEING SUED ALONE

Assuming that I am wrong in the foregoing, the result would be no different, in my opinion, even if the obligations of the three Governments under the Trusteeship Agreement were joint. It is possible, as I think is recognized in paragraphs 48 and 49 of the Judgment of the Court, to see Australia's argument as raising two questions: first, whether the fact that an obligation is joint by itself means that a suit will not lie against one co-obligor alone; and, second, whether a judgment against one co-obligor will constitute a determination of the responsibility of the other co-obligors and a resulting breach of the consensual basis of the Court's jurisdiction. The second question is examined in Part V; the first is considered below.

On the question being considered, I agree with Australia that "there are in reality two separate and distinct issues", namely, "whether Australia alone can be sued, and, if so, whether it can be sued for the whole damage" (Preliminary Objections of the Government of Australia, Vol. I, p. 131, para. 320). However, in my view, if the answer to the first issue is that Australia alone can be sued, the second issue, concerning the extent of the damage for which it may be sued, is a matter for the merits. The two issues being admittedly "separate and distinct", once it is accepted that Australia alone may be sued, I do not see how the question of the exact extent of the damage for which it is responsible can be made to take the form of a plea in bar of a suit otherwise properly brought against it. I believe this approach accords with the position taken by the Court in paragraph 48 of the Judgment. Accordingly, I shall be focusing on the first of these two issues, that is to say, whether Australia alone may be sued in respect of a joint obligation.

While refraining from citing and discussing particular texts, I cannot say that I have the impression that the valuable work of the International Law Commission, which was placed before the Court by the Parties, was directed to the question of pure principle as to whether a party to an act done at one level or another of association with another party may be sued alone. In so far as the work of the Commission deals with acts of that kind, it appears to be directed to the question whether, in a suit brought against any one such party, the claim may be for the entirety of the resulting

damage or only for such part as is proportionate to the extent of that party's own participation in the causative act, done in the exercise of its separate sovereign power. If a joint obligation is conceived of as an obligation which in law is capable of existing only in relation to all the co-obligors as a group, without any one of them being individually subject to it, this would be a ground for saying that proceedings will not lie against any one of them separately. On this aspect, Australia's pleadings are open to different interpretations (CR 91/20, p. 63, Professor Crawford, and Preliminary Objections of the Government of Australia, Vol. I, p. 3, para. 2, penultimate sentence, and p. 131, para. 321). However, I do not think that Australia is contending that, standing by itself, it was not subject to the obligations of the Trusteeship Agreement; if it were, it would, for reasons given under Part I above, be raising an issue of the merits, since it would in effect be saying that the obligation at international law, which Nauru alleges that it breached, simply did not exist. The general tendency of doctrinal writings, as I appreciate them, does not take the matter any further.

While properly acknowledging the need for caution in transposing legal concepts from domestic societies to the international community, both Parties presented municipal law materials and sought some support from them for their respective contentions. I am not acquainted with non-Anglo-Saxon legal systems but, subject to the same need for circumspection — a need that I emphasize — I will consider briefly the position in English law, as I understand it.

In the case of a joint tort, in English law the plaintiff can always sue any or all of the tortfeasors, because, as it was said over two hundred years ago, "a *tort* is in its nature the separate act of each individual" (*Egger* v. *Viscount Chelmsford* [1964] 3 All ER 412 CA; and *Clerk and Lindsell on Torts*, 16th ed., p. 179, para. 2.53). This rule applies also to torts committed by partners (*Halsbury's Laws of England*, 4th ed., Vol. 35, para. 67). The real problem was different; it was this, that "recovery of judgment against one of a number of joint tortfeasors operated as a bar to any further action against the others, even though the judgment remained unsatisfied" (*Clerk and Lindsell on Torts*, 16th ed., p. 180, para. 2.54). This bar was removed by Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 (replaced by the Civil Liability (Contribution) Act 1978), under which judgment against one joint tortfeasor is no bar to action against others, subject to considerations of aggregation and costs. Clearly, however, even before the 1935 enactment, there was nothing in principle to prevent the plaintiff from suing one only of a number of joint tortfeasors.

In the case of joint contractors the procedural position in 1967 was stated thus:

"A defendant has a *prima facie* right to have his co-contractor

> joined as defendant and in the absence of special circumstances showing that [an] order [staying the proceedings until joinder was effected] should not be made, it is the practice to make it; . . . But if it is shown that there is any good reason to the contrary, e.g., that the new party is out of the jurisdiction (*Wilson* v. *Balcarres, etc., Co.* [1893] 1 QB 422), or that every effort has been made to serve him without success, then the action may be allowed to proceed without joinder (*Robinson* v. *Geisel* [1894] 2 QB 685, CA)." (*The Supreme Court Practice 1967*, Vol. 1, p. 154, Order 15/4/10; and see *Chitty on Contracts*, 26th ed., Vol. 1, pp. 807-808, para. 1303, and G. H. Treitel, *The Law of Contract*, 6th ed., p. 444.)

The related common law rule was that "an action against a joint contractor served to bar any other proceedings against another joint contractor" (*Chitty on Contracts*, 26th ed., Vol. 1, p. 807, para. 1303). This rule was later abolished by Section 3 of the Civil Liability (Contribution) Act 1978, under which a plaintiff may sue one of several joint contractors without prejudice to his right to sue others later (*ibid.*, p. 809, para. 1306, and *The Supreme Court Practice, 1991*, Vol. 1, London, 1990, p. 185, Order 15/4/10).

Nauru argues persuasively that

> "the Court is not competent in the present proceedings to interpret any provisions in the Optional Clause declarations of the United Kingdom and New Zealand that they might seek to rely on if they were parties to proceedings commenced by Nauru" (CR 91/20, p. 90, Professor Crawford);

and certainly the position under the two declarations is not equally clear. But, if the Court may not make any interpretation of its own, it may nevertheless notice that it is Australia, the proponent of the preliminary objection, which is itself affirming that the Court would not have jurisdiction under those declarations against New Zealand and the United Kingdom if Nauru were to sue them (CR 91/17, pp. 20, 21, 26, 46, 48, Professor Pellet; and Preliminary Objections of the Government of Australia, Vol. I, p. 138, para. 346). In my view, the possibility, insisted on by Australia itself, that there would be no jurisdiction in respect of New Zealand and the United Kingdom constitutes a reasonable approximation to the exception in English law (even as it stood before 1978) which permitted of an action being brought against one of a number of joint contractors if, for reasons of jurisdiction or service, it was not practicable to join the others. That possibility also serves to attract attention to the Court's statement in 1984 to the effect that, in the absence of any system of compulsory intervention, and barring the operation of the *Monetary Gold* principle (an aspect dealt with in the following Part), "it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of

each case" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, I.C.J. Reports 1984*, p. 25, para. 40).

One of the books cited by Australia, and relied on by it, in its survey of domestic legal systems, was Glanville Williams, *Joint Obligations*, London, 1949 (Preliminary Objections of the Government of Australia, Vol. I, p. 128, para. 309). The particular reference was to page 35, paragraph 2. Two pages earlier, speaking of joint promises, that learned author expressed the view that "Bowen L.J. stated the rule clearly" when he said:

> "There is in the cases of joint contract and joint debt as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors *or he may sue one*, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors . . . it is for the same cause of action — there is only one cause of action. This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country." (Glanville Williams, *op. cit.*, pp. 33-34, citing *Re Hodgson, Beckett* v. *Ramsdale*, (1885) 31 Ch. D. 177, at p. 188, CA; emphasis added.)

Subject to the right to plead in abatement, Glanville Williams did not appear to think that the fact that a contractual obligation is joint operates in principle to preclude the plaintiff from suing one only of the joint contractors.

It does not appear to me that recourse to municipal law, in so far as I have been able to explore it, yields any satisfactory analogies supportive of the suggested existence of any rule of international law precluding the present action on the ground that the obligation was joint. On balance, the general trend of the references given by the Parties to non-Anglo-Saxon legal systems is not, I believe, at variance with this conclusion (see, also, the authorities cited in the Memorial of the United States of America of 2 December 1958 in *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 229 ff.).

As has often been remarked, to overestimate the relevance of private law analogies is to overlook significant differences between the legal framework of national societies and that of the international community, as well as differences between the jurisdictional basis and powers of the Court and those of national courts; "lock, stock and barrel" borrowings would of course be wrong (*International Status of South West Africa, I.C.J. Reports 1950*, p. 148, Judge McNair). On the other hand, nothing in

those differences requires mechanical disregard of the situation at municipal law; to speak of a joint obligation is necessarily to speak of a municipal law concept. The compulsory or involuntary character of municipal jurisdiction, with its facilities for enforcing contribution among co-obligors, does not, I think, wholly account for the fact that, at municipal law, a suit may be competently brought against one co-obligor in respect of a joint obligation. If for any reason it is impossible to enforce or obtain contribution among the co-obligors, this does not absolve an available co-obligor from liability to the obligee. The obligee is not entitled to collect the full amount repetitively from each of the co-obligors; but he is entitled to collect the full amount by suing any or all of them. Possibly, at international law, there could be a question as to whether a suit against one co-obligor may be for the full amount; but I am unable to see how this could affect his liability in principle to separate suit.

Further, any question whether there is a right of contribution would constitute a separate dispute between co-obligors to be separately resolved by any appropriate means of peaceful settlement. As indicated above, international judicial settlement differs from municipal judicial settlement in important ways; though it is in a real sense the ultimate method of peaceful settlement of international disputes, it does not enjoy the jurisdictional primacy enjoyed by municipal judicial settlement among other settlement mechanisms. The fact that recourse to the Court may not be open to a party seeking contribution is not decisive (cf. *J. H. Rayner Ltd.* v. *Department of Trade* [1990] 2 AC 418 HL, at p. 480, letter F). The claim to contribution may be pursued in other ways. This perspective is not, I believe, very different in principle from that adopted by counsel for Australia when he argued, as I understood him, to the effect that a decision of the Court upholding Australia's preliminary objection as to the absence of New Zealand and the United Kingdom would result in Nauru not obtaining any legal ruling on the merits, but would not deprive Nauru of the opportunity of pursuing its claim in other ways (CR 91/21, p. 68). In international law a right may well exist even in the absence of any juridical method of enforcing it (Eugène Borel, "Les voies de recours contre les sentences arbitrales", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 52 (1935-II), pp. 39-40). Thus, whether there is a right to contribution does not necessarily depend on whether there exists a juridical method of enforcing contribution.

In considering whether the legal rule contended for by Australia exists, I would remind myself of the following statement by Charles De Visscher:

> "The temptation to formalism, and the proneness to generalization by abstract concepts and to premature systematization, represent one of the most serious dangers to which international-law doctrine is still exposed. It escapes only by constant return to respect for facts and by exact observation of the concrete and very special conditions which in the international domain contribute to forming the legal rule and govern its applications. Of course the legal rule never embraces social reality in all its fullness and complexity. Attempting to do so, law would risk compromising its proper ends as well as overshooting its possibilities. If abstraction carried to an extreme degenerates into unreality, individualization pushed to excess leads to the destruction of the rule. International justice especially must maintain a proper relationship between social data and the rules designed to govern them." (Charles De Visscher, *Theory and Reality in Public International Law*, trans. P. E. Corbett, 1968, p. 143.)

Possibly, these words could offer comfort to both of the competing points of view on the question whether there is a legal rule precluding an action against one only of a number of joint actors. The implications of holding that there is such a rule can only be grasped and evaluated by reference to concrete cases exemplifying its operation.

In this case, Australia (which is before the Court) accepts that it "exercised actual administration of the territory of Nauru" (Preliminary Objections of the Government of Australia, Vol. I, p. 136, para. 339); its argument is that it was doing so on behalf of itself, New Zealand and the United Kingdom as together constituting the Administering Authority. I do not understand it to be saying that in law there is no conceivable basis on which it could be individually subject to the obligations of the Trusteeship Agreement; it contends that the issue whether it was in breach of those obligations can only be determined in a suit brought against itself, New Zealand and the United Kingdom. So the substance of the matter is this: it is not a question of Nauru proposing a technical device for attaching responsibility to Australia for something which Australia did not itself do or for breach of an obligation which Australia could not conceivably have in law, but rather a question of Australia proposing a formula precluding the Court from adjudicating on the issue whether Australia's own acts were in breach of its trusteeship obligations, on the ground that these obligations were jointly shared by Australia with two other States on whose behalf Australia was acting but which are not parties to the proceedings.

It seems to me that to hold, in such circumstances, that there exists a rule of law, as asserted by Australia, which has the effect of barring these proceedings in the absence of New Zealand and the United Kingdom on the ground that the obligation was joint is to import a level of formalism and abstraction that is incompatible with the "proper relationship between

social data and the rules designed to govern them" — a relationship which Judge De Visscher tells us it is the duty of international justice especially to maintain.

PART V. A JUDGMENT AGAINST AUSTRALIA WILL NOT AMOUNT TO A JUDICIAL DETERMINATION OF THE RESPONSIBILITY OF NEW ZEALAND AND THE UNITED KINGDOM

I come finally to Australia's argument that a judgment against it will amount to a determination of the responsibility of New Zealand and the United Kingdom, and that, consequently, Nauru's action is really against all three Governments, two of which, however, are absent and have not accepted the jurisdiction of the Court in the case.

Australia emphasized that the argument was not that New Zealand and the United Kingdom were "indispensable parties". In litigation before the Court there are, indeed, two elements which advise caution in adopting an "indispensable parties" rule. These elements, which are interrelated, are, first, that the jurisdiction of the Court is consensual, and, second, that the Court has no power to order joinder of third parties. There are circumstances in which it may be incompetent or improper for the Court to hear a case in the absence of a third party: the case of the *Monetary Gold Removed from Rome in 1943* shows that (*I.C.J. Reports 1954*, p. 32). But, as was indicated by that case and emphasized in later cases expounding it, the Court would only decline to exercise its jurisdiction where the legal interests of a State not party to the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision" *(ibid.)*. That this was the position in that case is shown by the following part of the Judgment:

> "The first Submission in the Application centres around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — only two States, Italy and Albania, are directly interested." *(Ibid.)*

Thus, in that case the Court was being asked to determine whether Albania, a non-party, had by its actions engaged international responsibility to Italy, the Applicant, and, if so, whether, in consequence, certain monetary gold belonging to Albania should be treated as due to Italy by way of compensation. Without determining these issues as between Italy and Albania, the Court could not pass on to determine the issues presented in the Application as between the parties thereto: Italy's claims against the parties to the case depended on the outcome of a claim which it was asserting against Alabania in its Application against those parties. It was not a case in which the decision which the Court was asked to pronounce as between the parties before it might be based on a course of reasoning which could be extended to a non-party; the decision would constitute a direct determination of the responsibility of the non-party, with concrete and juridically dispositive effects for its admitted ownership of the gold. A court (including this Court) may in some circumstances give judgment against a party *in absentia*; but no court, not even a municipal court exercising jurisdiction on a non-consensual basis, can give judgment against someone who was not in some sense a party to the proceedings, or to the relevant phase thereof leading to the particular judgment, with a corresponding entitlement to be heard. To do so would be to offend against a cardinal principle of judicial organization which forbids a court from adjudicating in violation of the *audi alteram partem* rule. That precept of judicial behaviour, which is of general application to all courts, would clearly have been affronted if the Court had adjudicated on Albania's responsibility. Additionally, the requirement for consent to jurisdiction, which is specific to this particular Court, would also have been negated.

It follows that the test to be applied in deciding whether the Court may not properly act is not simply whether it would have been more convenient to decide an issue with the presence before the Court of all the States that might be affected by the decision, but whether the absence of such a State is, in the particular circumstances, such as to make it impossible for the Court judicially to determine the issues presented before it even when account is taken of the protective provisions of Article 59 of the Statute.

The passage quoted above from the *Monetary Gold* case was cited by counsel for Nicaragua in the *Military and Paramilitary Activities* case (CR 84/14, p. 26, Mr. Reichler). It was cited in opposition to an argument by counsel for the United States to the effect that not only would the responsibilities of certain non-party States be necessarily determined by any decision against the United States, but that the decision would have practical effects on those States. The effects would be practical, it was argued, in the sense that, if the Court, as it was requested by Nicaragua, were to enjoin the United States from co-operating militarily with those States, the consequence would be to prevent them from obtaining any law-

ful military assistance from the United States and in turn to impair their legal right of self-defence (CR 84/19, pp. 42 ff., Mr. J. N. Moore; see also CR 84/10, pp. 76-77, Mr. McGovern, and Counter-Memorial submitted by the United States of America, Part IV, Chap. I). The argument did not find favour with the Court (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, pp. 184-186, 429-431). And yet, the argument would seem to have been stronger than Australia's contention in this case: unlike the position taken by the United States, Australia has not been able to argue that a decision against it would have the practical effect of depriving New Zealand and the United Kingdom of the ability to make use of any right which they may possess under international law. It is useful to note that the question, as the Court understood it, was not whether Nicaragua had a claim against any other State in an absolute sense (as Nauru might conceivably have against New Zealand and the United Kingdom), but whether such a claim was presented in the particular proceedings before the Court. In this respect, the Court recalled that Nicaragua

> "emphasizes that *in the present proceedings* Nicaragua asserts claims against the United States only, and not against any absent State, so that the Court is not required to exercise jurisdiction over any such State" (*I.C.J. Reports 1984*, p. 430, para. 86; emphasis added).

Was the conclusion reached in the *Monetary Gold* case overthrown by the position taken by the Court on Italy's application to intervene in the case of the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*? Refusing the application, the Court said:

> "The future judgment will not merely be limited in its effects by Article 59 of the Statute: it will be expressed, upon its face, to be without prejudice to the rights and titles of third States." (*I.C.J. Reports 1984*, pp. 26-27, para. 43.)

Although, strictly speaking, the second part of the statement seemed unnecessary, the substance of the statement was in keeping with the previously settled jurisprudence of the Court. However, at the merits stage the Court said:

> "The present decision must, as then foreshadowed [in 1984], be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights." (*I.C.J. Reports 1985*, p. 26, para. 21.)

Arguably, the position so taken by the Court went beyond, and was not really foreshadowed by, the position previously taken by it in 1984, for

now the Court was not merely saying that its decision would not in law affect Italy's interests, but was in fact refraining from adjudicating as between the parties before it with respect to any areas in relation to which Italy might have a claim. It seems to me that a point of some difficulty was raised by the argument that, if Italy's claims had been sufficiently extensive, this, on the view which the Court eventually took, could well have prevented the Court from giving any judgment at all as between the parties before it (*I.C.J. Reports 1985*, p. 28, para. 23). Possibly, the cited dictum of the Court in its 1985 decision is to be explained by certain "special features" to which it referred *(ibid.)*. Alternatively, it is to be explained by the particular terms of the Special Agreement, under which the Court was expected to decide

> "in absolute terms, in the sense of permitting the delimitation of the areas of shelf which 'appertain' to the Parties, as distinct from the areas to which one of the Parties has shown a better title than the other, but which might nevertheless prove to 'appertain' to a third State if the Court had jurisdiction to enquire into the entitlement of that third State, . . ." (*ibid.*, p. 25, para. 21).

In effect, the Special Agreement itself required the Court to refrain from adjudicating over areas which were subject to Italy's claims and which might therefore not "appertain" in "absolute terms" to the parties to the case. In my opinion, the case did not modify the general principle laid down in the *Monetary Gold* case.

That principle was applied in the case concerning the *Land, Island and Maritime Frontier Dispute* (*I.C.J. Reports 1990*, p. 92). For present purposes, the reasoning of the Chamber, particularly on questions of opposability, is to be found in the passage from its decision set out in the dissenting opinion of Judge Schwebel in the present case. The decision was closely canvassed by both sides. On a consideration of the views expressed, it seems to me that something could be said for the proposition that, *ex hypothesi*, a condominium of the three States (the case advanced by El Salvador), or a "community of interests" among them (the case advanced by Honduras), could not take effect in law as between two of them only. To determine that the rights of two States are governed by a condominium or by a "community of interests" of three is arguably to determine, on a basis of necessary interdependence, that the rights of the third State are also thereby governed. It is not easy to see how a declaration upholding the existence of either of the two suggested régimes could apply as between two of the three States save on the basis that it had the same legal effect in relation to the third State. By contrast, in the present case, any judgment against Australia can have full effect as between the two litigating States without needing to produce any legal effects in relation to the two absent States. The reasoning of the Chamber, in holding that it was not precluded from hearing the case before it in the absence of Nicaragua as a party, applies *a fortiori* to justify the hearing of the present case in the absence of New Zealand and the United

Kingdom. I have difficulty in seeing how it may be possible to reconcile the decision in that case with a different conclusion in this.

Australia accepts that, unlike the position in the *Monetary Gold* case, it is not necessary for the Court in this case to make a determination of responsibility against New Zealand and the United Kingdom as a prerequisite to making a determination of responsibility against Australia. However, Australia takes the view that any determination against it would necessarily imply simultaneous determinations against New Zealand and the United Kingdom, and it considers that this would be equally barred by the *ratio decidendi* of the *Monetary Gold* case in so far as this rests on the incompetence of the Court to determine the responsibility of any State without its consent. I agree that if the Court is in fact making a determination of the responsibility of a non-party, the particular stage in the decision-making process at which it is doing so cannot make the decision less objectionable. But this would be so only if what was involved was a judicial determination purporting to produce legal effects for the absent party, as was visualized in the *Monetary Gold* case, and not merely an implication in the sense of an extended consequence of the reasoning of the Court. It seems to me that an approach based on simultaneity of determinations is likely to involve an implication of that kind, and not an adjudication. The Court's jurisprudence shows that such implications are not a bar to the exercise of jurisdiction.

As I read the *Monetary Gold* case, the test is not merely one of sameness of subject-matter, but also one of whether, in relation to the same subject-matter, the Court is making a judicial determination of the responsibility of a non-party State. Leaving aside the question of sameness of subject-matter, would a decision in this case constitute a judicial determination of the responsibility of New Zealand and the United Kingdom? Or, if it would not technically constitute such a determination, would it be tantamount to such a determination in the very real sense in which the Court was asked to determine the responsibility of Albania?

In considering whether a possible judgment against Australia would amount to a determination of the responsibility of New Zealand and the United Kingdom, it is relevant, and, indeed, necessary, to consider the legal elements on which such a judgment might be based. The suit before the Court is constituted as between Nauru and Australia. Nauru is asking the Court to say that Australia is in breach of a certain obligation which Australia allegedly had to Nauru under international law. The obligation, assuming that it existed, was also the obligation of New Zealand and the United Kingdom. But Nauru does not need to rely on this fact, and the Court, while it may notice the fact, does not need to found its decision on it. That others had the same obligation does not lessen the fact that Aus-

tralia had the obligation. It is only with Australia's obligation that the Court is concerned. In contrast with the situation in the *Monetary Gold* case, the decision of the Court as between Nauru and Australia will not be based on the obligation of New Zealand and the United Kingdom. Also, even if the obligation was joint, the decision of the Court need not be founded on that fact: in that connection, as has been noticed in Part I, in today's Judgment the Court has not found it necessary to say whether or not the obligation was joint (see paragraph 48 of the Judgment). If it was joint, this would not mean that it was any the less the obligation of Australia. All the Court is concerned with in these proceedings is whether the obligation, if it existed, was Australia's obligation.

Therefore, there need be nothing in the legal elements of a possible judgment in favour of Nauru which would require the judgment to be construed as *per se* constituting or amounting to a judicial determination of the responsibility of New Zealand and the United Kingdom. On the basis of argument that the obligation was intrinsically and inseverably joint, it might be contended that the conclusion reached in the judgment could in logic be extended to New Zealand and the United Kingdom; but this would be a matter of extending the reasoning of the Court to a case to which its judgment *per se* does not apply and on a ground not relied on by the judgment itself. So far as the judgment is concerned, by itself it will not affect the rights of New Zealand or the United Kingdom in the sense in which a judgment deploys its effects, as would have been the case with Albania. New Zealand and the United Kingdom will not be deprived of any rights in the subject-matter of the case, or at all. Certainly, no property or property rights belonging to them will be transferred or otherwise affected as a result of such a decision. It is difficult to see what protection will be needed beyond that provided by Article 59 of the Statute of the Court.

In any proceedings by Nauru against them, New Zealand and the United Kingdom will be free to deny liability on any ground, whether or not it is a ground pleaded by Australia in these proceedings; in this respect, differences have been noticed in Part II above between the position of Australia, on the one hand, and that of New Zealand and the United Kingdom, on the other, under the Trusteeship Agreement, and it cannot be assumed *a priori* that these differences could not be reflected in the defence to any such proceedings. However strong may be the tendency of the Court to follow a possible decision given in this case in favour of Nauru in any proceedings brought by Nauru against New Zealand and the United Kingdom, that tendency still falls short of being a judicial determination made in this case of the responsibility of those two States in the sense in which the Court was asked to make a determination of the responsibility of Albania in the *Monetary Gold* case. A decision in this case, if, as I think, it does not *per se* constitute a judicial determination of the responsibility of New Zealand and the United Kingdom, can at best

have only precedential value in any proceedings concerning their responsibility; and that value, however high one may be disposed to rate it, is only influential, not controlling. The possibility of a court deciding differently on the same issues in differently constituted proceedings is not a phenomenon less known to the law than the general propensity of courts to be guided by their rulings in similar cases. To use the propensity to be guided by previous rulings to exclude the possibility of deciding differently in a later case would be even less right in international litigation than it would be in municipal.

It has been correctly pointed out that "[a]s interstate relationships become more complex, it is increasingly unlikely that any particular dispute will be strictly bilateral in character" (L. F. Damrosch, "Multilateral Disputes", in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 1987, p. 376). Counsel writing for Nicaragua in the *Military and Paramilitary Activities* case had earlier spelt out the implications of that consideration in the following way:

> "The rule established in *Monetary Gold* is soundly grounded in the realities of contemporary international relations. Legal disputes between States are rarely purely bilateral. As in the case of delimitation of the continental shelf, the resolution of such disputes will often directly affect the legal interests of other States. If the Court could not adjudicate without the presence of all such States, even where the parties before it had consented fully to its jurisdiction, the result would be a severe and unwarranted constriction of the Court's ability to carry out its functions." *(Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility,* Memorial of Nicaragua, para. 248.)

I agree with Australia that the

> "fact that international disputes may be increasingly multilateral in nature is no reason to ignore the fundamental international law principles of sovereignty of States and the requirement of consent to adjudication" (Preliminary Objections of the Government of Australia, Vol. I, p. 144, para. 363).

But I do not think that these principles are in danger of being violated in this case. That the wider implications of a dispute do not necessarily prevent adjudication in litigation between some only of the interested parties would seem to have been implicitly anticipated by the Permanent Court of International Justice as early as 1932 (*Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A/B, No. 46,* p. 136). As observed above, this

Court has recognized that, unless barred by the *Monetary Gold* principle, it should seek "to give the fullest decision it may in the circumstances of each case" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, I.C.J. Reports 1984*, p. 25, para. 40).

The jurisprudence of the Court is under constant review; no case, however venerable, is exempt from scrutiny and re-evaluation. However, it would not appear that there has been any movement away from the stand taken by the Court when it stated in 1984 that the "circumstances of the *Monetary Gold* case probably represent the *limit* of the power of the Court to refuse to exercise its jurisdiction" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, p. 431, para. 88; emphasis added). It may be that that limit has been set at a point which enables the Court to adjudicate in situations in which a municipal court would refrain from adjudicating unless there was joinder; but, if so, there are good reasons for the difference. The danger to the authority of the Court presented by any tendency to act on the basis of a low jurisdictional threshold is not something to be lightly dismissed; but I do not feel oppressed by any apprehension in the circumstances of this case if, as I consider, it can be treated as being within the limits permitted by the *Monetary Gold* case and as therefore not involving the exercise of jurisdiction against non-parties.

The decision in the *Monetary Gold* case turned in part on the fact that the rule enunciated in Article 59 of the Statute "rests on the assumption that the Court is at least able to render a binding decision" (*I.C.J. Reports 1954*, p. 33). For the reasons already given, in that case the Court could not give a decision on the seminal issue concerning Albania's international responsibility that would be "binding upon any State, either the third State, or any of the parties before it" *(ibid.)*. A decision in this case would of course not be binding on New Zealand and the United Kingdom; but I am unable to see why it would not be binding on Australia. Australia is before the Court; even if the alleged responsibility was joint, this does not by itself mean that Australia could not ultimately share in the responsibility (if any) on any basis whatsoever. It is for the Court to determine whether there is any basis on which Australia shares the responsibility. If the Court determines that there is a basis, it is difficult to see why its decision would not be binding on Australia.

I should also say something about Australia's contention that the absence of New Zealand and the United Kingdom from the proceedings deprives the Court of "critical factual information" (Preliminary Objections of the Government of Australia, Vol. I, p. 140, para. 354). Australia's reliance on the *Status of Eastern Carelia* case (*P.C.I.J., Series B, No. 5*, p. 27) overlooks the fact that the absence of an interested State does not necessarily operate to deprive the Court of evidence if the evidence is otherwise available (*Western Sahara, I.C.J. Reports 1975*, pp. 28-29). The

latter was also an advisory opinion case, but this does not affect the general proposition. A person who can give relevant evidence may be a necessary witness, not a necessary party[1]. In systems which provide for it, joinder is not justified for the sole purpose of securing or facilitating the production of evidence: evidence must be produced in the normal ways. A contention similar to Australia's was advanced in the *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility* case, but without success (*I.C.J. Reports 1984*, p. 430, para. 86; United States Counter-Memorial, para. 443; and Mr. J. N. Moore, CR 84/19, at pp. 42, 47, 48, 51). In any event, the arguments do not persuade me that Australia, having in fact been in charge of the administration of Nauru at all material times, is not, or cannot be, in possession of all the relevant evidence.

CONCLUSION

Australia's arguments are worthy of consideration, and there could be more than one view of their value. For the reasons given, I have not, however, been able to feel persuaded. In my opinion, the obligations of the three Governments under the Trusteeship Agreement were joint and several, and Australia could accordingly be sued alone. In the alternative, if the obligations were joint, this circumstance still did not prevent Nauru from suing Australia alone. Nor do I think that a possible judgment against Australia will amount to a determination of the responsibilities of New Zealand and the United Kingdom. Whether Australia in fact had an international obligation to ensure the rehabilitation of worked-out phosphate lands, whether, if so, it was in breach of that obligation, and what, if so, is the extent of responsibility which it thereby engaged, are different questions.

(Signed) Mohamed SHAHABUDDEEN.

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[1] *Amon* v. *Raphael Tuck & Sons, Ltd.* [1956] 1 All ER 273, at pp. 286-287.

Annex 618

Oil Platforms (Islamic Republic of Iran v United States of America), Judgment of 6 November 2003, I.C.J Reports 2003, p. 161, Separate Opinion of Judge Simma

SEPARATE OPINION OF JUDGE SIMMA

Matters relating to United States use of force are at the heart of the case, therefore the approach of dealing with Article XX before turning to Article X of the 1955 Treaty is acceptable — The Court's position regarding the United States attacks on the oil platforms, although correct as such, is marked throughout by inappropriate self-restraint — While hostile military action not reaching the threshold of an "armed attack" within the meaning of Article 51 of the United Nations Charter may be countered by proportionate and immediate defensive measures equally of a military character, the United States actions did not qualify as such proportionate counter-measures — The Court's treatment of Article X on "freedom of commerce" between the territories of the Parties follows a step-by-step approach which is correct up to a certain point but then takes turns in two wrong directions: first, the platforms attacked in October 1987 did not lose protection under Article X through being temporarily inoperative because the freedom under the Treaty embraces also the possibility of commerce in the future; secondly, the indirect commerce in Iranian oil going on during the time of the United States embargo is also protected by the Treaty — The Court's finding on the United States counter-claim is profoundly inadequate particularly with regard to the so-called "generic" counter-claim which should have been upheld — The problems of attribution and causality posed by the existence of several tortfeasors in the case could have been solved by recourse to a general principle of joint-and-several responsibility recognized by major domestic legal systems — Neither would the "indispensable-third-party" doctrine have stood in the way of declaring Iran responsible for breaches of Article X.

I have voted in favour of the first part of the *dispositif* of the present Judgment with great hesitation. In fact, I see myself in a position to concur — in principle — with the Court's treatment of only one of the two issues dealt with there, namely that of the alleged security interests of the United States measured against the international law on self-defence. As to the remaining parts of the *dispositif*, neither can I agree with the Court's decision that the United States attacks on the Iranian oil platforms ultimately did not infringe upon Iran's treaty right to respect for its freedom of commerce with the United States; nor do I consider that the way in which the Court disposed of the so-called "generic" counter-claim of the United States is correct. In my view, this counter-claim ought to have been upheld. Regarding the part of the *dispositif* devoted to this counter-claim, I thus had no choice but to dissent.

The reason why I have not done so also with regard to the first part of

the *dispositif*, even though, as I have just pointed out, I concur with the Court's decisions on only the first of the two issues decided therein[1], lies in a consideration of *Rechtspolitik*: I welcome that the Court has taken the opportunity, offered by United States reliance on Article XX of the 1955 Treaty, to state its view on the legal limits on the use of force at a moment when these limits find themselves under the greatest stress. Although I am of the view that the Court has fulfilled what I consider to be its duty in this regard with inappropriate restraint, I do not want to dissociate myself from what after all does result in a confirmation, albeit too hesitant, of the *jus cogens* of the United Nations Charter.

I. Iran's Claims

A. Introduction

1. As paragraph 37 of the Judgment pertinently reminds us, the original dispute between the Parties to the present case related to the legality under the international law on the use of force, that is to say, under the Charter of the United Nations and customary international law, of the attacks of the United States against the oil platforms. Paragraph 37 also points out that, at the time of those attacks, neither Party made any reference to the 1955 Treaty of Amity. When subsequently that Treaty was brought into play by Iran as a basis for the Court's jurisdiction, Iran attempted to ground jurisdiction not only in Article X, paragraph 1, but also Articles I and IV, paragraph 1, of the Treaty. In its 1996 Judgment on the United States Preliminary Objection the Court accepted only Article X, paragraph 1, as the basis of its jurisdiction[2] — which might seem surprising in the face of Article I of the Treaty which reads that "[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran". In the Court's opinion, however, Article I was not to be interpreted as incorporating into the Treaty all of the provisions of international law concerning peaceful and friendly relations. Rather, this Article would have to be regarded as fixing an objective in the light of which the other treaty provisions are to be interpreted and applied[3]. Thus, the Court concluded, Article I was "not without legal significance" for the interpretation of other Treaty provisions relevant in the case, in particular that of Article X, paragraph 1[4].

[1] As well as the reason why I prefer to label the present opinion a "separate" and not a "dissenting" opinion despite disagreeing with the majority of the Court's main findings in the case.

[2] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* at pp. 817 ff., 821.

[3] *Ibid.*, p. 814, para. 28.

[4] *Ibid.*, p. 815, para. 31.

In effect, the relevance ultimately assigned to Article I by the present Judgment can only be considered minimal[5].

2. Be this as it may, the 1996 Judgment did decide that "[m]atters relating to the use of force are . . . not *per se* excluded from the reach of the Treaty of 1955"[6]. As a result, the rather businesslike Article X, paragraph 1, on freedom of commerce[7] now serves as the proverbial eye of the needle through which the Court's treatment of the question of the use of armed force by the United States has to be squeezed. In effect, this needle's eye has now been made even smaller, impenetrable in the present case, in the Court's decision on the merits of Iran's claim of violation of Article X, paragraph 1.

3. From the viewpoint of legal policy and political relevance, however, there can be no doubt that in the present case the emphasis is squarely on the question of the legality *vel non* of the use of armed force by the United States against the oil platforms. I therefore accept the Judgment's approach of dealing with Article XX, paragraph 1 *(d)*, of the Treaty before turning to Article X, paragraph 1, not only for the more technical reasons advanced in the Judgment — all of which I consider convincing —, but also out of this broader consideration. For the same reason, I see no problem in the fact that the part of the Judgment devoted to the issue of United States use of armed force is considerably larger than that dealing with the question of the violation of the Treaty as such.

4. Returning to the order in which these matters are taken up in the Judgment, the United States itself has argued that there was no compelling reason for the Court to examine the question of a breach of Article X before turning to the question under Article XX. According to the Respondent, therefore the order in which the issues are to be treated is a matter for the discretion of the Court[8]. The manner in which the Court has exercised such discretion thus appears to me to be indisputable.

B. Article XX, Paragraph 1 (d)

5. In accordance with what I stated at the outset, the reason why I decided to vote in favour of the first part of the Judgment's *dispositif* is

[5] Article I is only referred to in the Judgment once (in paragraph 41) to support a conclusion which I consider cogent for rather more obvious reasons, namely that Article XX, paragraph 1 *(d)*, of the Treaty (on which *infra*) must not be read as allowing any use of force between the parties that is not permissible, or justified, under the relevant rules of international law. Paragraph 41 considers the opposite view "hardly consistent with Article I".

[6] *I.C.J. Reports 1996 (II)*, p. 812, para. 21.

[7] Respectively freedom of navigation; see *infra* on the United States counter-claim.

[8] CR 2003/11, p. 16; CR 2003/12, p. 14.

that I consider it of utmost importance, and a matter of principle, for the Court to pronounce itself on questions of the threat or use of force in international relations whenever it is given the opportunity to do so. In this regard, the desirable standard of vigour and clarity was set already in the *Corfu Channel* case where the Court condemned a right to self-help by armed force claimed by the United Kingdom

> "as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law"[9].

Unfortunately, in the sombre light of developments over the 50 years that have passed since the *Corfu Channel* case, but more particularly in the recent past, this statement of the Court shows traits of a prophecy.

6. My agreement with the present position of the Court in principle does not however keep me from criticizing the Judgment for what I consider the half-heartedness of the manner in which it deals with the question of the use of force.

I recognize of course that there are valid legal reasons for the Court to keep what has to be said on the legality of United States military actions against the oil platforms within the confines of the text of Article XX, paragraph 1 *(d)*, of the Treaty. In fact, my criticism of the Court's treatment of the issues arising under that provision does not stem from any disagreement with what the text of the Judgment is saying. Rather, what concerns me is what the Court has decided not to say. I find it regrettable that the Court has not mustered the courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency. I accept of course that, since its jurisdiction is limited to the bases furnished by the 1955 Treaty, it would not have been possible for the Court to go as far as stating in the *dispositif* of its Judgment that, since the United States attacks on the oil platforms involved a use of armed force that cannot be justified as self-defence, these attacks must not only, for reasons of their own, be found not to have been necessary to protect the essential security interests of the United States within the meaning of Article XX of the Treaty; they must also be found in breach of Article 2 (4) of the United Nations Charter. What the Court could have done, without neglecting any jurisdictional bounds as I see them, is to restate the backbone of the Charter law on use of force by way of strong, unequivocal *obiter dicta*. Everybody will be

[9] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 35.

aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2 (4) and 51 are cornerstones. We currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter[10]. In this debate, "supplied" with a case allowing it to do so, the Court ought to take every opportunity to secure that the voice of the law of the Charter rise above the current cacophony. After all, the International Court of Justice is not an isolated arbitral tribunal or some regional institution but the principal judicial organ of the United Nations. What we cannot but see outside the courtroom is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force. If such voices are an indication of the direction in which legal-political discourse on use of force not authorized by the Charter might move, do we need more to realize that for the Court to speak up as clearly and comprehensively as possible on that issue is never more urgent than today? In effect, what the Court has decided to say — or, rather, not to say — in the present Judgment is an exercise in inappropriate self-restraint.

7. Paragraph 78 of the Judgment concludes that the United States attacks against the oil platforms cannot be justified, under Article XX, paragraph 1 *(d)*, of the Treaty of 1955, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying as acts of self-defence under "international law on the question" (see *infra*), and thus did not fall within the category of measures that could be contemplated, "upon its correct interpretation", by the said provision of the Treaty. I admit of course that this passage can be read — indeed, it must be read — as stating by way of implication that the United States actions, constituting unilateral use of "armed force not qualifying, under international law . . . as acts of self-defence", were therefore in breach of Article 2 (4) of the United Nations Charter. *Tertium non datur*. It is a great pity however that the reasoning of the Court does not draw this necessary conclusion, and thus strengthen the Charter prohibition on the threat or use of armed force, in straightforward, terms. To repeat, I cannot see how in doing so the Court would have gone beyond the bounds

[10] Cf. Secretary-General Kofi Annan's Address to the General Assembly of 23 September 2003, General Assembly, 7th Plenary Meeting, 23 September 2003, A/58/PV.7, at p. 3.

of its jurisdiction. The text of the Judgment should have included an unambiguous statement to the effect that the United States military operations against the oil platforms, since they were not conducted in justified self-defence against an armed attack by Iran, must be considered breaches of the prohibition on the use of military force enshrined in the United Nations Charter and in customary international law.

8. Instead of doing so, the text adopted by the majority of the Court explains what is to be understood by the "international law on the question" (para. 78) in a way that comes dangerously close to creating the impression that the Court attempts to conceal the law of the Charter rather than to emphasize it: it speaks throughout its extensive debate on the United States attacks in light of Article XX of "international law on the question" (i.e., the question of the use of force), "international law applicable in the case" or " the relevant rules of international law". What these relevant, applicable etc. rules actually are is spelled out only once, and then in the subordinate part of a sentence: in paragraph 42, the Judgment states that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of *(inter alia)* Article XX, paragraph 1 *(d)*, of the Treaty extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force "by reference to international law applicable to this question, *that is to say, the provisions of the Charter of the United Nations and customary international law*" (emphasis added). Again: nowhere else in the part of the Judgment dealing with the United States attacks[11] is the United Nations Charter expressly mentioned. It is difficult to view such hiding of the law of the Charter behind the veil of terms like those that I have quoted above as a mere matter of style; it could unfortunately also be understood as a most unwelcome downgrading of the relevance and importance of the rules of the United Nations Charter on the use of force — as I just said, precisely at a time when the effectiveness of these rules is being challenged to the breaking-point.

Having said this, I turn to a number of more specific issues raised by the text of the Judgment devoted to Article XX, paragraph 1 *(d)*, of the 1955 Treaty.

9. I agree with the Judgment's understanding of the relationship between Article XX, paragraph 1 *(d)*, and the limits of general international law on unilateral use of force, according to which — in the words of a former President of this Court — this Article "cannot have contem-

[11] With the exception of a reference in paragraph 51 to Article 51 of the Charter as determining the meaning of "armed attacks".

plated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence" [12]. The Court, in paragraph 41 of the Judgment, thus accepts, and rightly so, the principle according to which the provisions of any treaty have to be interpreted and applied in the light of the treaty law applicable between the parties as well as of the rules of general international law "surrounding" the treaty [13]. If these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation.

10. The scope of measures taken to protect the essential security interests of a party according to Article XX, paragraph 1 *(d)*, is wider than that of measures taken in self-defence. There are many measures that a party may take on that basis, like import bans, which have nothing to do with the notion of self-defence. On the other hand, any measure taken in self-defence would equally constitute a measure necessary to protect essential security interests within the meaning of the 1955 Treaty. However, only measures which fulfil all of the conditions required for the exercise of the right of self-defence can qualify as action that is permissible under Article XX, paragraph 1 *(d)*. In the present case, to interpret Article XX, paragraph 1 *(d)*, more "liberally" would be both absurd and destructive: absurd, because our provision could then be read to mean that parties to treaties of, among other things, "amity" could be allowed to contract out of the most fundamental of all obligations under present international law, namely the prohibition on the threat or use of force — an obligation which States owe any other State even if they cannot muster any degree of "amity" for each other. Furthermore, such a reading of Article XX, paragraph 1 *(d)*, would be destructive because it would allow a mutual "emancipation" from some of the most cogent of all rules of international law.

11. I also strongly subscribe to the view of the Court expressed in the Judgment's paragraph 73 according to which the requirement of international law that action taken avowedly in self-defence must have been necessary for that purpose, is strict and objective, leaving no room for any "measure of discretion". In my view, this is also due to Article I of the 1955 Treaty ("There shall be firm and enduring peace and sincere friend-

[12] Dissenting opinion of Judge Sir Robert Jennings, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 541. Sir Robert referred to the exact counterpart of Article XX, paragraph 1 *(d)*, in the FNC Treaty between the United States and Nicaragua. The remaining doubts in Sir Robert's mind (cf. *ibid.*) were, in my view, unnecessary.

[13] Article 31, paragraph 3 *(c)*, of the 1969 Vienna Convention on the Law of Treaties.

ship between the United States . . . and Iran") which, according to the Court's Judgment of 1996 on the Preliminary Objection of the United States, must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied[14]. The least which this objective must lead to is a particularly high demand on the standard of "necessity" embodied in Article XX, paragraph 1 *(d)*; every one of the words used in the text of that provision must be carefully weighed and given its full import. Hence, in order to relieve a party from its obligation under Article X, paragraph 1, of the Treaty, a measure must, first, be necessary, not just desirable or useful to protect that State's essential security interests. Second, the measure must be necessary to actually protect these interests, not just to advance or support them. Third, the measure must be necessary to protect the security interests of the State taking it. Fourth, the security interests destined to be protected must be essential. And last, of course, the measure must be concerned with the security of the Respondent itself. Since Article XX, paragraph 1 *(d)*, of the 1955 Treaty is the exception to the rule of freedom of commerce and navigation enshrined in the same Treaty, and, as stated, in light of Article I, all these terms have to be subjected to extremely careful scrutiny.

12. I am less satisfied with the argumentation used in the Judgment by which the Court arrives at the — correct — conclusion that, since the Iranian mine, gunboat or helicopter attacks on United States shipping did not amount to an "armed attack" within the meaning of Article 51 of the Charter, the United States actions cannot be justified as recourse to self-defence under that provision. The text of paragraph 51 of the Judgment might create the impression that, if offensive military actions remain below the — considerably high — threshold of Article 51 of the Charter, the victim of such actions does not have the right to resort to — strictly proportionate — defensive measures equally of a military nature. What the present Judgment follows at this point are some of the less fortunate statements in the Court's *Nicaragua* Judgment of 1986[15]. In my view, the permissibility of strictly defensive military action taken against attacks of the type involving, for example, the *Sea Isle City* or the *Samuel B. Roberts* cannot be denied. What we see in such instances is an unlawful use of force "short of" an armed attack ("agression armée") within the meaning of Article 51, as indeed "the most grave form of the use of force"[16]. Against such smaller-scale use of force, defensive action — by force also

[14] *I.C.J. Reports 1996 (II)*, p. 814, para. 28.

[15] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, e.g., p. 101, para. 191; p. 103, para. 194; p. 127, para. 249.

[16] *Ibid.*, p. 101, para. 194.

"short of" Article 51 — is to be regarded as lawful[17]. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter. Here I see a certain analogy with the *Nicaragua* case, where the Court denied that the hostile activities undertaken by Nicaragua against El Salvador amounted to an "armed attack" within the meaning of Article 51, that would have given the United States a right to engage in collective self-defence, and instead qualified these activities as illegal military intervention. What the Court did consider permissible against such unlawful acts were "proportionate counter-measures", but only those resorted to by the immediate victim. The Court said:

> "While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused . . . could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, . . ."[18]

Hence, the Court drew a distinction between measures taken in legitimate self-defence on the basis of Article 51 of the Charter and lower-level, smaller-scale proportionate counter-measures which do not need to be based on that provision. In view of the context of the Court's above dictum, by such proportionate counter-measures the Court cannot have understood mere pacific reprisals, more recently, and also in the terminology used by the International Law Commission, called "counter-measures"[19]. Rather, in the circumstances of the *Nicaragua* case, the Court can only have meant what I have just referred to as defensive military action "short of" full-scale self-defence. Unfortunately, the present Judgment decided not to address this issue at all.

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[17] I have not developed this view *ad hoc,* under the impact of the present case, but as long as 20 years ago; see A. Verdross and B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, 3rd ed., 1984, p. 240, para. 472.

[18] *I.C.J. Reports 1986*, p. 127, para. 249.

[19] Cf. Articles 49-54 of the ILC's text on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001; cf. International Law Commission, Report on the Work of its Fifty-Third Session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10). The Commission strictly excluded from its concept of "counter-measures" any such measures amounting to a threat or use of force; cf. Article 50, para. 1 *(a)*.

13. To sum up my view on the use of force/self-defence aspects of the present case, there are two levels to be distinguished: there is, first, the level of "armed attacks" in the substantial, massive sense of amounting to "une agression armée", to quote the French authentic text of Article 51. Against such armed attacks, self-defence in its not infinite, but still considerable, variety would be justified. But we may encounter also a lower level of hostile military action, not reaching the threshold of an "armed attack" within the meaning of Article 51 of the United Nations Charter. Against such hostile acts, a State may of course defend itself, but only within a more limited range and quality of responses (the main difference being that the possibility of collective self-defence does not arise, cf. *Nicaragua*) and bound to necessity, proportionality and immediacy in time in a particularly strict way.

14. In the present case, I agree with the Court that neither the broad pattern of unlawful use of force by Iran against United States vessels and their naval escorts nor the two specific attacks against the *Sea Isle City* and the *Samuel B. Roberts* amounted to an "armed attack" within the meaning of Article 51 of the United Nations Charter. These hostile activities could, as I have pointed out, have been countered immediately by "proportionate counter-measures" also of a military nature, consisting of defensive measures designed to eliminate the specific source of the threat or harm to affected ships in, and at the time of, the specific incidents. The Iranian oil platforms and their possible non-commercial activities during the Gulf War were too remote from these incidents (in every sense of this word) to provide a legitimate target for counter-measures within the meaning given to this term in the *Nicaragua* Judgment. Also, there is in the international law on the use of force no "qualitative jump" from iterative activities remaining below the threshold of Article 51 of the Charter to the type of "armed attack" envisaged there. However, as I read the facts of the present case, there was on the part of Iran no iterative or continued pattern of armed attacks against United States ships to begin with. Attacks on ships flying foreign flags could not be relied on by the United States in order to trigger Article 51 action. Furthermore, not a single Security Council resolution adopted at the material time determined that it was Iran (alone) which had engaged in "armed attacks" against neutral shipping in the Gulf.

15. But even if we assume, for the sake of discussion, that the United States had been the victim of an armed attack by Iran within the meaning of Article 51 of the United Nations Charter, the United States attacks on the oil platforms would not qualify as legitimate acts of self-defence under that provision. The United States actions fulfilled neither the condition of necessity nor that of proportionality. In the light of the material before the Court relating to the political and military considerations on

the part of United States authorities that led to the attacks on the oil platforms, the selection of these platforms as targets was made on the basis of decisions by military commanders which may well be considered state of the art from the viewpoint of military efficiency, etc., but to which the notion of "self-defence" was quite foreign. It is possible, indeed probable, that some monitoring of United States as well as any other neutral shipping had actually taken place from aboard the oil platforms. Obviously this was a nuisance to United States military decision-makers. The United States authorities might also have been right in assuming a connection between information flowing, as it were, from the oil platforms and the harassing of neutral shipping in the Gulf. Thus, as I see it, either following the incidents involving the *Sea Isle City* and the *Samuel B. Roberts*, the United States military considered that enough was enough, and thus decided to neutralize the oil platforms, or, rather, the United States used these two incidents to teach Iran a broader lesson. The material put before the Court by the United States contains several more or less convincing reasons as to why it was the oil platforms and not some other military targets that were chosen for the purpose of a "reply" to the specific incidents involving the *Sea Isle City* and the *Samuel B. Roberts*, respectively the broader pattern of unlawful force engaged in by Iran. But nowhere in these materials do we encounter any trace of the considerations that an international lawyer would regard as necessary in order to justify action taken in self-defence.

16. I arrive at the conclusion that the United States military actions against the oil platforms were not of the defensive nature required both by Article 51 of the United Nations Charter and the general international law governing "proportionate counter-measures", to refer again to the *Nicaragua* Court's tantalizing phrase. As I interpret the law on the limits of unilateral use of armed force as it has evolved since 1945, there is no way to regard such actions as lawful or justified.

C. Article X, Paragraph 1

17. With regard to the question whether the United States attacks on the oil platforms constitute a breach of Article X, paragraph 1, of the 1955 Treaty, the Judgment follows a step-by-step approach with which I am able to concur throughout several of its argumentative stages. For instance, I agree with the statement of the Court in paragraph 82 according to which it is oil exports from Iran to the United States that are relevant to the case, not such exports in general. In the same paragraph the Court rightly disposes of the United States argument calling for a distinction between oil produced on Iranian land territory or in the territorial sea of Iran, on the one hand, and oil produced on the Iranian continental shelf, on the other.

18. I also agree with the gist of paragraph 89 of the Judgment, in which the Court considers that where a State destroys another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is an interference with freedom of international commerce being carried on by those means at that time. However, the Court relativizes this finding by saying that this consideration is valid "in principle". The Court thus introduces a distinction between "freedom of international commerce" in the Treaty sense (which it interprets later on) and the same freedom "in principle", that is, in some more general sense. This is the point from which the present Judgment appears to begin its retreat from the Court's position of 1996 or, to return to the metaphor used above, to close again the needle's eye offered to Iran at that earlier stage. I will turn to this change of course in more detail in paragraphs 21 ff. of my opinion.

19. In paragraph 91 of the Judgment, the Court reminds us that it remains uncontested between the Parties that "oil exports from Iran to the United States were — to some degree — ongoing at least until after the destruction of the first set of oil platforms" on 19 October 1987. In the same paragraph, the Court also points out that it is accepted by both Parties that the oil or petroleum products reaching the United States during this period were to some extent derived from crude oil produced by the platforms that were later subjected to attack. Thus the Court confirms that Iranian oil exports did right up to the beginning of the United States oil embargo constitute "commerce between the territories of the High Contracting Parties" within the meaning of Article X, paragraph 1, of the 1955 Treaty.

20. I also draw attention to paragraph 96 of the Judgment, according to which the Court sees no reason to question the view that, over the period during which the United States embargo was in effect, petroleum products that were derived in part from Iranian crude oil were reaching the United States in considerable quantities. The Court continues:

> "It could reasonably be argued that, had the platforms not been attacked, some of the oil that they would have produced would have been included in the consignments processed in Western Europe so as to produce the petroleum products reaching the United States."

21. Thus far, I can agree with the Court's build-up of the arguments concerning Article X, paragraph 1, of the Treaty. I have gone through the relevant stages of these arguments in order to demonstrate more clearly that from this point onwards the Court's reasoning begins to be flawed.

Where these flaws are summarized, as it were, and where therefore I part company with the reasoning of the Judgment, is at paragraph 98 which encapsulates the two main findings of the Court relating to

Article X, paragraph 1, of the Treaty. Paragraph 98 states that the two United States attacks cannot be said to have infringed upon Iran's rights under Article X, paragraph 1, of the Treaty because

— at the time of the United States attack of 19 October 1987 on the Reshadat platforms there was no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms[20], inasmuch as those platforms were under repair and inoperative;
— at the time of the attacks of 18 April 1988 on the Salman and Nasr platforms, all direct commerce in oil between the territories of Iran and the United States had been suspended in pursuance of the United States embargo; consequently there was at that time no commerce "between the territories" of the parties within the meaning of the Treaty.

22. My disagreement with those two conclusions is as follows: as the Permanent Court has observed in the *Oscar Chinn* case[21], freedom of trade consists in the right to engage in any commercial activity, such activity comprising not only the purchase and sale of goods, but also industry, and in particular the transport business. This observation was the basis for the Court's 1996 Judgment on the United States Preliminary Objection to arrive at what it calls the "natural interpretation" according to which the word "commerce" in Article X, paragraph 1, includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce[22]. In conformity with this finding, the present Judgment includes the oil platforms among the installations performing such ancillary activities.

23. What I cannot agree with is that those oil platforms that at the time of the 1987 attacks were under repair could have lost the protection rendered by Article X, paragraph 1, of the 1955 Treaty by the fact of their thus being temporarily inoperative. First, according to Iran, the Reshadat platforms were at the time of the United States attacks close to being recommissioned[23]: according to Iran, it was contemplated that production would resume several days before the United States embargo set in. But even if the Reshadat platforms had taken up production again at a later date, that is, during the period of the embargo, they would have

[20] Paragraph 47 of the Judgment clarifies that, while the United States attack was made solely on two platforms belonging to the Reshadat complex, it affected also the operation of the Resalat complex.
[21] *Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65.
[22] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 49.
[23] Cf. paragraph 92 of the Judgment.

participated in indirect commerce in oil (on which see *infra*), just like the Salman and Nasr platforms.

24. Concerning the time needed for the repair of the platforms, I see no reason to deny credibility to the Iranian claims as paragraph 93 of the Judgment chooses to do: Iraqi attacks on the Reshadat platforms had taken place way back in 1986 and I would not categorically exclude the possibility that the United States, resolved to "teach Iran a lesson", timed its attacks precisely so as to destroy the installations as imminently before they could resume their function as possible.

25. More importantly, however, I consider, first, that "freedom of commerce" within the meaning of Article X, paragraph 1, of the Treaty implies the coverage by that Treaty provision not only of actual, ongoing commerce but of commerce on a continuing basis. Secondly, with Iran, I read that freedom as embodying an undertaking by the Parties to refrain from any action, not authorized by general international law or expressly contemplated by the Treaty between them, which may be the source of impediments on the other Party related to international commerce[24]. Thus, according to this view, which I consider to be correct on this point, the key issue is not damage to commerce in practice but the violation of *the freedom to engage in commerce*, whether or not there actually was any commerce going on at the time of the violation.

26. To conclude from this interpretation of the Treaty-based "freedom of commerce" that one party to a treaty stipulating such freedom would be obligated to enhance the other party's capabilities to bring about goods destined for such commerce would be absurd. But what certainly follows from it is that the parties are prohibited to prevent each other's use of existing capabilities, particularly by destroying respective installations altogether. I see no other way to interpret the Court's statement of 1996, according to which "any act which would impede that 'freedom' is thereby prohibited"[25]. Further, as a consequence of that — abstract, as it were — understanding of freedom of commerce followed here, such freedom is not founded on momentary reality, it implies a possibility for the future[26]. Thus the destruction of the Reshadat installations did impair the freedom of Iran to engage in commerce in oil also with the United States, irrespective of the fact that at the time of the attacks the platforms were out of order. Even if it had taken Iran longer to render the installations attacked in 1987 operational again, reducing them to ruins is to

[24] Pellet, CR 2003/6, p. 28.
[25] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50.
[26] Pellet, CR 2003/6, p. 33, paras. 68 and 70; p. 34, para. 73.

me as obvious a violation of Iran's freedom of commerce as it could possibly be. Hence, for a violation of Article X, paragraph 1, to occur, no oil must have been flowing at the time of the United States attacks; it is sufficient that the attacks impeded the possibility of such flow. To give an example: let us assume that a person is suffering from a sore throat, depriving her of her voice, the chances being however that the person would be fully able to speak again in a few hours' time. If somebody gagged that person in order to prevent her from then speaking her mind, would such action be seen as an infringement upon that person's respective rights or not? The answer would certainly be yes. Thus I would venture to disagree with the view expressed in paragraph 92 of the Judgment according to which "[i]njury to potential for future commerce is . . . not necessarily to be identified with injury to freedom of commerce, within the meaning of Article X, paragraph 1, of the 1955 Treaty".

27. From the view taken here, the exact time of the projected resumption of operation of the oil platforms is not really relevant.

28. Further, I find myself in disagreement with the view expressed in paragraph 98 of the Judgment that, since at the time of the attacks on the Salman and Nasr platforms in April 1988, commerce in oil between the territories of Iran and the United States had been suspended through the United States President's Executive Order 12613, these platforms had lost protection under Article X, paragraph 1, of the 1955 Treaty as well. Thus, in the view of the Court, even though it recognizes that during the period of the United States embargo petroleum products were reaching the United States in considerable quantities that were derived in part from Iranian crude oil[27], commerce in such products did not constitute "commerce between the territories of Iran and the United States", understood exclusively as direct commerce. Also, the Judgment apparently views the "directness" of commerce in oil and petroleum products as eliminated not by the fact that, having been mixed with oil from other destinations, refined or otherwise processed, for instance in Rotterdam, Iranian crude oil could have lost its Iranian nationality, as it were, but rather by the existence in the context of indirect commerce of a succession of commercial transactions involving in addition to an Iranian seller and a United States buyer some intermediate participant(s) in a third country[28].

29. I find this interpretation of Article X, paragraph 1, plainly wrong. It is too formalistic and due to render the inter-State "commerce" pro-

[27] Cf. paragraph 96 of the present Judgment and *infra* paragraph 30.

[28] Cf. Judgment, paras. 96 ff. In the Court's view "[t]his is not 'commerce' between Iran and the United States, but commerce between Iran and an intermediate purchaser; and 'commerce' between an intermediate seller and the United States" (*ibid.*, para. 97).

tected under the Treaty a prey to private manipulations. In order to assess the ambit of this protection correctly, I would submit that a sharp distinction ought to be drawn between the level of international commercial law, that is, the law and the contractual relationships governing transactions in oil between private parties on the one hand and the level of public international, i.e., treaty law on the other: the 1955 Treaty intends to protect "commerce between the territories of the Parties" as a value, or as a good, belonging, as it were, to the States parties to it; it in no way focuses on the private transactions that make such commerce flow from Iran to the United States. Thus, what the Treaty protection of commerce aims at is the macro-economic aspect of oil trade. And in this regard, the situation was as follows: according to the information before the Court, Iran's economy benefited from an increase in sales of crude oil to Western European markets during the period of the embargo, and this corresponded to increased spending by United States importers on petroleum products in those markets. Just as there was, in some sense, a flow of Iranian oil into the United States in the form of "mixed" crude oil or refined products, so there was also a corresponding flow of capital out of the United States and, ultimately, into Iran to pay for the products. In my view, this is all there is needed to represent "commerce between the territories" of the two Parties for the purposes of a commercial treaty of the kind exemplified by the 1955 Treaty. Trade in oil has to be viewed in light of the realities of that trade[29]. I would presume that even before the enactment of the embargo, indirect trade in oil (products), as such trade is understood by the Judgment, was taking place. Subsequent to the United States President's Executive Order 12613, what happened was that all Iran-United States oil trade became indirect in that way.

30. The figures in that regard are quite telling. According to the report by Professor Odell submitted by Iran, trade in oil between Iran and Europe and Europe and the United States increased very significantly around the time in which the embargo was enacted. Thus Iranian crude exported to European OECD countries rapidly expanded from only 25.2 million tons in 1986 to 37.7 million in 1987, and to 43.0 million tons in 1988: a 70 per cent increase in two years.

In the course of the same two years, exports of oil products from Western Europe to the United States rose by 60 per cent, from 11.2 to 17.9 million tons, while exports of such products as a whole from Europe increased much more modestly by 35 per cent from 24.3 to 32.7 million tons. In 1986, 46.1 per cent of Western Europe's exports of relevant products went to the United States; in 1988, the United

[29] Crawford, CR 2003/5, pp. 3 ff.

States was the destination for 54.7 per cent of the total[30]. Professor Odell concludes:

> "One can reasonably presume that these much larger than previously reported levels of geographically non-specified destinations for oil products ex-Europe for 1988 could have been related to actions which sought to disguise an Iranian origin for large volumes of oil going to the United States through Europe."[31]

Again according to Professor Odell, the "denationalization" process that Iranian oil underwent in Europe was substantial so that it would be very difficult to trace the oil to its origin. Odell states that "it was thus an ideal system into which US embargoed Iranian crude could be introduced"[32].

31. Another critical observation in place would be that the Judgment is rather oblique in its treatment of the exception made in Executive Order 12613. After all, the Order provided that the embargo was not to apply, *inter alia*, to "petroleum products refined from Iranian crude oil in a third country". Must the very existence of this exception from the embargo not be seen as an implicit acknowledgment by the United States that indirect commerce was also to be regarded as "commerce" between itself and Iran? If it had been taken to be otherwise, the exception would not have been necessary at all.

32. The economic interests at the basis of indirect trade in oil (products) between Iran and the United States appear to me quite clear-cut: Iran had an interest in sending its oil to Western Europe because there the oil was mixed with crude from other geographical origins or refined to some degree, so that it was impossible to determine whether oil products subsequently imported into the United States from Western Europe had come from Iran or not. But it is apparent that the United States also had an interest in maintaining this arrangement. It permitted the United States to claim that it had placed an embargo on Iran while at the same time allowing American companies to indirectly import oil products from that country. It allowed Iran to hide the "nationality" of its oil by sending it to a third country where it was mixed with oil from other sources and then could be sold on to the United States without complaints. Thus it seems that one of the main motives behind shipping the oil to Europe before it went on to its final destination, the United States, was to circumvent the embargo rather than substantively change the product by adding significant value to it. The United States clearly had knowledge of these facts but its importers still bought greatly increased quantities of oil from Europe, as described in the Odell Report.

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[30] Reply and Defence to Counter-Claim submitted by Iran (RI), Vol. III, Odell Report, p. 10.

[31] *Ibid.*, p. 12.

[32] *Ibid.*, p. 9.

33. Again, what I cannot but see here is "commerce between the territories" of the two Parties, well within the meaning of Article X, paragraph 1, of the 1955 Treaty. Nowhere does that Treaty require that such commerce be carried on between Iranian and United States natural or legal persons, without any foreign intermediaries, or that the oil should be shipped between the territories of the Parties without any interruption.

Paragraph 97 of the Judgment seeks to strengthen the opposite point of view by saying that:

> "If, for example, the process of 'indirect commerce' in Iranian oil through Western European refineries . . . were interfered with at some stage subsequent to Iran's having parted with a consignment, Iran's commitment and entitlement to freedom of commerce vis-à-vis the United States could not be regarded as having been violated."

But let us assume that it would have been the United States itself that would have thus interfered, would in such case Iran not have regarded its entitlement to freedom of commerce as having been violated by the other Contracting Party? The answer will be a clear no. Thus, the very example chosen by the Court shows that the (as it were, "macro-" rather than "micro-") economic link characterizing the "commerce between the territories . . ." protected by the Treaty would not be severed by any intermediate private transactions involving third-country nationals.

34. With regard to the two groups of oil platforms attacked by the United States I therefore reach the following result:

(a) as far as the Reshadat[33] platforms attacked in October 1987 are concerned, there is the possibility that they could even have returned to contributing to direct commerce between the territories of the two countries before the United States embargo set in. After resumption of performance, they would with certainty have participated in indirect commerce;

(b) the same is valid for the Salman platform attacked in April 1988; as far as the Nasr platform attacked at the same date is concerned, it was operating at the time of the attack, that is, it was participating in Treaty-protected commerce.

Thus, the destruction of the oil platforms violated Iran's freedom of commerce

— given (correctly) what could be called the "abstract" meaning of such freedom in the case of the Reshadat, Resalat and Salman platforms;

— also understood in the "concrete" sense (as done by the Judgment) in case of the Nasr platform.

[33] And Resalat, see *supra*, footnote 20.

Since, in my view, indirect commerce is protected by Article X, paragraph 1, of the Treaty, both United States attacks constituted breaches of the Treaty. The Court should therefore have upheld Iran's respective claim.

II. The United States Counter-Claim

A. Introduction

35. While the Judgment discusses at length the issues of jurisdiction and admissibility of the United States counter-claim, in comparison it devotes very little attention to the substantive questions raised therein. In particular, the reasons for the dismissal of the generic counter-claim given in paragraph 123 of the Judgment appear to me to be plainly inadequate: all the Judgment has to say in this regard is that the high risk for navigation in the Gulf during the Iraq-Iran war is not sufficient for the Court to decide that Article X, paragraph 1, of the 1955 Treaty was breached by Iran, and, further, that the United States was unable to demonstrate an actual impediment to trade or navigation between the territories of the Parties resulting from Iran's hostile activities. After all, paragraph 123 of the Judgment tells us commerce and navigation between Iran and the United States did continue during the war[34]. According to the Court, in the circumstances of this case, a generic claim of breach of Article X, paragraph 1, cannot be sustained independently of the specific incidents involving a number of ships, the entirety of which the Court found as not having led to an interference with the freedom of commerce and navigation protected by the Treaty.

36. Thus far the Court's reasoning, contained in one single paragraph

[34] More precisely, paragraph 123 states that

> "according to the material before the Court the commerce and navigation between Iran and the United States continued during the war until the issuance of the United States embargo on 29 October 1987, and subsequently at least to the extent permitted by the exceptions to the embargo".

As set forth in paragraph 90 of the Judgment, the embargo prohibited the import into the United States of most goods, including oil, and services of Iranian origin. Most but not all goods were affected by the embargo, which means that certain goods could still be imported freely into the United States from Iran. Commerce between the two Parties, which is not limited to commerce in oil, therefore continued even after the issuance of the embargo. However, the fact that commerce between the two Parties continued during the war does not, in and of itself, demonstrate that Iran's actions did not impede on the freedom of commerce and navigation between the two Parties. Had it not been for the impediments resulting from Iranian actions, there might have been *more* commerce between the two Parties. In other words, some commerce was still going on during the war, but not as much as would have been the case absent Iran's actions detrimental to commercial shipping between the Parties.

of the Judgment, and the little there is is borrowed in part from the arguments used by the Court before to dismiss the specific variant of the United States counter-claims. Possibly such short shrift thus given to the generic counter-claim can be explained as the Court's reaction to the somewhat unpersuasive way in which it was pleaded. Indeed, what I would regard as a full-fledged reasoning in support of the generic counter-claim was never really articulated by the United States. I would submit however that there is more merit to this counter-claim than meets the eye.

37. In the following, after a brief explanation of the meaning of "generic counter-claim" underlying the present case, I will scrutinize the main arguments in favour of the United States counter-claim of this nature, as they can be developed on the modest basis of what the United States did actually muster by way of reasoning. In doing so, I do not assume to violate the *ultra petita partium* rule because the generic counter-claim was actually made, if only insufficiently argued.

38. Iran, in its written pleadings on the counter-claim, made a distinction between the general context and worsening conditions for shipping in the Persian Gulf during the period in question, and the specific incidents referred to by the United States as constituting breaches of Iran's obligations under the Treaty[35]. Looking at the written pleadings of the United States, however, one finds no mentioning of an express distinction between a "generic" and a "specific" counter-claim[36]. Rather, in the United States Counter-Memorial and Counter-Claim, the counter-claim was formulated as a single claim. At the stage of the oral pleadings, the United States actually seemed to reject the distinction[37]. I use the word "seemed" because the position of the United States was unclear: after what could be regarded as a rejection of the distinction proposed by Iran, counsel for the United States went on to say that, in the *Nicaragua* case,

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[35] Iran found it

> "useful to analyse the US's claims in two ways: first, to the extent the United States refers to attacks on specific vessels (the specific claims), and secondly, to the extent that it refers to a more general impairment of the freedom of commerce between the territories of the High Contracting Parties (the generic claim)" (RI, para. 9.22).

Iran then proceeded to analyse both "claims".

[36] Specific incidents were mentioned by the United States in order to illustrate the assertion that

> "Iran's actions resulted in extremely dangerous conditions for all vessels operating in the Gulf, including a number of United States vessels which suffered severe property damage and injury to their crews" (Counter-Memorial and Counter-Claim submitted by the United States of America (CMUS), para. 6.09).

[37] CR 2003/13, pp. 42-43, paras. 21.61-21.63.

"[t]he Court did not feel compelled to treat each of the incidents placed before it as individual claims . . . We urge the Court to do the same in this case."[38] In thus requesting the Court not to examine the incidents individually, the United States in fact embraced a more generic approach to the counter-claim implicitly.

39. Regardless of what the position of the United States on this problem of nomenclature ultimately was, the Court found the distinction suggested by Iran useful and took it up in its Judgment. I will therefore also follow it in my analysis. The way in which the Judgment proceeds is to reject the two types of counter-claims independently of each other, even though applying to the generic counter-claim more or less the same criteria that it applies earlier on to its specific variety. I submit that this approach cannot do justice to the generic counter-claim. To be able to stand on its own, the generic counter-claim must be given its distinct substance — a substance independent of that of the various specific incidents referred to by the United States. The Court's way of dealing with the matter in paragraph 123 reduces the generic counter-claim to an empty shell, which is then summarily disposed of.

40. To delineate the contours of the generic counter-claim in an adequate way, it is useful to refer to the 1986 *Nicaragua* Judgment. In the *Nicaragua* case, the Court was faced with similar violations of a similar treaty, which also protected the freedom of commerce and navigation "between the territories" of the two parties. When the Court assessed the impediment to the freedom of commerce and navigation caused by the United States attacks on Nicaraguan ships, it did not consider it necessary to establish whether the particular vessels harmed by mines were flying the Nicaraguan flag, and whether the ships in question were transporting cargo between the United States and Nicaragua[39] (even though Article XIX, paragraph 1, of the FCN Treaty between the United States and Nicaragua of 1956, like Article X of our Treaty, reads: "Between the territories of the two parties there shall be freedom of commerce and navigation").

41. Most importantly, in the *Nicaragua* case, the Court did not analyse each incident in detail. Rather, it gave a broad picture of the context prevailing at the time, and assessed the nature and the extent of United States involvement and, consequently, its responsibility for the resulting violations of general international law and the FCN Treaty. Nowhere do we find a specific account of what happened to each ship. The Court's

[38] CR 2003/13, p. 43, para. 21.64.

[39] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 48, para. 81.

approach, in this sense, was more "generic" than "specific". In our case as well, the analysis of the generic counter-claim should not entail an analysis of what happened to the specific ships named by the United States.

42. One difference, of course, has to be pointed out at once: whereas, in the *Nicaragua* case, responsibility for the military actions taken against Nicaragua could be attributed only to the United States, in the present case two States created the situation adverse to neutral shipping in the Gulf: Iran and Iraq or, to be more precise, Iran *or* Iraq. I do not believe however that this difference is determinant. With respect to the generic counter-claim, all that matters is that Iran was responsible for a significant portion of the actions that impaired the freedom of commerce and navigation between the United States and Iran. This is sufficient to hold Iran in breach of its obligations under Article X, paragraph 1, of the 1955 Treaty, and it is not necessary to determine the particular extent to which Iran was responsible for these actions.

43. Another point is of even greater importance: against the reasoning that follows it cannot be argued that all the impediments to free commerce and navigation which neutral ships faced in the Gulf were caused by legitimate acts of war carried out by the two belligerents, Iran and Iraq, and that therefore neutral shipping had nothing to complain about, so to speak, because it entered the maritime areas affected by the Gulf war at its own risk — a risk which all neutrals must bear if they decide to navigate and trade in such a dangerous environment. This argument appears ill founded because it is well recognized that both Iran and Iraq conducted their activities against neutral shipping in and around the Gulf that are at issue here widely in disregard of the rules of international *jus in bello*, in particular the laws of maritime neutrality. I will exemplify such illegal activities on the part of Iran in the following analysis, but what has to be emphasized already at this point is that these activities were not justified simply because a state of war existed between Iran and Iraq.

B. Analysis

44. In my view, in the present case the purpose of the generic counter-claim is to compensate the United States for the harm done by Iran to commerce and navigation with the United States rather than for the harm done to specific vessels. For the reasons now to be outlined, I will argue (1) that Iran's actions constitute a violation of Article X, paragraph 1, of the 1955 Treaty, and (2) that the impediment on the freedom of commerce and navigation caused by those actions is evidenced by the increase in labour, insurance, and other costs resulting for the partici-

pants in commerce between the two countries during the relevant period[40].

1. Iran's violation of Article X, paragraph 1

45. The United States described in detail the various actions taken by Iran which caused damage to vessels, higher navigational risks, and delayed passage[41]. Let us look at these hostile activities.

First, I consider undeniable that Iran laid mines for the purpose of sinking and damaging ships — also United States-flagged ships and other vessels engaged in commerce between Iran and the United States — sailing in the Gulf and surrounding waters. In this regard, the *Texaco Caribbean* incident of 10 August 1987 is very instructive. A week after this tanker had struck a mine, Iran assisted in minesweeping operations in the area and destroyed a number of mines[42]. A Reuters wire report indicates that six mines were found in the area in the three days following the incident[43]. It is striking that Iran did not identify any of the mines which it found and destroyed; at least no such information appears in any of the reports. Then, from 21 to 28 September 1987, France and the United Kingdom conducted minesweeping operations in the area where the *Texaco Caribbean* incident had taken place. In the course of these operations, no mines could be detected[44]. On 10 October 1987 (that is, two months after the mining of the tanker), warships of the two countries returned to the site and undertook a second minesweeping operation. This time five mines were detected. The United Kingdom Ministry of Defence identified those mines as Iranian-manufactured SADAF-02 mines, on the basis of the serial numbers and characteristics of these weapons[45]. This evidence suggests that Iran had laid mines again, *after* it had cleaned up the area following the *Texaco Caribbean* incident. It also

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[40] According to Iran, the United States had to prove the following with respect to the generic claim:

1. the existence of *commerce* between the territories of the High Contracting Parties, independently of any individually named ship or other instrumentality;
2. that conduct *attributable to Iran violated the freedom of that commerce*, contrary to Article X (1) of the Treaty of Amity; and
3. (eventually) the *quantum of damages* or compensation directly attributable to that violation.

Iran's response to the counter-claim at paragraph 9.24 (emphasis added).

[41] CR 2003/13, pp. 20-21, paras. 20.7-20.14.

[42] Observations and Submissions of Iran on the United States Preliminary Objection, Exhibit 27.

[43] CMUS, Exhibit 52.

[44] *Ibid.*, Exhibit 53.

[45] *Ibid.*, Exhibit 43, para. 15, Exhibit 53.

appears highly probable that the mines which Iran destroyed without identifying them back in August were its own[46].

46. To the evidence related to the *Texaco Caribbean* incident can be added that resulting from minesweeping operations undertaken by the United States Navy off the coast of Kuwait in June 1987[47], and such operations undertaken by Kuwait itself in July 1987[48]. The mines swept during those operations were identified as Iranian following the boarding and search of the *Iran Ajr* on 21 September 1987, because they were identical to the mines found on board that vessel. Then, in November 1987, minesweeping operations detected Iranian mines in the location where the *Bridgeton* had been hit. Those are only examples of the evidence showing that Iran repeatedly laid mines in the Persian Gulf during the relevant period.

47. Moreover, Iran gave no warning to ships travelling in the area that mines had in fact been laid. When belligerents lay mines, Article 3 of the 1907 Hague Convention (VIII) Relating to the Laying of Automatic Submarine Contact Mines requires that "every possible precaution must be taken for the security of peaceful shipping"[49]. Even States which did not ratify or accede to the Hague Convention, among them Iran[50], have a duty of notification when laying mines[51]. This prohibition dating from 1907 was reconfirmed by the Court in its *Nicaragua* Judgment of 1986, which stated that:

> "if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humani-

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[46] The only response provided by Iran was that it could not have laid those mines there since Iranian ships used that route too. See CR 2003/14, p. 21, at para. 39.

[47] CMUS, Exhibit 37.

[48] *Ibid.*, Exhibit 34.

[49] D. Schindler and J. Toman, *Droit des conflits armés*, Comité International de la Croix Rouge & Institut Henry-Dunant (eds.), 1996, pp. 1115-1120.

[50] Information available at www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=1919 (last visited 28 October 2003).

[51] CMUS, Annex, Vol. VI, Exhibit 172, p. 282:

> "It is probably also true that [the States which did not accede to the Hague Convention (VIII)] may not lay mines off the enemy coast merely to intercept neutral shipping, *that they are bound to observe the duty to notify the laying of mines*, that they have to take additional safety measures to protect innocent shipping and that they must also remove mines at the end of the war." (Emphasis added.)

See also *ibid.*, Exhibit 173, pp. 168-169.

tarian law underlying the specific provisions of Convention No. VIII of 1907"[52].

It is certainly not within the jurisdiction of the Court in the present case to determine whether Iran's failure to notify ships travelling in the Gulf of the existence of the mines it laid violated the above Hague Convention, or even the principles of humanitarian law underlying that Convention. Yet, it is obvious, and well within jurisdictional reach in the present case, that, had Iran notified neutral ships of its minelaying activities, it would have mitigated the disruption to the freedom of commerce and navigation. There can be no doubt that the laying of the mines, aggravated by Iran's failure to notify, created dangerous conditions for maritime commerce and navigation between Iran and the United States.

48. Secondly, ships engaged in commerce between Iran and the United States were attacked by Iranian aircraft[53]. Whether such attacks were launched from or with the assistance of the oil platforms is irrelevant at this stage. They were carried out by fixed-wing aircraft and helicopters[54]. These attacks, like the mining attacks, disrupted maritime commerce in the Gulf[55].

49. Thirdly, ships engaged in commerce between Iran and the United States were also attacked by Iranian gunboats equipped with machine guns and rocket launchers[56]. The United States listed three attacks of this type in its counter-claim: the attacks on the *Lucy,* the *Esso Freeport* and the *Diane*[57]. Iran argued that close to no damage had been caused by those attacks. However, the impediment to freedom of commerce was not caused by damage to the ships but rather by the insecure environment which these attacks created for merchant shipping, including shipping between Iran and the United States.

2. Evidence of the impediment to freedom of commerce and navigation

50. Concerning, first, freedom of navigation, the Court stated in 1998 that it had jurisdiction "to entertain the United States counter-claim in so far as the acts alleged may have prejudiced the *freedoms* guaranteed by Article X, paragraph 1"[58], thereby including the freedom of navigation. All the vessels mentioned in the United States counter-claim had a right

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[52] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 112, para. 215.

[53] CMUS, p. 64, paras. 1.91-1.95.

[54] *Ibid.*, p. 161, para. 6.04.

[55] *Ibid.*, Exhibit 6; Exhibit 17, pp. 3-4; Exhibit 19; Exhibit 52, p. 19.

[56] *Ibid.*, p. 161, para. 6.04. See also *ibid.*, Exhibit 22, p. 2, and Exhibit 32, p. 3.

[57] *Ibid.*, p. 166, para. 6.08.

[58] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998,* p. 204, para. 36 (emphasis added).

to pass innocently, and follow the route of their choice, through Iranian territorial waters on their way to and from the United States, by virtue of the 1955 Treaty. I do not believe that the fact that merchant ships engaged in Treaty-protected commerce were in effect forced to navigate in a narrow channel in the Gulf created an impediment to their freedom of navigation, guaranteed by Article X, paragraph 1. In my view, this was a result of the general military situation in the Gulf rather than due to a deliberate hostile measure taken by Iran. It was simply advisable for ships to keep out of the Iranian war zone. The ensuing factual restriction to the passage of ships therefore does not amount to a violation of Article X, paragraph 1, of the 1955 Treaty by Iran.

51. On the other hand, Iranian attacks on ships engaged in commerce between the Parties through mining, and attacks by aircraft or patrol boats, did very well prevent these vessels from navigating freely and safely through the Gulf. Such vessels had to navigate so as to avoid the areas where Iranian mines had been discovered or were suspected to have been laid, thus effectively being forced to use indirect routes which were lengthier and therefore more expensive. In addition, ships began travelling at night for safety reasons. Thus, by creating conditions too dangerous for ships to travel by daylight, Iran also impeded upon the United States freedom of navigation.

52. Concerning, second, freedom of commerce, measuring the impact of a given hostile measure or action on such freedom is a difficult task. Nevertheless, there is substantial evidence supporting a finding that Iran's actions impeded on the freedom of commerce between the two countries guaranteed by Article X, paragraph 1, of the 1955 Treaty. Let me set out this evidence.

53. As concerns, first, minelaying, the Court declared in the *Nicaragua* case that, when a right of access to a port "is hindered by the laying of mines, this constitutes an infringement of the freedom of communications and of maritime commerce"[59]. In our case, as demonstrated above, the evidence shows that Iran repeatedly laid mines in order to disrupt neutral shipping in the Gulf, which necessarily included shipping between Iran and the United States. Thus, through these minelaying activities, Iran clearly infringed upon the freedom of commerce protected by Article X, paragraph 1, or in the words of the Court in *Nicaragua*, acted in "manifest contradiction"[60] to the freedom of commerce guaranteed by the 1955 Treaty.

[59] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 128 ff., para. 253.
[60] *Ibid.*, pp. 139 ff., para. 278.

54. The Iranian activities also led to an increase in labour costs. In general, wages of crew members had to be raised in order to reflect the increasingly dangerous sailing conditions in the Gulf. As travelling by daylight became more dangerous, ships began travelling at night to avoid attacks by Iranian helicopters, etc., resulting in a further increase of crew members' wages[61] . For instance, Chevron, an American oil company whose tankers transported crude oil from the Gulf to the United States during the Tanker War[62],

> "gave each crewmember the option of disembarking before his or her ship entered the Gulf . . . Virtually all crewmembers stayed with their vessels, and they received a 100 percent pay bonus during the time that they were in the Gulf."[63]

55. Further, because of the war raging between the two countries, insurance premiums related to commerce in the Gulf also increased. For instance, two days following the *Texaco Caribbean* incident, Lloyd's underwriters in London decided to impose an immediately effective war-risk premium charge equivalent to 0.125 per cent of the insured value of the vessels' hull for ships visiting the United Arab Emirates ports before entering the Gulf[64]. At the time, most shipping insurance policies did not include damage caused by military hostilities in war zones, and companies were compelled to purchase additional insurance policies covering the risks the ships now faced in the Gulf[65]. These extra costs contributed to making shipping between the countries of the Gulf (including Iran) and the United States more expensive[66].

56. Iran dismissed this argument by saying that such costs are

[61] "Our routing obviously cost KOTC considerable time and money. The day spent waiting in Jubayl was an extra day of war zone bonuses to the crews and war risk premiums, since war risk premiums had to be paid for the whole period the vessel was within the Arabian Gulf . . ." (CMUS, Exhibit 31, p. 3, para. 8; see also *ibid.*, para. 6.)

[62] Rejoinder of the United States (RUS), Exhibit 180, p. 1, paras. 1-3.
[63] *Ibid.*, para. 7.
[64] CMUS, Exhibit 52.

[65] RUS, Exhibit 180, p. 2, para. 8; see also CMUS, Exhibit 7.

[66] It is instructive that in the *Nicaragua* case the Court also noted that the explosion of mines created "risks causing a rise in marine insurance rates" (*I.C.J. Reports 1986*, p. 48, para. 80). Later, the Court stated again that "Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce" (*ibid.*, p. 139, para. 278).

unrecoverable under international law[67]. Whether or not there is merit to this claim is irrelevant in the present context. What is relevant, however, is that the increased cost of commerce constituted an impediment to the freedom of such commerce between the two Parties.

57. In addition, Iran argued that evidence relating to ships travelling to and from Kuwait and Saudi Arabia is "strictly irrelevant to any claim based on Article X (1) of the 1955 Treaty"[68]. This argument is to be dismissed since such evidence is indicative of the conditions — military, economic, etc. — prevailing in the Persian Gulf at the time for all its "users". The fact that commercial shipping to and from Kuwait was disturbed reflects a wider, more general context in which shipping in the Gulf was made more dangerous and thus more costly. Since all ships took similar routes within the Gulf, the conditions affecting commercial shipping between the United States and Iran also affected shipping between the United States and Kuwait or Saudi Arabia. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua*,

> "it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy *and its trading relations with any State whose vessels enjoy the right of access to its ports*"[69].

58. To finally mention some other financial impact of Iran's actions on commercial shipping between Iran and the United States, before entering the Gulf, tankers had to remove any oil remaining on board for fear of dangerous explosions that could occur if a ship carrying oil struck a mine or was hit by a missile. The cost of such measures was $50,000 for each voyage in the Gulf[70]. Further, ships travelling through the Gulf had to sail at faster speed (17 knots instead of 12-14 knots), resulting in significant penalties and, incidentally, higher navigational risks[71]. In addition, while the passage through the Gulf was normally made without stopping, many vessels actually stopped twice en route to avoid a daylight passage and to allow management to assess the potential for attack. As a result, passage through the Gulf was longer, and thus more expensive for shipping companies. Chevron, for instance, incurred as much as $40,000 a day in additional operating costs while ships were stranded in the Gulf, a loss to which had to be added the

[67] CR 2003/14, p. 61, paras. 41-43.
[68] RI, Vol. I, p. 220, para. 11.5.

[69] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 129, para. 253; emphasis added.
[70] RUS, Exhibit 180, para. 11.
[71] *Ibid.*, para. 14.

amount of capital (oil barrels) tied up on board (as high as $50,000,000 for a very large crude oil carrier)[72]. Other costs included escort protection for ships to help them avoiding striking mines[73].

C. Conclusions

59. By laying mines without warning commercial ships, by not notifying neutral ships of the presence of mines, and by harassing commercial shipping of all nationalities in the Persian Gulf also in other ways, Iran created dangerous and more onerous conditions for commercial shipping also between the two Parties[74]. As I have emphasized at the outset, the state of war between Iran and Iraq did not provide Iran with a general justification for its hostile activities because these were, for the greatest part, in violation of the laws of war and neutrality. Therefore, Iran ought to have been found in violation of its obligations under the 1955 Treaty, and the generic counter-claim of the United States should have been upheld.

60. To emphasize once again: in order to reach this conclusion, we need not look at each of the specific incidents described by the United States independently, or prove that each of these incidents is attributable to Iran. In fact, doing so would be inappropriate in the context of a generic claim. As long as it is clear that, during the Tanker War, Iran and Iraq were both engaging in actions detrimental to neutral commercial shipping in the Gulf (including, of course, commercial shipping between Iran and the United States)[75], the particular extent to which Iran was responsible for these actions need not be determined with precision. It is sufficient to establish that Iran, because of the Iran-Iraq war, was responsible for a significant portion of those actions, and that such actions impaired the freedom of commerce between the United States and Iran guaranteed by the 1955 Treaty in ways not justifiable simply because of the existence of a state of war.

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[72] RUS, Exhibit 180, para. 15.

[73] *Ibid.*, para. 16. For Chevron, such protection amounted up to $40,000 a day.

[74] CMUS, p. 160. While I believe that Iran's actions were inconsistent with Article X of the 1955 Treaty, it is not my view that such actions reached the level of an "armed attack" against the United States in the meaning of Article 51 of the United Nations Charter. There is thus no inconsistency between what I conclude here and what I have said on Article XX of the 1955 Treaty (see the respective section of the present opinion).

[75] In this regard, cf. paragraph 44 of the Judgment:

> "the Court notes that it is not disputed between the Parties that neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage, during the Iran-Iraq war. It notes also that this was to a great extent due to the presence of mines and minefields laid by both sides."

61. An obstacle to admitting the United States counter-claim could be seen in the argument that the acts alleged to have constituted an impediment to the freedom of commerce and navigation under the Treaty cannot be attributed to Iran with certainty. Therefore, the argument would go, it is impossible to find Iran responsible for those acts. I will now proceed to show how this obstacle may be overcome.

62. One remark is to be made right at the outset: in the present case the problem of attribution poses itself almost exclusively with regard to minelaying by the parties to the Gulf war. But as referred to above, in addition to mine attacks, Iran also carried out attacks by helicopters, other aircraft and patrol boats, which largely contributed to the unsafe shipping conditions in the Gulf. Whereas identifying the State responsible for particular minelaying activities is not an easy exercise, identifying the State engaging in attacks by helicopters or patrol boats is much less difficult. Attribution of responsibility therefore can only be problematic with respect to minelaying. As for attacks by helicopters, patrol boats, etc., against ships engaged in commerce between Iran and the United States, there is hardly any doubt that they were carried out by Iran. Therefore, when we move away from the mines, so to speak, the generic counter-claim becomes free of the problem of attribution. Hence, the following reasoning is in essence devoted to the problem of attribution of minelaying in the Gulf.

63. As I have just demonstrated, attribution of responsibility for such minelaying activities certainly represents the principal challenge to the generic counter-claim. Against this challenge militates a sense of fairness. Yet, the thought that Iran could be held responsible for acts that could not be attributed to it beyond a certain threshold of proof is also troubling. The question we face is thus the following: how can we hold Iran responsible for acts which, even though they did create impediments to the freedom of commerce and navigation, cannot be attributed to Iran with certainty?

64. It is common knowledge that the Iran-Iraq war had a destabilizing effect on the regional economy, including American commerce going through the Gulf. This destabilizing effect is easily measurable by the increase in costs for doing commerce in the Gulf, as the evidence discussed above shows. It is more difficult — if not impossible — to measure with any exactitude the negative impact of individual Iraqi or Iranian actions on the economic conditions of commerce, let alone on American commerce specifically. The damage caused by these actions, i.e. the impediment to the freedom of commerce and navigation protected by the 1955 Treaty, is indivisible and as such cannot be apportioned between Iran and Iraq.

65. Responsibility, however, is another matter. It is clear that a series of actions taken by each party to the war necessarily disturbed the economic environment (even if unintentionally). But what conclusion is to be drawn from this? Should we hold both States equally responsible for the impediments caused to commerce and navigation? Or can neither of the two States be held responsible because it is impossible to determine precisely who did what?

66. In order to find a solution to our dilemma, I have engaged in some research in comparative law to see whether anything resembling a "general principle of law" within the meaning of Article 38, paragraph 1 *(c)*, of the Statute of the Court can be developed from solutions arrived at in domestic law to come to terms with the problem of multiple tortfeasors. I submit that we find ourselves here in what I would call a textbook situation calling for such an exercise in legal analogy. To state its result forthwith: research into various common law jurisdictions as well as French, Swiss and German tort law indicates that the question has been taken up and solved by these legal systems with a consistency that is striking.

67. To begin with common law jurisprudence, in a well-known case heard by the Supreme Court of California[76], the plaintiff sued two defendants for injury to his right eye and face as a result of having been struck by birdshot discharged from a shotgun while the two defendants had been hunting in an open range. It was admitted that both defendants had fired at a quail, and that one piece of birdshot had hit the plaintiff's eye and another his lip. However, there was no means of determining which injury had been caused by which defendant. The defendants argued that they were not joint tortfeasors because they had not been acting in concert, and that there was not sufficient evidence to show which of the two was guilty of the negligence that caused the injuries[77].

The trial court had determined that "the negligence of both defendants was the legal cause of the injury — or that both were responsible"[78], even though "the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them"[79]. The California Supreme Court went on to quote Dean Wigmore, a United States authority on tort law:

> "When two or more persons by their acts are possibly the sole cause of a harm . . . and the plaintiff has introduced evidence that the one of the two persons . . . is culpable, then the defendant has the

[76] *Summers* v. *Tice*, 33 Cal. 2d 80 (1948).
[77] *Ibid.*, p. 83.
[78] *Ibid.*, p. 84.
[79] *Ibid.*

> burden of proving that the other person . . . was the sole cause of the harm. The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all."[80]

As a matter of fairness to the plaintiff, the court then reversed the burden of proof: each defendant had to prove that he had not caused the injury. Since such proof could not be put forward, the court held both defendants liable. The court dismissed the defendants' argument that causation was lacking between their acts and the plaintiff's damage[81]. Most importantly, the court also dismissed the argument that the plaintiff should establish the portion of the damage caused by each tortfeasor in cases where there is a plurality of tortfeasors and where the damage cannot be apportioned among them[82].

68. This solution, which has since been embodied in the Restatement of Torts[83], is interesting in many ways. On the one hand, it recognizes the difficulty of a finding of responsibility where apportionment is impossible. On the other hand, it excludes as unfair a solution in which no one would be held responsible. Finally, this provides an answer by shifting the burden of proof on to each defendant. The solution provides the wrongdoer a way out — acknowledging the peculiarity of a situation where facts cannot be ascertained with certainty —, while at the same time ensuring the plaintiff recovery for his injury if the defendant fails to show his innocence.

69. The same solution was adopted by Canadian courts in *Cook* v. *Lewis*[84]. According to Markesinis and Deakin, English courts faced with the question of multiple tortfeasors are likely to take a similar approach[85].

70. In French law, too, multiple tortfeasors (irrespective of whether they are acting in concert) causing an indivisible damage are each responsible for the entirety of such damage. Each tortfeasor is considered as having caused the entire prejudice to the victim, who can recover in full

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[80] *Summers* v. *Tice*, 33 Cal. 2d 80 (1948), p. 85.
[81] *Ibid.*, p. 87.
[82] *Ibid.*, p. 88.
[83] Rest. 2d Torts, s. 433B, subsec. (3).
[84] [1951] SCR 830. On Canadian law, see also Jean-Louis Baudoin, *La responsabilité civile délictuelle*, 1973, p. 164, para. 235.

[85] Markesinis and Deakin, *Tort Law*, 4th ed., 1999, p. 185.

from any of them[86]. In any event, when French courts dealt with this question in the past, they typically discussed the *extent* of each tortfeasor's responsibility (partial or total) rather than responsibility as such. When unable to hold each defendant liable on the basis of a specific damage, French courts resorted to interpretations such as "collective breach of duty" or "collective duty to look after the object which caused the damage" even when tortfeasors had evidently not been acting with a common motive, merely out of fairness for the injured plaintiff[87]. In fact, this solution had already been adopted in Roman law in the form of the cause of action concerning *"effusis et dejectis"* (things spilled or thrown out): whenever someone was injured by an object that had fallen from the unidentified window of an apartment building, all residents of such building were considered liable for the damage caused[88].

71. The same principles can be found in Swiss law, where Article 51 of the Code des Obligations states that, when multiple tortfeasors acting independently of each other cause a damage that cannot be divided among them, any of the tortfeasors can be held responsible in full — just like in the case of tortfeasors acting in concert[89]. A commentary reads as follows:

> "Whether the unlawful acts have been committed by a number of persons knowingly acting in concert (Art. 50, *'solidarité parfaite . . .'*), or acting independently of each other, and even where liability is based on different legal grounds (Art. 51, *'solidarité imparfaite'*), the injured party enjoys an entitlement to *concurrent claims*, without being concerned by any relationship between the joint tortfeasors; he can only make a single claim to reparation, but each tortfeasor will be liable towards him in respect of that claim as a whole and, if he so wishes, the action need only be brought against any one tortfeasor."[90]

72. The way, finally, in which German tort law addresses our issue is

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[86] H., L. and J. Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, Vol. II, 6th ed., 1970, p. 1078, para. 1952; see also Boris Starck, Henri Roland and Laurent Boyer, *Obligations: 1. Responsabilité délictuelle,* 5th ed., 1996, p. 468, para. 1142; René Rodière, *La responsabilité délictuelle dans la jurisprudence* (1978), pp. 346-348, para. 119. In particular, Rodière reproduces a decision of the Cour de Cassation dating from 1892, which, as he notes, has been consistently followed by various jurisdictions and approved by doctrine (Civ. 11 juillet 1892).

[87] Boris Starck *et al. (ibid.)*, p. 454, para. 1102.

[88] *Ibid.*, p. 455, para. 1104.

[89] Georges Scyboz and Pierre-Robert Gilliéron, *Code civil suisse et Code des Obligations annotés*, 5th ed., 1993; see also Danielle Gauthey Ladner, *Solidarité et consorité en matière délictuelle en droit suisse et américain, en particulier new-yorkais*, 2002, p. 57, para. 2.5, and p. 70, para. 4.

[90] Georges Scyboz and Pierre-Robert Gilliéron, *op. cit.*, commentary on Articles 50 and 51. *[Translation by the Registry.]*

virtually identical with the domestic solutions hitherto outlined. The pertinent provision of the German Civil Code (Bürgerliches Gesetzbuch), § 830, reads as follows:

> "1. If several persons through a jointly committed delict have caused damage, each is responsible for the damage. The same applies if it cannot be discovered which of several participants has caused the damage through his action.
> 2. Instigators and accomplices are in the same position as joint actors."

The first sentence of § 830, paragraph 1, is not relevant to our case because it presupposes the pursuance of a common design by the tortfeasors. The same is valid regarding the provision's paragraph 2. However, the rule contained in the second sentence of § 830, paragraph 1, is to the point: its function is precisely to spare the victim the difficult, indeed impossible, task of proving which one of several tortfeasors actually caused the damage. The rule's applicability depends upon three conditions: first, each of the participants must have engaged in the activity leading to loss or damage (irrespective of causality); second, one of the participants must necessarily have caused such loss or damage; but, third, it is impossible to determine which one of the participants did so, in whole or in part[91].

73. Elevating the joint-and-several liability doctrine thus described to the level of international law in the present case would lead to a finding that Iran is responsible for damages, or impediments, that it did not directly cause[92]. Personally, I would find it more objectionable not to hold Iran liable than to hold Iran liable for the entire damage caused to the United States as a result of actions taken during the Iran-Iraq war. In fact, I see no objection to holding Iran responsible for the entire damage even though it did not directly cause it all. Remember that the question before us is whether Iran can be found in breach of its treaty obligations

[91] Palandt-Thomas, 62nd ed., 2003, § 830 BGB Rn 7. For some of the precedents in German jurisprudence see BGH NJW 1960, 862 (responsibility of multiple tortfeasors for injuring a person by throwing stones), and BGH NJW 1994, 932 (responsibility of several producers of sweetened tea for the so-called "baby bottle syndrome").

[92] As Markesinis and Deakin point out,

> "by treating the cluster of theoretically apportionable injuries that cannot as a practical matter be apportioned as though they constituted a single indivisible injury, the law of joint and several liability means that each tortfeasor can be made to pay for more harm that he actually caused" (*op. cit.*, p. 234).

It is interesting to note that the Michigan Supreme Court, in *Maddux* v. *Donaldson* (362 Mich. 425, at 433), accepted this not only as an inevitable but also as a just consequence when division of liability among tortfeasors is impossible.

or not; in the present context I do not discuss any question of reparation. This issue would only have arisen at a later stage. With regard to that — now theoretical — issue and looking back at the range of solutions found in domestic tort laws, I find very pertinent the compromise course steered by the Supreme Court of California in the *Sindell* v. *Abbott Laboratories* case. In that case, the court did not feel compelled to dismiss all responsibility claims on the ground that some potential defendants were absent[93]. To the contrary, the court, following *Summers* v. *Tice*, held each of the defendants responsible and attempted, to the best it could, to approximate each defendant's responsibility. The compromise found by the court to account for the absence of interested parties was to hold the defendants liable only for part of the damage suffered by plaintiff, not for its entirety (I will return to the particular problems posed by the absence of a potential respondent in the present case in the final part of this section).

74. On the basis of the (admittedly modest) study of comparative tort law thus provided, I venture to conclude that the principle of joint-and-several responsibility common to the jurisdictions that I have considered can properly be regarded as a "general principle of law" within the meaning of Article 38, paragraph 1 *(c)*, of the Court's Statute. I submit that this principle should have been applied in our present case to the effect that, even though responsibility for the impediment caused to United States commerce with Iran cannot (and ought not, see *infra*) be apportioned between Iran and Iraq, Iran should nevertheless have been held in breach of its treaty obligations.

75. Another authoritative source addressing the issue of a plurality of responsible States can be found in the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001[94]. The ILC's solution is in conformity with the result of the comparative research I have just presented. Article 47 states: "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."

76. In the context of the specific variant of the United States counterclaim, Article 47 would apply only if both Iran and Iraq were responsible for a given action — for instance, if Iran had carried out an attack against a ship engaged in treaty-protected commerce, jointly planning and co-ordinating the operation with Iraq. However, in the present case,

[93] *Sindell* v. *Abbott Laboratories*, 607 P. 2d 924 (1980).
[94] See *supra* footnote 19.

the reality is such that the two States never acted in concert with respect to a specific incident, and thus it always was either Iran *or* Iraq which was responsible for a given incident. As a result, Article 47, which requires both States to be responsible for the same internationally wrongful act, cannot be applied to the specific counter-claim.

77. Applied to the generic counter-claim, on the other hand, Article 47 is very helpful. In the context of the generic counter-claim, the "internationally wrongful act" is constituted by the creation of negative economic, political and safety conditions in the Gulf rather than by a specific incident. The bringing about of this environment, taken as a whole, is attributable to both States, as it is common knowledge that they both participated in the worsening of the conditions prevailing in the Gulf at the time. The difference is clear: unlike the specific claim, where only one State is responsible for the act of violating international law, the generic claim falls within the scope of ILC Article 47 because the two States are responsible for the same act. It is the creation of dangerous conditions for shipping and doing commerce in the Gulf which constitutes the internationally wrongful act within the meaning of Article 47.

By application of Article 47 to the generic counter-claim, the United States could invoke the responsibility of either State, that is, also of Iran, individually. Thus, in the principle underlying Article 47, and in the "generic" identification of the internationally wrongful act, lies another basis on which Iran should have been held in violation of its Treaty obligations and the generic counter-claim upheld by the Court.

78. As a result, the problem of attributing responsibility in the face of factually "indivisible" wrongful acts — which I presented earlier as the principal obstacle to the admission of the counter-claim — could have been overcome pursuant both to the general principle that multiple tortfeasors can be held responsible individually even when the damage cannot be apportioned among them, and the principles embodied in ILC Article 47.

79. There remains one last question: it could be argued that dealing with the United States generic counter-claim in the direction indicated would by necessity lead the Court to finding that Iraq, too, violated international law — a pronouncement for which the Court has no jurisdiction in the present case. This is the essence of the so-called "indispensable-third-party" doctrine, consecutively accepted and rejected by the Court depending on the circumstances of the cases at hand.

80. The doctrine, first spelled out in the *Monetary Gold* case, holds that the Court has no jurisdiction to decide a case where a third State's "legal interests would not only be affected by the decision, but would

form the very-subject matter of the decision"[95]. Since then, the Court dismissed the argument in some cases as one which could not prevent the Court from exercising jurisdiction among the parties, such as in the *Nicaragua* case, the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* or the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*. In other instances, the Court did apply the *Monetary Gold* principle and refused to adjudicate absent the consent of the interested third State, such as in *East Timor (Portugal* v. *Australia)*.

81. Taking a closer look at the factual circumstances of each of these cases, it appears that the concept of "indispensable third parties" has been interpreted restrictively by the Court. In the present case, the role of Iraq in impeding the freedom of commerce and navigation between the United States and Iran certainly does not constitute the subject-matter of the dispute. Moreover, any findings by the Court as to Iraq's behaviour would only rely on common knowledge and there would be no need for additional evidence (i.e., proving that, because of the war, Iraq, like Iran, contributed to the deterioration of the shipping conditions in the Gulf). For this reason, the present case would not have fallen within the restrictive ambit of the doctrine of the "indispensable third party". The mere fact that the war in the region involved a State not party to the present proceedings or, for that matter, to the bilateral treaty between Iran and the United States, could not have prevented the Court from deciding upon Iran's responsibility under this Treaty. The Court could have found Iran responsible without engaging in any detailed assessment of Iraq's actions, or rendering any decision as to Iraq's responsibility *per se*[96].

82. Even more convincing, I believe, is the Court's dismissal in the *Nauru* case of Australia's argument that, Australia being only one of three States making up the Administering Authority under the Trusteeship Agreement, a claim could only be brought against the three of them "jointly" but not against each of them individually. The Court distinguished the issue of reparation in full from the question whether Australia could be sued alone[97], and continued:

---

[95] Case of *Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment, I.C.J. Reports 1954,* p. 32. A similar principle had already been developed by the P.C.I.J. in the Advisory Opinion on the *Status of Eastern Carelia (1923, P.C.I.J., Series B, No. 5)* and by this Court in the *Corfu Channel* case in 1949 *(I.C.J. Reports 1949)*.

[96] In *East Timor* the Court clearly stated that "it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not party to the case" (*I.C.J. Reports 1995*, p. 104, para. 34).

[97] As I have also done, cf. *supra* paragraph 73.

> "The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States."[98]

In the present case, where two States contributed to a single, indivisible damage without having acted in concert (unlike the three States in the *Nauru* case), the holding of the Court in the *Nauru* case applies with even greater strength: if the Court did not see fit to declare the *Nauru* case inadmissible on the basis that States acting "jointly" were absent from the proceedings, it could not have held inadmissible the United States counter-claim, in the context of which States were acting independently of each other.

83. In any case, I have already mentioned that, in contrast to mine-laying, helicopter and patrol boats attacks were clearly attributable to Iran and also contributed to creating an impediment to the freedom of commerce and navigation owed to the United States. Those attacks do not raise any issue pertaining to attribution of responsibility or the absence of Iraq from the proceedings. Had the Court rejected all other arguments, it should at least have upheld the United States counter-claim on that basis.

(Signed) Bruno SIMMA.

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[98] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, pp. 258-259, para. 48.

Annex 619

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019, p.65

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

EFFETS JURIDIQUES DE LA SÉPARATION DE L'ARCHIPEL DES CHAGOS DE MAURICE EN 1965

AVIS CONSULTATIF DU 25 FÉVRIER 2019

2019

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965

ADVISORY OPINION OF 25 FEBRUARY 2019

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LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965

25 FEBRUARY 2019

ADVISORY OPINION

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OPERATIVE CLAUSE 183

INTERNATIONAL COURT OF JUSTICE

YEAR 2019

2019
25 February
General List
No. 169

25 February 2019

LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965

Events leading to the adoption of General Assembly resolution 71/292 requesting an advisory opinion.

Geographic location of Mauritius in the Indian Ocean — Chagos Archipelago, including the island of Diego Garcia, administered by the United Kingdom during colonization as a dependency of Mauritius — Adoption on 14 December 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)) —Establishment of the Special Committee on Decolonization ("Committee of Twenty-Four") to monitor the implementation of resolution 1514 (XV) — Lancaster House agreement between the representatives of the colony of Mauritius and the United Kingdom Government regarding the detachment of the Chagos Archipelago from Mauritius — Creation of the British Indian Ocean Territory ("BIOT"), including the Chagos Archipelago — Agreement between the United States of America and the United Kingdom concerning the availability of the BIOT for defence purposes — Adoption by the General Assembly of resolutions on the territorial integrity of non-self-governing territories — Independence of Mauritius — Forcible removal of the population of the Chagos Archipelago — Request by Mauritius for the BIOT to be disbanded and the territory restored to it — Creation of a marine protected area around the Chagos Archipelago by the United Kingdom — Challenge to the creation of a marine protected area by Mauritius before an Arbitral Tribunal and decision of the Tribunal.

* *

Jurisdiction of the Court to give the advisory opinion requested.

Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the Charter — Competence of the General Assembly to seek advisory opinions — Request made in accordance with the Charter — Questions submitted to the Court are legal in character.

Argument that there is no exact statement of the question upon which an opinion is required — Any lack of clarity in the questions cannot deprive the Court of its jurisdiction — Arguments examined by the Court when it analyses the questions put by the General Assembly.

The Court has jurisdiction to give the advisory opinion requested.

* *

Discretion of the Court to decide whether it should give an opinion.

Integrity of the Court's judicial function — Only "compelling reasons" may lead the Court to refuse to exercise its judicial function.

Argument that advisory proceedings are not suitable for determination of complex and disputed factual issues — Sufficient information on the facts at the disposal of the Court.

Argument that the Court's response would not assist the General Assembly in the performance of its functions — Determination of the usefulness of the opinion left to the requesting organ.

Argument that an advisory opinion by the Court would reopen the findings of an Arbitral Tribunal — Opinion given to the General Assembly, not to States — Principle of res judicata *does not preclude the rendering of an advisory opinion — Issues determined by the Arbitral Tribunal not the same as those before the Court.*

Argument that the questions asked relate to a pending territorial dispute between two States, which have not consented to its settlement by the Court — Questions relate to the decolonization of Mauritius — Active role played by the General Assembly with regard to decolonization — Issues raised by the request located in the broader frame of reference of decolonization — The Court not dealing with a bilateral dispute by giving an opinion on legal issues on which divergent views are said to have been expressed by the two States — Giving the opinion requested does not have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State.

No compelling reasons for the Court to decline to give the opinion requested by the General Assembly.

* *

Factual context of the separation of the Chagos Archipelago from Mauritius and the removal of Chagossians from the archipelago.

Discussions between the United Kingdom and the United States on the use of certain British-owned islands in the Indian Ocean for defence purposes — Agreement between the two parties for the establishment of a military base by the United States on the island of Diego Garcia.

Discussions between the Government of the United Kingdom and the representatives of the colony of Mauritius with respect to the Chagos Archipelago — Fourth Constitutional Conference held in London in September 1965 involving representatives of the two parties — Lancaster House agreement — Agreement in principle by representatives of the colony of Mauritius to the detachment of the Chagos Archipelago from the territory of Mauritius.

Situation of the Chagossians — Entire population of Chagos Archipelago forcibly removed from the territory between 1967 and 1973 and prevented from return-

ing — Compensation paid by the United Kingdom to certain Chagossians — Various proceedings initiated by Chagossians before United Kingdom courts, the European Court of Human Rights and the Human Rights Committee — Committee's recommendations that Chagossians should be able to exercise their right to return to their territory — Today Chagossians are dispersed in several countries, including the United Kingdom, Mauritius and Seychelles — By virtue of United Kingdom law and judicial decisions of that country, they are not allowed to return to the archipelago.

* *

Language of the questions posed in resolution 71/292 — Competence of the Court to clarify the questions put to it for an advisory opinion — No need to reformulate the questions in this instance — No need for the Court to interpret restrictively the questions put by the General Assembly.

* *

Question of whether the process of decolonization of Mauritius was lawfully completed having regard to international law.

Relevant period and applicable rules of law.

Relevant period between the separation of the Chagos Archipelago in 1965 and the independence of Mauritius in 1968 — Evolution of the law on self-determination — Right to self-determination has a broad scope of application as a fundamental human right — In these proceedings, the Court only to analyse that right in the context of decolonization — Right to self-determination enshrined by the Charter and reaffirmed by subsequent General Assembly resolutions — Resolution 1514 (XV) represents a defining moment in the consolidation of State practice on decolonization — Declaratory character of resolution 1514 (XV) with regard to the right to self-determination as a customary norm — Resolution 1514 (XV) provides that any disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter — Reaffirmation of the right of all peoples to self-determination by the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights — Right to self-determination reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States —Means of implementing the right to self-determination in a non-self-governing territory set out in resolution 1541 (XV) — Exercise of self-determination must be the expression of the free and genuine will of the people concerned — Right to self-determination, under customary international law, does not impose a specific mechanism for its implementation in all instances — Right to self-determination of a people defined by reference to the entirety of a non-self-governing territory — Customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination — Incompatibility with the right to self-determination of any detachment by the administering Power of part of a non-self-governing territory, unless such detachment is based on the freely expressed and genuine will of the people of the territory concerned.

Right to self-determination, as a customary norm, constitutes the applicable international law during the relevant period.

Functions of the General Assembly with regard to decolonization.

Crucial role of the General Assembly with regard to decolonization — Monitoring of the means by which the free and genuine will of the people of a non-self-governing territory is expressed — General Assembly has consistently called upon administering Powers to respect the territorial integrity of non-self-governing territories.

Examination of the circumstances relating to the detachment of the Chagos Archipelago and its accordance with the applicable international law.

Agreement in principle of the Council of Ministers of Mauritius to the detachment of the Chagos Archipelago given when the colony of Mauritius was under the authority of the United Kingdom, its administering Power — Agreement not an international agreement — No free and genuine expression of the will of the people — Unlawful detachment of the Chagos Archipelago and its incorporation into a new colony, known as the BIOT.

Process of decolonization of Mauritius not lawfully completed when Mauritius acceded to independence in 1968.

* *

Consequences under international law arising from the continued administration by the United Kingdom of the Chagos Archipelago.

Decolonization of Mauritius not conducted in a manner consistent with the right of peoples to self-determination — United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State — Continuing character of the unlawful act — United Kingdom under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible — Modalities for completing the decolonization of Mauritius to be determined by the General Assembly.

Obligation of all Member States to co-operate with the United Nations to put the modalities for completing the decolonization of Mauritius into effect — Resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, is an issue relating to the protection of the human rights of those concerned — Issue should be addressed by the General Assembly during the completion of the decolonization of Mauritius.

ADVISORY OPINION

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN, SALAM, IWASAWA; *Registrar* COUVREUR.

On the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The questions on which the advisory opinion of the Court has been requested are set forth in resolution 71/292 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 22 June 2017. By a letter dated 23 June 2017 and received in the Registry on 28 June 2017, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit these questions for an advisory opinion. Certified true copies of the English and French texts of the resolution were enclosed with the letter. The resolution reads as follows:

"*The General Assembly*,

Reaffirming that all peoples have an inalienable right to the exercise of their sovereignty and the integrity of their national territory,

Recalling the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in its resolution 1514 (XV) of 14 December 1960, and in particular paragraph 6 thereof, which states that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations,

Recalling also its resolution 2066 (XX) of 16 December 1965, in which it invited the Government of the United Kingdom of Great Britain and Northern Ireland to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV) and to take no action which would dismember the Territory of Mauritius and violate its territorial integrity, and its resolutions 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967,

Bearing in mind its resolution 65/118 of 10 December 2010 on the fiftieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, reiterating its view that it is incumbent on the United Nations to continue to play an active role in the process of decolonization, and noting that the process of decolonization is not yet complete,

Recalling its resolution 65/119 of 10 December 2010, in which it declared the period 2011-2020 the Third International Decade for the Eradication of Colonialism, and its resolution 71/122 of 6 December 2016, in which it called for the immediate and full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Noting the resolutions on the Chagos Archipelago adopted by the Organization of African Unity and the African Union since 1980, most recently at the twenty-eighth ordinary session of the Assembly of the Union, held in Addis Ababa on 30 and 31 January 2017, and the resolutions on the Chagos Archipelago adopted by the Movement of Non-Aligned Countries since 1983, most recently at the Seventeenth Conference of Heads of State or Government of Non-Aligned Countries, held on Margarita Island, Bolivarian Republic of Venezuela, from 13 to 18 September 2016, and in particular the deep concern expressed therein at the forcible removal by the United Kingdom of Great Britain and Northern Ireland of all the inhabitants of the Chagos Archipelago,

Noting also its decision of 16 September 2016 to include in the agenda of its seventy-first session the item entitled 'Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965', on the understanding that there would be no consideration of this item before June 2017,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions:

(a) 'Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?';

(b) 'What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?'."

2. By letters dated 28 June 2017, the Registrar gave notice of the request for an advisory opinion to all States entitled to appear before the Court, pursuant to Article 66, paragraph 1, of the Statute.

3. By an Order dated 14 July 2017, the Court decided, in accordance with Article 66, paragraph 2, of the Statute, that the United Nations and its Member States were likely to be able to furnish information on the questions submitted to it for an advisory opinion, and fixed 30 January 2018 as the time-limit within which written statements might be submitted to it on those questions and 16 April 2018 as the time-limit within which States and organizations having presented a written statement might submit written comments on the other written statements.

4. By letters dated 18 July 2017, the Registrar informed the United Nations and its Member States of the Court's decisions and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations, under cover of a letter dated 30 November 2017 from the United Nations Legal Counsel, communicated to the Court a dossier of documents likely to throw light upon the questions formulated by the General Assembly, which was received in the Registry on 4 December 2017.

6. By a letter dated 10 January 2018 and received in the Registry the same day, the Legal Counsel of the African Union requested, first, that the African Union be permitted to furnish information, in writing and orally, on the questions submitted to the Court for an advisory opinion, and, secondly, that it be granted an extension of one month for the filing of its written statement.

7. By an Order dated 17 January 2018, the Court decided that the African Union was likely to be able to furnish information on the questions submitted to the Court for an advisory opinion and that it might do so within the time-limits fixed by the Court. By the same Order, the Court further decided to extend to 1 March 2018 the time-limit within which all written statements might be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute, and to extend to 15 May 2018 the time-limit within which States and organizations having presented a written statement might submit written comments, in accordance with Article 66, paragraph 4, of the Statute.

8. By letters dated 17 January 2018, the Registrar informed the United Nations and its Member States, as well as the African Union, of the Court's decisions and transmitted to them a copy of the Order.

9. Within the time-limit thus extended by the Court in its Order of 17 January 2018, written statements were filed in the Registry, in order of their receipt, by Belize, Germany, Cyprus, Liechtenstein, Netherlands, United Kingdom of Great Britain and Northern Ireland, Serbia, France, Israel, Russian Federation, United States of America, Seychelles, Australia, India, Chile, Brazil, Republic of Korea, Madagascar, China, Djibouti, Mauritius, Nicaragua, the African Union, Guatemala, Argentina, Lesotho, Cuba, Viet Nam, South Africa, Marshall Islands and Namibia.

10. By a communication dated 5 March 2018, the Registry informed States having presented written statements, as well as the African Union, of the list of participants having filed written statements in the proceedings and explained that the Registry had set up a dedicated website from which those statements could be downloaded. By the same communication, the Registry further informed those States and the African Union that the Court had decided to hold hearings which would open on 3 September 2018.

11. On 14 March 2018, the Court decided, on an exceptional basis, to authorize the late filing of the written statement of the Republic of Niger.

12. On the same day, the Registrar informed the United Nations, and those of its Member States which had not presented written statements, that written statements had been filed in the Registry. By the same communication, the Registrar also indicated that the Court had decided to hold hearings which would open on 3 September 2018, during which oral statements and comments might be presented by the United Nations and its Member States, regardless of whether or not they had submitted written statements and, as the case may be, written comments.

13. On 15 March 2018, the Registrar communicated a full set of the written statements received in the Registry to all States having submitted written statements, as well as to the African Union.

14. By communications dated 26 March 2018, the United Nations and its Member States, as well as the African Union, were asked to inform the Registry, by 15 June 2018 at the latest, if they intended to take part in the oral proceedings.

15. Within the time-limit as extended by the Court in its Order of 17 January 2018, written comments were filed in the Registry, in order of their receipt, by the African Union, Serbia, Nicaragua, United Kingdom of Great Britain and Northern Ireland, Mauritius, Seychelles, Guatemala, Cyprus, Marshall Islands, United States of America and Argentina.

16. Upon receipt of those written comments, the Registrar, by communications dated 16 May 2018, informed States having presented written statements,

as well as the African Union, that written comments had been submitted and that those comments could be downloaded from a dedicated website.

17. On 22 May 2018, the Registrar transmitted a full set of the written comments to all States having submitted such comments, as well as to the African Union.

18. By letters dated 29 May 2018, the Registrar transmitted to the United Nations, and to all its Member States that had not participated in the written proceedings, a full set of the written statements and written comments filed in the Registry.

19. By letters dated 21 June 2018, the Registrar communicated to the United Nations and its Member States, as well as to the African Union, the list of participants in the oral proceedings and enclosed a detailed schedule of those proceedings.

20. By letters dated 26 June 2018, the Registrar informed Member States of the United Nations participating in the oral proceedings, as well as the African Union, of certain practical arrangements regarding the organization of those proceedings.

21. By a letter dated 2 July 2018, the Philippines informed the Court that it would no longer be making a statement during the oral proceedings. By letters dated 10 July 2018, the Registrar informed Member States of the United Nations participating in the oral proceedings and the African Union accordingly.

22. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and written comments submitted to it accessible to the public with effect from the opening of the oral proceedings.

23. In the course of the hearings held from 3 to 6 September 2018, the Court heard oral statements, in the following order, by:

for the Republic of Mauritius:	H.E. Sir Anerood Jugnauth, GCSK, KCMG, QC, Minister Mentor, Minister of Defence, Minister for Rodrigues of the Republic of Mauritius, Mr. Pierre Klein, Professor at the Université libre de Bruxelles, Ms Alison Macdonald, QC, Barrister at Matrix Chambers, London, Mr. Paul S. Reichler, Attorney at Law, Foley Hoag LLP, member of the Bar of the District of Columbia, Mr. Philippe Sands, QC, Professor of International Law at University College London, Barrister at Matrix Chambers, London;
for the United Kingdom of Great Britain and Northern Ireland:	Mr. Robert Buckland, QC, MP, Solicitor General, Mr. Samuel Wordsworth, QC, member of the Bar of England and Wales, Essex Court Chambers, Ms Philippa Webb, member of the Bar of England and Wales, 20 Essex Street Chambers,

	Sir Michael Wood, KCMG, member of the Bar of England and Wales, 20 Essex Street Chambers;
for the Republic of South Africa:	Ms J. G. S. de Wet, Chief State Law Adviser (International Law), Department of International Relations and Co-operation;
for the Federal Republic of Germany:	H.E. Mr. Christophe Eick, Ambassador, Legal Adviser, Federal Foreign Office, Berlin,
	Mr. Andreas Zimmermann, Professor of International Law, University of Potsdam;
for the Argentine Republic:	H.E. Mr. Mario Oyarzábal, Ambassador, Legal Adviser, Ministry of Foreign Affairs and Worship, Mr. Marcelo Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Member and Secretary-General of the Institut de droit international;
for Australia:	Mr. Bill Campbell, QC, Mr. Stephen Donaghue, QC, Solicitor General of Australia;
for Belize:	Mr. Ben Juratowitch, QC, Attorney at Law, Belize, and admitted to practice in England and Wales, and in Queensland, Australia, Freshfields Bruckhaus Deringer;
for the Republic of Botswana:	Mr. Chuchuchu Nchunga Nchunga, Deputy Government Attorney, Attorney General's Chambers, Botswana, Mr. Shotaro Hamamoto, Professor of International Law, Kyoto University, Japan;
for the Federative Republic of Brazil:	H.E. Ms Regina Maria Cordeiro Dunlop, Ambassador of the Federative Republic of Brazil to the Kingdom of the Netherlands;
for the Republic of Cyprus:	H.E. Mr. Costas Clerides, Attorney General of the Republic of Cyprus, Ms Mary-Ann Stavrinides, Attorney of the Republic, Law Office of the Republic of Cyprus, Mr. Polyvios G. Polyviou, Chryssafinis & Polyviou LLC;
for the United States of America:	Ms Jennifer G. Newstead, Legal Adviser, United States Department of State;
for the Republic of Guatemala:	Mr. Lesther Antonio Ortega Lemus, Minister Counsellor, Co-Representative of Guatemala, H.E. Ms Gladys Marithza Ruiz Sánchez De Vielman, Ambassador, Representative of Guatemala;

for the Republic of the Marshall Islands:	Mr. Caleb W. Christopher, Legal Adviser, Permanent Mission of the Republic of the Marshall Islands to the United Nations, New York;
for the Republic of India:	H.E. Mr. Venu Rajamony, Ambassador of India to the Kingdom of the Netherlands;
for the State of Israel:	Mr. Tal Becker, Legal Adviser, Ministry of Foreign Affairs, Mr. Roy Schöndorf, Deputy Attorney General (International Law), Ministry of Justice;
for the Republic of Kenya:	H.E. Mr. Lawrence Lenayapa, Ambassador of the Republic of Kenya to the Kingdom of the Netherlands, Ms Pauline Mcharo, Deputy Chief State Counsel, Office of the Attorney General of Kenya;
for the Republic of Nicaragua:	H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands;
for the Federal Republic of Nigeria:	Mr. Dayo Apata, Solicitor General of the Federal Republic of Nigeria, Permanent Secretary, Federal Ministry of Justice;
for the Republic of Serbia:	Mr. Aleksandar Gajić, Chief Legal Counsel at the Ministry of Foreign Affairs;
for the Kingdom of Thailand:	H.E. Mr. Virachai Plasai, Ambassador of the Kingdom of Thailand to the United States of America;
for the Republic of Vanuatu:	Mr. Robert McCorquodale, Brick Court Chambers, member of the Bar of England and Wales, Ms Jennifer Robinson, Doughty Street Chambers, member of the Bar of England and Wales;
for the Republic of Zambia:	Mr. Likando Kalaluka, SC, Attorney General, Mr. Dapo Akande, Professor of Public International Law, University of Oxford;
for the African Union:	H.E. Ms Namira Negm, Ambassador, Legal Counsel of the African Union and Director of Legal Affairs Directorate, Mr. Mohamed Gomaa, Legal Counsellor and Arbitrator, Mr. Makane Moïse Mbengue, Professor of International Law, University of Geneva, and Affiliate Professor, Institut d'études politiques, Paris.

24. At the hearings, a Member of the Court put a question to Mauritius, which replied in writing, as requested, within the prescribed time-limit. The Court having decided that the other participants could submit comments or observations on the reply given by Mauritius, written comments were filed in the Registry, in order of their receipt, by the African Union, Argentina, United Kingdom of Great Britain and Northern Ireland and United States of America.

Another Member of the Court put a question to all the participants in the oral proceedings, to which Australia, Botswana and Vanuatu, Nicaragua, United Kingdom of Great Britain and Northern Ireland, Mauritius, Argentina, United States of America and Guatemala, in that order, replied in writing, as requested. The Court having decided that the other participants could submit comments or observations on the replies thus given, Mauritius, the African Union and United States of America submitted such comments or observations in writing.

* * *

I. Events Leading to the Adoption of the Request for the Advisory Opinion

25. Before examining the events leading to the adoption of the request for the advisory opinion, the Court recalls that the Republic of Mauritius consists of a group of islands in the Indian Ocean comprising approximately 1,950 sq km. The main island of Mauritius is located about 2,200 km south-west of the Chagos Archipelago, about 900 km east of Madagascar, about 1,820 km south of Seychelles and about 2,000 km off the eastern coast of the African continent.

26. The Chagos Archipelago consists of a number of islands and atolls. The largest island is Diego Garcia, located in the south-east of the archipelago. With an area of about 27 sq km, Diego Garcia accounts for more than half of the archipelago's total land area.

27. Although Mauritius was occupied by the Dutch from 1638 to 1710, the first colonial administration of Mauritius was established in 1715 by France which named it *Ile de France*. In 1810, the British captured *Ile de France* and renamed it Mauritius. By the Treaty of Paris of 1814, France ceded Mauritius and all its dependencies to the United Kingdom.

28. Between 1814 and 1965, the Chagos Archipelago was administered by the United Kingdom as a dependency of the colony of Mauritius. From as early as 1826, the islands of the Chagos Archipelago were listed by Governor Lowry-Cole as dependencies of Mauritius. The islands were also described in several ordinances, including those made by Governors of Mauritius in 1852 and 1872, as dependencies of Mauritius. The Mauritius Constitution Order of 26 February 1964 (hereinafter the "1964 Mauritius Constitution Order"), promulgated by the United Kingdom Government, defined the colony of Mauritius in Section 90 (1) as "the island of Mauritius and the Dependencies of Mauritius".

29. In accordance with General Assembly resolution 66 (I) of 14 December 1946, the United Kingdom as the administering Power regularly transmitted information to the General Assembly under Article 73 *(e)* of the Charter of the United Nations concerning Mauritius as

a non-self-governing territory. The information submitted by the United Kingdom was included in several reports of the Fourth Committee (Special Political and Decolonization Committee) of the General Assembly. In many of these reports, the islands of the Chagos Archipelago, and sometimes the Chagos Archipelago itself, are referred to as dependencies of Mauritius. In its 1947 Report, Mauritius is described as comprising the island of Mauritius and its dependencies among which are mentioned the island of Rodriguez and the Oil Islands group of which the principal island is Diego Garcia. The Report of 1948 collectively referred to all of the islands as "Mauritius". The Report of 1949 states that "there are dependent upon Mauritius a number of islands scattered over the Indian Ocean, of which the most important is Rodriguez . . . Other dependencies are: Chagos Archipelago . . . Agalega and Cargados Charajos".

30. On 14 December 1960, the General Assembly adopted resolution 1514 (XV) entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples" (hereinafter "resolution 1514 (XV)"). On 27 November 1961, the General Assembly, by resolution 1654 (XVI), established the United Nations Special Committee on Decolonization (hereinafter the "Committee of Twenty-Four") to monitor the implementation of resolution 1514 (XV).

31. In February 1964, discussions commenced between the United States of America (hereinafter the "United States") and the United Kingdom regarding the use by the United States of certain British-owned islands in the Indian Ocean. The United States expressed an interest in establishing military facilities on the island of Diego Garcia.

32. On 29 June 1964, the United Kingdom also commenced talks with the Premier of the colony of Mauritius regarding the detachment of the Chagos Archipelago from Mauritius. At Lancaster House, talks between representatives of the colony of Mauritius and the United Kingdom Government led to the conclusion on 23 September 1965 of an agreement (hereinafter the "Lancaster House agreement", described in more detail in paragraph 108 below).

33. On 8 November 1965, by the British Indian Ocean Territory Order 1965, the United Kingdom established a new colony known as the British Indian Ocean Territory (hereinafter the "BIOT") consisting of the Chagos Archipelago, detached from Mauritius, and the Aldabra, Farquhar and Desroches Islands, detached from Seychelles.

34. On 16 December 1965, the General Assembly adopted resolution 2066 (XX) on the "Question of Mauritius", in which it expressed deep concern about the detachment of certain islands from the territory of Mauritius for the purpose of establishing a military base and invited the "administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

35. On 20 December 1966, the General Assembly adopted resolution 2232 (XXI) on a number of territories including Mauritius. The resolution reiterated that

> "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".

36. The talks between the United Kingdom and the United States resulted in the conclusion on 30 December 1966 of the "Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory" and the conclusion of an Agreed Minute of the same date.

37. Based on the 1966 Agreement, the United States and the United Kingdom agreed that the Government of the United Kingdom would take any "administrative measures" necessary to ensure that their defence needs were met. The Agreed Minute provided that, among the administrative measures to be taken, was "resettling any inhabitants" of the islands. The inhabitants of the Chagos Archipelago are referred to as Chagossians and, sometimes, as the "Ilois" or "islanders". In this Opinion these terms are used interchangeably.

38. On 10 May 1967, Sub-Committee I of the Committee of Twenty-Four reported that:

> "By creating a new territory, the British Indian Ocean Territory, composed of islands detached from Mauritius and Seychelles, the administering Power continues to violate the territorial integrity of these Non-Self Governing Territories and to defy resolutions 2066 (XX) and 2232 (XXI) of the General Assembly."

39. On 15, 17 and 19 June 1967, the Committee of Twenty-Four examined the Report of Sub-Committee I and adopted a resolution on Mauritius. In this resolution, the Committee

> "[d]eplores the dismemberment of Mauritius and Seychelles by the administering Power which violates their territorial integrity, in contravention of General Assembly resolutions 2066 (XX) and 2232 (XXI) and calls upon the administering Power to return to these Territories the islands detached therefrom".

40. On 7 August 1967, general elections were held in Mauritius and the political parties in favour of independence prevailed.

41. On 19 December 1967, the General Assembly adopted resolution 2357 (XXII) on a number of territories including Mauritius, and reaffirmed what it had declared in resolution 2232 (XXI) (see paragraph 35 above).

42. On 12 March 1968, Mauritius became an independent State and on 26 April 1968 was admitted to membership in the United Nations. Sir Seewoosagur Ramgoolam became the first Prime Minister of the Republic of Mauritius. Section 111, paragraph 1, of the 1968 Constitution of Mauritius, promulgated by the United Kingdom Government before independence on 4 March 1968, defined Mauritius as "the territo-

ries which immediately before 12th March 1968 constituted the colony of Mauritius". This definition did not include the Chagos Archipelago in the territory of Mauritius.

43. Between 1967 and 1973, the entire population of the Chagos Archipelago was either prevented from returning or forcibly removed and prevented from returning by the United Kingdom. The main forcible removal of Diego Garcia's population took place in July and September 1971.

44. On 11 April 1979, in a discussion on the detachment of the Chagos Archipelago, Prime Minister Ramgoolam told the Mauritian Parliament "we had no choice".

45. In July 1980, the Organization of African Unity (hereinafter the "OAU") adopted resolution 99 (XVII) (1980) in which it "demands" that Diego Garcia be "unconditionally returned to Mauritius".

46. On 9 October 1980, the Mauritian Prime Minister, at the thirty-fifth session of the United Nations General Assembly, stated that the BIOT should be disbanded and the territory restored to Mauritius as part of its natural heritage.

47. In July 2000, the OAU adopted Decision AHG/Dec.159 (XXXVI) (2000) expressing its concern that the Chagos Archipelago was "excised by the colonial power from Mauritius prior to its independence in violation of UN Resolution 1514".

48. On 1 April 2010, the United Kingdom announced the creation of a marine protected area in and around the Chagos Archipelago. On 20 December 2010, Mauritius instituted proceedings against the United Kingdom pursuant to Article 287 of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or "the Convention") before an Arbitral Tribunal constituted under Annex VII of the Convention, challenging the creation of a marine protected area by the United Kingdom. In those proceedings, Mauritius submitted, *inter alia*, that (1) the United Kingdom was not entitled to declare a marine protected area or other maritime zones in and around the Chagos Archipelago as it was not a coastal State within the meaning of UNCLOS; (2) the United Kingdom was not entitled to declare unilaterally a marine protected area or other maritime zones because Mauritius had rights as a coastal State within the meaning of Articles 56, paragraph 1, and 76, paragraph 8, of UNCLOS; (3) the United Kingdom should not take any steps to prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius in respect of any submission that Mauritius may make to that Commission regarding the Chagos Archipelago; and (4) the marine protected area was incompatible with the United Kingdom's obligations under UNCLOS.

49. On 27 July 2010, the African Union adopted Decision 331 (2010), in which it stated that the Chagos Archipelago, including Diego Garcia, was detached "by the former colonial power from the territory of Mauri-

tius in violation of [General Assembly] Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965 which prohibit colonial powers from dismembering colonial territories prior to granting independence".

50. On 18 March 2015, the Arbitral Tribunal constituted under Annex VII of UNCLOS rendered an award in the *Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom* (hereinafter the *"Arbitration regarding the Chagos Marine Protected Area"*). The Tribunal found, in its Award, that it lacked jurisdiction on Mauritius' first, second and third submissions, but had jurisdiction to consider Mauritius' fourth submission. With respect to the first submission, the Tribunal observed that "[t]he parties' dispute regarding sovereignty over the Chagos Archipelago does not concern interpretation or application" of UNCLOS. On the merits, the Arbitral Tribunal found, *inter alia*, that, in establishing the marine protected area surrounding the Chagos Archipelago, the United Kingdom had breached its obligations under Article 2, paragraph 3, Article 56, paragraph 2, and Article 194, paragraph 4, of the Convention, and that the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius, when no longer needed for defence purposes, was legally binding.

51. On 30 December 2016, the 50-year period covered by the 1966 Agreement came to an end; however, it was extended for a further period of twenty years, in accordance with its terms.

52. On 30 January 2017, the Assembly of the African Union adopted resolution AU/Res.1 (XXVIII) on the Chagos Archipelago which resolved, among other things, to support Mauritius with a view to ensuring "the completion of the decolonization of the Republic of Mauritius".

53. On 23 June 2017, the General Assembly adopted resolution 71/292 requesting an advisory opinion from the Court (see paragraph 1 above). Having recalled the events leading to the adoption of that request, the Court now turns to the consideration of the questions of jurisdiction and discretion.

II. Jurisdiction and Discretion

54. When the Court is seised of a request for an advisory opinion, it must first consider whether it has jurisdiction to give the opinion requested and if so, whether there is any reason why the Court should, in the exercise of its discretion, decline to answer the request (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 412, para. 17).

A. Jurisdiction

55. The Court's jurisdiction to give an advisory opinion is based on Article 65, paragraph 1, of its Statute which provides that "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

56. The Court notes that the General Assembly is competent to request an advisory opinion by virtue of Article 96, paragraph 1, of the Charter, which provides that "[t]he General Assembly . . . may request the International Court of Justice to give an advisory opinion on any legal question".

57. The Court now turns to the requirement in Article 96 of the Charter and Article 65 of its Statute that the advisory opinion must be on a "legal question".

58. In the present proceedings, the first question put to the Court is whether the process of decolonization of Mauritius was lawfully completed having regard to international law when it was granted independence following the separation of the Chagos Archipelago. The second question relates to the consequences arising under international law from the continued administration by the United Kingdom of the Chagos Archipelago. The Court considers that a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question.

59. The Court therefore concludes that the request has been made in accordance with the Charter and that the two questions submitted to it are legal in character.

60. One of the participants in the present proceedings has argued that the Court lacks jurisdiction because the questions asked "ostensibly relate to one topic, but . . . in fact relate to a different topic". Moreover, it contended that there is no "exact statement of the question upon which an opinion is required" within the meaning of Article 65, paragraph 2, of the Statute. According to the same participant, the questions put to the Court do not reflect the real issues, which relate to sovereignty rather than decolonization.

61. The Court is of the view that the arguments raised in these proceedings in relation to Article 65, paragraph 2, of its Statute do not deprive it of jurisdiction to render the advisory opinion. When faced with similar arguments in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court observed that "lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court." (*Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 153-154, para. 38.) The Court will examine these arguments in paragraphs 135 to 137 below.

62. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution 71/292 of the General Assembly.

B. Discretion

63. The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it:

> "The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion . . .', should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, pp. 415-416, para. 29.)

64. The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 156-157, paras. 44-45; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, pp. 415-416, para. 29).

65. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). Thus, the consistent jurisprudence of the Court is that only "compelling reasons" may lead the Court to refuse its opinion in response to a request falling within its jurisdiction (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 30).

66. The Court must satisfy itself as to the propriety of the exercise of its judicial function in the present proceedings. It will therefore give careful consideration as to whether there are compelling reasons for it to decline to respond to the request from the General Assembly.

67. Some participants in the present proceedings have argued that there are "compelling reasons" for the Court to exercise its discretion to decline to give the advisory opinion requested. Among the reasons raised by these participants are that, first, advisory proceedings are not suitable for determination of complex and disputed factual issues; secondly, the Court's response would not assist the General Assembly in the performance of its functions; thirdly, it would be inappropriate for the Court to re-examine a question already settled by the Arbitral Tribunal constituted under Annex VII of UNCLOS in the *Arbitration regarding the Chagos Marine Protected Area*; and fourthly, the questions asked in the present proceedings relate to a pending bilateral dispute between two States which have not consented to the settlement of that dispute by the Court.

68. The Court will now turn to the examination of these arguments.

1. Whether advisory proceedings are suitable for determination of complex and disputed factual issues

69. It has been argued by some participants that the questions raise complex and disputed factual issues which are not suitable for determination in advisory proceedings. Those participants have contended that in these proceedings the Court does not have sufficient information and evidence to arrive at a conclusion on the complex and disputed questions of fact before it.

70. Other participants have maintained that the factual issues before the Court are not complex and that what really matters is the Court's interpretation of those facts.

71. The Court recalls that in its Advisory Opinion on *Western Sahara* when it was faced with the same argument, it concluded that what was decisive was whether it had

> "sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*I.C.J. Reports 1975*, pp. 28-29, para. 46).

72. Moreover, the Court recalls that, in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, it held that

> "to enable [it] to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues" (*I.C.J. Reports 1971*, p. 27, para. 40).

73. The Court observes that an abundance of material has been presented before it including a voluminous dossier from the United Nations. Moreover, many participants have submitted written statements and

written comments and made oral statements which contain information relevant to answering the questions. Thirty-one States and the African Union filed written statements, ten of those States and the African Union submitted written comments thereon, and twenty-two States and the African Union made oral statements. The Court notes that information provided by participants includes the various official records from the 1960s, such as those from the United Kingdom concerning the detachment of the Chagos Archipelago and the accession of Mauritius to independence.

74. The Court is therefore satisfied that there is in the present proceedings sufficient information on the facts before it for the Court to give the requested opinion. Accordingly, the Court cannot decline to answer the questions put to it.

2. Whether the Court's response would assist the General Assembly in the performance of its functions

75. It has been argued by some participants that the advisory opinion requested would not assist the General Assembly in the proper exercise of its functions. These participants have maintained that the General Assembly has not been actively engaged in the decolonization of Mauritius since 1968. In particular, they have asserted that, after Mauritius became independent in March 1968, it was removed from the list of territories being monitored by the Committee of Twenty-Four and that the Chagos Archipelago was never added to that list. Other participants have argued that the Court's response would be useful to the General Assembly, which continued to be active after 1968 in considering the question of Mauritius and the detachment of the Chagos Archipelago.

76. The Court considers that it is not for the Court itself to determine the usefulness of its response to the requesting organ. Rather, it should be left to the requesting organ, the General Assembly, to determine "whether it needs the opinion for the proper performance of its functions" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 417, para. 34). The Court recalls that, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, it did not accept an argument that the Court should refuse to respond to the General Assembly's request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion. The Court observed that:

> "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

77. In the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court stated that it "cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion" (*I.C.J. Reports 2004 (I)*, p. 163, para. 62). The Court recalls that "[i]n any event, to what extent or degree its opinion will have an impact on the action of the General Assembly is not for the Court to decide" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73).

78. It follows that in the present proceedings the Court cannot decline to answer the questions posed to it by the General Assembly in resolution 71/292 on the ground that its opinion would not assist the General Assembly in the performance of its functions.

3. Whether it would be appropriate for the Court to re-examine a question allegedly settled by the Arbitral Tribunal constituted under UNCLOS Annex VII in the Arbitration regarding the Chagos Marine Protected Area

79. Certain participants have argued that an advisory opinion by the Court would reopen the findings of the Arbitral Tribunal in the *Arbitration regarding the Chagos Marine Protected Area* that are binding on Mauritius and the United Kingdom.

80. Other participants have contended that *res judicata* does not apply in these proceedings because the same parties are not seeking to litigate the same issue that has already been definitively settled between them in an earlier case.

81. The Court recalls that its opinion "is given not to States, but to the organ which is entitled to request it" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). The Court observes that the principle of *res judicata* does not preclude it from rendering an advisory opinion. When answering a question submitted for an opinion, the Court will consider any relevant judicial or arbitral decision. In any event, the Court further notes that the issues that were determined by the Arbitral Tribunal in the *Arbitration regarding the Chagos Marine Protected Area* (see paragraph 50 above) are not the same as those that are before the Court in these proceedings.

82. It follows from the foregoing that the Court cannot decline to answer the questions on this ground.

4. Whether the questions asked relate to a pending dispute between two States, which have not consented to its settlement by the Court

83. Some participants have argued that there is a bilateral dispute between Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago and that this dispute is at the core of the advisory proceedings. According to those participants, to determine the issues in

the present proceedings, the Court would be required to arrive at conclusions on certain key points such as the effect of the 1965 Lancaster House agreement. Certain participants have contended that the dispute over sovereignty, which arose in the 1980s in bilateral relations, is the "real dispute" that motivates the request. These participants have further contended that Mauritius' claims in the *Arbitration regarding the Chagos Marine Protected Area* revealed the existence of a bilateral territorial dispute between that State and the United Kingdom. Therefore, to render an advisory opinion would contravene "the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 24-25, paras. 32-33; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71).

84. Other participants have maintained that there is no territorial dispute between the United Kingdom and Mauritius that would prevent the Court from giving the advisory opinion requested. In particular, they have argued that the questions put to the Court by the General Assembly concern issues located in a broader frame of reference, that is, the law of decolonization and the exercise of the right to self-determination. Some participants have argued that the dispute between Mauritius and the United Kingdom relating to territorial sovereignty over the Chagos Archipelago could neither have arisen independently nor could it be detached from the question of decolonization. Other participants have contended that the United Kingdom, having undertaken in 1965 to return the Chagos Archipelago to Mauritius once it was no longer needed for defence purposes, recognized that the archipelago belonged to Mauritius, and accordingly there could be no territorial dispute.

85. The Court recalls that there would be a compelling reason for it to decline to give an advisory opinion when such a reply "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33).

86. The Court notes that the questions put to it by the General Assembly relate to the decolonization of Mauritius. The General Assembly has not sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius. The Court has emphasized that it may be in the interest of the General Assembly to seek an advisory opinion which it deems of assistance in carrying out its functions in regard to decolonization:

> "The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely

different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory." (*Western Sahara, Advisory Opinion, I.C.J Reports 1975*, pp. 26-27, para. 39.)

87. The Court observes that the General Assembly has a long and consistent record in seeking to bring colonialism to an end. From the earliest days of the United Nations, the General Assembly has played an active role in matters of decolonization. Article 1, paragraph 2, of the Charter establishes, as one of the purposes of the United Nations, respect for the principle of equal rights and self-determination of peoples. In this regard, the Court notes that Chapter XI of the Charter of the United Nations relates to non-self-governing territories and that the first article in that Chapter, Article 73, provides that administering powers of non-self-governing territories are required, *inter alia*, to "transmit regularly to the Secretary-General for information purposes . . . statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible". This information was considered by the Fourth Committee (Special Political and Decolonization Committee) of the General Assembly and included in its reports. The work of the Committee continued until 1961 when the Committee of Twenty-Four was established.

88. The Court therefore concludes that the opinion has been requested on the matter of decolonization which is of particular concern to the United Nations. The issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 26, para. 38; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 50).

89. Moreover, the Court observes that there may be differences of views on legal questions in advisory proceedings (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34). However, the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute.

90. In these circumstances, the Court does not consider that to give the opinion requested would have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State. The Court therefore cannot, in the exercise of its discretion, decline to give the opinion on that ground.

91. In light of the foregoing, the Court concludes that there are no compelling reasons for it to decline to give the opinion requested by the General Assembly.

III. The Factual Context of the Separation of the Chagos Archipelago from Mauritius

92. The Court notes that the questions submitted to it by the General Assembly relate to the separation of the Chagos Archipelago from Mauritius and the legal consequences arising from the continued administration by the United Kingdom of the Chagos Archipelago (see paragraph 1 above). Before addressing these questions, the Court deems it important to examine the factual circumstances surrounding the separation of the archipelago from Mauritius, as well as those relating to the removal of the Chagossians from this territory.

93. In this regard, the Court notes that, prior to the separation of the Chagos Archipelago from Mauritius, there were formal discussions between the United Kingdom and the United States and between the Government of the United Kingdom and the representatives of the colony of Mauritius.

A. The Discussions between the United Kingdom and the United States with respect to the Chagos Archipelago

94. In February 1964, talks commenced between the Governments of the United Kingdom and the United States on the "strategic use of certain small British-owned islands in the Indian Ocean" for defence purposes. During these talks, the United States expressed an interest in establishing a military communication facility on Diego Garcia. At the end of the talks, it was agreed that the United Kingdom delegation would recommend to its Government that it should be responsible for acquiring land, resettling the population and providing compensation at the United Kingdom Government's expense; that the Government of the United States would be responsible for construction and maintenance costs and that the United Kingdom Government would assess quickly the feasibility of the transfer of the administration of Diego Garcia and the other islands of the Chagos Archipelago from Mauritius.

95. According to a memorandum of the United Kingdom Foreign Office, the United Kingdom was of the view that the course of action that would best satisfy its major interests would appear to be to detach Diego Garcia and other islands in the Chagos Archipelago from Mauritius prior to the latter's independence, and to place these islands under the direct administration of the United Kingdom, and that this action could be done by Order in Council. The United Kingdom considered that it had the constitutional power to take such action without the consent of Mauritius, but that such an approach would expose it to criticism in the United Nations. The same document also indicated that such criticism would lose most of its force if prior acceptance by the Mauritian Ministers of the detachment was obtained by the United Kingdom, whether such acceptance was obtained by positive consent or by acquiescence. The document further stated that it would best suit the interests of the

United Kingdom if the detachment of the Chagos Archipelago was presented to Mauritius as "a *fait accompli*" or at most if Mauritius was told of the United Kingdom's plans "at the last moment".

96. According to a declassified internal United Kingdom document dated 23 and 24 September 1965 (Record of UK-US Talks on Defence Facilities in the Indian Ocean, United Kingdom, FO 371/184529), the Governments of the United Kingdom and the United States considered that, rather than detaching the islands of the Chagos Archipelago from Mauritius and the islands of Aldabra, Farquhar and Desroches from Seychelles in two separate operations, their interests would be better served by carrying out the detachment "as a single operation" in order to avoid "a second row" in the United Nations. According to the same document, during the talks, the United Kingdom explained to the United States that the detachment of the Chagos Archipelago from Mauritius would take place in three stages; in the final stage it was envisaged that, when the defence facilities were installed on an island, "it would be free from local civilian inhabitants".

97. The discussions between the United Kingdom and the United States led to the conclusion of the 1966 Agreement for the establishment of a military base by the United States on the Chagos Archipelago (see paragraph 36 above).

B. The Discussions between the Government of the United Kingdom and the Representatives of the Colony of Mauritius with respect to the Chagos Archipelago

98. The 1964 Mauritius Constitution Order, promulgated by the United Kingdom Government, established a Legislative Assembly consisting of 40 elected members, the Speaker and the Chief Secretary *ex officio* and up to 15 members nominated by the Governor. The nominated members of the Legislative Assembly held office at the pleasure of the Governor. There was established a Council of Ministers for Mauritius consisting of 10 to 13 appointed members, the Chief Secretary of Mauritius and the Premier of Mauritius; and temporary members who could replace an appointed member who was ill or absent from the island of Mauritius. The members of the Council were appointed by the Governor, after consultation with the Premier. They had to be members of the Legislative Assembly. In the discussions between the Government of the United Kingdom and the representatives of the colony of Mauritius, the latter was represented by the Premier of Mauritius, or by the Premier and other members of the Council of Ministers.

99. In 1964, the Committee of Twenty-Four reported that the Constitution of Mauritius did not allow the representatives of the people to exercise real powers, and that authority was virtually all concentrated in the hands of the United Kingdom Government (see paragraph 172 below).

100. On 29 June 1964, Mr. John Rennie, the Governor of Mauritius, discussed with Sir Seewoosagur Ramgoolam, the Premier of Mauritius, the idea of detaching the Chagos Archipelago from Mauritius. Although he was favourably disposed to providing "facilities", the Premier indicated that he preferred a long-term lease rather than detachment.

101. On 19 July 1965, the Governor of Mauritius was instructed by the Colonial Office to inform the Mauritian Council of Ministers of the proposal to detach the Chagos Archipelago by constitutionally separating it from Mauritius. On 30 July 1965, the Governor of Mauritius informed the Colonial Office that the Council of Ministers opposed the detachment because of the negative public reaction that it would receive in Mauritius. The Governor indicated that the Council of Ministers expressed a preference for a long-term lease of the islands, while the United Kingdom indicated that a lease was not acceptable.

102. On 3 September 1965, Sir Seewoosagur Ramgoolam and Sir Anthony Greenwood, the United Kingdom's Secretary of State for the Colonies, met in London prior to the start of the Fourth Constitutional Conference and agreed that the discussion on the detachment and the constitutional conference should be kept separate. However, it appears that this approach was later modified to link both matters in a possible package deal.

103. On 7 September 1965, the Fourth Constitutional Conference commenced in London and ended on 24 September 1965. Previous constitutional conferences were held in July 1955, February 1957 and June 1961. During the Fourth Constitutional Conference, there were several private meetings on defence matters. The first meeting on 13 September 1965 was attended by Sir Seewoosagur Ramgoolam, Sir Anthony Greenwood, and Mr. John Rennie. At the meeting, the Premier stated that Mauritius preferred a lease rather than a detachment of the Chagos Archipelago. Following the meeting, the United Kingdom Foreign Secretary and the Defence Secretary concluded that if Mauritius would not agree to the detachment, they would have to "adopt the Foreign Office and Ministry of Defence recommendation of 'forcible detachment and compensation paid into a fund'".

104. On 20 September 1965, during a meeting on defence matters chaired by the United Kingdom Secretary of State, the Premier of Mauritius again stated that "the Mauritius Government was not interested in the excision of the islands and would stand out for a 99-year lease". As an alternative, the Premier of Mauritius proposed that the United Kingdom first concede independence to Mauritius and thereafter allow the Mauritian Government to negotiate with the Governments of the United Kingdom and the United States on the question of Diego Garcia. During those discussions, the Secretary of State indicated that a lease would not be acceptable to the United States and that the Chagos Archipelago would have to be made available on the basis of its detachment.

105. On 22 September 1965, a Note was prepared by Sir Oliver Wright, Private Secretary to the United Kingdom's Prime Minister, Sir Harold Wilson. It read:

> "Sir Seewoosagur Ramgoolam is coming to see you at 10:00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago. I attach a brief prepared by the Colonial Office, with which the Ministry of Defence and the Foreign Office are on the whole content. The key sentence in the brief is the last sentence of it on page three."

106. The key last sentence referred to above read:

> "The Prime Minister may therefore wish to make some oblique reference to the fact that H.M.G. have the legal right to detach Chagos by Order in Council, *without* Mauritius consent but this would be a grave step." (Emphasis in the original.)

107. On 23 September 1965 two events took place. The first event was a meeting in the morning of 23 September 1965 between Prime Minister Wilson and Premier Ramgoolam. Sir Oliver Wright's Report on the meeting indicated that Prime Minister Wilson told Premier Ramgoolam that

> "in theory there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with Independence or without it. On the defence point, Diego Garcia could either be detached by order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be Independence and detachment by agreement, although he could not of course commit the Colonial Secretary at this point."

108. The second event on the same day was a meeting on defence matters held at Lancaster House between Premier Ramgoolam, three other Mauritian Ministers and the United Kingdom Secretary of State. At the end of that meeting, the United Kingdom Secretary of State enquired whether the Mauritian Ministers could agree to the detachment of the Chagos Archipelago on the basis of undertakings that he would recommend to the Cabinet. The undertakings in the Lancaster House agreement, contained in paragraph 22 of the Record of the Meeting of 23 September 1965, were:

> "(i) negotiations for a defence agreement between Britain and Mauritius;
> (ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;

(iii) compensation totalling up to £3[million] should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;

(iv) the British Government would use their good offices with the United States Government in support of Mauritius' request for concessions over sugar imports and the supply of wheat and other commodities;

(v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;

. . . . . .

(vii) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius".

The Premier of Mauritius informed the Secretary of State for the Colonies that the proposals put forward by the United Kingdom were acceptable in principle, but that he would discuss the matter with his other ministerial colleagues.

109. On 24 September 1965, the Government of the United Kingdom announced that it was in favour of granting independence to Mauritius.

110. On 6 October 1965, the Secretary of State for the Colonies communicated to the Governor of Mauritius the United Kingdom's acceptance of the following additional understanding that had been sought by the Premier of Mauritius:

(i) The British Government would use their good offices with the United States Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable:

(a) navigational and meteorological facilities;
(b) fishing rights;
(c) use of air strip for emergency landing and for refuelling civil planes without disembarkation of passengers.

(ii) That the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government.

This additional understanding was eventually incorporated into the final record of the meeting at Lancaster House and formed part of the Lancaster House agreement.

111. In a Minute sent on 5 November 1965 to the United Kingdom Prime Minister, the Secretary of State for the Colonies expressed concern that the United Kingdom would be accused of "creating a . . . colony in a period of decolonization and of establishing new military bases when we should be getting out of the old ones". The Foreign Office

also advised that "the islands chosen have virtually no permanent inhabitants".

112. On 5 November 1965, the Governor of Mauritius informed the United Kingdom Secretary of State that the Mauritius Council of Ministers "confirmed agreement to the detachment of the Chagos Archipelago". The Governor noted that agreement had been given on the conditions set out in paragraph 22 of the Record of the Meeting of 23 September 1965 (which contained the Lancaster House agreement) and that the Council of Ministers had formulated an additional understanding.

C. The Situation of the Chagossians

113. In the early nineteenth century, several hundred persons were brought to the Chagos Archipelago from Mozambique and Madagascar and enslaved to work on coconut plantations owned by British nationals who lived on the island of Mauritius. In the 1830s, 60,000 enslaved persons in Mauritius, including those in the Chagos Archipelago, were set free.

114. Following the 1966 Agreement (see paragraph 36 above), between 1967 and 1973, the inhabitants of the Chagos Archipelago who had left the islands were prevented from returning. The other inhabitants were forcibly removed and prevented from returning to the islands (see paragraph 43 above).

115. On 16 April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971, which made it unlawful for any person to enter or remain in the Chagos Archipelago without a permit. It also provided for the Commissioner to make an order directing the removal of such a person from the Chagos Archipelago (*Chagos Islanders* v. *Attorney General and BIOT Commissioner* (2003), EWHC 2222, para. 34).

116. In the oral proceedings, the United Kingdom reiterated that it "fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and it deeply regrets that fact".

117. On 4 September 1972, by virtue of an agreement concluded between Mauritius and the United Kingdom, Mauritius accepted payment of the sum of £650,000 in full and final discharge of the United Kingdom's undertaking given in 1965 to meet the cost of resettlement of persons displaced from the Chagos Archipelago. On 24 March 1973, Prime Minister Ramgoolam wrote to the British High Commissioner in Port Louis, acknowledging receipt of the sum of £650,000, but emphasizing that the payment did not affect the verbal agreement on minerals, fishing and prospecting rights reached at Lancaster House on 23 September 1965 and was subject to the remaining Lancaster House undertakings, including the return of the islands to Mauritius without compensation if the need for use by the United Kingdom of the islands no longer existed.

118. In February 1975, Mr. Michel Vencatessen, a former resident of the Chagos Archipelago, brought an action against the United Kingdom Government claiming damages for intimidation, deprivation of liberty and assault in relation to his removal from the Chagos Archipelago in 1971. In 1982, the claim was stayed by agreement of the parties.

119. On 7 July 1982, an agreement was concluded between the Governments of Mauritius and the United Kingdom, for the payment by the United Kingdom of the sum of £4 million on an *ex gratia* basis, with no admission of liability on the part of the United Kingdom, "in full and final settlement of all claims whatsoever of the kind referred to in Article 2 of this Agreement against . . . the United Kingdom by or on behalf of the Ilois". According to Recital 2 of the preamble to the Agreement, the term "Ilois" has to be understood as those who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965. Article 2 provides:

> "The claims referred to in Article 1 of this Agreement are solely claims by or on behalf of the Ilois arising out of:
>
> *(a)* All acts, matters and things done by or pursuant to the British Indian Ocean Territory Order 1965, including the closure of the plantations in the Chagos Archipelago, the departure or removal of those living or working there, the termination of their contracts, their transfer to and resettlement in Mauritius and their preclusion from returning to the Chagos Archipelago (hereinafter referred to as 'the events'); and
>
> *(b)* Any incidents, facts or situations, whether past, present or future, occurring in the course of the events or arising out of the consequences of the events."

Article 4 requires Mauritius "to procure from each member of the Ilois community in Mauritius a signed renunciation of the claims".

120. The sum of approximately £4 million paid by the United Kingdom was disbursed to 1,344 islanders between 1983 and 1984. As a condition for collecting the funds, the islanders were required to sign or to place a thumbprint on a form renouncing the right to return to the Chagos Archipelago. The form was a one-page legal document, written in English, without a Creole translation. Only 12 persons refused to sign (*Chagos Islanders* v. *Attorney General and BIOT Commissioner* (2003), EWHC 2222, para. 80).

121. In 1998, Mr. Louis Olivier Bancoult, a Chagossian, instituted proceedings in the United Kingdom courts challenging the validity of legislation denying him the right to reside in the Chagos Archipelago. On

3 November 2000, judgment was given in his favour by the Divisional Court which ruled that the relevant provisions of the 1971 Ordinance be quashed (*Regina (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs and Another (No. 1)* (2000)). The United Kingdom Government did not appeal the ruling and it repealed the 1971 Ordinance that had prohibited Chagossians from returning to the Chagos Archipelago. The United Kingdom's Foreign Secretary announced that the United Kingdom Government was examining the feasibility of resettling the Ilois.

122. On the same day that the Divisional Court rendered the judgment in Mr. Bancoult's favour, the United Kingdom made another immigration ordinance applicable to the Chagos Archipelago, with the exception of Diego Garcia (Ordinance No. 4 of 2000). The ordinance provided that restrictions on entry into and residence in the archipelago would not apply to the Chagossians, given their connection to the Chagos Islands. In its written statement, the United Kingdom has submitted that, following the adoption of that ordinance, none of the Chagossians returned to live there although there was no legal bar to them doing so. Chagossians were however not permitted to enter or reside in Diego Garcia.

123. On 6 December 2001, the Human Rights Committee, constituted under the International Covenant on Civil and Political Rights, in considering the periodic reports submitted by the United Kingdom under Article 40 of the said Covenant, noted "the State party's acceptance that its prohibition of the return of Ilois who had left or been removed from the territory was unlawful". It recommended that "the State party should, to the extent still possible, seek to make exercise of the Ilois' right to return to their territory practicable".

124. In June 2002, a feasibility study commissioned by the BIOT Administration concerning the Chagos Archipelago was completed. It was carried out in response to a request made by former inhabitants of the Chagos Archipelago to be permitted to return and live in the archipelago. The study indicated that, while it may be feasible to resettle the islanders in the short term, the costs of maintaining a long-term inhabitation were likely to be prohibitive. Even in the short term, natural events such as periodic flooding from storms and seismic activity, were likely to make life difficult for a resettled population. In 2004, the United Kingdom issued two orders in Council: the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004. These orders declared that no person had the right of abode in the BIOT nor the right without authorization to enter and remain there.

125. In 2004, Mr. Bancoult challenged the validity of the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004 in the courts of the United Kingdom. He succeeded in the High Court. An appeal was brought by the Secretary of State for Foreign and Commonwealth Affairs against the decision of the High Court. The Court of Appeal upheld the decision of the High Court that the orders were invalid on the basis that their content

and the circumstances of their adoption constituted an abuse of power by the United Kingdom Government (*Regina (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs (No. 2)* (2007)).

126. On 30 July 2008, the Human Rights Committee, in considering another periodic report submitted by the United Kingdom, took note of the aforementioned decision of the Court of Appeal. On the basis of Article 12 of the International Covenant on Civil and Political Rights, the Committee recommended that:

> "The State party should ensure that the Chagos islanders can exercise their right to return to their territory and should indicate what measures have been taken in this regard. It should consider compensation for the denial of this right over an extended period."

127. The Secretary of State for Foreign and Commonwealth Affairs appealed the decision of the Court of Appeal (see paragraph 125) upholding Mr. Bancoult's challenge of the validity of the British Indian Ocean Territory (Constitution) Order 2004. On 22 October 2008, the House of Lords upheld the appeal by the Secretary of State for Foreign and Commonwealth Affairs.

128. On 11 December 2012, the European Court of Human Rights, in the *Chagos Islanders* v. *United Kingdom* case, declared inadmissible an application made by a group of 1,786 Chagossians against the United Kingdom for breach of their rights under the European Convention on Human Rights. One of the grounds for the decision was that the claims of the applicants had been settled through implementation of the 1982 Agreement between Mauritius and the United Kingdom.

129. On 20 December 2012, the United Kingdom announced a review of its policy on resettlement of the Chagossians who were forcibly removed from, or prevented from returning to, the Chagos Archipelago. A second feasibility study, carried out between 2014 and 2015, was commissioned by the BIOT Administration to analyse the different options for resettlement in the Chagos Archipelago. The feasibility study concluded that resettlement was possible although there would be significant challenges including high and very uncertain costs, and long-term liabilities for the United Kingdom taxpayer. Thereafter, on 16 November 2016, the United Kingdom decided against resettlement on the "grounds of feasibility, defence and security interests and cost to the British taxpayer".

130. On 8 February 2018, the Supreme Court of the United Kingdom rendered its judgment in the case of *Regina (on the application of Bancoult No. 3)* v. *Secretary of State for Foreign and Commonwealth Affairs* (2018). The case was brought by Mr. Bancoult on behalf of a group of Chagossians who were forcibly removed from the archipelago. In the proceedings, Mr. Bancoult challenged the declaration of a marine protected area by the United Kingdom around the Chagos Archipelago. Mr. Ban-

coult, the appellant, contended that the marine protected area had been established for the improper purpose of rendering impracticable the resettlement of the Chagos islanders on the archipelago. He claimed that this was evidenced by a diplomatic cable sent by the United States Embassy in London to departments of the United States Government in Washington, to elements in its military command structure and to its Embassy in Port Louis, Mauritius. The cable recorded a 2009 meeting in which United States and United Kingdom officials discussed the reasons for the establishment of the marine protected area. The cable was subsequently leaked and published in two national newspapers. Called upon in the appeal to rule on the admissibility of that cable, the Supreme Court held that the cable in question was admissible. However, it dismissed the appeal on other grounds.

131. To date, the Chagossians remain dispersed in several countries, including the United Kingdom, Mauritius and Seychelles. By virtue of United Kingdom law and judicial decisions of that country, they are not allowed to return to the Chagos Archipelago.

IV. The Questions Put to the Court by the General Assembly

132. Having reviewed the factual background of the present request for an advisory opinion, the Court will now examine the two questions put by the General Assembly:

> Question *(a)*: "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?"
>
> Question *(b)*: "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

133. Some participants have asked the Court to reformulate both questions or to interpret them restrictively. In particular, they have contested the assumption that the resolutions referred to in Question *(a)* would create international obligations for the United Kingdom, thereby prejudging the answer the Court is requested to give. They have also contended that the legal questions really at issue concern the matter of sovereignty over the Chagos Archipelago, which is the subject of a bilateral dispute between Mauritius and the United Kingdom.

134. One participant has asserted that the General Assembly's request, which does not expressly refer to the legal consequences for States of the continued administration by the United Kingdom of the Chagos Archipelago, should be interpreted in such a way as to limit the advisory opinion to the functions of the United Nations, excluding all issues that concern States, in particular, Mauritius and the United Kingdom.

135. The Court recalls that it may depart from the language of the question put to it where the question is not adequately formulated (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*) or does not reflect the "legal questions really in issue" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 89, para. 35). Similarly, where the question asked is ambiguous or vague, the Court may clarify it before giving its opinion (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46). Although, in exceptional circumstances, the Court may reformulate the questions referred to it for an advisory opinion, it only does so to ensure that it gives a reply "based on law" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

136. The Court considers that there is no need for it to reformulate the questions submitted to it for an advisory opinion in these proceedings. Indeed, the first question is whether the process of decolonization of Mauritius was lawfully completed in 1968, having regard to international law, following the separation of the Chagos Archipelago from its territory in 1965. The General Assembly's reference to certain resolutions which it adopted during this period does not, in the Court's view, prejudge either their legal content or scope. In Question *(a)*, the General Assembly asks the Court to examine certain events which occurred between 1965 and 1968, and which fall within the framework of the process of decolonization of Mauritius as a non-self-governing territory. It did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius. In Question *(b)*, which is clearly linked to Question *(a)*, the Court is asked to state the consequences, under international law, of the continued administration by the United Kingdom of the Chagos Archipelago. By referring in this way to international law, the General Assembly necessarily had in mind the consequences for the subjects of that law, including States.

137. It is for the Court to state the law applicable to the factual situation referred to it by the General Assembly in its request for an advisory opinion. There is thus no need for it to interpret restrictively the questions put to it by the General Assembly. When the Court states the law in the exercise of its advisory function, it lends its assistance to the General Assembly in the solution of a problem confronting it (*Western Sahara,*

Advisory Opinion, I.C.J. Reports 1975, p. 21, para. 23). In giving its advisory opinion, the Court is not interfering with the exercise of the General Assembly's own functions.

138. The Court will now consider the first question put to it by the General Assembly, namely whether the process of decolonization of Mauritius was lawfully completed having regard to international law.

A. Whether the Process of Decolonization of Mauritius Was Lawfully Completed Having Regard to International Law (Question (a)*)*

139. In order to pronounce on whether the process of decolonization of Mauritius was lawfully completed having regard to international law, the Court will determine, first, the relevant period of time for the purpose of identifying the applicable rules of international law and, secondly, the content of that law. In addition, since the General Assembly has referred to some of the resolutions it adopted, the Court, in determining the obligations reflected in these resolutions, will have to examine the functions of the General Assembly in conducting the process of decolonization.

1. The relevant period of time for the purpose of identifying the applicable rules of international law

140. In Question *(a)*, the General Assembly situates the process of decolonization of Mauritius in the period between the separation of the Chagos Archipelago from its territory in 1965 and its independence in 1968. It is therefore by reference to this period that the Court is required to identify the rules of international law that are applicable to that process.

141. Various participants have stated that international law is not frozen at the date when the first steps were taken towards the realization of the right to self-determination in respect of a territory.

142. The Court is of the view that, while its determination of the applicable law must focus on the period from 1965 to 1968, this will not prevent it, particularly when customary rules are at issue, from considering the evolution of the law on self-determination since the adoption of the Charter of the United Nations and of resolution 1514 (XV) of 14 December 1960 entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples". Indeed, State practice and *opinio juris*, i.e. the acceptance of that practice as law (Article 38 of the Statute of the Court), are consolidated and confirmed gradually over time.

143. The Court may also rely on legal instruments which postdate the period in question, when those instruments confirm or interpret pre-existing rules or principles.

2. Applicable international law

144. The Court will have to determine the nature, content and scope of the right to self-determination applicable to the process of decolonization of Mauritius, a non-self-governing territory recognized as such, from 1946 onwards, both in United Nations practice and by the administering Power itself. The Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonization.

145. The participants in the advisory proceedings have adopted opposing positions on the customary status of the right to self-determination, its content and how it was exercised in the period between 1965 and 1968. Some participants have asserted that the right to self-determination was firmly established in customary international law at the time in question. Others have maintained that the right to self-determination was not an integral part of customary international law in the period under consideration.

146. The Court will begin by recalling that "respect for the principle of equal rights and self-determination of peoples" is one of the purposes of the United Nations (Article 1, paragraph 2, of the Charter). Such a purpose concerns, in particular, the "Declaration regarding non-self-governing territories" (Chapter XI of the Charter), since the "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government" are obliged to "develop [the] self-government" of those peoples (Article 73 of the Charter).

147. In the Court's view, it follows that the legal régime of non-self-governing territories, as set out in Chapter XI of the Charter, was based on the progressive development of their institutions so as to lead the populations concerned to exercise their right to self-determination.

148. Having made respect for the principle of equal rights and self-determination of peoples one of the purposes of the United Nations, the Charter included provisions that would enable non-self-governing territories ultimately to govern themselves. It is in this context that the Court must ascertain when the right to self-determination crystallized as a customary rule binding on all States.

149. Custom is constituted through "general practice accepted as law" (Article 38 of the Statute of the Court). The Court has emphasized that both elements, namely general practice and *opinio juris*, which are constitutive of international custom, are closely linked:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be

> evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough." (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 77.)

150. The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization. Prior to that resolution, the General Assembly had affirmed on several occasions the right to self-determination (resolutions 637 (VII) of 16 December 1952, 738 (VIII) of 28 November 1953 and 1188 (XII) of 11 December 1957) and a number of non-self-governing territories had acceded to independence. General Assembly resolution 1514 (XV) clarifies the content and scope of the right to self-determination. The Court notes that the decolonization process accelerated in 1960, with 18 countries, including 17 in Africa, gaining independence. During the 1960s, the peoples of an additional 28 non-self-governing-territories exercised their right to self-determination and achieved independence. In the Court's view, there is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption.

151. As the Court has noted:

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70.)

152. The Court considers that, although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption. The resolution was adopted by 89 votes with 9 abstentions. None of the States participating in the vote contested the existence of the right of peoples to self-determination. Certain States justified their abstention on the basis of the time required for the implementation of such a right.

153. The wording used in resolution 1514 (XV) has a normative character, in so far as it affirms that "[a]ll peoples have the right to self-determination". Its preamble proclaims "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifesta-

tions" and its first paragraph states that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations".

This resolution further provides that "[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire". In order to prevent any dismemberment of non-self-governing territories, paragraph 6 of resolution 1514 (XV) provides that:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

154. Article 1, common to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, by General Assembly resolution 2200 A (XXI), reaffirms the right of all peoples to self-determination, and provides, *inter alia*, that:

> "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

155. The nature and scope of the right to self-determination of peoples, including respect for "the national unity and territorial integrity of a State or country", were reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. This Declaration was annexed to General Assembly resolution 2625 (XXV) which was adopted by consensus in 1970. By recognizing the right to self-determination as one of the "basic principles of international law", the Declaration confirmed its normative character under customary international law.

156. The means of implementing the right to self-determination in a non-self-governing territory, described as "geographically separate and . . . distinct ethnically and/or culturally from the country administering it", were set out in Principle VI of General Assembly resolution 1541 (XV), adopted on 15 December 1960:

> "A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
>
> *(a)* Emergence as a sovereign independent State;
> *(b)* Free association with an independent State; or
> *(c)* Integration with an independent State."

157. The Court recalls that, while the exercise of self-determination may be achieved through one of the options laid down by resolution 1541 (XV), it must be the expression of the free and genuine will of the people concerned. However, "[t]he right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 36, para. 71).

158. The right to self-determination under customary international law does not impose a specific mechanism for its implementation in all instances, as the Court has observed:

> "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances." (*Ibid.*, p. 33, para. 59.)

159. Some participants have argued that the customary status of the right to self-determination did not entail an obligation to implement that right within the boundaries of the non-self-governing territory.

160. The Court recalls that the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory, as stated in the aforementioned paragraph 6 of resolution 1514 (XV) (see paragraph 153 above). Both State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law. The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.

161. In the Court's view, the law on self-determination constitutes the applicable international law during the period under consideration,

namely between 1965 and 1968. The Court noted in its Advisory Opinion on *Namibia* the consolidation of that law:

> "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 52).

162. The Court will now examine the functions of the General Assembly during the process of decolonization.

3. The functions of the General Assembly with regard to decolonization

163. The General Assembly has played a crucial role in the work of the United Nations on decolonization, in particular, since the adoption of resolution 1514 (XV). It has overseen the implementation of the obligations of Member States in this regard, such as they are laid down in Chapter XI of the Charter and as they arise from the practice which has developed within the Organization.

164. It is in this context that the Court is asked in Question *(a)* to consider, in its analysis of the international law applicable to the process of decolonization of Mauritius, the obligations reflected in General Assembly resolutions 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967.

165. In resolution 2066 (XX) of 16 December 1965, entitled "Question of Mauritius", having noted "with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration, and in particular of paragraph 6 thereof", the General Assembly, in the operative part of the text, invites "the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

166. In resolutions 2232 (XXI) and 2357 (XXII), which are more general in nature and relate to the monitoring of the situation in a number of non-self-governing territories, the General Assembly

> "[r]eiterates its declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".

167. In the Court's view, by inviting the United Kingdom to comply with its international obligations in conducting the process of decolonization of Mauritius, the General Assembly acted within the framework of the Charter and within the scope of the functions assigned to it to oversee the application of the right to self-determination. The General Assembly assumed those functions in order to supervise the implementation of obligations incumbent upon administering Powers under the Charter. It thus established a special committee tasked with examining the factors that would enable it to decide "whether any territory is or is not a territory whose people have not yet attained a full measure of self-government" (resolution 334 (IV) of 2 December 1949). It has been the Assembly's consistent practice to adopt resolutions to pronounce on the specific situation of any non-self-governing territory. Thus, immediately after the adoption of resolution 1514 (XV), it established the Committee of Twenty-Four tasked with monitoring the implementation of that resolution and making suggestions and recommendations thereon (resolution 1654 (XVI) of 27 November 1961). The General Assembly also monitors the means by which the free and genuine will of the people of a non-self-governing territory is expressed, including the formulation of questions submitted for popular consultation.

168. The General Assembly has consistently called upon administering Powers to respect the territorial integrity of non-self-governing territories, especially after the adoption of resolution 1514 (XV) of 14 December 1960 (see, for example, General Assembly resolutions 2023 (XX) of 5 November 1965 and 2183 (XXI) of 12 December 1966 (Question of Aden); 3161 (XXVIII) of 14 December 1973 and 3291 (XXIX) of 13 December 1974 (Question of the Comoro Archipelago); 34/91 of 12 December 1979 (Question of the islands of Glorieuses, Juan de Nova, Europa and Bassas da India)).

169. The Court will now examine the circumstances relating to the detachment of the Chagos Archipelago from Mauritius and determine whether it was carried out in accordance with international law.

4. Application in the present proceedings

170. It is necessary to begin by recalling the legal status of Mauritius before its independence. Following the conclusion of the 1814 Treaty of Paris, the "island of Mauritius and the Dependencies of Mauritius" [*"l'île Maurice et les dépendances de Maurice"*], including the Chagos Archipelago, were administered without interruption by the United Kingdom. This is how the whole of Mauritius, including its dependencies, came to appear on the list of non-self-governing territories drawn up by the General Assembly (resolution 66 (I) of 14 December 1946). It was on this basis that the United Kingdom regularly provided the General Assembly with information relating to the

existing conditions in that territory, in accordance with Article 73 of the Charter. Therefore, at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory.

171. In the Lancaster House agreement of 23 September 1965, the Premier and other representatives of Mauritius, which was still under the authority of the United Kingdom as administering Power, agreed in principle to the detachment of the Chagos Archipelago from the territory of Mauritius. This agreement in principle was given on condition that the archipelago could not be ceded to any third party and would be returned to Mauritius at a later date, a condition which was accepted at the time by the United Kingdom.

172. The Court observes that when the Council of Ministers agreed in principle to the detachment from Mauritius of the Chagos Archipelago, Mauritius was, as a colony, under the authority of the United Kingdom. As noted at the time by the Committee of Twenty-Four: "the present Constitution of Mauritius . . . do[es] not allow the representatives of the people to exercise real legislative or executive powers, and that authority is nearly all concentrated in the hands of the United Kingdom Government and its representatives" (UN doc. A/5800/Rev.1 (1964-1965), p. 352, para. 154). In the Court's view, it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter. The Court is of the view that heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony. Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned.

173. In its resolution 2066 (XX) of 16 December 1965, adopted a few weeks after the detachment of the Chagos Archipelago, the General Assembly deemed it appropriate to recall the obligation of the United Kingdom, as the administering Power, to respect the territorial integrity of Mauritius. The Court considers that the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago.

174. The Court concludes that, as a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968.

B. The Consequences under International Law arising from the Continued Administration by the United Kingdom of the Chagos Archipelago (Question (b)*)*

175. Having established that the process of decolonization of Mauritius was not lawfully completed in 1968, the Court must now examine the consequences, under international law, arising from the United Kingdom's continued administration of the Chagos Archipelago (Question *(b)*). The Court will answer this question, drafted in the present tense, on the basis of the international law applicable at the time its opinion is given.

176. Several participants in the proceedings before the Court have argued that the United Kingdom's continued administration of the Chagos Archipelago has consequences under international law not only for the United Kingdom itself, but also for other States and international organizations. The consequences mentioned include the requirement for the United Kingdom to put an immediate end to its administration of the Chagos Archipelago and return it to Mauritius. Some participants have gone further, advocating that the United Kingdom must make good the injury suffered by Mauritius. Others have considered that the former administering Power must co-operate with Mauritius regarding the resettlement on the Chagos Archipelago of the nationals of the latter, in particular those of Chagossian origin.

In contrast, one participant has contended that the only consequence for the United Kingdom under international law concerns the retrocession of the Chagos Archipelago when it is no longer needed for the defence purposes of that State. Finally, a few participants have taken the view that the time frame for completing the decolonization of Mauritius is a matter for bilateral negotiations to be conducted between Mauritius and the United Kingdom.

As regards the consequences for third States, some participants have maintained that those States have an obligation not to recognize the unlawful situation resulting from the United Kingdom's continued administration of the Chagos Archipelago and not to render assistance in maintaining it.

* *

177. The Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State (see *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 23; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 38, para. 47; see also Article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts). It is an

unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.

178. Accordingly, the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.

179. The modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization. As the Court has stated in the past, it is not for it to "determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 421, para. 44).

180. Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; see also *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect. As recalled in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle" (General Assembly resolution 2625 (XXV)).

181. As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.

182. In response to Question *(b)* of the General Assembly, relating to the consequences under international law that arise from the continued administration by the United Kingdom of the Chagos Archipelago, the Court concludes that the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possi-

ble, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius.

* * *

183. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By twelve votes to two,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

AGAINST: *Judges* Tomka, Donoghue;

(3) By thirteen votes to one,

Is of the opinion that, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* Donoghue;

(4) By thirteen votes to one,

Is of the opinion that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* Donoghue;

(5) By thirteen votes to one,

Is of the opinion that all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* Donoghue.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of February, two thousand and nineteen, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President XUE appends a declaration to the Advisory Opinion of the Court; Judges TOMKA and ABRAHAM append declarations to the Advisory Opinion of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Advisory Opinion of the Court; Judges CANÇADO TRINDADE and ROBINSON append a joint declaration to the Advisory Opinion of the Court; Judge DONOGHUE appends a dissenting opinion to the Advisory Opinion of the Court; Judges GAJA, SEBUTINDE and ROBINSON append separate opinions to the Advisory Opinion of the Court; Judges GEVORGIAN, SALAM and IWASAWA append declarations to the Advisory Opinion of the Court.

(Initialled) A.A.Y.
(Initialled) Ph.C.

Annex 620

Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2024

21 May 2024

List of cases:
No. 31

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW

ADVISORY OPINION

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ADVISORY OPINION

Present: *President* HOFFMANN; *Vice-President* HEIDAR; *Judges* JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCIOLO, KAMGA; *Registrar* HINRICHS OYARCE.

On the Request submitted to the Tribunal by the Commission of Small Island States on Climate Change and International Law,

THE TRIBUNAL,

composed as above,

gives the following Advisory Opinion:

I. Introduction

A. Request

1. By letter dated 12 December 2022, received electronically by the Registry of the Tribunal on the same day, the Co-Chairs of the Commission of Small Island States on Climate Change and International Law (hereinafter "the Commission") transmitted to the Tribunal a request for an advisory opinion (hereinafter "the Request"), pursuant to a decision of the third meeting of the Commission held on 26 August 2022. The originals of that letter and of the decision of the Commission were filed with the Registry on 20 December 2022.

2. The Commission was created pursuant to the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (hereinafter the "COSIS Agreement"), which was concluded on 31 October 2021 and entered into force on the same date. At the time of the filing of the Request, Antigua and Barbuda, Tuvalu, the Republic of Palau, Niue, the

Republic of Vanuatu and Saint Lucia were parties to the COSIS Agreement. Subsequently, Saint Vincent and the Grenadines, Saint Christopher (Saint Kitts) and Nevis, and the Commonwealth of the Bahamas also acceded to it. All parties to the COSIS Agreement are also States Parties to the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

3. At its third meeting, the Commission adopted the following decisions:

DECISIONS OF THE THIRD MEETING OF THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW (*)

Virtual Meeting 26 August 2022

The Commission of Small Island States, pursuant to Article 3(5) of the Agreement of 31 October 2021, has decided as follows:

1. Further to the Co-Chairs' 24 November 2022 request for a recommendation regarding an Advisory Opinion from the International Tribunal for the Law of the Sea (ITLOS), the Commission notes with appreciation the work of the Sub-Committee on Protection and Preservation of the Marine Environment and approves the 18 June 2022 *Recommendation CLE. 1/2022/Rec* of the Committee of Legal Experts to request the following Advisory Opinion from ITLOS consistent with Article 2(2) of the Agreement:

   "What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:

   (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

   (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"

2. The Commission expresses it support for the initiative of Vanuatu to request an Advisory Opinion on climate change from the International Court of Justice ("ICJ") and decides that the Committee of Legal Experts should assist members of the Commission in making submissions to the ICJ as appropriate.

3. The Commission requests the Sub-Committees on Sea-Level Rise, Human Rights, and Loss and Damages respectively, to propose further activities that the Commission may undertake to contribute

> to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, consistent with its mandate under Article 1(3) of the Agreement.

(*) Adopted unanimously by COSIS Members meeting virtually: (1) Hon. Gaston Browne, Prime Minister of Antigua and Barbuda; (2) Hon. Kausea Natano, Prime Minister of Tuvalu; and (3) Hon. Surangel Whipps Jr., President of the Republic of Palau.

Vote recorded by Meeting Chair, Eselealofa Apinelu, High Commissioner of Tuvalu to Fiji

(Signed)	*(Signed)*	*(Signed)*
(Eselealofa Apinelu)	*(Gaston Browne)*	*(Surangel Whipps Jr.)*
	(Signed)	
	(Kausea Natano)	

4. In their letter dated 12 December 2022, the Co-Chairs of the Commission stated that they were "representing the Commission pursuant to Article 3(3) of the Agreement for the Establishment of the Commission" and were "hereby submit[ting] a request for an advisory opinion". The Co-Chairs of the Commission also referred to article 21 of the Statute of the Tribunal (hereinafter "the Statute") and article 138 of the Rules of the Tribunal (hereinafter "the Rules") and noted that,

> [i]n this respect, Article 2(2) of the Agreement provides (emphasis added):
>
> > Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, *the Commission shall be authorized* to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.

5. In the same letter, the Co-Chairs informed the Tribunal of the appointment of Mr Payam Akhavan and Ms Catherine Amirfar as the Representative and Co-representative, respectively, of the Commission for the proceedings.

6. Together with the said letter, the Co-Chairs of the Commission transmitted to the Tribunal documents likely to throw light upon the questions contained in the request for an advisory opinion, pursuant to article 131 of the Rules. All these documents were posted on the website of the Tribunal.

7. On 12 December 2022, the Request was entered into the List of cases as Case No. 31, which was named “Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law”. By letter of the same date, the Registrar of the Tribunal informed the Co-Chairs that the Request had been filed with the Registry on 12 December 2022 and entered into the List of cases as Case No. 31.

8. By a communication dated 19 December 2022, the Representative of the Commission corrected the date in paragraph 1, first line, of the decisions of 26 August 2022 adopted by the Commission to read 24 November 2021 instead of 24 November 2022.

B. Chronology of the procedure

9. By notes verbales dated 13 December 2022, in accordance with article 133, paragraph 1, of the Rules, the Registrar notified all States Parties to the United Nations Convention on the Law of the Sea (hereinafter “States Parties”) of the Request.

10. By letter of the same date, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the Request.

11. By Order dated 16 December 2022, pursuant to article 133, paragraph 2, of the Rules, the President of the Tribunal decided “that the intergovernmental organizations listed in the annex to the … order are considered likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion”. By the same Order, pursuant to article 133, paragraph 3, of the Rules, the President invited the States Parties, the Commission and the aforementioned intergovernmental organizations to present written statements on those questions and fixed 16 May 2023 as the time limit within which written statements could be presented to the Tribunal. By the same Order, the President decided that, in accordance with article 133, paragraph 4, of the Rules, oral proceedings would be

held. The Order was notified to the States Parties, the Commission and the intergovernmental organizations listed in its annex.

12. By letter dated 31 January 2023, the African Union requested that it be identified, pursuant to article 133, paragraph 2, of the Rules, “as an intergovernmental organization able to furnish information on the questions submitted to the Tribunal for an advisory opinion, thereby permitting [the African Union] to participate in the proceedings”. By letter dated 2 February 2023, the Registrar informed the African Union of the decision of the President to consider the African Union as such an intergovernmental organization and invited the African Union to furnish information within the time limit fixed by the Order of 16 December 2022.

13. By letter dated 3 February 2023, the European Commission requested the President “to extend the deadline to present written statements pursuant to Order 2022/4 by one month, until 16 June 2023.” By Order dated 15 February 2023, the President extended, pursuant to article 133, paragraph 3, of the Rules, to 16 June 2023 the time limit within which written statements could be presented to the Tribunal. The same Order recorded the President’s decision to consider the African Union as an intergovernmental organization likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion. The Order was notified to the States Parties, the Commission, the intergovernmental organizations listed in the annex to the Order of 16 December 2022, and the African Union.

14. By letter dated 20 February 2023, the International Seabed Authority (hereinafter “the Authority”) requested the President “to consider the Authority as one of the intergovernmental organizations … likely to be able to furnish information on the questions submitted to the Tribunal and therefore to invite the Authority to present its written statement within the time limit as extended by the President of the Tribunal.” By letter dated 24 February 2023, the Registrar informed the Authority of the decision of the President to consider it as an intergovernmental organization likely to be able to furnish such information and invited the Authority to do so within the extended time limit fixed by the Order of 15 February 2023.

15. By letter dated 31 May 2023, received by the Registry on 8 June 2023, the Pacific Community requested, in accordance with article 133, paragraph 2, of the Rules, “the Tribunal’s authorisation to present observations on the questions submitted by the Commission … for an advisory opinion” and that the Tribunal include the Pacific Community “among those intergovernmental organisations invited to present observations in Case No. 31”. By letter dated 8 June 2023, the Registrar informed the Pacific Community of the decision of the President to consider the Pacific Community as an intergovernmental organization likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion and invited it to do so within the extended time limit fixed by the Order of 15 February 2023.

16. By note verbale dated 5 June 2023, the Permanent Mission of India to the United Nations requested that “the deadline to submit written statement[s] to the Tribunal … further be extended for at least two months or as appropriate to enable member states to furnish written statements to the Tribunal.” By letter dated 6 June 2023, the Registrar informed the Permanent Mission of India, at the request of the President, that “at this stage of the written proceedings it is not contemplated to grant a further extension of the time limit prescribed” and invited India “to submit a written statement as soon as possible.”

17. Within the time limit fixed by the President in his Order dated 15 February 2023, written statements were submitted by the following 31 States Parties, which are listed in the order in which their statements were received: the Democratic Republic of the Congo, Poland, New Zealand, Japan, Norway, Germany, Italy, China, the European Union, Mozambique, Australia, Mauritius, Indonesia, Latvia, Singapore, the Republic of Korea, Egypt, Brazil, France, Chile, Bangladesh, Nauru, Belize, Portugal, Canada, Guatemala, the United Kingdom, the Netherlands, Sierra Leone, Micronesia (Federated States of) and Djibouti. Within the same time limit, written statements were also submitted by the Commission and the following seven intergovernmental organizations, which are listed in the order in which their statements were received: the United Nations; the International Union for Conservation of Nature (hereinafter “the IUCN”); the International Maritime

Organization (hereinafter “the IMO”); the Pacific Community; the United Nations Environment Programme; the African Union and the Authority.

18. By letter dated 20 June 2023, in accordance with article 133, paragraph 3, of the Rules, the Registrar notified the States Parties, the Commission and the intergovernmental organizations that had submitted written statements of the list of those participants. By the same letter, the Registrar also informed them that these statements were accessible in a dedicated section of the Tribunal’s website.

19. In addition, statements were submitted by the following entities: the United Nations Special Rapporteurs on Human Rights and Climate Change, Toxics and Human Rights and Human Rights and the Environment (on 31 May 2023); the High Seas Alliance (on 15 June 2023); ClientEarth (on 15 June 2023); Opportunity Green (on 15 June 2023); the Center for International Environmental Law and Greenpeace International (on 15 June 2023); the Advisory Committee on Protection of the Sea (on 16 June 2023); the World Wide Fund for Nature (on 16 June 2023); Our Children’s Trust and Oxfam International (on 16 June 2023); the Observatory for Marine and Coastal Governance (on 16 June 2023); and One Ocean Hub (on 17 June 2023).

20. The statements from the High Seas Alliance, Opportunity Green, the Center for International Environmental Law and Greenpeace International, and Our Children’s Trust and Oxfam International were accompanied by a petition to be granted permission to act as amici curiae in the proceedings. Furthermore, in a communication transmitting its statement, ClientEarth sought permission to “[i]ntervene in the Advisory Proceedings of Case No. 31”.

21. At the request of the President, the Registrar, by separate letters dated 5, 15, 16 and 19 June 2023, respectively, informed the entities mentioned in paragraph 20 above that their statements would not be included in the case file since they had not been transmitted under article 133 of the Rules; the statements would, however, be transmitted to the States Parties, the Commission and the intergovernmental organizations that had presented written statements, and also posted on the website of the Tribunal in a separate section of documents relating to the case. By letter

dated 20 June 2023, the aforementioned States Parties, the Commission and the intergovernmental organizations were informed thereof.

22. By note verbale dated 19 June 2023, after the expiry of the time limit for the submission of written statements, Rwanda submitted a written statement. By the said note verbale, Rwanda also transmitted a letter dated 17 June 2023 from the Minister of Justice/Attorney-General of Rwanda. Therein, the Minister of Justice/Attorney-General stated that "Rwanda recognises the slight delay in this submission, owing to the fact that the Convention did not enter into force for Rwanda until today." By note verbale of the Tribunal dated 20 June 2023, Rwanda was informed that, in light of the reasons provided in the letter dated 17 June 2023, the President had decided that the written statement of Rwanda should be admitted and included in the case file.

23. By communication dated 21 June 2023, after the expiry of the time limit for the submission of written statements, the Food and Agriculture Organization of the United Nations (hereinafter "the FAO") submitted a written statement. By letter of the same date, the Registrar informed the FAO that, although the statement had reached the Registry after the expiry of the time limit for the submission of statements, the President had decided that the statement should be admitted and included in the case file.

24. By communication dated 23 June 2023, the Registrar informed the States Parties, the Commission and the intergovernmental organizations that had presented written statements of the submission of the statements of Rwanda and of the FAO. These statements were posted on the Tribunal's website in a section entitled "Statements received after the expiry of the time limit fixed by Order 2023/1 of 15 February 2023".

25. On 26 June 2023, pursuant to article 134 of the Rules, all written statements submitted to the Tribunal were made accessible to the public on the Tribunal's website.

26. By Order dated 30 June 2023, in accordance with article 133, paragraph 4, of the Rules, the President fixed 11 September 2023 as the date for the opening of the hearing at which oral statements could be made by the States Parties, the Commission and the intergovernmental organizations listed in the annex to the Order of the President of 16 December 2022, as well as the African Union, the Authority and the Pacific Community. The same Order recorded the President's decisions to consider the Authority and the Pacific Community as intergovernmental organizations likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion (see paras. 14 and 15 above). By the same Order, the States Parties, the Commission and the above-mentioned intergovernmental organizations were invited to indicate to the Registrar, no later than 4 August 2023, their intention to make oral statements at the hearing. The Order was notified to the States Parties, the Commission and the above-mentioned intergovernmental organizations.

27. By note verbale dated 30 June 2023, after the expiry of the time limit for the submission of written statements, Viet Nam submitted a written statement. By note verbale of the Tribunal dated 13 July 2023, Viet Nam was informed that, although the statement had reached the Registry after the expiry of the time limit for the submission of statements, the President had decided that the statement should be admitted and included in the case file. By communication dated 14 July 2023, the Registrar informed the States Parties, the Commission and the intergovernmental organizations that had presented written statements of the submission of the statement of Viet Nam. The statement was posted on the Tribunal's website in a section entitled "Statements received after the expiry of the time limit fixed by Order 2023/1 of 15 February 2023".

28. Within the time limit prescribed by the Order of the President of 30 June 2023, 34 States Parties, listed as follows in alphabetical order, expressed their intention to participate in the oral proceedings: Argentina, Australia, Bangladesh, Bolivia, Chile, China, Comoros, the Democratic Republic of Congo, Djibouti, the European Union, France, Germany, Guatemala, India, Indonesia, Italy, Latvia, Mauritius, Mexico, Micronesia (Federated States of), Mozambique, Nauru, the Netherlands, New Zealand, Norway, the Philippines, Portugal, the Republic of Korea, Saudi Arabia,

Sierra Leone, Singapore, Timor-Leste, the United Kingdom and Viet Nam. Within the same time limit, the Commission, the African Union, the IUCN and the Pacific Community also expressed their intention to participate in the oral proceedings.

29. By separate notes verbales dated 18 July 2023, the United Kingdom and the Netherlands, respectively, requested the Tribunal "to order a second round of written statements and to revise the date for the oral hearings accordingly". Both States Parties stated that "introducing a second round of written statements is necessary and appropriate in a case of this significance and complexity", that "[t]his would allow participating States and intergovernmental organizations to respond in writing to statements" already made, and that it would facilitate "narrowing of the issues before the Tribunal", leading to "a more efficient oral phase of the proceedings". In their respective notes verbales, the United Kingdom and the Netherlands further stated that, should the Tribunal decline to accede to that request, they invited it "to bear firmly in mind the lack of opportunity afforded to States Parties and participating intergovernmental organizations to respond in writing to the written statements when the Tribunal comes to consider the appropriate procedure for the hearing, including in particular a fair allocation of time", and that "all participants should be accorded an equal allocation of time at the hearing", which "includes the Commission of Small Island States on Climate Change and International Law (COSIS)". They added that "the status of COSIS as the international organization requesting the advisory opinion should give it no greater procedural rights, including in particular time allocation for oral submissions, than any of the participating States Parties to UNCLOS."

30. By letter dated 20 July 2023, France requested a postponement of the hearing by a few weeks to allow States more time to prepare the oral statements, taking account of the number of written statements made and the importance and complexity of the legal issues raised in the Request. By letter dated 21 July 2023, Italy suggested a postponement of the hearing "by a few weeks, in consideration of the significant number of statements filed and of the complexity of the issues raised by the Request of Advisory Opinion."

31. By separate notes verbales of the Tribunal dated 7 August 2023, the United Kingdom and the Netherlands were informed that the matter raised in their respective notes verbales had been brought to the attention of the Tribunal, that the Tribunal had concluded that a second round of written statements was not required, and that no further time limit would be fixed pursuant to article 133, paragraph 3, of the Rules within which States Parties and the intergovernmental organizations which had made written statements could present written statements on the statements made. The United Kingdom and the Netherlands were further informed that the Tribunal would allow delegations sufficient time at the hearing to make their oral submissions and also to respond to the written statements made by other participants.

32. By letters dated 7 and 8 August 2023 addressed to Italy and France, respectively, the Registrar, at the request of the President, informed the two States that the matter raised in their respective letters had been brought to the attention of the Tribunal and that, in the view of the Tribunal, a postponement of the date for the opening of the hearing was not required. The Registrar further indicated that the Tribunal however considered that the schedule of the hearing should be organized in such a manner so as to grant delegations sufficient time to make their oral statements and also to respond to the written statements made by other participants.

33. By letter dated 28 July 2023, the Commission “provide[d] notice of its intention to examine two expert witnesses, Dr. Sarah Cooley and Dr. Shobha Maharaj, each of whom ha[d] submitted a report annexed to the Commission’s written statement, and request[ed] permission to proceed as such at the hearing under Articles 73(2), 77(2), and 78(1) of the Rules of the Tribunal.” By letter dated 8 August 2023, the Registrar, at the request of the President, invited the Commission to include Dr Cooley and Dr Maharaj as members of its delegation in order to allow them to address the Tribunal.

34. By letter dated 21 August 2023, the Sub-Regional Fisheries Commission (hereinafter “the SRFC”) requested permission to make oral statements at the hearing. By letter dated 28 August 2023, the Registrar informed the SRFC, at the

request of the President, that since the SRFC was not included in the Order of 30 June 2023, its request to participate in the oral proceedings was not granted.

35. By note verbale dated 28 August 2023, after the expiry of the time limit for the submission of written statements, India submitted a written statement. By note verbale of the Tribunal dated 8 September 2023, India was informed that although the statement had reached the Registry after the expiry of the time limit for the submission of statements, the Tribunal had decided that the statement should be admitted and included in the case file. By communication of the same date, the States Parties, the Commission and the intergovernmental organizations that had presented written statements were informed of the submission of the statement of India. The statement was posted on the Tribunal's website in a section entitled "Statements received after the expiry of the time limit fixed by Order 2023/1 of 15 February 2023".

36. By note verbale dated 5 September 2023, Belize informed the Tribunal of its intention to participate in the hearing. By note verbale of the Tribunal dated 8 September 2023, Belize was informed that, "[w]hile noting that the note verbale dated 5 September 2023 was received after the date fixed in the Order of the President of 30 June 2023 for a State Party to indicate its intention to make an oral statement at the hearing, the Tribunal nevertheless decided to allow Belize to make an oral statement at the hearing."

37. Prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 7 and 8 September 2023.

38. The Tribunal held 18 public sittings on 11, 12, 13, 14, 15, 18, 19, 20, 21 and 25 September 2023, at which it heard oral statements, in the following order, from:

For the Commission of Small Island States on Climate Change and International Law:	Mr Gaston Browne, Prime Minister of Antigua and Barbuda, Co-Chair of COSIS, Mr Kausea Natano, Prime Minister of Tuvalu, Co-Chair of COSIS,

Mr Arnold Kiel Loughman, Attorney General, Republic of Vanuatu,

Mr Payam Akhavan, SJD OOnt FRSC, Professor of International Law, Chair in Human Rights, and Senior Fellow, Massey College, University of Toronto; member, Permanent Court of Arbitration; associate member, Institut de droit international; member, Bar of New York; member, Law Society of Ontario,

Ms Naima Te Maile Fifita, Founder, Moana Tasi Project; 2023 Sue Taei Ocean Fellow,

Ms Phoebe Okowa, Professor of International Law, Queen Mary University, London; member, International Law Commission; advocate, High Court of Kenya,

Ms Sarah Cooley, Director of Climate Science, Ocean Conservancy,

Ms Shobha Maharaj, Science Director, Terraformation,

Ms Margaretha Wewerinke-Singh, Associate Professor of Sustainability Law, University of Amsterdam; Adjunct Professor of Law, University of Fiji; member, Bar of Vanuatu; Blue Ocean Law,

Mr Makane Moïse Mbengue, Professor of International Law, University of Geneva; member, Curatorium of the Hague Academy of International Law; associate member, Institut de droit international,

Mr Brian McGarry, Assistant Professor of Public International Law, Grotius Centre for International Legal Studies, Leiden University; member, Bar of New York,

Ms Jutta Brunnée, Dean, Faculty of Law, University of Toronto; University Professor; associate member, Institut de droit international,

Mr Jean-Marc Thouvenin, Professor, University Paris Nanterre; Secretary-General, The Hague Academy of International Law; associate member, Institut de droit international; member, Paris Bar; Sygna Partners,

Ms Catherine Amirfar, Debevoise & Plimpton LLP; member, Bars of New York and of the Supreme Court of the United States; Immediate Past President, American Society of International Law,

Ms Philippa Webb, Professor of Public International Law, King's College, London; Barrister, Twenty Essex; member, Bar of England and Wales; member, Bar of New York; member, Bar of Belize,

Ms Nilüfer Oral, Director, Centre for International Law, National University of Singapore; member, International Law Commission; associate member, Institut de droit international,

Mr Conway Blake, Debevoise & Plimpton LLP; solicitor advocate of the senior courts of England and Wales; member, Bar of the Eastern Caribbean Supreme Court,

Mr Eden Charles, Special Representative of the Secretary-General, International Seabed Authority; Lecturer of Law, University of the West Indies; Chair, Advisory Board, One Ocean Hub, UK Research and Innovation,

Mr Zachary Phillips, Crown Counsel, Attorney General's Chambers, Ministry of Legal Affairs, Antigua and Barbuda; member, Bar of Antigua and Barbuda,

and

Mr Vaughan Lowe KC, Emeritus Chichele Professor of International Law, University of Oxford; barrister, Essex Court Chambers; member, Institut de droit international; member, Bar of England and Wales;

For Australia:

Mr Jesse Clarke, General Counsel (International Law), Office of International Law, Attorney-General's Department,

Mr Stephen Donaghue KC, Solicitor-General of Australia,

and

Ms Kate Parlett, member of the Bar of England and Wales, Twenty Essex;

For Germany:	Ms Tania Freiin von Uslar-Gleichen, Legal Adviser, Federal Foreign Office;
For Saudi Arabia:	Ms Noorah Mohammed S. Algethami, Legal Consultant;
For Argentina:	Mr Gabriel Herrera, Minister, Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship;
For Bangladesh:	Mr Md. Khurshed Alam, Rear Admiral (Retd.), BN, Secretary, Maritime Affairs Unit, Ministry of Foreign Affairs, Ms Catherine Amirfar, Debevoise & Plimpton LLP; member, Bars of New York and of the Supreme Court of the United States; Immediate Past President, American Society of International Law, and Mr Payam Akhavan, SJD OOnt FRSC, Professor of International Law, Chair in Human Rights, and Senior Fellow, Massey College, University of Toronto; member, Permanent Court of Arbitration; associate member, Institut de droit international; member, Bar of New York; member, Law Society of Ontario;
For Chile:	Ms Ximena Fuentes Torrijo, Representative;
For Portugal:	Ms Patrícia Galvão Teles, Director-General for Legal Affairs, Ministry of Foreign Affairs;
For Djibouti:	Mr Yacin Houssein Doualé, Ambassador of the Republic of Djibouti, Germany, and Mr Guled Yusuf, Partner, Allen & Overy LLP;
For Guatemala:	Mr Lesther Antonio Ortega Lemus, Minister Counsellor and Chargé d'Affaires, Embassy of the Republic of Guatemala in the Kingdom of the Netherlands, and

Mr Alfredo Crosato Neumann, PhD, Geneva Graduate Institute; Member, Bar of Lima;

For India: Mr Luther M. Rangreji, Joint Secretary (L&T), Ministry of External Affairs;

For Nauru: Ms Anastasia Francilia Adire, Legal Advisor, Permanent Mission of the Republic of Nauru to the United Nations, New York,

and

Mr Eirik Bjorge, Professor of International Law, University of Bristol, United Kingdom;

For Indonesia: Mr L. Amrih Jinangkung, Director General for Legal Affairs and International Treaties, Ministry of Foreign Affairs;

For Latvia: Ms Kristīne Līce, Legislation and International Law Adviser to the President of Latvia,

and

Mr Mārtiņš Paparinskis, Professor of Public International Law, University College London; member, International Law Commission; member, Permanent Court of Arbitration;

For Mauritius: Mr Jagdish Dharamchand Koonjul, G.C.S.K., G.O.S.K., Ambassador and Permanent Representative of the Republic of Mauritius to the United Nations, New York,

Mr Philippe Joseph Sands KC, G.C.S.K., Professor of International Law, University College London; Barrister, 11 King’s Bench Walk, London,

and

Ms Kate Cook, Barrister, Matrix Chambers, London;

For Micronesia: Mr Clement Yow Mulalap, Adviser (Legal), Permanent Mission of the Federated States of Micronesia to the United Nations, New York;

For New Zealand:	Ms Victoria Hallum, Deputy Secretary, Multilateral and Legal Affairs Group, Ministry of Foreign Affairs and Trade, and Ms Charlotte Skerten, Lead Adviser, Legal Division, Ministry of Foreign Affairs and Trade;
For the Republic of Korea:	Mr Hwang Jun-shik, Director-General for International Legal Affairs, Ministry of Foreign Affairs;
For China:	Mr Ma Xinmin, Director-General, Department of Treaty and Law, Ministry of Foreign Affairs;
For Mozambique:	Ms Paula da Conceição Machatine Honwana, Representative, Mr Charles C. Jalloh, Professor, Florida International University; Member, Special Rapporteur and Second-Vice Chairperson, International Law Commission, Ms Phoebe Okowa, Professor, Queen Mary University, London; Member, International Law Commission, and Mr Andrew Loewenstein, Partner, Foley Hoag LLP;
For Norway:	Mr Andreas Motzfeldt Kravik, State Secretary, Ministry of Foreign Affairs;
For Belize:	Mr Lennox Gladden, Chief Climate Change Officer, National Climate Change Office, Ministry of Sustainable Development, Climate Change and Disaster Risk Management, Mr Sean Aughey, Barrister, Essex Court Chambers, member of the Bar of England and Wales, and Mr Sam Wordsworth KC, Barrister, Essex Court Chambers, member of the Bar of England and Wales, member of the Paris Bar;

For the Philippines:	Mr Carlos D. Sorreta, Permanent Representative, Permanent Mission to the United Nations, Geneva, Mr Gilbert U. Medrano, Assistant Solicitor General, Office of Solicitor General, and Ms Maria Angela A. Ponce, Assistant Secretary, Maritime and Ocean Affairs Office, Department of Foreign Affairs;
For Sierra Leone:	Mr Alpha Sesay, Deputy Minister of Justice, Mr Dire D. Tladi, Professor, University of Pretoria; former Member, Special Rapporteur and Chair, International Law Commission, Mr Charles C. Jalloh, Professor, Florida International University; Member, Special Rapporteur and Second-Vice Chairperson (74th session), International Law Commission, and Ms Christina Hioureas, Partner, Foley Hoag LLP;
For Singapore:	Mr Lionel Yee, Deputy Attorney-General, Attorney-General's Chambers;
For Timor-Leste:	Ms Elizabeth Exposto, Chief of Staff to the Prime Minister; Chief Executive Officer, Land and Maritime Boundary Office, Mr John Middleton AM KC, Senior Advisor, DLA Piper; Former Judge, Federal Court of Australia, and Mr Eran Sthoeger, Legal Counsel;
For the European Union:	Mr André Bouquet, Legal Adviser, Legal Service, European Commission, and

Ms Margherita Bruti Liberati, Member, Legal Service, European Commission;

For Viet Nam: Ms Le Duc Hanh, Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs;

For the Pacific Community: Ms Rhonda Robinson, Director, SPC Geoscience, Energy and Maritime Division,

and

Ms Kathy Jetñil-Kijiner, Climate Envoy;

For Comoros: Mr Youssouf Mondoha Assoumani, Ambassador of the Union of Comoros to the Federal Democratic Republic of Ethiopia; Permanent Representative to the African Union,

Mr Iain Sandford, Partner, Sidley Austin LLP, Geneva; Barrister and Solicitor, High Court of Australia, Supreme Court of the Australian Capital Territory and High Court of New Zealand,

Mr Dominic Coppens, Senior Managing Associate, Sidley Austin LLP, Brussels; Professor, Department of International and European Law, Maastricht University; Member, Brussels Bar – A list,

and

Ms Katherine Connolly, Senior Managing Associate, Sidley Austin LLP, Geneva; Barrister and Solicitor, Supreme Court of New South Wales;

For the Democratic Republic of the Congo: Mr Ivon Mingashang, Professor of International Law, Law Faculty, University of Kinshasa; member of the International Law Commission; member, Kinshasa/Gombe Bar,

Mr Sylvain Lumu Mbaya, Professor of International Law, Law Faculty, University of Kinshasa; Judge at the Constitutional Court of the DRC,

Mr Jean-Paul Segihobe Bigira, Professor of International Law, Department of Public International Law and International Relations, Law Faculty, University of Kinshasa; Member of Parliament; member, Kinshasa/Gombe Bar,

and

Mr Nicolas Angelet, Professor of International Law, Université libre de Bruxelles; member, Brussels Bar;

For the International Union for Conservation of Nature:

Ms Christina Voigt, Chair, IUCN World Commission on Environmental Law (WCEL); Co-Chair, Paris Agreement Implementation and Compliance Committee; Professor, Department of Public and International Law, University of Oslo,

Ms Cymie R. Payne, Chair, IUCN-WCEL Ocean Law Specialist Group; Associate Professor, Rutgers University, New Jersey,

and

Ms Tara Davenport, Assistant Professor, Faculty of Law, National University of Singapore (NUS); Co-Head, Oceans Law and Policy Programme, Centre for International Law, Singapore;

For the African Union:

Mr Tordeta Ratebaye, Ambassador, Deputy Chief of Staff, Cabinet of the Chairperson, African Union Commission,

Mr Mohamed Salem Boukhari Khalil, Acting Legal Counsel, Director of Legal Affairs, African Union Commission,

Mr Nicolas J.S. Lockhart, Partner, Sidley Austin LLP, Geneva; Solicitor (Scotland),

Mr Deepak Raju, Senior Managing Associate, Sidley Austin LLP, Geneva; Solicitor (England and Wales); Advocate (Maharashtra and Goa, India),

and

Mr Mamadou Hébié, Associate Professor of International Law, Grotius Centre for International Legal Studies, Leiden University; Member, Bar of the State of New York;

For France:

Ms Sandrine Barbier, Deputy Director of Legal Affairs, Ministry for Europe and Foreign Affairs,

and

	Mr Mathias Forteau, Professor, University of Paris Nanterre;
For Italy:	Mr Stefano Zanini, Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation,
	and
	Mr Roberto Virzo, Professor of International Law, University of Messina;
For the Netherlands:	Mr René J.M. Lefeber, Legal Adviser, Ministry of Foreign Affairs;
For the United Kingdom:	Mr Ben Juratowitch KC, Barrister, Essex Court Chambers,
	and
	Ms Amy Sander, Barrister, Essex Court Chambers.

39. The hearing was broadcast on the Internet as a webcast.

40. On 11 September 2023, the Registrar communicated questions posed by Judge Kittichaisaree pursuant to article 76 of the Rules to the Commission and to the IUCN. The question posed to the Commission was as follows:

> In light of Chapters 6, 7 and 8 of your Written Statement, could you please clarify further which specific obligations mentioned by you insofar as they are relevant to the Request for an Advisory Opinion are, in your view, obligations of conduct and which ones are obligations of result, and why?

The question posed to the IUCN was as follows:

> In light of paragraph 74 *et seq.* of your Written Statement, could you please clarify further which specific obligations mentioned by you insofar as they are relevant to the Request for an Advisory Opinion are, in your view, obligations of conduct and which ones are obligations of result, and why?

The Commission and the IUCN were requested to respond to the respective questions orally during the oral arguments and/or in writing by the end of the hearing.

41. By letter dated 24 September 2023, the Commission transmitted a written response to the question put to it. During the sitting held on 21 September 2023, the IUCN provided a response to the question put to it. The written response of the Commission and a transcript of the oral response of the IUCN were posted on the Tribunal's website.

42. By communication dated 25 September 2023, the Registrar invited the States Parties, the Commission and the intergovernmental organizations that had participated in the oral proceedings to submit comments on the responses of the Commission and the IUCN by 2 October 2023. Comments were received from Australia, France, Latvia, the Netherlands and the United Kingdom by separate communications dated 2 October 2023 and from Timor-Leste by letter dated 4 October 2023. By communication dated 16 October 2023, the Registrar informed the States Parties, the Commission and the intergovernmental organizations that had participated in the hearing of the comments received. These comments were posted on the Tribunal's website.

43. By communications dated 18 and 20 September 2023, the IMO transmitted two documents to the Tribunal and requested that those documents be considered documents in support of the written statement submitted by the IMO on 16 June 2023. By letter dated 13 October 2023, the Registrar informed the IMO that the Tribunal had decided, on 12 October 2023, to admit the two documents in support of the IMO's written statement and therefore considered them as part of the case file.

44. In accordance with article 17 of the Rules, President Hoffmann and Judges Pawlak, Yanai, Kateka, Paik and Gómez-Robledo, whose term of office expired on 30 September 2023, having participated in the meeting mentioned in article 68 of the Rules, continued to sit in the case until its completion. President Hoffmann continued to preside over the Tribunal in the present case until completion, pursuant to article 16, paragraph 2, of the Rules.

II. Background

45. The Tribunal notes that the Request submitted by the Commission has scientific aspects. It further notes that various international instruments have been adopted to address climate change. The Tribunal thus finds it appropriate to provide at the outset an overview of the science and legal regime relating to climate change as a background to the Request.

A. Scientific aspects

46. The phenomenon of climate change is central to the Request and the questions contained therein necessarily have scientific aspects. In their written and oral submissions, the participants in the present proceedings addressed at length scientific aspects related to climate change and the ocean, and submitted or referred to abundant materials on scientific issues.

47. In relation to the phenomenon of climate change, the Tribunal notes that, in its resolution 43/53 of 6 December 1988, the United Nations General Assembly (hereinafter "the General Assembly") recognized, for the first time, that "climate change is a common concern of mankind". In the same resolution, the General Assembly stated that "the emerging evidence indicates that continued growth in atmospheric concentrations of 'greenhouse' gases could produce global warming with an eventual rise in sea levels, the effects of which could be disastrous for mankind if timely steps are not taken at all levels". In this resolution, the General Assembly also endorsed the action of the World Meteorological Organization and the United Nations Environment Programme in jointly establishing an Intergovernmental Panel on Climate Change (hereinafter "the IPCC") to provide "internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies". At present, there are 195 member countries of the IPCC. In its resolution 67/210 of 21 December 2012, the General Assembly declared that "climate change is one of the greatest challenges of our time". This statement has been subsequently reaffirmed by the General Assembly in several resolutions. The Tribunal further notes that, in its resolution 76/296 of 25 July 2022, the General

Assembly endorsed the declaration adopted by the 2022 United Nations Ocean Conference that it was “deeply alarmed by the adverse effects of climate change on the ocean and marine life”.

48. Since its establishment in 1988, the IPCC has produced several assessment reports on climate change, the latest within the sixth assessment cycle concluded in 2023. This cycle produced several special reports, such as the 2018 Special Report on Global Warming of 1.5°C (hereinafter “the 2018 Report”) and the 2019 Special Report on the Ocean and Cryosphere in a Changing Climate (hereinafter “the 2019 Report”). The sixth assessment cycle also produced three separate working group reports – the Working Group I report entitled “Climate Change 2021: The Physical Science Basis” finalized on 6 August 2021 (hereinafter “the WGI 2021 Report”), the Working Group II report entitled “Climate Change 2022: Impacts, Adaptation and Vulnerability” finalized on 27 February 2022 (hereinafter “the WGII 2022 Report”), and the Working Group III report entitled “Climate Change 2022: Mitigation of Climate Change” finalized on 4 April 2022 – and a Synthesis Report published in March 2023 (hereinafter “the 2023 Synthesis Report”).

49. The Tribunal notes that the IPCC reports are subject to review and endorsement by the IPCC member countries. According to the IPCC, such endorsement “acknowledges that the report is a definitive assessment that has been developed following the IPCC’s defined procedures, underpinning the report’s authority” (IPCC Factsheet, “How does the IPCC approve reports?”, first paragraph). Different levels of formal endorsement apply to the different types of materials prepared by the IPCC. The summary for policymakers, which is prepared for each IPCC report, including for synthesis reports, is submitted for “approval”, where approval means that the summary has been subject to detailed, line-by-line discussion and agreement during an IPCC plenary session. The body of the underlying reports is subject to “acceptance” by the plenary. “Acceptance” means that, while “the material has not been subject to line by line discussion and agreement, it nevertheless presents a comprehensive, objective and balanced view of the subject matter” (Principles Governing IPCC Work, Appendix A, p. 2). The synthesis report of an IPCC cycle summarizes the key findings of the working group reports and any special reports of that cycle. While its summary for policymakers is

again approved line by line, the body of the synthesis report is subject to “adoption”, section by section and not line by line.

50. With regard to the confidence levels used in IPCC reports, the IPCC explains the following:

> A level of confidence is expressed using five qualifiers: very low, low, medium, high and very high, and typeset in italics, for example, *medium confidence*. The following terms have been used to indicate the assessed likelihood of an outcome or result: virtually certain 99–100% probability; very likely 90–100%; likely 66–100%; about as likely as not 33–66%; unlikely 0–33%; very unlikely 0–10%; and exceptionally unlikely 0–1%. Additional terms (extremely likely 95–100%; more likely than not >50–100%; and extremely unlikely 0–5%) are also used when appropriate. Assessed likelihood is typeset in italics, for example, *very likely*.
> (WGI 2021 Report, p. 4, fn. 4)

51. The Tribunal observes that most of the participants in the proceedings referred to reports of the IPCC, recognizing them as authoritative assessments of the scientific knowledge on climate change, and that none of the participants challenged the authoritative value of these reports.

52. The Tribunal notes that the IPCC defines climate change as:

> A change in the state of the *climate* that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. *Climate change* may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions and persistent *anthropogenic* changes in the composition of the *atmosphere* or in *land use*.
> (WGII 2022 Report, p. 2902)

53. Successive IPCC reports provide important findings in relation to the changes of the Earth’s climate that have occurred over time and their causes. The 2023 Synthesis Report states that “[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred”, and that “[h]uman-caused climate change is already affecting many weather and climate extremes in every region across the globe” (2023 Synthesis Report, p. 46). The same report further states that “[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land” and that “[t]he scale of recent changes across the climate system as a whole

and the present state of many aspects of the climate system are unprecedented over many centuries to many thousands of years" (2023 Synthesis Report, p. 46).

54. The IPCC affirms in its 2023 Synthesis Report that human activities, principally through greenhouse gases (hereinafter "GHGs"), "have unequivocally caused global warming" (2023 Synthesis Report, p. 42). Greenhouse gases are "[g]aseous constituents of the *atmosphere*, both natural and *anthropogenic*, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth's *ocean* and *land* surface, by the *atmosphere* itself and by clouds" (WGII 2022 Report, p. 2911). The most common GHGs in the Earth's atmosphere include carbon dioxide, methane and nitrous oxide. The IPCC explains that GHGs "absorb infrared radiation, emitted by the Earth's surface, the atmosphere and clouds", and "[t]hey emit in turn infrared radiation in all directions including downward to the Earth's surface" (Climate Change 2001, The Scientific Basis, pp. 89-90). According to the IPCC, GHGs thus "trap heat within the atmosphere" (Climate Change 2001, The Scientific Basis, p. 90). Anthropogenic GHG emissions, according to the Climate Change 2014 Synthesis Report of the IPCC (hereinafter "the 2014 Synthesis Report"), "have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever", and this "has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years" (2014 Synthesis Report, p. 4). In this regard, the Tribunal notes that the IPCC defines the term "anthropogenic" as "[r]esulting from or produced by human activities" which "include the burning of *fossil fuels, deforestation, land use* and land use changes …, livestock production, fertilisation, waste management, and industrial processes," and the term "anthropogenic emissions" as "[e]missions of *greenhouse gases (GHGs), precursors* of GHGs, and *aerosols*, caused by human activities" (2019 Report, p. 679).

55. The IPCC has also assessed the role of the ocean in the climate system. The 2019 Report observes that the ocean is "a fundamental climate regulator on seasonal to millennial time scales" (2019 Report, p. 78). This role is twofold: the ocean "stores heat trapped in the atmosphere caused by increasing concentrations of greenhouse gases" and thus "masks and slows surface warming"; at the same time, it also stores excess carbon dioxide (*ibid*., p. 456), and such carbon storage

represents a major control on atmospheric carbon dioxide. According to the IPCC, “[a]bout a quarter of carbon dioxide (CO_2) released by human activities is taken up by the ocean” (*ibid*., p. 218) and “[a]bsorption by the ocean and uptake by plants and soils are the primary natural CO_2 sinks on decadal to centennial time scales” (WGI 2021 Report, p. 179).

56. The IPCC observes that “[c]oastal blue carbon ecosystems, such as mangroves, salt marshes and seagrasses, can help reduce the risks and impacts of climate change, with multiple co-benefits” (WGII 2022 Report, p. 2692). These coastal habitats “are characterised by high, yet variable, organic carbon storage in their soils and sediments” (2019 Report, p. 522) and “have sequestered carbon dioxide from the atmosphere continuously over thousands of years, building stocks of carbon in biomass and organic rich soils” (WGII 2022 Report, p. 1480). The IPCC further observes that “the protection and enhancement of coastal blue carbon can be an important contribution to both mitigation and adaptation at the national scale” (2019 Report, p. 454), while noting that “[t]he potential climatic benefits of blue carbon ecosystems can only be a very modest addition to, and not a replacement for, the very rapid reduction of greenhouse gas emissions” (*ibid.*, p. 454).

57. The reports of the IPCC indicate that the accumulation of anthropogenic GHGs in the atmosphere has had numerous effects on the ocean. The 2023 Synthesis Report states that climate change has caused “substantial damages and increasingly irreversible losses”, including in “cryospheric and coastal and open ocean ecosystems (*high confidence*)” (2023 Synthesis Report, p. 46). According to the 2019 Report, “[c]limate change-related effects in the ocean include sea level rise, increasing ocean heat content and marine heat waves, ocean deoxygenation, and ocean acidification” (2019 Report, p. 79).

58. With respect to ocean warming, the WGI 2021 Report observes that “the dominant effect of human activities is apparent not only in the warming of global surface temperature, but also in … the warming of the ocean” (WGI 2021 Report, p. 515). The 2019 Report states that “[i]t is virtually certain that the global ocean has warmed unabated since 1970 and has taken up more than 90% of the excess heat in the climate system (*high confidence*)” (2019 Report, p. 9). The report further states

that “[s]ince 1993, the rate of ocean warming has more than doubled (*likely*). Marine heatwaves have very likely doubled in frequency since 1982 and are increasing in intensity (*very high confidence*)” (*ibid*., p. 9). The report states that “[w]arming of the ocean reduces not only the amount of oxygen it can hold, but also tend[s] to stratify it” and that, “[a]s a result, less oxygen is transported to depth, where it is needed to support ocean life” (2019 Report, p. 113). It further states that “[i]n response to ocean warming and increased stratification, open ocean nutrient cycles are being perturbed” (*ibid*., p. 450) and that “[w]arming-induced changes in spatial distribution and abundance of fish stocks have already challenged the management of some important fisheries and their economic benefits (*high confidence*)” (*ibid*., p. 451).

59. Regarding sea level rise, the WGI 2021 Report indicates that “[h]eating of the climate system has caused global mean sea level rise through ice loss on land and thermal expansion from ocean warming” (WGI 2021 Report, p. 11). According to the 2023 Synthesis Report, “[g]lobal mean sea level increased by 0.20 [0.15 to 0.25] m between 1901 and 2018” and “[h]uman influence was *very likely* the main driver of these increases since at least 1971” (2023 Synthesis Report, p. 46). Among other effects, the 2019 Report indicates that “[g]lobal mean sea level rise will cause the frequency of extreme sea level events at most locations to increase”, that “[c]oastal tidal amplitudes and patterns are projected to change”, that “[r]ising mean sea levels will contribute to higher extreme sea levels associated with tropical cyclones”, and that “[c]oastal hazards will be exacerbated by an increase in the average intensity, magnitude of storm surge and precipitation rates of tropical cyclones” (2019 Report, pp. 20-21). The 2019 Report also states that “[c]oastal ecosystems are observed to be under stress from ocean warming and SLR [sea level rise] that are exacerbated by non-climatic pressures from human activities on ocean and land (*high confidence*)” (*ibid*., p. 451). The WGII 2022 Report notes that “[s]ea level rise poses an existential threat for some Small Islands and some low-lying coasts (*medium confidence*)” (WGII 2022 Report, p. 15).

60. The IPCC defines ocean acidification as follows:

> A reduction in the *pH* of the *ocean*, accompanied by other chemical changes (primarily in the levels of carbonate and bicarbonate ions), over an extended period, typically decades or longer, which is caused primarily

> by *uptake* of *carbon dioxide (CO_2)* from the *atmosphere*, but can also be caused by other chemical additions or subtractions from the ocean. *Anthropogenic* OA [ocean acidification] refers to the component of pH reduction that is caused by human activity.
> (2019 Report, p. 693)

A 2001 IPCC report notes that, "[b]ecause of its solubility and chemical reactivity, CO_2 is taken up by the ocean much more effectively than other anthropogenic gases" (Climate Change 2001, The Scientific Basis, p. 197). The IPCC, in its WGI 2021 Report, explains that, "[o]nce dissolved in seawater, CO_2 reacts with water and forms carbonic acid" (WGI 2021 Report, p. 714) and that, as it explains in a 2007 report, as carbon dioxide increases, the pH decreases and therefore the ocean becomes more acidic. According to the 2014 Synthesis Report, "[s]ince the beginning of the industrial era, oceanic uptake of CO_2 has resulted in acidification of the ocean; the pH of ocean surface water has decreased by 0.1 (*high confidence*), corresponding to a 26% increase in acidity" (2014 Synthesis Report, p. 41).

61. Regarding the effects of ocean acidification, the same report indicates that "[m]arine ecosystems, especially coral reefs and polar ecosystems, are at risk" from this process, which "has impacts on the physiology, behaviour and population dynamics of organisms" and "acts together with other global changes (e.g., warming, progressively lower oxygen levels) and with local changes (e.g., pollution, eutrophication) (*high confidence*), leading to interactive, complex and amplified impacts for species and ecosystems" (*ibid*., p. 67). With regard to the effects on species, a 2014 IPCC report states that "the absorption of rising atmospheric CO_2 by … organisms changes carbonate system variables … in organism internal fluids" and that "[a]ccumulation of CO_2 and the resulting acidification can also affect a wide range of organismal functions" (Climate Change 2014, Impacts, Adaptation, and Vulnerability, p. 436). As to species producing calcified exoskeletons, the 2019 Report states that dissolved carbon dioxide taken up by the ocean "makes the water more corrosive for marine organisms that build their shells and structures out of mineral carbonates, such as corals, shellfish and plankton" (2019 Report, p. 113). According to the same report, "[b]iogenic shallow reefs with calcified organisms (e.g., corals, mussels, calcified algae) are particularly sensitive to ocean acidification" (*ibid*., p. 502). The 2019 Report further states that "[p]rojected ocean acidification

and oxygen loss will also affect deep ocean biodiversity and habitats that are linked to provisioning services in the deep ocean" (*ibid*., p. 509). Furthermore, as stated in the 2018 Report, "[l]arge-scale changes to foodweb structure are occurring in all oceans" (2018 Report, p. 227).

62. With regard to climate-related risks, the IPCC, in its 2023 Synthesis Report, concludes that "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*)" (2023 Synthesis Report, p. 14), and, in the 2018 Report, states that they "are higher for global warming of 1.5°C than at present, but lower than at 2°C (*high confidence*)" (2018 Report, p. 5). The WGI 2021 Report also indicates that "[m]any changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level" (WGI 2021 Report, p. 21). In addition, the 2019 Report anticipates that, "[o]ver the 21st century, the ocean is projected to transition to unprecedented conditions with increased temperatures (*virtually certain*), greater upper ocean stratification (*very likely*) [and] further acidification (*virtually certain*)" (2019 Report, p. 18). According to the 2023 Synthesis Report, the "[i]ncreasing frequency of marine heatwaves will increase risks of biodiversity loss in the oceans, including from mass mortality events (*high confidence*)" (2023 Synthesis Report, p. 98). In particular, "[w]arm-water corals are at high risk already and are projected to transition to very high risk even if global warming is limited to 1.5°C (*very high confidence*)" (2019 Report, p. 24).

63. In the 2018 Report, the IPCC states that "[l]imiting warming to 1.5°C implies reaching net zero CO_2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO_2 forcers, particularly methane (*high confidence*)" (2018 Report, p. 95). As to what is required to reach this goal, in the same report, the IPCC further states:

> Such mitigation pathways are characterized by energy-demand reductions, decarbonization of electricity and other fuels, electrification of energy end use, deep reductions in agricultural emissions, and some form of CDR [carbon dioxide removal] with carbon storage on land or sequestration in geological reservoirs. Low energy demand and low demand for land- and GHG-intensive

> consumption goods facilitate limiting warming to as close as possible to 1.5°C. (*Ibid*., p. 95)

64. Furthermore, the 2018 Report observes that "1.5°C implies very ambitious, internationally cooperative policy environments that transform both supply and demand (*high confidence*)" (2018 Report, p. 95) and that, "[i]n comparison to a 2°C limit, the transformations required to limit warming to 1.5°C are qualitatively similar but more pronounced and rapid over the next decades (*high confidence*)" (*ibid*., p. 95).

65. The IPCC concludes, in its 2023 Synthesis Report, that "[g]lobal warming will continue to increase in the near term in nearly all considered scenarios and modelled pathways" (2023 Synthesis Report, p. 68). With regard to climate change mitigation, i.e., "human intervention to reduce emissions or enhance the sinks of greenhouse gases" (2023 Synthesis Report, Annex I, p. 126), the IPCC finds in the same report that "[d]eep, rapid, and sustained GHG emissions reductions, reaching net zero CO_2 emissions and including strong emissions reductions of other GHGs, in particular CH_4, are necessary to limit warming to 1.5°C … or less than 2°C … by the end of century *(high confidence*)" (2023 Synthesis Report, p. 68).

66. The Tribunal notes that the IPCC, in its 2023 Synthesis Report, states that "climate change is a threat to human well-being and planetary health" (2023 Synthesis Report, p. 89), and that "[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected (*high confidence*)" (2023 Synthesis Report, p. 5). The 2019 Report observes that "[h]uman communities in close connection with coastal environments … are particularly exposed to ocean and cryosphere change" (2019 Report, p. 5). For instance, the same report identifies future shifts in fish distribution and decreases in fisheries which would affect "income, livelihoods, and food security of marine resource-dependent communities", as well as impacts on marine ecosystems which would put "key cultural dimensions of lives and livelihoods at risk" (*ibid*., p. 26). In addition, the WGII 2022 Report indicates that "[c]limate hazards are a growing driver of involuntary migration and displacement" and that "[c]limate-related illnesses … and threats to mental health and well-being are increasing" (WGII 2022 Report, p. 1044).

In this respect, the Tribunal notes that climate change represents an existential threat and raises human rights concerns.

B. International instruments on climate change

67. The Tribunal notes that various international agreements and other instruments have been negotiated and adopted to address the issue of climate change. At the core of these agreements is the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC"), which opened for signature in June 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro and entered into force on 21 March 1994. To date, there are 198 Parties to the UNFCCC, including all States Parties to the Convention.

68. The objective of the UNFCCC, as set out in its Article 2, is to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." This provision further specifies that such a level should be achieved "within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner." The UNFCCC defines climate change in Article 1, paragraph 2, as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." In Article 1, paragraph 4, the term "[e]missions" is defined as "the release of greenhouse gases and/or their precursors into the atmosphere over a specified area and period of time." In Article 1, paragraph 5, the term "[g]reenhouse gases" is defined as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation." The use by the UNFCCC of the plural ("emissions") and of the qualifier "over a period of time" suggests that these are multiple and, to a certain extent, lasting releases of GHGs, which, *inter alia*, indicates their eventual accumulation or concentration.

69. With a view to achieving the objective of the UNFCCC and the implementation of its provisions, the Parties to the UNFCCC are guided by the provisions of Article 3.

These provisions refer, *inter alia*, to common but differentiated responsibilities and respective capabilities, specific needs and special circumstances of developing country Parties, precautionary measures, sustainable development and cooperation. Article 4, paragraph 1, contains general commitments for all Parties to the UNFCCC, while paragraph 2 of the same article formulates specific commitments applicable only to Parties listed in Annex I to the UNFCCC (hereinafter “Annex I Parties”), which includes developed country Parties and country Parties that are undergoing the process of transition to a market economy. These commitments relate to all GHGs not controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter “the Montreal Protocol”). The UNFCCC also establishes the Conference of the Parties (hereinafter “COP”), which, in accordance with Article 7, is entrusted to “keep under regular review the implementation of the [UNFCCC] and any related legal instruments that the [COP] may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the [UNFCCC].” In the implementation of commitments, “full consideration” is to be given to the specific needs and concerns of developing country Parties arising from the adverse effects of climate change or the impact of the implementation of response measures (see Article 4, para. 8). Low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are identified as those particularly vulnerable to the adverse effects of climate change (see nineteenth preambular paragraph).

70. On 11 December 1997, the third COP adopted the Kyoto Protocol to the UNFCCC, which entered into force on 16 February 2005. To date, there are 192 Parties to it, including 167 States Parties to the Convention. The Kyoto Protocol operationalizes the UNFCCC by setting quantified emission reduction targets for Annex I Parties. It establishes commitments for these Parties to limit and reduce their GHG emissions in accordance with agreed individual targets over a first commitment period from 2008 to 2012 (see Article 3, para. 1). Moreover, the Kyoto Protocol introduces flexible market-based mechanisms that rely on the trade of emissions permits (see Articles 6, 12 and 17) and establishes an extensive monitoring, review and verification system for ensuring compliance with commitments (see Articles 5, 7, 8 and 18). The Doha Amendment, which was

adopted on 8 December 2012, *inter alia*, established a second commitment period for Annex I Parties from 2013 until 2020.

71. Under the Kyoto Protocol, Annex I Parties are also required to limit or reduce GHG emissions from aviation and marine bunker fuels. This commitment is to be achieved by "working through" the International Civil Aviation Organization (hereinafter "ICAO") and the IMO, respectively (see Article 2, para. 2, of the Kyoto Protocol).

72. On 12 December 2015, the twenty-first COP adopted the Paris Agreement, which entered into force on 4 November 2016. To date, there are 195 Parties to it, including 168 States Parties to the Convention. The Paris Agreement aims to strengthen the global response to the threat of climate change, including by setting a temperature goal which is defined in Article 2, paragraph 1(a), as follows:

> Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

73. In order to achieve the temperature goal set out in Article 2 of the Paris Agreement, Article 4, paragraph 1, thereof provides that

> Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

74. In accordance with Article 4, paragraph 2, of the Paris Agreement, the temperature and emissions goals of this treaty are to be attained, *inter alia*, through the preparation, communication and maintenance of successive nationally determined contributions that each Party intends to achieve and the pursuance of domestic mitigation measures. In accordance with Article 4, paragraph 3,

> [e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common

> but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Article 4, paragraph 6, provides that the least developed countries and Small Island Developing States "may" prepare and communicate strategies, plans and actions for low GHG emissions development reflecting their special circumstances.

75. A further aim of the Paris Agreement is to increase the ability to adapt to the adverse impacts of climate change and foster climate resilience and low GHG emissions development in a manner that does not threaten food production (see Article 2, para. 1(b)). Accordingly, each Party is required, as appropriate, to engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions (see Article 7, para. 9).

76. Making finance flows consistent with a pathway towards low GHG emissions and climate-resilient development is another aim of the Paris Agreement (see Article 2, para. 1(c)). In this regard, Article 9, paragraph 1, of the Paris Agreement requires developed country Parties to provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the UNFCCC.

77. The Tribunal also notes that the COP has adopted numerous decisions in relation to the UNFCCC, the Kyoto Protocol and the Paris Agreement. Thus, on 20 November 2022, the twenty-seventh COP adopted the Sharm el-Sheikh Implementation Plan, in which it "[*r*]*ecognizes* that limiting global warming to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030", "[*a*]*lso recognizes* that this requires accelerated action" and "*requests* Parties that have not yet done so to revisit and strengthen the 2030 targets in their nationally determined contributions as necessary to align with the Paris Agreement temperature goal by the end of 2023, taking into account different national circumstances" (Decision 1/CMA.4 of 20 November 2022, paras. 15, 16 and 23). In its decision 1/CP.27 of 20 November 2022, the COP "[*r*]*eiterates* that the impacts of climate change will be much lower at the temperature increase of 1.5°C

compared with 2 °C and *resolves* to pursue further efforts to limit the temperature increase to 1.5 °C". On 13 December 2023, the twenty-eighth COP adopted the First Global Stocktake, where it, *inter alia*, in paragraph 28, recognized "the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5°C pathways" and called on Parties to contribute to certain global efforts enumerated therein (Decision FCCC/PA/CMA/2023/L.17 of 13 December 2023). Several COP decisions address matters relating to climate change and the ocean (Decision 1/CP.25 of 15 December 2019, para. 31; Decision 1/CP.26 of 12 November 2021, paras. 60-61; Decision 1/CP.27 of 20 November 2022, paras. 49-50; Decision 1/CMA.4 of 20 November 2022, para. 79).

78. The Tribunal further notes that international instruments adopted within the framework of the IMO, ICAO and the Montreal Protocol also address matters related to climate change.

79. On 15 July 2011, the IMO adopted amendments to Annex VI to the International Convention for the Prevention of Pollution from Ships of 2 November 1973, as modified by the Protocol of 1978 (hereinafter "MARPOL"). Annex VI deals with the prevention of air pollution from ships. The 2011 amendments were made with a view to reducing GHG emissions from ships through the inclusion of regulations concerning energy efficiency (Resolution MEPC.203(62), Annex). Pursuant to the regulations, new ships engaged in international voyages are required to meet gradually increasing levels of energy efficiency. In 2018, the IMO introduced the Initial IMO Strategy on reduction of GHG emissions from ships. In 2021, the IMO adopted amendments to Annex VI (Resolution MEPC.328(76), Annex), which entered into force in November 2022. Regulation 20 of Annex VI, as amended, states that the goal of the relevant regulations "is to reduce the carbon intensity of international shipping, working towards the levels of ambition set out in the *Initial IMO Strategy on reduction of GHG emissions from ships* [adopted in 2018]."

80. On 7 July 2023, the IMO adopted the 2023 IMO Strategy on Reduction of GHG Emissions from Ships (hereinafter "the 2023 IMO GHG Strategy"). It seeks to enhance IMO's contribution to global efforts by addressing GHG emissions from international shipping. The 2023 IMO GHG Strategy identifies a set of levels of

ambition for the sector, notably “to peak GHG emissions from international shipping as soon as possible and to reach net-zero GHG emissions by or around, i.e. close to, 2050, taking into account different national circumstances” (see paras. 1.10.1, 3.1 and 3.3.4 of the 2023 IMO GHG Strategy).

81. In 2017 and 2018, the ICAO adopted Volumes III and IV, respectively, of Annex 16 to the Convention on International Civil Aviation (hereinafter “the Chicago Convention”). Annex 16 to the Chicago Convention contains international standards and recommended practices that govern the environmental impacts of international aviation. Volumes III and IV of Annex 16 relate to climate change mitigation. Volume III concerns the certification of aeroplane carbon dioxide emissions, while Volume IV establishes a carbon offsetting and reduction scheme for international aviation.

82. On 16 September 1987, the Montreal Protocol was adopted as a protocol to the Vienna Convention for the Protection of the Ozone Layer and entered into force on 1 January 1989. To date, there are 197 Parties to it, including all States Parties to the Convention. The Montreal Protocol deals with the phase-out of the production and consumption of chemicals that deplete the ozone layer, including chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), which are GHGs. An amendment to the Montreal Protocol adopted on 15 October 2016 (hereinafter “the Kigali Amendment”) provides for the phase-down of hydrofluorocarbons (HFCs), used to replace HCFCs, and which are substances that are not ozone depleting but are potent GHGs. The Kigali Amendment entered into force on 1 January 2019 (with the exception of the amendment to article 4 of the Montreal Protocol (control of trade with non-parties) which will enter into force on 1 January 2033). To date, there are 159 Parties to the Kigali Amendment.

III. Jurisdiction and discretion

83. The Tribunal will now proceed to the issue of jurisdiction and discretion. It will first consider whether it has jurisdiction to give the advisory opinion requested by the

Commission and, if so, whether there is any reason the Tribunal should, in the exercise of its discretion, decline to answer the Request.

A. Jurisdiction

84. The Tribunal's jurisdiction to render an advisory opinion is based on article 21 of its Statute. This provision reads: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

85. In *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (hereinafter "the *SRFC Advisory Opinion*"), the Tribunal stated that its jurisdiction comprises three elements:

> (i) all "disputes" submitted to the Tribunal in accordance with the Convention; (ii) all "applications" submitted to the Tribunal in accordance with the Convention; and (iii) all "matters" ("toutes les fois que cela" in French) specifically provided for in any other agreement which confers jurisdiction on the Tribunal
> (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015,* p. 4, at p. 21, para. 54).

86. The Tribunal further stated that the term "all matters" ("*toutes les fois que cela*" in French) includes advisory opinions, if specifically provided for in "any other agreement which confers jurisdiction on the Tribunal" (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 21, para. 56).

87. The Tribunal also clarified that the expression "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" does not by itself establish the advisory jurisdiction of the Tribunal. In terms of article 21 of the Statute, it is the "other agreement" which confers such jurisdiction on the Tribunal. When the "other agreement" confers advisory jurisdiction on the Tribunal, the Tribunal is then rendered competent to exercise such jurisdiction with regard to "all matters" specifically provided for in the "other agreement". Article 21 and the

"other agreement" conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 22, para. 58).

88. Article 2, paragraph 2, of the COSIS Agreement states:

> Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.

The Tribunal considers that by providing for authorization enabling the Commission to request advisory opinions from the Tribunal, the COSIS Agreement "confers jurisdiction on the Tribunal" within the meaning of article 21 of the Statute.

89. Thus, article 21 of the Statute and the COSIS Agreement conferring jurisdiction on the Tribunal constitute the substantive legal basis of the advisory jurisdiction of the Tribunal in this case.

90. The Tribunal notes that its finding in the *SRFC Advisory Opinion* regarding the legal basis of its advisory jurisdiction has been supported by most States Parties to the Convention.

91. The Tribunal further notes that most participants in the current proceedings expressed the view that the Tribunal has jurisdiction to render the advisory opinion requested by the Commission.

92. The Tribunal also observes that the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (hereinafter "the BBNJ Agreement"), the latest agreement adopted to ensure the effective

implementation of the Convention, specifically provides that the Conference of the Parties may request the Tribunal to give an advisory opinion. This Agreement was adopted by consensus on 19 June 2023 and has not yet entered into force.

93. The Tribunal now turns to the prerequisites to be satisfied in order for the Tribunal to exercise its jurisdiction. Article 138, paragraphs 1 and 2, of the Rules reads as follows:

> 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
>
> 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

94. As the Tribunal clarified in the *SRFC Advisory Opinion*, article 138 of the Rules does not establish the jurisdiction of the Tribunal but only furnishes the prerequisites that must be met before the Tribunal can exercise its advisory jurisdiction (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 22, para. 59).

95. These prerequisites are as follows: (a) there is an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion; (b) the request has been transmitted to the Tribunal by a body authorized by or in accordance with the agreement; and (c) the request submitted to the Tribunal concerns a legal question.

96. As regards the first prerequisite, the Tribunal notes that the COSIS Agreement is an international agreement which entered into force on 31 October 2021 and to which six States were Parties at the time the Request was filed.

97. As set out in its preamble, the basis for the COSIS Agreement is the need to address the adverse effects that GHG emissions have on the marine environment,

including marine living resources, and their devastating impact for small island States. Furthermore, the Commission's mandate, as stated in article 1, paragraph 3, of the COSIS Agreement, is "to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations."

98. Considering that one of the main objectives of the Convention is the protection and preservation of the marine environment, to which Part XII is dedicated, it is clear that the COSIS Agreement is an international agreement related to the purposes of the Convention.

99. In article 1, paragraph 1, the COSIS Agreement establishes the Commission of Small Island States on Climate Change and International Law as an intergovernmental organization with international legal personality. Pursuant to article 3, membership of the Commission is open to all members of the Alliance of Small Island States (AOSIS) that become parties to the COSIS Agreement.

100. The Tribunal further observes that article 2, paragraph 2, of the COSIS Agreement specifically states that "the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea ("ITLOS") on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules."

101. As to the second prerequisite whereby the request must be transmitted to the Tribunal by a body authorized by or in accordance with the COSIS Agreement, the Tribunal notes that the Commission, during its Third Meeting, convened on 26 August 2022, unanimously decided to submit to the Tribunal a request for an advisory opinion pursuant to article 3, paragraph 5, of the Agreement. The Request was subsequently transmitted to the Tribunal by the Co-Chairs of the Commission (see paras. 1 and 3 above).

102. The Tribunal now turns to the third prerequisite whereby the request for an advisory opinion must concern a legal question. The questions read as follows:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

103. The Tribunal considers that these questions have been framed in terms of law. To respond to these questions, the Tribunal is called upon to interpret the relevant provisions of the Convention and of the COSIS Agreement and to identify other relevant rules of international law (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at pp. 23-24, para. 65).

104. The Tribunal therefore concludes that the questions raised by the Commission are of a legal nature.

105. In addition to the aforementioned prerequisites, article 21 of the Statute lays down that the jurisdiction of the Tribunal extends to "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." Accordingly, it is necessary for the Tribunal to assess whether the questions posed by the Commission constitute matters which fall within the framework of the COSIS Agreement (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 24, para. 67).

106. In this regard, the questions need not necessarily be limited to the interpretation or application of any specific provision of the COSIS Agreement. It is

enough if the questions have a “sufficient connection” with the purpose of the COSIS Agreement (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 24, para. 68).

107. The Tribunal notes that article 2, paragraph 1, of the COSIS Agreement provides that the purpose of the Commission is to, *inter alia*, “[assist] Small Island States to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment”.

108. The Tribunal is satisfied in the present case that the questions posed by the Commission (see para. 102 above) have a sufficient connection with the purpose of the COSIS Agreement. The questions are directly relevant to matters which fall within the framework of the Agreement.

109. For the aforementioned reasons, the Tribunal finds that it has jurisdiction to give the advisory opinion requested by the Commission.

B. Discretion

110. Having found that it has jurisdiction to entertain the Request, the Tribunal will now turn to the issue of its discretionary power to decline to render an advisory opinion in the present case.

111. The Tribunal stated in the *SRFC Advisory Opinion* that “[a]rticle 138 of the Rules, which provides that ‘the Tribunal may give an advisory opinion’, should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied” (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 25, para. 71). The Tribunal further stated that “[i]t is well settled that a request for an advisory opinion should not in principle be refused except for ‘compelling reasons’” (see *ibid*.; see also *Legality of*

the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 235, para. 14).

112. Some participants in the present proceedings expressed the view that the lack of consent of States not party to the COSIS Agreement to any aspect of the Request might constitute a ground for the Tribunal to decline to give an advisory opinion.

113. Contrary to this view, it was contended that the fact that the advisory opinion has been requested by some States Parties to the Convention, and not by all, cannot be a reason for the Tribunal to refrain from giving the opinion. The lack of consent, it was stated, has no bearing on the discretionary power of the Tribunal to refuse to give an advisory opinion to an entity entitled to request it.

114. The Tribunal notes that an advisory opinion is given to the requesting entity, which considers it desirable in order to obtain enlightenment as to the course of action it should take. An advisory opinion as such has no binding force and the consent of States not members of the requesting entity is not relevant (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 26, para. 76).

115. The Tribunal observes that, in response to its invitation, a large number of participants in the written and oral proceedings furnished the Tribunal with information relevant to the Request. A vast majority of the participating States Parties expressed support for an advisory opinion to be rendered by the Tribunal and were of the view that the present proceedings did not give rise to any compelling reasons for the Tribunal to exercise its discretion to decline to give an advisory opinion. Some participants drew attention to the urgency of the threat of climate change to member States of the Commission and also to the collective interest of States Parties to the Convention in emphasizing that there were compelling reasons for the Tribunal to proceed expeditiously to answer the questions.

116. Another reason the Tribunal might decline to exercise its jurisdiction is the possibility that the questions raised in the Request may be closely related to questions which are the subject of a dispute affecting the rights and obligations of

third States that have not consented to the Request (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at pp. 25-26, para. 75). The Tribunal is not aware of any legal dispute between the members of the Commission and any other States relating to the subject matter of the advisory opinion which would require the latter's consent.

117. Some participants expressed the view that the Commission, in this case, was not seeking guidance in respect of its own actions but rather clarification in respect of the obligations of States Parties to the Convention regarding the protection and preservation of the marine environment.

118. In this regard, the Tribunal is aware of the importance of the questions in the Request for the members of the Commission and that by answering the questions, the Tribunal would be assisting the Commission in the performance of its activities and contributing to the fulfilment of its mandate, including the implementation of the Convention.

119. It was further argued by some participants that the Request contains questions that are wide, abstract and of a general nature and that since the Request is framed in broad terms, the Tribunal should have careful regard to the parameters of its judicial function. On the other hand, it was contended that the questions in the Request are clear enough and that there is sufficient information and evidence to enable the Tribunal to give an advisory opinion.

120. The Tribunal is of the view that the questions raised by the Commission are clear and specific enough to enable it to give an advisory opinion. The Tribunal considers that sufficient information and evidence have been made available on which to base its findings. The Tribunal further finds that the Request is compatible with its judicial functions, as it is called upon to clarify and provide guidance concerning the specific obligations of States Parties to the Convention by interpreting and applying the provisions of the Convention, in particular the provisions of Part XII, and other relevant rules of international law. As the Tribunal made clear in the *SRFC Advisory Opinion*, it "does not take a position on issues beyond the scope of its

judicial functions" (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, *ITLOS Reports 2015*, p. 4, at p. 25, para. 74).

121. In light of the foregoing, the Tribunal deems it appropriate to render the advisory opinion requested by the Commission.

122. The Tribunal is mindful of the fact that climate change is recognized internationally as a common concern of humankind. The Tribunal is also conscious of the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most vulnerable to such impacts. Bearing this in mind, the Tribunal will provide clarification on the issues raised by the Commission.

IV. Applicable law

123. The Tribunal will now address the applicable law in this case. Article 138, paragraph 3, of the Rules states that "[t]he Tribunal shall apply *mutatis mutandis* articles 130 to 137" of the Rules in the exercise of its functions relating to advisory opinions. These articles are those which lay down the rules applicable to the Seabed Disputes Chamber in the exercise of its functions relating to advisory opinions.

124. Article 130, paragraph 1, of the Rules states:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

125. The Tribunal refers in this regard to article 23 of the Statute, which provides that "[t]he Tribunal shall decide all disputes and applications in accordance with article 293."

126. Article 293, paragraph 1, of the Convention reads:

> A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

127. Therefore, the Tribunal concludes that the Convention, the COSIS Agreement and other relevant rules of international law not incompatible with the Convention constitute the applicable law in this case.

V. Interpretation of the Convention and the relationship between the Convention and external rules

128. Having addressed the applicable law, the Tribunal will now proceed to the question of the interpretation of the Convention and the relationship between the Convention and other relevant rules of international law (external rules). The questions posed by the Commission to the Tribunal relate to the interpretation of the Convention. The rules governing treaty interpretation are codified in articles 31 to 33 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") and form part of the applicable law in this case.

129. The general rule of treaty interpretation is contained in article 31 of the VCLT and reads:

> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

130. The Tribunal notes that many participants in the present proceedings have emphasized the open character of the Convention and its constitutional and framework nature. In the Tribunal's view, coordination and harmonization between the Convention and external rules are important to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument. The relationship between the provisions of Part XII of the Convention, entitled "Protection and Preservation of the Marine Environment", and external rules is of particular relevance in this case.

131. In this regard, the Tribunal points out the following mechanisms through which a relationship between the provisions of Part XII of the Convention and external rules is formed. First, the Convention contains certain provisions – also called rules of reference – that refer to external rules. These rules of reference employ different terms and have both a different scope and legal effect.

132. Second, article 237 of the Convention clarifies the relationship of Part XII of the Convention with other treaties relating to the protection and preservation of the marine environment. Article 237 reads:

> *Obligations under other conventions on the protection and preservation of the marine environment*
>
> 1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

> 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

133. Article 237 of the Convention reflects the need for consistency and mutual supportiveness between the applicable rules. On the one hand, Part XII of the Convention is without prejudice to the specific obligations of States under special conventions and agreements concluded previously in this field and to agreements which may be concluded in furtherance of the general principles of the Convention. On the other hand, such specific obligations should be carried out in a manner consistent with the general principles and objectives of the Convention.

134. The rules of reference contained in Part XII of the Convention and article 237 of the Convention demonstrate the openness of Part XII to other treaty regimes.

135. Third, article 31, paragraph 3(c), of the VCLT (see para. 129 above) requires that account be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties. This method of interpretation ensures, as observed by the International Court of Justice (hereinafter “the ICJ”), that treaties do not operate in isolation but are “interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53). The term “any relevant rules of international law“ includes both relevant rules of treaty law and customary law.

136. The Tribunal is of the view that, subject to article 293 of the Convention, the provisions of the Convention and external rules should, to the extent possible, be interpreted consistently. In this context, the Tribunal notes that the Study Group of the International Law Commission (hereinafter “the ILC”), in its 2006 Report on the Fragmentation of International Law, concluded that “[i]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent

possible, be interpreted so as to give rise to a single set of compatible obligations" (Fragmentation of International Law, Report of the Study Group of the ILC, 2006, p. 8; see also Guideline 9 of the 2021 ILC Guidelines on the protection of the atmosphere).

137. As reflected in paragraphs 67 to 82 above, there is an extensive treaty regime addressing climate change that includes the UNFCCC, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment. The Tribunal considers that, in the present case, relevant external rules may be found, in particular, in those agreements.

VI. Scope of the Request and relationship between the questions

A. Scope of the Request

138. Before responding to the questions submitted to it, the Tribunal wishes to examine the scope of the Request.

139. There are two questions before the Tribunal:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

The phrase: "What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea …, including under Part XII", applies both to Question (a) and Question (b). As the Tribunal has stated above, the questions raised by the Commission are clear enough to enable it to give an advisory opinion

(see para. 120 above). However, certain elements of that phrase have elicited divergent views in the present proceedings. Since the phrase is important to the scope of the Request, the Tribunal will now address these elements.

140. The questions posed to the Tribunal are concerned with the specific obligations "of State Parties to the United Nations Convention on the Law of the Sea". This wording suggests that the Commission seeks an opinion from the Tribunal on the specific obligations under the Convention. However, in the present proceedings, certain participants invited the Tribunal to provide guidance on States Parties' obligations under international law to curb anthropogenic GHG emissions into the atmosphere and the marine environment. In particular, it was suggested that the Tribunal could determine specific obligations assumed by States under the UNFCCC and the Paris Agreement.

141. Article 2, paragraph 2, of the COSIS Agreement authorizes the Commission to request advisory opinions from the Tribunal "on any legal question *within the scope of the 1982 United Nations Convention on the Law of the Sea*, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules" (emphasis added). The Commission itself has suggested that both questions concern States Parties' obligations under the Convention. Specifically, in its final oral statement in the present proceedings, the Commission asked the Tribunal "to state, clearly and objectively *what the current legal duties of States Parties are under UNCLOS* in relation to the impact of climate change on the marine environment" (emphasis added).

142. The Tribunal concludes that it is requested to render an advisory opinion on the specific obligations of States Parties under the Convention. In order to identify these obligations and clarify their content, the Tribunal will have to interpret the Convention and, in doing so, also take into account external rules, as appropriate.

143. The questions posed to the Tribunal refer to the specific obligations of States Parties to the Convention, "including under Part XII". Many participants focused their pleadings on the obligations contained in Part XII. However, other participants noted

that the questions are not limited to the obligations under Part XII of the Convention and addressed obligations under other parts of the Convention as well.

144. The Tribunal is of the view that, as a matter of ordinary interpretation, the word “including” in the above phrase indicates that the Tribunal is requested to provide guidance as to the specific obligations of the States Parties under Part XII as well as other relevant provisions of the Convention.

145. The Tribunal will now consider whether the issues of responsibility and liability fall within the scope of the Request. Some participants in the present proceedings have stated that issues of responsibility and liability are relevant, in particular because the Request refers to obligations without characterizing them as primary or secondary. In contrast, it has been argued that the Request concerns only primary obligations and does not involve issues of responsibility and liability, nor does it invite the Tribunal to consider legal consequences arising from the breach of obligations. The Commission, for instance, has explained that it is asking the Tribunal to state what the legal duties of States Parties are in relation to the impacts of climate change on the marine environment and not for which acts or omissions injunctive relief or compensation is available.

146. The Commission asks the Tribunal to identify specific “obligations” under the Convention; terms such as “responsibility” and “liability” do not appear in the Request. The Tribunal notes that article 1, paragraph 3, of the COSIS Agreement clearly distinguishes between the obligations, on the one hand, and responsibility for their breaches, on the other (see para. 97 above). Considering the Request against the backdrop of this provision, the Tribunal is of the view that if the Commission had intended for the Tribunal to address issues of responsibility and liability, it would have expressly formulated the Request accordingly.

147. In this regard, the Request is notably different from the requests for advisory opinion previously dealt with by the Seabed Disputes Chamber and the Tribunal. The request submitted to the Seabed Disputes Chamber explicitly asked not only about the responsibilities and obligations of States Parties with respect to the sponsorship of activities in the Area but also, *inter alia*, about the extent of liability of a State Party

for any failure to comply with the provisions of the Convention and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 by an entity it has sponsored (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 15, para. 1). The request to the Tribunal for an advisory opinion submitted by the SRFC expressly asked not only about the obligations of the flag State but also, *inter alia,* about the extent to which a State should be held liable for illegal, unreported and unregulated fishing activities conducted by vessels under its flag (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission,* Advisory Opinion*, 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 8, para. 2).

148. In both previous advisory opinions, a distinction has been made between primary and secondary obligations under international law (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at pp. 30-31, paras. 64-71; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 44, para. 145). In the present case, the Tribunal will confine itself to primary obligations. However, to the extent necessary to clarify the scope and nature of primary obligations, the Tribunal may have to refer to responsibility and liability.

149. The Tribunal wishes to address another issue concerning the Request's scope. Some participants, referring to the mention of sea level rise in the Request, invited the Tribunal to deal with the issue of the relationship between sea level rise and existing maritime claims or entitlements. On the other hand, other participants expressed the view that, while acknowledging the importance of this issue, the present proceedings should focus instead on environmental issues. The Commission, in particular, explained that questions relating to consequences of sea level rise upon maritime zones, entitlements and boundaries are not before the Tribunal in the present case.

150. The Request mentions sea level rise in both questions. The preamble of the COSIS Agreement states, *inter alia*, that the Parties to the Agreement affirm that

maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the Convention, and the rights and entitlements that flow from them, “shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise”. However, neither the Request nor the decision that approved it refers to this provision or otherwise addresses the issue of base points, baselines, claims, rights or entitlements to maritime zones established under the Convention, or maritime boundaries, and the corresponding obligations in the context of “physical changes connected to climate change-related sea-level rise”. Instead, the Request employs sea level rise to form part of the context within which the Tribunal should consider the specific obligations concerning the protection and preservation of the marine environment, a matter on which the Request clearly concentrates. The Tribunal is of the view that if the Commission had intended to solicit an opinion on the consequences of sea level rise for base points, baselines, claims, rights or entitlements to the maritime zones established under the Convention, or maritime boundaries, and the corresponding obligations, it would have expressly formulated the Request accordingly.

B. Relationship between the questions

151. Before examining the two questions in the Request, the Tribunal wishes to address the relationship between them. Several participants in the proceedings expressed the view that the obligation to protect and preserve the marine environment reflected in the second question is more comprehensive than the obligation to prevent, reduce and control pollution of the marine environment reflected in the first question; therefore, the second question is broader than the first question. In this regard, some participants proposed that the Tribunal address Question (b) prior to Question (a).

152. The Tribunal considers that the obligation addressed in the second question is broader in scope than the obligation addressed in the first question. The obligation to protect and preserve the marine environment encompasses the obligation to prevent, reduce and control marine pollution. In addition, it extends to the protection of the marine environment from any negative impacts. As the arbitral tribunal in the *Chagos Marine Protected Area* case stated, “[w]hile the control of pollution is

certainly an important aspect of environmental protection, it is by no means the only one" (*Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI*, p. 359, at pp. 499-500, para. 320; see also *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *Advisory Opinion*, *2 April 2015, ITLOS Reports 2015*, p. 4, at p. 37, para. 120; *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,* p. 280, at p. 295, para. 70; *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016*, *RIAA, Vol. XXXIII*, p. 153, at pp. 521-522, para. 945). Thus, implementing the obligation to prevent, reduce and control pollution of the marine environment does not exhaust the implementation of the obligation to protect and preserve it. Given this relationship between the two obligations addressed in the questions before the Tribunal, it is plain that the second question is more comprehensive than the first question. The Tribunal will follow the order of the questions as they were posed in the Request and in its response to the second question will deal with the obligations not addressed in the first question.

VII. Question (a)

153. The Tribunal will now turn to the first question posed by the Commission. The question reads:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

A. Clarification of terms and expressions

154. The first question posed to the Tribunal by the Commission concerns the specific obligations of States Parties to the Convention to prevent, reduce and

control marine pollution in relation to the deleterious effects that result or are likely to result from climate change and ocean acidification, which are caused by anthropogenic GHG emissions into the atmosphere. Before responding to the question, the Tribunal wishes to clarify certain terms and expressions employed therein to determine the precise meaning of the question.

155. The Tribunal first notes that the question asks the Tribunal to identify specific obligations of “State Parties to UNCLOS”. The term “State Parties” refers to States and international organizations which have become Parties to the Convention in accordance with article 1, paragraph 2, subparagraphs 1 and 2, of the Convention. Currently, 168 States and one international organization are Parties to the Convention.

156. The next point the Tribunal wishes to clarify is the meaning of “specific obligations” to prevent, reduce and control pollution of the marine environment. The term “specific obligations” may denote concrete or particularized obligations, in contrast to general obligations. It may also mean obligations specific to pollution of the marine environment in relation to the deleterious effects arising from climate change and ocean acidification. In responding to the question, the Tribunal will bear in mind both aspects of the term “specific”.

157. The terms “climate change”, “greenhouse gas emissions”, and “ocean acidification” do not appear in the Convention. The Tribunal understands that those terms are used in Question (a) as they are defined in relevant legal instruments relating to climate change or in authoritative scientific works such as in the IPCC reports. For the purpose of responding to Question (a), the Tribunal accepts those definitions and usage, which have already been explained in paragraphs 52, 54, 60 and 68 above.

158. Question (a) points to the specific obligations under the Convention to prevent, reduce and control marine pollution “in relation to” the deleterious effects that result or are likely to result from climate change and ocean acidification, which are caused by anthropogenic GHG emissions. The Tribunal observes that the question is formulated on the premise that these obligations necessarily apply to

climate change and ocean acidification. However, in the Tribunal's view, the validity of this premise cannot be presumed and needs to be examined. Therefore, the Tribunal will first address whether the obligations under the Convention apply to climate change and ocean acidification. If they do, the Tribunal will then examine how those obligations should be interpreted and applied in relation to the deleterious effects caused by anthropogenic GHG emissions.

B. Whether anthropogenic GHG emissions fall within the definition of marine pollution under the Convention

159. In responding to Question (a), the first issue that should be addressed is whether anthropogenic GHG emissions into the atmosphere fall under the definition of "pollution of the marine environment" under article 1, paragraph 1, subparagraph 4, of the Convention.

160. A large majority of the participants in the proceedings recognized that anthropogenic GHG emissions meet the definition of "pollution of the marine environment" under article 1, paragraph 1, subparagraph 4, of the Convention. On the other hand, some participants argued that GHG emissions should not be considered "pollution of the marine environment" and that to include them within the ambit of "pollution of the marine environment" would be tantamount to the Tribunal exercising legislative functions.

161. Article 1, paragraph 1, subparagraph 4, of the Convention reads:

> For the purposes of this Convention … "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

This definition does not provide a list of pollutants or forms of pollution of the marine environment. Instead, it sets out three criteria to determine what constitutes such pollution: (1) there must be a substance or energy; (2) this substance or energy must be introduced by humans, directly or indirectly, into the marine environment; and

(3) such introduction must result or be likely to result in deleterious effects. These criteria are cumulative; all of them must be satisfied to meet the definition. The definition is general in that it encompasses whatever satisfies these criteria.

162. The Tribunal will now examine whether anthropogenic GHG emissions satisfy the criteria set out above.

163. The terms “substance” and “energy” have a broad meaning. The Tribunal is of the view that, in the context of the present case, the term “substance” refers to any particular kind of matter with uniform properties or a kind of matter of a definite chemical composition. As to the term “energy”, the Tribunal notes that one of the forms of energy is thermal energy or heat. It further notes that the ILC, in its commentary to the definition of “atmospheric pollution” – and specifically to the “introduction of energy” – in the 2021 Draft guidelines on the protection of the atmosphere, explains that this reference to energy is understood to include heat (ILC Draft guidelines on the protection of the atmosphere, Commentary to Guideline 1, subpara. (b)).

164. The term “gas”, in the context of the present case, refers to a substance in a form like air that is neither solid nor liquid. It is clear from the ordinary meaning of the word “gas” and from the UNFCCC and IPCC definitions of the term “greenhouse gases” (see paras. 54 and 68 above) that they are substances. Consequently, the first criterion of the Convention’s definition of “pollution of the marine environment” is satisfied.

165. The Tribunal will now address the second criterion. The first question concerns, in the context of pollution of the marine environment, not GHGs as such but “anthropogenic emissions” thereof. In view of the definitions of the term “emissions” in the UNFCCC (see para. 68 above) and of the terms “anthropogenic” and “anthropogenic emissions” by the IPCC (see para. 54 above), it is clear that anthropogenic GHG emissions are produced “by man”, within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.

166. The term “marine environment” appears in many provisions of the Convention. However, the Convention does not give a definition of it. The term “marine” means belonging to, existing or found in, or produced by, the sea; belonging to, or situated at, the sea-side, bounded by the sea. The term “environment” denotes the area surrounding a place or thing; the surroundings or physical context and conditions in which an organism lives, develops, or a thing exists; the external conditions in general affecting the life, existence, or properties of an organism or object. The ICJ has recognized that the environment “represents the living space, the quality of life and the very health of human beings, including generations unborn” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 241, para. 29). Thus, it may be assumed that the term “marine environment” in article 1, paragraph 1, subparagraph 4, of the Convention combines both spatial and material components. This is supported, in particular, by the context in which the term is used in the Convention, in light of its object and purpose, by the relevant subsequent practice of the States Parties to the Convention regarding its interpretation, and by the corresponding international jurisprudence.

167. According to its fourth preambular paragraph, one of the main goals of the Convention is to establish a legal order for the seas and oceans that will promote the protection and preservation of the marine environment. Here, the marine environment is referred to in a general sense. The Tribunal notes that most of the provisions of Part XII and, in particular, articles 192 and 194, use the term “marine environment” generally, without specifying to which maritime zone it relates.

168. Article 1, paragraph 1, subparagraph 4, of the Convention refers to “the marine environment, including estuaries”. Articles 145, paragraph (a), and 211, paragraph 1, refer to “the marine environment, including the coastline”. This indicates that the marine environment under the Convention encompasses certain spaces beyond maritime zones established thereunder.

169. Under article 194, paragraph 5, of the Convention, the measures taken in accordance with Part XII, i.e., protection and preservation of the marine environment, “shall include those necessary to protect and preserve rare or fragile ecosystems as

well as the habitat of depleted, threatened or endangered species and other forms of marine life." The term "ecosystem" is not defined in the Convention, but article 2 of the Convention on Biological Diversity (hereinafter "the CBD"), which was adopted on 5 June 1992 and entered into force on 29 December 1993, defines ecosystem to mean "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit." The IPCC defines "ecosystem" as a "functional unit consisting of living organisms, their non-living environment and the interactions within and between them" (2019 Report, Annex I, Glossary, p. 684). In this regard, the Tribunal recalls that in the *Southern Bluefin Tuna* cases and in the *SRFC Advisory Opinion*, it held that living resources of the sea and marine life are part of the marine environment (*Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 61, para. 216; see also *Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI*, p. 359, at p. 580, para. 538).

170. The Tribunal notes that the term "marine environment" is defined in the regulations relating to prospecting and exploration of mineral resources in the Area adopted by the Authority. These regulations all provide the same definition of the term "marine environment", stating that it

> includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof.
> (Regulations on prospecting and exploration for polymetallic sulphides in the Area, regulation 1, para. 3(c); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, regulation 1, paragraph 3(d); Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, regulation 1, paragraph 3(c).)

This definition of the marine environment has spatial and material dimensions. In clarifying the term "marine environment", the Tribunal has taken these regulations

into account as representing the practice of the States Parties to the Convention and of the Authority in this respect.

171. The Tribunal also notes that the participants in the present proceedings who addressed the meaning of the term “marine environment” expressed the view that it should be understood broadly.

172. The ordinary meaning of the word “introduction” relevant in the present context is the action of introducing, bringing in or inserting. The ordinary relevant meaning of the word “directly” indicates the absence of an intervening medium or agent; that is to say, through a direct process or mode. The ordinary relevant meaning of the word “indirectly” suggests indirect action or through indirect means, connection, agency or instrumentality, or an intervening person or thing. Given these ordinary meanings of “direct” and “indirect”, the introduction of the anthropogenic GHGs into the marine environment may take place either immediately, through a direct mode or in stages. According to the science (see para. 60 above), because of its solubility and chemical reactivity, carbon dioxide from human activities, which has the largest share and growth in gross GHG emissions (2023 Synthesis Report, p. 4), is taken up by the ocean much more effectively than other emitted gases. Carbon dioxide then dissolves in sea water and mixes into the deep ocean (see, e.g., Climate Change 2001, The Scientific Basis, pp. 187, 197-199). Thus, GHGs, as substances, are directly introduced by humans into the marine environment. Furthermore, according to the science (see para. 54 above), GHGs trap heat within the atmosphere and the ocean then stores this heat. In this way, and considering that heat is a form of energy, humans indirectly introduce energy into the marine environment through anthropogenic GHG emissions.

173. In light of the above, the Tribunal concludes that anthropogenic GHG emissions satisfy the second criterion of the “pollution of the marine environment” definition.

174. To fall within the definition of marine pollution, the introduction of substances or energy must result or be likely to result “in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine

activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities". The Tribunal notes that the "deleterious effects" illustrated in article 1, paragraph 1, subparagraph 4, of the Convention are not exhaustive, as implied by the words "such ... as" and, in any case, are not limited to the marine environment. This is clear, considering, for instance, that effects on human health, marine activities or amenities are mentioned. The definition also points to actual ("results") or potential ("likely to result") deleterious effects. The Tribunal further notes that the definition neither qualifies the "likelihood" of the deleterious effects nor specifies the level of "harm" that can be considered a deleterious effect.

175. The introduction of excess heat (energy) into the marine environment due to the accumulation of GHGs in the atmosphere results in ocean warming. Being itself a component of climate change, ocean warming, according to the IPCC findings made with high confidence, "accounted for 91% of the heating in the climate system" (WGI 2021 Report, p. 11). Anthropogenic GHG emissions thereby cause climate change, which includes ocean warming and sea level rise. The introduction of anthropogenic GHGs into the marine environment also causes ocean acidification (see para. 60 above). In turn, climate change, including ocean warming and sea level rise, and ocean acidification, interacting with other climatic and non-climatic factors, produce multiple deleterious effects on the marine environment and beyond. These effects of climate change and ocean acidification are observed and explained by the science and are widely acknowledged by States (see paras. 51 to 61 above). In particular, adverse effects of climate change are recognized by international climate treaties.

176. The UNFCCC has already acknowledged that human activities have been substantially increasing the atmospheric concentrations of GHGs, that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind, and that climate change has adverse effects (UNFCCC, first and second preambular paragraphs). This has been further recognized in the Kyoto Protocol and the Paris Agreement.

177. The UNFCCC defines the adverse effects of climate change as

> changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.
> (UNFCCC, Article 1, para. 1)

178. The adverse effects of climate change and ocean acidification satisfy the criterion relating to “deleterious effects” provided in article 1, paragraph 1, subparagraph 4, of the Convention. Thus, through the introduction of carbon dioxide and heat (energy) into the marine environment, anthropogenic GHG emissions cause climate change and ocean acidification, which results in the deleterious effects illustrated in the definition of pollution of the marine environment.

179. In light of the above, the Tribunal concludes that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.

C. Part XII of the Convention and marine pollution

180. Having found that anthropogenic GHG emissions into the atmosphere constitute “pollution of the marine environment” within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention, the Tribunal will now turn to the specific obligations of States Parties to the Convention to prevent, reduce and control such pollution.

181. In this regard, the Tribunal will first identify the provisions of the Convention relevant to its response to Question (a). It will then interpret those provisions to the extent necessary to respond to the question and examine how they should be applied in relation to anthropogenic GHG emissions causing pollution of the marine environment. The Tribunal will conclude by setting out the specific obligations of States Parties to prevent, reduce and control pollution of the marine environment arising from climate change and ocean acidification.

182. The provisions of the Convention which are relevant to answering Question (a) are those dealing with the obligations to prevent, reduce and control pollution of the marine environment. These provisions are mostly found in Part XII of the Convention. Before identifying and analysing them, the Tribunal finds it appropriate to give an overview of the system for the protection and preservation of the marine environment set out in Part XII of the Convention, in particular the marine pollution regime.

183. As stated in the fourth preambular paragraph of the Convention, the protection and preservation of the marine environment is one of the goals to be achieved by the Convention. To that end, the Convention, in particular Part XII, sets out fundamental principles to provide direction and guidance to States in their endeavour to protect and preserve the marine environment, and imposes upon States various obligations in this regard.

184. Article 192 of the Convention, the first article of Part XII, provides that "States have the obligation to protect and preserve the marine environment." While article 192 imposes upon States a legal obligation, this provision is, at the same time, a statement of principle upon which the legal order for the protection and preservation of the marine environment under the Convention is based.

185. Article 193 of the Convention provides that

> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

186. These two articles together reflect, in the context of the protection and preservation of the marine environment, a principle of international environmental law, which has its origin in the Stockholm Declaration on the Human Environment adopted on 16 June 1972 (hereinafter "the Stockholm Declaration"). Principle 21 of the Stockholm Declaration reads:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do

> not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

This principle was further developed in Principle 2 of the Rio Declaration on Environment and Development adopted on 14 June 1992 (hereinafter "the Rio Declaration"), which refers to the sovereign right of States to exploit their own resources pursuant to their own environmental and "developmental" policies.

187. It should be noted that, while article 193 of the Convention recognizes the sovereign right of States to exploit their natural resources pursuant to their environmental policies, it further provides that States must exercise such right "in accordance with their duty to protect and preserve the marine environment." This article thus places a constraint upon States' exercise of their sovereign right. This shows the importance the Convention attaches to the protection and preservation of the marine environment.

188. The approach of the Convention to the protection and preservation of the marine environment is manifest in the subsequent provisions of Part XII. Those provisions impose upon States, among other obligations, those to prevent, reduce and control pollution of the marine environment. While the obligation to protect and preserve the marine environment is much broader in scope than the obligation to prevent, reduce and control marine pollution, the latter obligation constitutes the main component of the former obligation under the Convention.

189. Many provisions of Part XII of the Convention are directly or indirectly concerned with the prevention, reduction and control of pollution of the marine environment. They are structured in such a way as to provide for what may be called the regime for regulating marine pollution. The key provision in this regard is article 194 of the Convention, which requires States, *inter alia*, to take all necessary measures to prevent, reduce and control pollution of the marine environment from "any source". Thus, this article lays down an obligation common to all sources of pollution with which States must comply.

190. This obligation under article 194 of the Convention is complemented and elaborated upon by provisions in section 5 of Part XII (articles 207 to 212), which address the obligations of States with respect to specific sources of pollution. Those provisions are essentially concerned with the adoption of national legislation and the establishment of international rules and standards to regulate marine pollution. Section 6 of Part XII (articles 213 to 222), which corresponds to source-specific obligations under section 5, addresses the obligations of States to enforce national legislation and to implement international rules and standards.

191. In addition, there are other provisions in Part XII relevant to the prevention, reduction and control of pollution of the marine environment. They include provisions in section 2 on global and regional cooperation, section 3 on technical assistance and section 4 on monitoring and environmental assessment.

192. For the purpose of the present Advisory Opinion, the Tribunal will first consider the obligations of States under article 194 of the Convention and how they should be interpreted and applied in relation to marine pollution arising from anthropogenic GHG emissions. It will then proceed to examine the obligations of States with respect to the specific sources of pollution provided for in sections 5 and 6 of Part XII. The Tribunal will subsequently consider other relevant obligations under sections 2, 3 and 4 of Part XII.

D. Obligations applicable to any source of pollution under article 194 of the Convention

193. Article 194 of the Convention is the primary provision in the marine pollution regime set out in Part XII. This article provides for obligations to prevent, reduce and control marine pollution applicable to any source. Most of the participants in the proceedings took the view that article 194 of the Convention is a key provision in responding to Question (a).

194. Article 194 of the Convention reads:

Measures to prevent, reduce and control pollution of the marine environment

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;

(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the

> habitat of depleted, threatened or endangered species and other forms of marine life.

195. This article provides for three main obligations of States: first, the obligation under paragraph 1 to take necessary measures to prevent, reduce and control marine pollution; second, the obligation under paragraph 2 to take necessary measures to ensure that certain situations relating to pollution do not occur; and third, the obligation under paragraph 5 to take necessary measures to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

196. Although the third obligation is included in article 194 of the Convention addressing measures to prevent, reduce and control marine pollution, it is clear that the measures envisaged under paragraph 5 are not circumscribed to merely those concerning pollution. For that reason, this paragraph refers to the measures taken in accordance with “this Part” rather than “this article”. The Tribunal considers that the third obligation can be more adequately addressed in the context of its reply to Question (b) as to the specific obligations to protect and preserve the marine environment. In its response to Question (a), the Tribunal will accordingly confine itself to the two obligations under paragraphs 1 and 2.

1. Obligation under article 194, paragraph 1, of the Convention

197. Article 194, paragraph 1, of the Convention imposes upon States an obligation to take all necessary measures to prevent, reduce and control marine pollution from any source, regardless of the specific sources of such pollution. This obligation is applicable to any kind of pollution. As anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment, it follows that article 194, paragraph 1, applies to such pollution. Most of the participants in the present proceedings expressed the same view.

(a) Scope and content of the obligation

Objective

198. The aim of the obligation to take all necessary measures under article 194, paragraph 1, of the Convention is to "prevent, reduce and control" pollution of the marine environment from any source. As the objective of prevention refers to preventing pollution from occurring at all, it necessarily applies to pollution that has not yet occurred, namely, future or potential pollution. On the other hand, the objective of reducing and controlling pollution presupposes the existence of pollution. Thus, the objective of preventing, reducing and controlling pollution means preventing future or potential pollution and reducing and controlling existing pollution. The compound objective to prevent, reduce and control marine pollution should be understood in the context of the comprehensive nature of the obligation under article 194, paragraph 1, to prevent, reduce and control any kind of pollution from any source. It is also a reflection of the reality that prevention of pollution from all sources at all times is, in practice, not possible.

199. In relation to anthropogenic GHG emissions, the objective of preventing, reducing and controlling marine pollution should be appreciated on the basis of the scientific assessment that, even if anthropogenic GHG emissions were to cease, the deleterious effects on the marine environment would nevertheless continue owing to the extent of GHGs already accumulated in the atmosphere. The obligation under article 194, paragraph 1, of the Convention requires States to take all necessary measures with a view to reducing and controlling existing marine pollution from such emissions and eventually preventing such pollution from occurring at all. Therefore, this obligation does not entail the immediate cessation of marine pollution from anthropogenic GHG emissions.

200. The Tribunal notes in this regard Article 4, paragraph 1, of the Paris Agreement, which provides that

> [i]n order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country

> Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.

The Tribunal considers that the aim set out in the above provision is consistent with the objective of the obligation under article 194, paragraph 1, of the Convention.

Modalities

201. All measures necessary to prevent, reduce and control marine pollution shall be taken individually or jointly as appropriate. The phrase “as appropriate” in this context implies that there is no priority between an individual action and a joint action. Either action can be taken if it is appropriate. The appropriateness of an individual or joint action depends on the particular circumstances in which measures are taken. The reference to the word “jointly” indicates the importance of cooperation in addressing pollution of the marine environment. This point is also underscored by requiring States to “endeavour to harmonize their policies” in taking necessary measures as set forth in the final part of article 194, paragraph 1, of the Convention.

202. In relation to marine pollution from anthropogenic GHG emissions, given the global and transboundary nature of such pollution, joint actions should be actively pursued. It was contended in this regard that it is only through joint action that global levels of GHG emissions in the atmosphere and the consequent pollution of the marine environment can be prevented, reduced and controlled. While the importance of joint actions in regulating marine pollution from anthropogenic GHG emissions is undisputed, it does not follow that the obligation under article 194, paragraph 1, of the Convention is discharged exclusively through participation in the global efforts to address the problems of climate change. States are required to take all necessary measures, including individual actions as appropriate.

Necessary measures

203. Article 194, paragraph 1, of the Convention requires States to take “all measures … that are necessary” to prevent, reduce and control pollution of the

marine environment. The word “necessary” ordinarily means “indispensable”, “requisite” or “essential”. In the context of this provision, “necessary” should be understood broadly. Such understanding is consistent with the expansive scope of the obligation under article 194, paragraph 1, implied by words such as “all” measures or “any” source. It is further supported by the inclusive definition of “pollution of the marine environment” set forth in article 1, paragraph 1, subparagraph 4, of the Convention. Accordingly, necessary measures include not only measures which are indispensable to prevent, reduce and control marine pollution but also other measures which make it possible to achieve that objective.

204. However, such measures must be “consistent with [the] Convention”, as stated in article 194, paragraph 1, of the Convention. It is clear that measures to prevent, reduce and control marine pollution must be consistent with the Convention, in which rights and duties of the coastal State or flag State in various maritime zones are set out. In addition, necessary measures must not deny or unjustifiably interfere with the rights of States recognized by the Convention, such as navigational rights. This point is underscored by article 194, paragraph 4, which provides that

> [i]n taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

205. Article 194, paragraph 1, of the Convention does not provide for any specific criteria as to what constitutes necessary measures. However, paragraph 3 of this article gives some indication about the kinds of measures that States must take with respect to specific sources of pollution. Among such measures, there are those designed to minimize, to the fullest possible extent, the release of toxic, harmful or noxious substances, especially those which are persistent. In the context of climate change, those measures are commonly known as “mitigation measures”. Central to such measures is the reduction of anthropogenic GHG emissions into the atmosphere.

206. While article 194, paragraph 1, of the Convention leaves it to each State to determine what measures are necessary to prevent, reduce and control marine

pollution, this does not mean that such measures are whatever measures States deem necessary to that end. Rather, necessary measures should be determined objectively. Many participants in the proceedings emphasized the importance of objectively determining those measures.

207. In the Tribunal's view, there are various factors States should consider in their objective assessment of necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions. It is evident that the science is particularly relevant in this regard. International rules and standards relating to climate change are another relevant factor. There are other factors that may be considered, such as available means and capabilities of the State concerned.

208. With regard to climate change and ocean acidification, the best available science is found in the works of the IPCC which reflect the scientific consensus. As noted in paragraph 51 above, most of the participants expressed the view that the IPCC reports are authoritative assessments of the scientific knowledge on climate change and referred to them in their pleadings in the present proceedings. In this regard, the Tribunal considers that the assessments of the IPCC relating to climate-related risks and climate change mitigation deserve particular consideration.

209. In the 2018 Report, the IPCC concludes that there is a high risk of a much worse outcome if temperature increases exceed 1.5°C above pre-industrial levels (2018 Report, Summary for Policymakers, p. 10). It points out significant differences in impacts when global temperature increases are maintained within 1.5°C as compared to 2°C. It states with high confidence that limiting global warming to 1.5°C compared to 2°C

> is projected to reduce increases in ocean temperature as well as associated increases in ocean acidity and decreases in ocean oxygen levels … Consequently, limiting global warming to 1.5°C is projected to reduce risks to marine biodiversity, fisheries, and ecosystems, and their functions and services to humans.
> (*ibid*., p. 8)

As to ocean acidification, the IPCC states with high confidence that

> [t]he level of ocean acidification due to increasing CO_2 concentrations associated with global warming of 1.5°C is projected to amplify the adverse effects of warming, and even further at 2°C, impacting the growth, development, calcification, survival, and thus abundance of a broad range of species, for example, from algae to fish.
> (*ibid*., p. 9)

210. As to emission pathways, the IPCC states in the 2018 Report that "[l]imiting warming to 1.5°C implies reaching net zero CO_2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO_2 forcers, particularly methane (*high confidence*)" (2018 Report, p. 95). It also states in the 2023 Synthesis Report that

> [d]eep, rapid, and sustained GHG emissions reductions, reaching net zero CO_2 emissions and including strong emissions reductions of other GHGs, in particular CH_4, are necessary to limit warming to 1.5°C … or less than 2°C … by the end of century (*high confidence*).
> (2023 Synthesis Report, p. 68)

211. The Tribunal notes that while most of the participants in the proceedings agree that States should refer to the science in determining necessary measures, there is disagreement among them as to its exact role. In this regard, it was contended that best available scientific standards require States, at a minimum, to take all measures objectively necessary to limit average global temperature rise to no more than 1.5°C above pre-industrial levels, without overshoot, taking into account any current emission gaps. It was also contended that States are required to reach global peaking of GHG emissions as soon as possible and undertake rapid reduction thereafter in accordance with the best available science. However, other participants took the view that while the best available science is a relevant factor for States to consider in assessing necessary measures under article 194, paragraph 1, of the Convention, it is not the only relevant factor to be considered. It was argued in this regard that the view that necessary measures must be aimed at limiting average temperature rise to 1.5°C above pre-industrial levels would be to elevate scientific information to the status of a legal obligation under the Convention, without accounting for the other factors. According to this view, some of those factors may point in different directions from others, and a State must weigh them in any particular circumstance.

212. The Tribunal considers that in the determination of necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, the science undoubtedly plays a crucial role, as it is key to understanding the causes, effects and dynamics of such pollution and thus to providing the effective response. However, this does not mean that the science alone should determine the content of necessary measures. In the Tribunal's view, as indicated above, there are other relevant factors that should be considered and weighed together with the best available science.

213. The Tribunal wishes to add at this juncture that in determining necessary measures, scientific certainty is not required. In the absence of such certainty, States must apply the precautionary approach in regulating marine pollution from anthropogenic GHGs. While the precautionary approach is not explicitly referred to in the Convention, such approach is implicit in the very notion of pollution of the marine environment, which encompasses potential deleterious effects. In this regard, the Tribunal recalls the observation of the Seabed Disputes Chamber in *Responsibilities and Obligations of States with Respect to Activities in the Area* (hereinafter "the *Area Advisory Opinion*") that

> the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 47, para. 135)

For marine pollution arising from anthropogenic GHG emissions, the precautionary approach is all the more necessary given the serious and irreversible damage that may be caused to the marine environment by such pollution, as is assessed by the best available science.

214. Relevant international rules and standards are another reference point for assessing necessary measures. In the context of climate change, such international rules and standards are found in various climate-related treaties and instruments.

The UNFCCC and the Paris Agreement stand out in this regard as primary treaties addressing climate change. Annex VI to MARPOL, which was amended in 2011 and 2021 with a view to reducing GHG emissions from ships, is also relevant. Volumes III and IV of Annex 16 to the Chicago Convention can be referred to in taking necessary measures to prevent, reduce and control GHG emissions from aircraft. The Montreal Protocol, including the Kigali Amendment, is also of relevance.

215. Most of the participants in the proceedings referred to the UNFCCC and the Paris Agreement as being relevant to the assessment of necessary measures. In this regard, the Tribunal considers the global temperature goal and the timeline for emission pathways set forth in the Paris Agreement particularly relevant. They are based upon the best available science stated above.

216. Article 2, paragraph 1, of the Paris Agreement, as stated above (see para. 72), provides that the Agreement aims to strengthen the global response to the threat of climate change, including by

> [h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

The dual temperature goal stipulated in the Paris Agreement has been further strengthened by the successive decisions of the Parties to the Paris Agreement. In 2022, for example, the COP adopted the Sharm el-Sheikh Implementation Plan, in which it "[*r*]*eiterates* that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2 °C and *resolves* to pursue further efforts to limit the temperature increase to 1.5 °C" (Decision 1/CP.27 of 20 November 2022, para. 7; see also Decision FCCC/PA/CMA/2023/L.17 of 13 December 2023, para. 4).

217. Article 4, paragraph 1, of the Paris Agreement sets timelines for emission pathways to achieve the long-term temperature goal set out in Article 2. According to this provision,

> Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.

218. Article 4, paragraph 2, of the Paris Agreement requires each Party to "prepare, communicate and maintain successive nationally determined contributions that it intends to achieve." Parties then "shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions." In addition, each Party's successive nationally determined contribution "will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

219. Most of the participants in the proceedings took the view that the international rules and standards set out in the UNFCCC and the Paris Agreement are relevant in determining necessary measures under article 194, paragraph 1, of the Convention. The Tribunal notes, however, that there is a divergence of views among participants as to the relationship between the obligations under the Convention, on the one hand, and the obligations and commitments contained in the Paris Agreement, on the other. This dissent concerns, *inter alia*, the role to be accorded to international rules and standards under the Paris Agreement in the determination of necessary measures under article 194, paragraph 1, of the Convention.

220. It was contended in this regard that compliance with the UNFCCC and the Paris Agreement satisfies the specific obligation under article 194 of the Convention to take measures to prevent, reduce and control pollution of the marine environment arising from anthropogenic GHG emissions. It was also argued that Part XII of the Convention should not be interpreted as imposing obligations with respect to such emissions that are inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement. According to this view, the UNFCCC and the Paris Agreement are *lex specialis* in respect of the obligations of States Parties under the more general provisions of the Convention. In the same vein, several participants took the view

that, as concerns obligations regarding the effect of climate change, the Convention does not by itself impose more stringent commitments than those laid down in the UNFCCC and the Paris Agreement.

221. Other participants disagreed with those views. It was contended that the question of what measures are necessary to prevent, reduce and control pollution of the marine environment is not to be interpreted solely or primarily by reference to the separate and independent commitments under the specialized treaties on climate change. It was also contended that the Paris Agreement should be considered as a minimum standard for compliance with Part XII of the Convention as concerns the deleterious effects of climate change. Similarly, many participants expressed the view that the Paris Agreement does not exhaust States' obligations to protect and preserve the marine environment from the adverse impacts of climate change. It was stated in this regard that while any true obligations under those specialized treaties are to be taken into account, this in no way precludes the Tribunal from going beyond the Paris Agreement. Many participants also took the view that it is not necessary to apply the principle of *lex specialis,* as no conflict exists between the rules concerned.

222. In the view of the Tribunal, the UNFCCC and the Paris Agreement, as the primary legal instruments addressing the global problem of climate change, are relevant in interpreting and applying the Convention with respect to marine pollution from anthropogenic GHG emissions. In particular, the temperature goal and the timeline for emission pathways set out in the Paris Agreement inform the content of necessary measures to be taken under article 194, paragraph 1, of the Convention. However, the Paris Agreement does not require the Parties to reduce GHG emissions to any specific level according to a mandatory timeline but leaves each Party to determine its own national contributions in this regard.

223. The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to

regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.

224. The Tribunal also does not consider that the Paris Agreement modifies or limits the obligation under the Convention. In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention. Furthermore, as stated above, the protection and preservation of the marine environment is one of the goals to be achieved by the Convention. Even if the Paris Agreement had an element of *lex specialis* to the Convention, it nonetheless should be applied in such a way as not to frustrate the very goal of the Convention.

Available means and capabilities

225. The Tribunal will now consider other factors relevant to the determination of necessary measures to prevent, reduce and control marine pollution. Article 194, paragraph 1, of the Convention provides that States shall take necessary measures, using for this purpose "the best practicable means at their disposal" and "in accordance with their capabilities". Thus, the scope and content of necessary measures may vary depending on the means available to States and their capabilities, such as their scientific, technical, economic and financial capabilities.

226. The reference to "the best practicable means at their disposal" and "in accordance with their capabilities" injects a certain degree of flexibility in implementing the obligation under article 194, paragraph 1, of the Convention. In particular, it seeks to accommodate the needs and interests of States with limited means and capabilities, and to lessen the excessive burden that the implementation of this obligation may entail for those States. However, the reference to available means and capabilities should not be used as an excuse to unduly postpone, or

even be exempt from, the implementation of the obligation to take all necessary measures under article 194, paragraph 1.

227. In the context of marine pollution from anthropogenic GHG emissions, States with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities. The Tribunal notes in this regard that both the UNFCCC and the Paris Agreement recognize the principle of common but differentiated responsibilities and respective capabilities as a key principle in their implementation. Article 3 of the UNFCCC refers to this principle as one of the principles to guide the Parties in their actions to achieve the objective of that Convention and to implement its provisions. Article 2, paragraph 2, of the Paris Agreement also states that "[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

228. Article 4, paragraph 4, of the Paris Agreement, in particular, stipulates the differentiated responsibilities between developed country Parties and developing country Parties with respect to GHG mitigation efforts as follows:

> Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

229. The Tribunal considers that while the obligation under article 194, paragraph 1, of the Convention does not refer to the principle of common but differentiated responsibilities and respective capabilities as such, it contains some elements common to this principle. Thus, the scope of the measures under this provision, in particular those measures to reduce anthropogenic GHG emissions causing marine pollution, may differ between developed States and developing States. At the same time, it is not only for developed States to take action, even if they should "continue taking the lead". All States must make mitigation efforts.

Obligation to harmonize policies

230. Article 194, paragraph 1, of the Convention imposes an obligation upon States to endeavour to harmonize their policies in taking necessary measures to prevent, reduce and control marine pollution. The word “endeavour” indicates that States must make every effort to harmonize their policy but are not required to achieve such harmonization. Given the nature of marine pollution, it is not difficult to see the need for, and the benefit of, harmonization of policies. Lack of harmonization may make the anti-pollution policy of each State less effective. This is particularly true for marine pollution arising from anthropogenic GHG emissions, in light of its diffused causes and global effects.

Duty not to transfer or transform, and use of technologies

231. Article 195 of the Convention requires States, in taking measures to prevent, reduce and control pollution of the marine environment, not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another. In this context, some participants raised the issue of marine geoengineering. Marine geoengineering would be contrary to article 195 if it has the consequence of transforming one type of pollution into another. It may further be subject to article 196 of the Convention which requires States, *inter alia*, to take all measures necessary to prevent, reduce and control marine pollution resulting from the use of technologies under their jurisdiction or control. The Tribunal is aware that marine geoengineering has been the subject of discussions and regulations in various fora, including the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972 and its 1996 Protocol, and the CBD.

(b) Nature of the obligation

232. The Tribunal will now turn to the question of the nature of the obligation under article 194, paragraph 1, of the Convention. This obligation requires States to take all measures that are necessary to prevent, reduce and control pollution of the marine environment. As stated above, the prevention, reduction and control of marine

pollution is the objective or result States must seek to achieve by taking necessary measures.

233. In the view of the Tribunal, what is required of States under this provision is not to guarantee the prevention, reduction and control of marine pollution at all times but to make their best efforts to achieve such result. In the words of the Seabed Disputes Chamber in the *Area Advisory Opinion*, this is "an obligation of conduct", and not "an obligation of result". As such, it is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost" to obtain the intended result (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 41, para. 110). It is thus the conduct of a State, not the result which would be entailed by the conduct, that will determine whether the State has complied with its obligation under article 194, paragraph 1, of the Convention.

234. Since article 194, paragraph 1, of the Convention provides for an obligation of conduct, it requires States to act with "due diligence" in taking necessary measures to prevent, reduce and control marine pollution. As the Seabed Disputes Chamber has stated, "[t]he notions of obligations 'of due diligence' and obligations 'of conduct' are connected" (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 41, para. 111).

235. The obligation of due diligence requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective. The Tribunal notes in this regard that the ICJ, in *Pulp Mills on the River Uruguay,* described an obligation to act with due diligence as follows:

> It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.

(*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 14, at p. 79, para. 197)

236. This obligation of due diligence is particularly relevant in a situation in which the activities in question are mostly carried out by private persons or entities. The obligation to regulate marine pollution from anthropogenic GHG emissions is a primary example in this respect. In that situation, it would not be reasonable to hold a State, which has acted with due diligence, responsible simply because such pollution has occurred.

237. Most of the participants in these proceedings expressed the view that the obligation under article 194, paragraph 1, of the Convention is an obligation of conduct and not an obligation of result. They also stated that it is an obligation of due diligence. However, it was contended that while the obligation under article 194, paragraph 1, is an obligation for States to adopt a certain conduct, it does also mean that States Parties have a positive obligation of result, which is to adopt and implement all measures necessary to prevent, reduce and control marine pollution. It was further contended that the provisions of Part XII of the Convention, and in particular articles 192 and 194, entail but also go beyond due diligence obligations. It was also suggested that the obligation under article 194, paragraph 1, is divided into the obligation of result with respect to governmental activities, such as taking all necessary measures, and the obligation of due diligence with respect to activities of non-State actors. In response, it was argued that while the wording of article 194 assumes that necessary measures must be taken, this in itself does not lead to the conclusion that this is an obligation of result.

238. The Tribunal observes that the obligation under article 194, paragraph 1, of the Convention, and, in fact, obligations under some other provisions of Part XII, including article 194, paragraph 2, are formulated in such a way as to prescribe not only the required conduct of States but also the intended objective or result of such conduct. Whether this obligation is that of conduct or of result depends on whether States are required to achieve the intended objective or result, i.e., prevention, reduction and control of marine pollution. This, in turn, depends essentially upon the text of the relevant provision and the overall circumstances envisaged by it. As

stated above (see paras. 232 to 236), the Tribunal considers that what is required under article 194, paragraph 1, is not to achieve the prevention, reduction and control of marine pollution but to take all necessary measures to that end.

239. In the words of the Seabed Disputes Chamber in the *Area Advisory Opinion*, due diligence is a "variable concept" (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 43, para. 117). It is difficult to describe due diligence in general terms, as the standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies. There are several factors to be considered in this regard. They include scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved. The standard of due diligence may change over time, given that those factors constantly evolve. In general, as the Seabed Disputes Chamber stated, "[t]he standard of due diligence has to be more severe for the riskier activities" (*ibid*.). The notion of risk in this regard should be appreciated in terms of both the probability or foreseeability of the occurrence of harm and its severity or magnitude.

240. In the context of marine pollution from anthropogenic GHG emissions, many participants in the proceedings expressed the view that the standard of due diligence should be set high. Some participants contended that due diligence cannot be interpreted as a simple best effort standard; a due diligence standard for marine pollution caused by GHG emissions should be substantially higher than best efforts, which has traditionally characterized pure conduct obligations; and the level of diligence must be set at its most severe in the case of climate change.

241. Best available science informs that anthropogenic GHG emissions pose a high risk in terms of foreseeability and severity of harm to the marine environment. As noted above (see para. 62), the IPCC, in its 2023 Synthesis Report, concludes that "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*)" (2023 Synthesis Report, p. 14). There is also broad agreement within the scientific community that if global temperature increases exceed 1.5°C, severe consequences for the marine environment would ensue. In light of such information,

the Tribunal considers that the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be stringent. However, its implementation may vary according to States' capabilities and available resources. Such implementation requires a State with greater capabilities and sufficient resources to do more than a State not so well placed. Nonetheless, implementing the obligation of due diligence requires even the latter State to do whatever it can in accordance with its capabilities and available resources to prevent, reduce and control marine pollution from anthropogenic GHG emissions.

242. The obligation of due diligence is also closely linked with the precautionary approach. As the Seabed Disputes Chamber stated in the *Area Advisory Opinion*, the precautionary approach is "an integral part of the general obligation of due diligence" (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 46, para. 131). Therefore, States would not meet their obligation of due diligence under article 194, paragraph 1, of the Convention if they disregarded or did not adequately account for the risks involved in the activities under their jurisdiction or control. This is so, even if scientific evidence as to the probability and severity of harm to the marine environment of such activities were insufficient. Accordingly, States must apply the precautionary approach in their exercise of due diligence to prevent, reduce and control marine pollution from anthropogenic GHG emissions.

(c) Conclusion

243. To conclude, under article 194, paragraph 1, of the Convention, States Parties to the Convention have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection. Such measures should be determined objectively, taking into account, *inter alia*, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal. The scope and content of necessary measures may vary in accordance with the means available to

States Parties and their capabilities. The necessary measures include, in particular, those to reduce GHG emissions. The obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence. The standard of due diligence under article 194, paragraph 1, of the Convention is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions. However, the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.

2. Obligation under article 194, paragraph 2, of the Convention

244. The Tribunal will now proceed to consider the obligation under article 194, paragraph 2, of the Convention in relation to anthropogenic GHG emissions. This provision sets out the obligation of States in the situation of transboundary pollution. It imposes upon States a particular obligation applicable to the transboundary setting in addition to the obligation to prevent, reduce and control marine pollution under article 194, paragraph 1.

245. Article 194, paragraph 2, of the Convention requires States to take all measures necessary to ensure that the following two situations do not occur: first, activities under their jurisdiction or control do not cause damage by pollution to other States and their environment; and second, pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.

246. The obligation stipulated in article 194, paragraph 2, of the Convention bears a close resemblance to the well-established principle of harm prevention. First developed through arbitral and judicial decisions, this principle was incorporated in Principle 21 of the Stockholm Declaration, which states that "States have … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." This principle was reaffirmed in Principle 2 of the Rio Declaration. The Tribunal notes in this regard that the ICJ stated in the *Legality of the Threat or Use of Nuclear Weapons*:

> The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
> (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226, at p. 242, para. 29; see also *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, RIAA, Vol. XXVII*, p. 35, at pp.66-67, para. 59)

(a) Scope and content of the obligation

247. The phrase "activities under their jurisdiction or control" refers to activities carried out by both public and private actors. In addition, there should be a link of jurisdiction or control between such activities and a State. The concept of "jurisdiction or control" of a State in this context is a broad one, encompassing not only its territory but also areas in which the State can, in accordance with international law, exercise its competence or authority. Such areas include, for example, a State's exclusive economic zone and continental shelf. Activities carried out on board ships or aircraft which are registered in a State may also be considered activities under the jurisdiction of that State.

248. The Tribunal notes that while "damage" is mentioned in the first situation of transboundary pollution involving two or more States, there is no such reference in the second situation. Given that the notion of pollution involves both actual and potential deleterious effects on the marine environment, the obligation in the former situation should be understood as requiring the prevention of actual damage by pollution, whereas the obligation in the latter situation extends not only to damage that actually occurred but also to damage that is likely to occur. In this sense, article 194, paragraph 2, of the Convention imposes a more stringent obligation by requiring States to prevent the "spread" of pollution than the principle laid down in the Stockholm Declaration and the Rio Declaration which refers to "damage" to the environment of other States and of areas beyond the limits of national jurisdiction.

249. Article 194, paragraph 2, of the Convention, unlike paragraph 1, does not refer to the means to be employed by States in taking necessary measures or to

capabilities. The absence of such reference could be understood to imply that the scope and content of necessary measures to be taken by States under article 194, paragraph 2, are not differentiated in accordance with the availability of means and capabilities. The transboundary context of the obligation under paragraph 2 could lend some support to such understanding. However, in the view of the Tribunal, despite the lack of the above reference, the scope and content of necessary measures under article 194, paragraph 2, may differ among States in accordance with the availability of means and capabilities. As will be seen below, this obligation is an obligation of due diligence, and its implementation may vary in relation to several factors, including the capabilities of each State.

250. In the context of anthropogenic GHG emissions causing marine pollution, article 194, paragraph 2, of the Convention requires States to take all necessary measures to ensure that GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and that pollution arising from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. Many participants in the proceedings took the view that article 194, paragraph 2, is relevant with respect to marine pollution caused by anthropogenic GHG emissions. It was submitted in this regard that, in order to fulfil the obligation under article 194, paragraph 2, States must be at least as diligent as necessary to limit average global temperature rise to no more than 1.5°C. The Tribunal has stated above that the temperature goal of 1.5°C is one of the relevant factors to consider in determining necessary measures under article 194, paragraph 1, but that it is not the only such factor. In the Tribunal’s view, this finding applies equally to the obligation under article 194, paragraph 2.

251. On the other hand, it was contended that GHG emissions are not activities of the kind to which article 194, paragraph 2, of the Convention is directed. According to this view, given that GHG emissions from the territory of one State will contribute to the volume of emissions in the atmosphere for decades to come, this provision cannot sensibly be interpreted as requiring States to ensure that such emissions do not spread to the territory of another State or on to the high seas. It was further contended that even if article 194, paragraph 2, covers GHG emissions, the measures necessary to ensure that such emissions do not cause damage to the

environment of other States, and that pollution does not spread beyond national jurisdiction, go no further than the measures necessary to prevent, reduce or control pollution pursuant to article 194, paragraph 1.

252. The Tribunal has concluded above that anthropogenic GHG emissions into the atmosphere fall under the definition of pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention. It follows that the obligations under article 194 thus apply to marine pollution from such emissions. In the Tribunal's view, there appears to be no convincing reason to exclude the application of article 194, paragraph 2, to such pollution. It is acknowledged that, given the diffused and cumulative causes and global effects of climate change, it would be difficult to specify how anthropogenic GHG emissions from activities under the jurisdiction or control of one State cause damage to other States. However, this difficulty has more to do with establishing the causation between such emissions of one State and damage caused to other States and their environment. This should be distinguished from the applicability of an obligation under article 194, paragraph 2, to marine pollution from anthropogenic GHG emissions.

253. The Tribunal is also not convinced by the argument that the obligation under article 194, paragraph 2, of the Convention can be satisfied by meeting the obligation under paragraph 1. Such a view would have the consequence of depriving the obligation under paragraph 2 of any effect with respect to marine pollution from anthropogenic GHG emissions. The Tribunal considers that article 194, paragraph 2, imposes upon States a particular obligation in the context of transboundary pollution.

(b) Nature of the obligation

254. The obligation under article 194, paragraph 2, of the Convention requires States to take all measures necessary to ensure that activities under their jurisdiction do not cause damage by pollution to other States and their environment and that pollution arising from their activities does not spread beyond the limits of their national jurisdiction. The Tribunal considers that this obligation is an obligation of due diligence for the same reason stated in the context of the obligation under

article 194, paragraph 1. The Tribunal recalls that the Seabed Disputes Chamber in the *Area Advisory Opinion* referred to article 194, paragraph 2, as an example of such obligation (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 42, para. 113).

255. It was argued that the obligation under article 194, paragraph 2, of the Convention is an explicit and broad obligation of States to adopt all measures necessary to ensure that certain events will not occur, whereas the obligation the Seabed Disputes Chamber considered in the *Area Advisory Opinion* was the responsibility to ensure compliance as set out in article 139 of the Convention. According to this argument, the obligation under article 194, paragraph 2, therefore, goes beyond acting merely with due diligence and encompasses an obligation of result. The Tribunal has already expressed its view on this argument in relation to the obligation under article 194, paragraph 1, of the Convention. That finding is equally valid for the obligation under article 194, paragraph 2.

256. As stated above, the standard of due diligence is variable, depending upon relevant factors, including risks of harm involved in activities. With respect to transboundary pollution affecting the environment of other States, the standard of due diligence can be even more stringent.

257. In this regard, the Tribunal wishes to emphasize that an obligation of due diligence should not be understood as an obligation which depends largely on the discretion of a State or necessarily requires a lesser degree of effort to achieve the intended result. The content of an obligation of due diligence should be determined objectively under the circumstances, taking into account relevant factors. In many instances, an obligation of due diligence can be highly demanding. Therefore, it would not be correct to assume that the obligation under article 194, paragraph 2, of the Convention, as an obligation of due diligence, would be less conducive to the prevention, reduction and control of marine pollution from anthropogenic GHG emissions.

(c) Conclusion

258. To conclude, article 194, paragraph 2, of the Convention imposes upon States Parties a particular obligation applicable to the transboundary setting in addition to the obligation to prevent, reduce and control marine pollution from anthropogenic GHG emissions. Under this provision, States Parties have the specific obligation to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. It is an obligation of due diligence. The standard of due diligence under article 194, paragraph 2, can be even more stringent than that under article 194, paragraph 1, because of the nature of transboundary pollution.

E. Obligations applicable to specific sources of pollution

259. Having addressed the obligations of States common to the prevention, reduction and control of pollution from any source, the Tribunal will now proceed to examining obligations relating to pollution from specific sources. The relevant provisions in this regard are found in sections 5 and 6 of Part XII of the Convention.

260. Section 5 of Part XII of the Convention addresses the obligations to adopt national laws and regulations and establish international rules and standards to prevent, reduce and control marine pollution from six different sources: pollution from land-based sources (article 207), pollution from seabed activities subject to national jurisdiction (article 208), pollution from activities in the Area (article 209), pollution by dumping (article 201), pollution from vessels (article 211), and pollution from or through the atmosphere (article 212). In particular, this section addresses the relationship between national legislation and international rules and standards, and how States should refer to international rules and standards in adopting their national laws and regulations. Depending on the specific sources of pollution, different formulations of reference to international rules and standards are introduced in section 5.

261. Section 6 of Part XII of the Convention addresses the obligation to enforce national laws and regulations and implement international rules and standards. This section follows the source-specific approach of the previous section. The provisions of section 6, as an enforcement sequel to national legislation and international rules and standards adopted in accordance with section 5, need to be read together with the corresponding provisions of that section.

262. The initial issue the Tribunal should consider is how to characterize pollution of the marine environment from anthropogenic GHG emissions in terms of specific sources of pollution. This is necessary because the scope and content of the obligations of States under section 5 of Part XII vary depending on the specific source of pollution. Most participants in the proceedings took the view that marine pollution from anthropogenic GHG emissions can be considered either pollution from land-based sources or pollution from or through the atmosphere. They also expressed the view that marine pollution from such emissions from vessels can be considered either pollution from vessels or pollution from or through the atmosphere. The Tribunal notes in this regard that Question (a) asks it to identify the specific obligations of States Parties to prevent, reduce and control marine pollution in relation to deleterious effects caused by “anthropogenic GHG emissions into the atmosphere”.

263. According to the information submitted to the Tribunal, most anthropogenic GHG emissions into the atmosphere causing marine pollution originate from land-based sources. In addition, such emissions originate from vessels or aircraft. There are also some GHG emissions from other sources, including from certain seabed activities such as venting and flaring.

264. While there are multiple sources of GHG emissions into the atmosphere, the Tribunal considers that the types of pollution most relevant to the present proceedings are confined to marine pollution caused by anthropogenic GHG emissions into the atmosphere from land-based sources, vessels and aircraft. The relevant provisions under the Convention addressing such pollution are found in articles 207 (pollution from land-based sources), 211 (pollution from vessels) and 212 (pollution from or through the atmosphere). The corresponding provisions for

enforcement are articles 213 (enforcement with respect to pollution from land-based sources), 217 (enforcement by flag States) and 222 (enforcement with respect to pollution from or through the atmosphere).

1. Obligations to adopt national legislation and establish international rules and standards

265. At the outset, the Tribunal wishes to reiterate that articles 207, 211 and 212 of the Convention complement and elaborate the obligations common to all sources of pollution set out in article 194. The interpretation of these articles, therefore, should be consistent with that of article 194. The Tribunal notes that the findings it made in interpreting and applying article 194 in relation to marine pollution from anthropogenic GHG emissions are equally applicable with respect to articles 207, 211 and 212.

(a) Obligations under article 207 of the Convention

266. The Tribunal will now consider the obligations under article 207 of the Convention, which reads:

> *Pollution from land-based sources*
>
> 1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.
>
> 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.
>
> 3. States shall endeavour to harmonize their policies in this connection at the appropriate regional level.
>
> 4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

> 5. Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment.

267. Article 207 of the Convention imposes upon States three main obligations: first, the obligation to adopt national legislation; second, the obligation to take other necessary measures; and third, the obligation to endeavour to establish international rules, standards and practices and procedures. Those obligations are mostly concerned with establishing the legal framework, both national and international, necessary to prevent, reduce and control marine pollution from land-based sources.

268. In addition to the above three obligations, article 207 of the Convention provides for obligations to endeavour to harmonize policies and to take certain specific measures. Article 207, paragraph 3, requires States to endeavour to harmonize their policies at the appropriate regional level. This obligation is consistent with the obligation to endeavour to harmonize policies under article 194, paragraph 1. Article 207, paragraph 5, which requires States to take measures to minimize the release of toxic, harmful or noxious substances, reiterates what is prescribed in article 194, paragraph 3, subparagraph (a).

269. Article 207, paragraph 1, of the Convention requires States to adopt laws and regulations to prevent, reduce and control marine pollution from land-based sources. Such laws and regulations are a formal means to give effect to necessary measures States must take under article 194 of the Convention. For marine pollution from anthropogenic GHG emissions, central to those laws and regulations is the reduction of such emissions.

270. In adopting laws and regulations, States are required to take into account “internationally agreed rules, standards and recommended practices and procedures”. There is no definition of this phrase in the Convention. Those rules, standards and practices and procedures encompass a broad range of norms, both binding and non-binding in nature. In the context of climate change, they include those contained in climate change treaties such as the UNFCCC and the Paris

Agreement. Accordingly, States Parties to the Convention have an obligation to take into account those norms in adopting their laws and regulations to prevent, reduce and control marine pollution from GHG emissions.

271. The phrase “taking into account” should be understood to mean that States are not required to adopt such rules, standards and practices and procedures in their national laws and regulations. However, States must, in good faith, give due consideration to them. In any case, States must comply with internationally agreed rules and standards, which are binding upon them.

272. Article 207, paragraph 2, of the Convention requires States to take other measures as may be necessary to prevent, reduce and control such pollution. Those measures can be wide-ranging, from the establishment of administrative procedures for the regulation of pollution to the monitoring of risks and effects of marine pollution and assessment of the potential effects of planned activities on the marine environment. In the context of marine pollution from anthropogenic GHG emissions, the Tribunal’s findings with respect to the obligation to take necessary measures under article 194 equally apply to the obligation under this paragraph.

273. Article 207, paragraph 4, of the Convention imposes upon States an obligation to endeavour to establish global and regional rules, standards and recommended practices and procedures to regulate pollution from land-based sources. Thus, States are required to make every effort in good faith to establish such rules, standards and practices and procedures, but are not required to succeed in establishing them. In this respect, States should act through competent international organizations or diplomatic conference. The efforts of States must be on a continuing basis. In the context of marine pollution from anthropogenic GHG emissions, this obligation means that States, which are parties to relevant international agreements such as the UNFCCC and the Paris Agreement, are required to participate in the process under those agreements with a view to “strengthen[ing] the global response to the threat of climate change”, as stated in Article 2, paragraph 1, of the Paris Agreement.

(b) Obligations under article 212 of the Convention

274. The Tribunal will now consider the obligations under article 212 of the Convention, which reads:

> *Pollution from or through the atmosphere*
>
> 1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.
>
> 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.
>
> 3. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution.

275. Article 212 of the Convention imposes upon States three obligations: first, the obligation to adopt national legislation to prevent, reduce and control marine pollution from or through the atmosphere; second, the obligation to take other necessary measures; and third, the obligation to endeavour to establish international rules, standards and practices and procedures.

276. There is no substantial difference between the obligations under article 212 of the Convention and those under article 207 in terms of their scope. While article 212 does not explicitly provide for the obligations to endeavour to harmonize policies and to take measures to minimize the release of toxic, harmful or noxious substances into the marine environment, as article 207 does, such obligations apply with respect to pollution from or through the atmosphere under article 212. The obligation to endeavour to harmonize policies is an obligation common to all sources of pollution, including pollution from or through the atmosphere, under article 194, paragraph 1. The obligation to minimize the release of toxic, harmful or noxious substances applies to pollution from or through the atmosphere under article 194, paragraph 3, subparagraph (a).

277. The content of the obligations under article 212 of the Convention is similar to that of the obligations under article 207. Thus, the findings the Tribunal made above with respect to the obligations under article 207 apply *mutatis mutandis* to those under article 212. In this regard, “internationally agreed rules and standards and recommended practices and procedures” relevant to pollution from or through the atmosphere include not only those contained in climate change treaties but also those in instruments such as Volume IV of Annex 16 to the Chicago Convention establishing a carbon offsetting and reduction scheme for international aviation. The Tribunal also notes that the IMO adopted amendments to Annex VI to MARPOL in 2011 and 2021 with a view to reducing GHG emissions from ships. As stated above, the IMO also recently adopted the 2023 IMO GHG Strategy to enhance its contribution to global efforts in this regard (see para. 80 above).

(c) Obligations under article 211 of the Convention

278. The Tribunal will now consider the obligations relating to marine pollution from vessels. Those obligations are found in article 211 of the Convention. In the context of marine pollution from anthropogenic GHG emissions, the most relevant provision is article 211, paragraph 2. The Tribunal will confine itself to that provision, which reads:

> States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

279. Article 211, paragraph 2, of the Convention imposes upon States the obligation to adopt laws and regulations to prevent, reduce and control marine pollution from vessels flying their flag or of their registry. Thus, the obligation under this provision is incumbent on the flag State. Such laws and regulations must at least have the same effect as that of generally accepted international rules and standards. This provision, therefore, provides for the minimum threshold national legislation must meet. States may adopt more stringent laws and regulations than generally accepted international rules and standards. This requirement stands in contrast with

the requirement to “take into account” internationally agreed rules and standards under articles 207 and 212.

280. The term “generally accepted international rules and standards” is not defined in the Convention. Such rules and standards may refer to those contained in international legal instruments that are accepted by a sufficiently large number of States. They must be established through the competent international organization or general diplomatic conference. The term “the competent international organization” in this context is understood to refer to the IMO. The reference to “the competent international organization or general diplomatic conference” is distinct from the reference to “competent international organizations or diplomatic conference” made in articles 207 and 212 of the Convention. Thus, only those rules and standards that satisfy the above requirements would qualify as “generally accepted international rules and standards”. In the context of marine pollution from GHG emissions from vessels, the Tribunal notes in this regard that the IMO adopted amendments to Annex VI to MARPOL in 2011 and 2021 with a view to reducing GHG emissions from ships.

2. Obligation of enforcement

281. The Tribunal now turns to the obligation of enforcement under articles 213, 217 and 222 of the Convention. The scope and content of the obligations with respect to land-based pollution under article 213 and with respect to pollution from or through the atmosphere under article 222 are similar. For the purpose of the present Advisory Opinion, the Tribunal will, therefore, address those obligations together. It will then deal with the obligation of enforcement with respect to pollution from vessels under article 217.

(a) Obligations under articles 213 and 222 of the Convention

282. Article 213 of the Convention reads:

> *Enforcement with respect to pollution from land-based sources*
>
> States shall enforce their laws and regulations adopted in accordance with article 207 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from land-based sources.

Article 222 of the Convention reads:

> *Enforcement with respect to pollution from or through the atmosphere*
>
> States shall enforce, within the air space under their sovereignty or with regard to vessels flying their flag or vessels or aircraft of their registry, their laws and regulations adopted in accordance with article 212, paragraph 1, and with other provisions of this Convention and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from or through the atmosphere, in conformity with all relevant international rules and standards concerning the safety of air navigation.

283. The above two articles address, respectively, the enforcement of national legislation and the implementation of applicable international rules and standards with respect to pollution from land-based sources and pollution from or through the atmosphere. States have two obligations in this regard: first, the obligation to enforce their laws and regulations; and second, the obligation to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards.

284. The first obligation requires States to enforce their laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources or from or through the atmosphere. The word “enforce” is a broad term, encompassing the variety of ways and means to ensure compliance with laws and regulations within the framework of the national legal system. Such ways and means

may include, for example, monitoring and inspection, administrative guidance, investigation and prosecution for breaches of laws, and judicial or quasi-judicial proceedings. The Tribunal notes in this regard that article 235, paragraph 2, of the Convention provides for the obligation of States to “ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.” Section 7 of Part XII of the Convention provides for various safeguards relating to the institution of proceedings and the exercise of powers of enforcement.

285. The second obligation requires States to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards. The term “applicable international rules and standards” should be understood to refer to those rules and standards which are binding upon the State concerned either as treaty or customary international law. Accordingly, they are to be distinguished from “internationally agreed rules, standards and recommended practices and procedures”, which States must “[take] into account” in adopting national laws and regulations under articles 207 or 212 of the Convention. Such rules, standards and practices and procedures do not have to be binding upon the States. Applicable international rules and standards must be established through competent international organizations or diplomatic conference. Such rules and standards must be implemented in accordance with the legal system of each State.

286. In the context of marine pollution from anthropogenic GHG emissions, articles 213 and 222 of the Convention should be interpreted as imposing an obligation to adopt laws and regulations and to take measures necessary to implement, among others, rules and standards set out in climate change treaties and other relevant instruments. If a State Party to the Convention, which is bound by those rules and standards, fails to take such measures, its international responsibility would be engaged for breach of the obligations under article 213 or 222 of the Convention.

(b) Obligations under article 217 of the Convention

287. Article 217 of the Convention provides for enforcement by States with respect to marine pollution from vessels flying their flag or of their registry. The Convention, in particular articles 218 and 220, also provides for enforcement by port States and coastal States. However, in the context of marine pollution from anthropogenic GHG emissions, the most relevant provision is article 217, paragraph 1, and the Tribunal will confine itself to this provision for the purpose of the present proceedings. Article 217, paragraph 1, reads:

> States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

288. Article 217, paragraph 1, of the Convention imposes upon States the obligation to ensure that vessels flying their flag or of their registry comply with applicable international rules and standards and their laws and regulations. To this end, it requires States to adopt laws and regulations and take other measures necessary to implement such international rules and standards as well as their national laws and regulations.

289. “[A]pplicable international rules and standards” refer to those rules and standards that are binding upon the States concerned. Such rules and standards must be established through the competent international organization or general diplomatic conference. The findings made by the Tribunal in this regard in relation to article 211 of the Convention equally apply to the present paragraph. The national “laws and regulations” to be implemented must be adopted in accordance with the Convention, in particular article 211, paragraph 2.

290. The means of implementation include laws and regulations, and other necessary measures. Such measures may be wide-ranging and include administrative and judicial measures.

291. In the context of marine pollution from anthropogenic GHG emissions from vessels, applicable international rules and standards may be found, *inter alia*, in Annex VI to MARPOL, as amended in 2011 and 2021.

F. Other obligations

292. The Tribunal will now proceed to examine other obligations relevant to its response to Question (a). Such obligations may be found in Part XII of the Convention, section 2 on global and regional cooperation, section 3 on technical assistance, and section 4 on monitoring and environmental assessment.

293. At the outset, the Tribunal points out that its findings in this regard apply not only in response to Question (a) but also in response to Question (b).

1. Global and regional cooperation

294. The Tribunal first wishes to turn to the specific obligations of cooperation under Part XII, section 2, of the Convention.

295. The Tribunal notes that almost all of the participants in the present proceedings shared the view that countering the effects of anthropogenic GHG emissions on the marine environment necessarily requires international cooperation. In this context, reference was made to the existence of a duty to cooperate under general international law, which informs Part XII of the Convention, and it was argued that this duty is central to the examination of the Request. It was also contended that pollution of the marine environment from such emissions calls for a regulatory response which must be supported by international coordination informed by internationally agreed standards. In this regard, references were made to cooperation efforts conducted under the auspices of the UNFCCC and the Paris Agreement. Almost all of the participants expressed the view that article 197 of the

Convention sets out the key obligation of cooperation and that this obligation is further elaborated upon in articles 198, 199, 200 and 201 of the Convention.

296. The Tribunal recalls its finding in the *MOX Plant Case* that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law" (*MOX Plant (Ireland* v. *United Kingdom)*, *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 110, para. 82; see also *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 25, para. 92; *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, *Advisory Opinion, 2 April 2005, ITLOS Reports 2015*, p. 4, at p. 43, para. 140; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment*, *I.C.J. Reports 2010,* p. 14, at p. 49, para. 77).

297. In the Tribunal's view, the duty to cooperate is reflected in and permeates the entirety of Part XII of the Convention. This duty is given concrete form in a wide range of specific obligations of States Parties, which are central to countering marine pollution from anthropogenic GHG emissions at the global level. In this respect, the Tribunal notes the finding of the IPCC that

> [c]limate change has the characteristics of a collective action problem at the global scale, because most GHGs accumulate over time and mix globally, and emissions by any agent (e.g., individual, community, company, country) affect other agents. Effective mitigation will not be achieved if individual agents advance their own interests independently. Collective responses, including international cooperation, are therefore required to effectively mitigate GHG emissions and address other climate change issues.
> (2014 Synthesis Report, Summary for Policymakers, p. 17)

298. Most multilateral climate change treaties, including the UNFCCC and the Paris Agreement, contemplate and variously give substance to the duty to cooperate on the assumption, as indicated in the preamble of the UNFCCC, that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response".

299. In relation to marine pollution from anthropogenic GHG emissions, the Tribunal notes that the duty to cooperate is an integral part of the general obligations under articles 194 and 192 of the Convention given that the global effects of these emissions necessarily require States' collective action (see paras. 201 and 202 above). Furthermore, specific obligations to cooperate are provided for in Part XII, section 2, in particular in articles 197, 200 and 201. The Tribunal considers that these specific obligations complement the general obligations established in articles 194 and 192 by setting out the means for complying with the latter obligations.

(a) Obligation to cooperate under article 197 of the Convention

300. The core obligation of cooperation is enshrined in article 197 of the Convention, which reads as follows:

> *Cooperation on a global or regional basis*
>
> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

301. According to article 197 of the Convention, cooperation is expressly aimed at developing a common regulatory framework "for the protection and preservation of the marine environment". Article 197 must be read in conjunction with article 194, paragraph 1, which refers to "all measures" that States shall take, individually or *jointly* as appropriate, in order "to prevent, reduce and control pollution of the marine environment from any source". It follows that cooperation in the formulation and elaboration of international rules, standards and recommended practices and procedures under article 197 is among the joint measures contemplated in article 194, paragraph 1.

302. The obligation to cooperate under article 197 is aimed at the formulation and elaboration of rules, standards and practices and procedures for the protection and preservation of the marine environment, and is characterized by a large degree of

flexibility. Such rules, standards and practices and procedures may be binding or non-binding. States are free to choose whether to cooperate through competent international organizations or otherwise. The possibility of having recourse to various forms of cooperation is particularly useful in the prevention, reduction and control of marine pollution from anthropogenic GHG emissions.

303. The Tribunal observes that most of the participants in the proceedings emphasized the importance of global cooperation through international organizations. In addition, some of the participants referred to regional cooperation insofar as marine pollution from anthropogenic GHG emissions has a particular impact on certain regions.

304. The Tribunal considers that the expression “competent international organizations” used in article 197 of the Convention refers, in the context of the present case, to all international organizations with competence to address, directly or indirectly, the protection and preservation of the marine environment from anthropogenic GHG emissions.

305. Article 197 of the Convention provides for the possibility of having recourse to regional cooperation agreements and plans as a means to combat marine pollution “as appropriate” and “taking into account characteristic regional features”. Given the impacts of pollution from anthropogenic GHG emissions, cooperation on a global scale is typically the most appropriate means to that end. Nevertheless, some effects of marine pollution from such emissions may be particularly harmful for the marine environment of certain geographical areas because of their special characteristics. In such situations, the obligation to cooperate on a global scale may be supported by regional cooperation under article 197 and article 123 on cooperation of States bordering enclosed or semi-enclosed seas.

306. The Tribunal will now turn to the nature of the obligation under article 197 of the Convention. It notes that most of the participants in the present proceedings were of the view that the obligation of cooperation enshrined in article 197 is an obligation of conduct, and that compliance therewith should be assessed by reference to the efforts that States make to coordinate their actions. It was also

generally contended that such obligation is of an ongoing nature, that cooperation must be meaningful, and that States must participate in good faith in cooperative efforts.

307. In the view of the Tribunal, this provision does not oblige States to achieve a normative outcome but to participate meaningfully in the formulation and elaboration of rules, standards and recommended practices and procedures for the protection and preservation of the marine environment.

308. The Tribunal wishes to recall that, in the *SRFC Advisory Opinion*, it stated that

> the obligation to "seek to agree …" under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.
> (*Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion of 2 April 2015, ITLOS Reports 2015*, p. 4, at pp. 59-60, para. 210; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment*, *I.C.J. Reports 2010,* p. 14, at p. 49, para. 77)

The same reasoning applies to the obligation to cooperate under article 197 of the Convention.

309. Thus, the Tribunal considers that the obligation to cooperate under article 197 of the Convention, either on a global or regional basis, is an obligation of conduct which requires States to act with "due diligence". States are required to fulfil this obligation in good faith.

310. In the Tribunal's view, compliance with the obligation of cooperation is to be assessed by reference to the efforts made by States to formulate and elaborate international rules, standards and recommended practices and procedures. The results achieved by States through cooperation may, however, be relevant in assessing States' compliance with the obligation to cooperate.

311. The obligation of cooperation set out in article 197 of the Convention is of a continuing nature. It requires States to make an ongoing effort to formulate and elaborate rules, standards and recommended practices and procedures. The adoption of a particular treaty, such as the UNFCCC or the Paris Agreement, does not discharge a State from its obligation to cooperate, as the obligation requires an ongoing effort on the part of States in the development of new or revised regulatory instruments, in particular in light of the evolution of scientific knowledge.

(b) Obligation to cooperate under articles 200 and 201 of the Convention

312. The Tribunal notes that article 197 does not exhaust the obligation to cooperate under section 2 of Part XII of the Convention. States are also required to cooperate to promote studies, undertake research programmes, and encourage the exchange of information and data (article 200), and to establish appropriate scientific criteria for regulations (article 201).

313. Article 200 of the Convention reads:

> *Studies, research programmes and exchange of information and data*
>
> States shall cooperate, directly or through competent international organizations, for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment. They shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, exposure to it, and its pathways, risks and remedies.

Article 201 of the Convention reads:

> *Scientific criteria for regulations*
>
> In the light of the information and data acquired pursuant to article 200, States shall cooperate, directly or through competent international organizations, in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment.

The obligations under articles 200 and 201 provide the basis for the formulation and elaboration of international rules, standards and recommended practices and

procedures pursuant to article 197. The development of an effective common regulatory framework presupposes the existence of adequate information on the state of the marine environment based on updated scientific criteria and methods.

314. The Tribunal is of the view that articles 200 and 201 of the Convention apply in the context of marine pollution from anthropogenic GHG emissions.

315. Article 200 of the Convention is aimed at ensuring that pollution of the marine environment is properly acknowledged. In particular, this article is important for the development of an adequate common regulatory framework to protect and preserve the marine environment, as provided for under article 197. States are required to cooperate, directly or through competent international organizations, either globally or regionally, *inter alia*, in encouraging the exchange of information and data, primarily on the causes and effects of pollution. Cooperation also involves the search for possible and effective remedies in response to threats to the marine environment.

316. Article 201 of the Convention serves to link article 197 with article 200. Cooperation between States in the formulation and elaboration of rules, standards and recommended practices and procedures must be based on appropriate scientific criteria, developed through coordinated studies, research programmes and exchange of information and data. In particular, cooperation in the formulation and elaboration of a common regulatory framework would be ineffective if it did not rest on a solid scientific basis.

317. The Tribunal recalls that a close relationship between regulatory measures for the protection and preservation of the marine environment, on the one hand, and scientific findings and criteria, on the other, was previously highlighted by the Seabed Disputes Chamber in its *Area Advisory Opinion*. The Chamber held that measures adopted to prevent pollution of the marine environment may need to change over time to become stricter “in light ... of new scientific or technological knowledge” (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 43, para. 117).

318. In the context of anthropogenic GHG emissions, the obligation under article 201 of the Convention requires States to participate in those fora for cooperation aimed at establishing appropriate scientific criteria for the formulation of rules and standards for the prevention, reduction and control of marine pollution from such emissions. An example of such cooperation is the Subsidiary Body for Scientific and Technological Advice (SBSTA) under the UNFCCC, which, *inter alia,* assists the COP and the Meeting of the Parties to the Paris Agreement by providing information and advice on scientific and technological matters.

319. The obligation under article 201 of the Convention requires States to make, in good faith, continuous efforts. Such efforts may be made directly or through competent international organizations, at the global or regional level. Cooperation can be pursued through various international organizations, including those without a specific law of the sea mandate, if the extent and nature of the effects of anthropogenic GHG emissions so require.

320. The participation of States in relevant international organizations and fora in undertaking scientific research programmes, encouraging the exchange of information and data as well as developing scientific criteria for regulating marine pollution from anthropogenic GHG emissions is particularly important in light of the global scale of such emissions.

(c) Conclusion

321. To conclude, the Tribunal finds that articles 197, 200 and 201, read together with articles 194 and 192 of the Convention, impose specific obligations on States Parties to cooperate, directly or through competent international organizations, continuously, meaningfully and in good faith in order to prevent, reduce and control marine pollution from anthropogenic GHG emissions. In this regard, first, States Parties are required to cooperate in formulating and elaborating rules, standards and recommended practices and procedures, consistent with the Convention and based on available scientific knowledge, to counter marine pollution from such emissions. Second, States Parties are required to cooperate to promote studies, undertake scientific research, and encourage the exchange of information and data on marine

pollution from anthropogenic GHG emissions, its pathways, risks and remedies, including mitigation and adaptation measures. Third, States Parties are required to establish appropriate scientific criteria on the basis of which rules, standards and recommended practices and procedures are to be formulated and elaborated to counter marine pollution from such emissions.

2. Technical assistance

322. The Tribunal now turns to the specific obligations contained in Part XII, section 3, of the Convention, namely, article 202 on scientific and technical assistance to developing States and article 203 on preferential treatment for developing States.

323. Article 202 reads:

> *Scientific and technical assistance to developing States*
>
> States shall, directly or through competent international organizations:
>
> (a) promote programmes of scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution. Such assistance shall include, *inter alia*:
>
> (i) training of their scientific and technical personnel;
> (ii) facilitating their participation in relevant international programmes;
> (iii) supplying them with necessary equipment and facilities;
> (iv) enhancing their capacity to manufacture such equipment;
> (v) advice on and developing facilities for research, monitoring, educational and other programmes;
>
> (b) provide appropriate assistance, especially to developing States, for the minimization of the effects of major incidents which may cause serious pollution of the marine environment;
>
> (c) provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments.

324. Article 203 of the Convention reads:

> *Preferential treatment for developing States*
>
> Developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects, be granted preference by international organizations in:
>
> (a) the allocation of appropriate funds and technical assistance; and
>
> (b) the utilization of their specialized services.

325. The Tribunal notes that most of the participants in the present proceedings were of the view that assistance to developing States is indispensable in combating pollution of the marine environment from anthropogenic GHG emissions. Such assistance seeks to alleviate the difficulties of developing States in addressing this issue and to enhance their capacity to do so. However, divergent views were expressed on the relationship between the obligation of assistance in the Convention and the principle of common but differentiated responsibilities and respective capabilities contemplated in the UNFCCC. It was contended that obligations of assistance under the Convention are a means of implementing the principle of common but differentiated responsibilities and respective capabilities in the context of the law of the sea. It was also argued that this principle, although not expressly mentioned in the Convention, must be considered, as the Convention and the climate change treaty regime are mutually supportive. It was further maintained that this principle should not be used as a pretext to escape the responsibility that weighs on all States, both individually and collectively, to counter marine pollution from anthropogenic GHG emissions. Other participants took the view that articles 202 and 203 should be interpreted only in the context of the Convention.

326. The Tribunal notes that articles 202 and 203 of the Convention do not refer to the principle of common but differentiated responsibilities and respective capabilities. However, the obligation of assistance to developing States under these articles has some elements underlying this principle in that States with lesser capabilities need assistance from States that are better placed in order to meet their environmental responsibilities.

327. In the view of the Tribunal, scientific, technical, educational and other assistance to developing States that are particularly vulnerable to the adverse effects of climate change is a means of addressing an inequitable situation. Although they contribute less to anthropogenic GHG emissions, such States suffer more severely from their effects on the marine environment. In this regard, the Tribunal notes the relevance of the UNFCCC and the Paris Agreement, which expressly recognize and take into account the specific needs and special circumstances of developing countries, "especially those that are particularly vulnerable to the adverse effects of climate change."

328. The Tribunal notes the fifth preambular paragraph of the Convention which states that the achievement of its goals "will contribute to the realization of a just and equitable international economic order which takes into account … the special interests and needs of developing countries". In the same vein, the General Assembly, in its annual resolution on oceans and the law of the sea, has recognized that

> the realization of the benefits of the Convention could be enhanced by international cooperation, technical assistance and advanced scientific knowledge, as well as by funding and capacity-building, and reiterating the essential need for cooperation, in accordance with States' capabilities, including through capacity-building and transfer and development of marine technology, inter alia, in relation to … the protection and preservation of the marine environment.
> (General Assembly Resolution 78/69, 5 December 2023, p. 4)

329. The Tribunal observes that articles 202 and 203 of the Convention identify a wide range of assistance mechanisms to permit developing States to appropriately address marine pollution from anthropogenic GHG emissions. These mechanisms coexist with those indicated by the UNFCCC (e.g., in Article 4, para. 3; Article 5, para. (b); Article 6, para. (a)(iv)) and the Paris Agreement (e.g., in Articles 9, 10 and 11) for supporting capacity-building, technical development and transfer, and the financial capabilities of developing States.

330. The main recipients of the assistance under article 202 of the Convention are developing States. In the context of marine pollution from anthropogenic GHG emissions, they should be those developing and least developed States that are

most directly and severely affected by the effects of such emissions on the marine environment. The above assistance is confined to that aimed at the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution.

331. The obligation of assistance under article 202 of the Convention includes three categories of measures, the content of which is outlined broadly, allowing for an element of discretion on the part of States.

332. The first category of assistance measures, envisaged in article 202, subparagraph (a), of the Convention, includes the promotion of programmes of scientific, educational, technical and other assistance to developing States. The provision identifies some of the measures for promoting assistance. The purpose of this provision is, in the short and medium term, to provide the adequate scientific and technological knowledge to developing States by facilitating and supporting their participation in relevant international research and capacity-building programmes; and, in the long term, to develop capacities for research, production and management of scientific knowledge and technologies in these States to enable them to set up their own programmes to counter marine pollution from anthropogenic GHG emissions.

333. The Tribunal notes that the wide range of assistance measures provided for in article 202, subparagraph (a), of the Convention is not exhaustive. This is deduced from the expression “include, *inter alia*”, contained in the provision. It may also be noted that there are other provisions of the Convention which deal with assistance to developing States in the fields of science, technology and education (e.g., in Part XIII, section 2, and in Part XIV).

334. The second category of assistance measures, envisaged in article 202, subparagraph (b), of the Convention, concerns the provision of appropriate assistance, especially to developing States, in order to minimize the effects of major incidents which may cause serious marine pollution. This category appears to be of lesser relevance in the context of addressing marine pollution from anthropogenic GHG emissions.

335. The third category of measures, envisaged in article 202, subparagraph (c), of the Convention, is to provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments. The modalities of assistance are left to the discretion of States.

336. The Tribunal is of the view that “other assistance” referred to in article 202, subparagraph (a), of the Convention may include financial assistance aimed at providing developing States with assistance to promote the programmes and undertake the activities indicated in article 202 of the Convention. It is evident that scientific, educational and technical assistance entails financial implications. As indicated in paragraph 330 above, the financial assistance to developing States is confined to the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution.

337. Article 203 of the Convention shifts the focus from the duty of assistance incumbent on States to the right to preferential treatment enjoyed by developing States within international organizations with respect to the allocation of appropriate funds and technical assistance and the use of their specialized services to prevent, reduce, control and minimize the effects of marine pollution.

338. The Tribunal notes that article 203 of the Convention implies the obligation of States to take, through the international organizations of which they are members, the measures necessary to put into effect preferential treatment for developing States as envisaged in this provision. In the context of marine pollution from anthropogenic GHG emissions, preferential treatment for developing States, in particular those vulnerable to the adverse effects of climate change (see para. 69 above), shall be granted for the purposes of prevention, reduction and control of marine pollution from such emissions or minimization of its effects.

339. To conclude, the Tribunal is of the view that articles 202 and 203 of the Convention set out specific obligations to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions. Article 202 provides for the obligation of appropriate

assistance, directly or through competent international organizations, in terms of capacity-building, scientific expertise, technology transfer and other matters. Article 203 reinforces the support to developing States, in particular those vulnerable to the adverse effects of climate change, by granting them preferential treatment in funding, technical assistance and pertinent specialized services from international organizations.

3. Monitoring and environmental assessment

340. The Tribunal will now turn to the specific obligations of States stipulated in Part XII, section 4, of the Convention. Article 204 addresses the monitoring of the risks or effects of pollution; article 205, the publication of reports; and article 206, the assessment of potential effects of activities.

341. Article 204 reads:

> *Monitoring the risks or effects of pollution*
>
> 1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.
>
> 2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

342. Article 205 reads:

> *Publication of reports*
>
> States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

343. Article 206 reads:

> *Assessment of potential effects of activities*
>
> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or

> significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

344. The Tribunal notes that many participants in the present proceedings took the view that section 4 of Part XII of the Convention contains obligations which are highly relevant to the questions posed in the Request. It was contended that this section is concerned with obtaining and disseminating knowledge, and that it plays a critical role in ensuring the compliance of States with their obligations under article 192 and, in particular, article 194. It was further contended that monitoring and assessment conducted by a State pursuant to articles 204 and 206, and any reports made available to States pursuant to article 205, may be relevant in assessing what measures are necessary to prevent, reduce and control pollution of the marine environment from anthropogenic GHG emissions.

345. The Tribunal observes at the outset that the obligations envisaged in section 4 are procedural in nature. As held by the arbitral tribunal in the *Chagos Marine Protected Area Arbitration*, procedural obligations, such as the requirement to conduct an environmental impact assessment, "may, indeed, be of equal or even greater importance than the substantive standards existing in international law" (*Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, *Award of 18 March 2015, RIAA, Vol. XXXI*, p. 359, at p. 500, para. 322). Compliance with these procedural obligations is a relevant factor in meeting the general obligations under articles 194 and 192 of the Convention.

(a) Obligation under article 204 of the Convention

346. Under article 204 of the Convention, States shall endeavour to monitor the risks or effects of pollution of the marine environment (paragraph 1) and shall keep under surveillance the effects deriving from any activity in which they are involved, with a view to determining whether this activity is likely to pollute the marine environment (paragraph 2). Both obligations are continuing in nature, in that monitoring and surveillance must be ongoing. The extent of the monitoring obligation

is conditioned by the fact that States, consistent with the rights of other States, are obliged to make every effort, as far as practicable, taking into account their capabilities.

347. Article 204, paragraph 1, of the Convention aims to enhance knowledge of the harmful consequences of marine pollution as a whole. It provides for two phases of monitoring. First, the risks and effects of pollution of the marine environment are to be observed and measured. Second, the data collected are to be evaluated and analysed. In both phases, States are called upon to use “recognized scientific methods”. The standard of “recognized” scientific methods is exacting.

348. With respect to the means through which to fulfil the monitoring obligation, the provision gives discretion to the State concerned. States shall comply with this obligation by acting directly or through the competent international organizations, whether global or regional. In this respect, the Tribunal observes that the adverse effects caused to the marine environment by anthropogenic GHG emissions have been, for many years, the subject of monitoring by international scientific bodies and mechanisms.

349. Article 204, paragraph 2, of the Convention provides for the obligation to keep under surveillance the effects of activities that States have permitted, or in which they are engaged. This obligation is stricter than that under article 204, paragraph 1. The obligation applies irrespective of the place where the activities are conducted or the nationality of the individuals or entities carrying out the activities.

(b) Obligation under article 205 of the Convention

350. Under article 205 of the Convention, States are required to publish reports of the results of their monitoring activities or to provide such reports to the competent international organizations to make them available to all States.

351. The Tribunal notes that the obligation to publish such reports or to provide them to the competent international organizations complements the duty of monitoring set out in article 204 of the Convention. The obligation to circulate reports

is based on the assumption that one of the most effective means for the protection and preservation of the marine environment consists in sharing information and scientific results on risks to the marine environment. In the context of climate change, article 205 requires States to ensure transparency by disseminating the results of their monitoring activities with respect to the negative impacts caused to the marine environment by anthropogenic GHG emissions.

(c) Obligation under article 206 of the Convention

352. The obligation to conduct environmental impact assessments, contemplated in article 206 of the Convention, requires States to assess the potentially harmful effects of a planned activity prior to its execution and to disseminate the obtained results thereafter.

353. The Tribunal notes that most of the participants in the present proceedings were of the view that there is an obligation to conduct an environmental impact assessment under the Convention and customary international law. Most participants also shared the view that the due diligence standard is closely connected to this obligation. It was generally argued that the scope of article 206 of the Convention is wide and that the discretion of States in triggering the obligation therein is limited by various elements, including the precautionary approach. In this regard, it was contended that an environmental impact assessment may also concern the cumulative effects of a planned activity on the marine environment. Furthermore, it was argued that, although article 206 establishes the duty to carry out an environmental impact assessment, the means to assess the adverse effects of activities related to GHG emissions on the marine environment, and the implementation of such a duty, need further study. Finally, while the view was expressed that the form and content of impact assessments are a matter for domestic rather than international law, several participants referred to other international instruments for guidance on this issue.

354. The Tribunal is of the view that the obligation to conduct environmental impact assessments is crucial to ensure that activities do not harm the marine environment and is an essential part of a comprehensive environmental management system

(see *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016, RIAA, Vol. XXXIII*, p. 153, at p. 523, para. 948).

355. As the Seabed Disputes Chamber noted, this obligation also forms part of customary international law (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at pp. 50-51, paras. 145 and 147; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 204).

356. The obligation to conduct an environmental impact assessment pursuant to article 206 of the Convention encompasses the duty of vigilance and prevention. As noted by the ICJ, this duty would not be considered to have been fulfilled if an environmental impact assessment was not undertaken of activities at risk of affecting the environment (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 204). Article 206 therefore constitutes a "particular application" of the obligation enunciated in article 194, paragraph 2 (*The South China Sea Arbitration*, *Award of 12 July 2016, RIAA, Vol. XXXIII*, p. 153, at p. 523, para. 948).

357. In the Tribunal's view, although article 206 of the Convention does not specify the scope and content of an environmental impact assessment, it indicates some of the components that are relevant in addressing the Request.

358. The obligation to conduct an environmental impact assessment concerns "planned activities". This broad term implies that such assessment is to be conducted prior to the implementation of a project (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 83-84, para. 205; *Certain Activities Carried out by Nicaragua in the Border Area, (Costa Rica* v. *Nicaragua*), *Judgment, I.C.J. Reports 2015*, p. 665, at pp. 706-707, para. 104, p. 720, para. 153, and pp. 722-733, para. 161). The activities under assessment comprise both those planned by private entities and those planned by States.

359. Article 206 of the Convention establishes certain requirements to trigger the obligation to conduct an environmental impact assessment. These requirements are the “jurisdiction or control” of the State over the planned activities and the “reasonable grounds for believing” that these activities “may cause substantial pollution of or significant and harmful changes to the marine environment”.

360. As stated above, the concept of “jurisdiction or control” is a broad one. The duty under article 206 of the Convention applies to any planned activity under the jurisdiction or control of the State concerned (see para. 247 above). Land-based activities as well as those at sea are included.

361. Concerning the requirement of “reasonable grounds for believing”, the arbitral tribunal in the *South China Sea Arbitration* observed that the “terms ‘reasonable’ and ‘as far as practicable’ contain an element of discretion for the State concerned” (*The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award of 12 July 2016*, *RIAA, Vol. XXXIII*, p. 153, at p. 523, para. 948). However, the discretion of such a State is limited by the fact that it is required to determine whether an activity under its jurisdiction or control “may cause substantial pollution of or significant and harmful changes to the marine environment”. It is a matter of objective determination based on facts and scientific knowledge. Such pollution and changes need not be actual but can also be potential. Therefore, the Tribunal considers that the precautionary approach may restrict the margin of discretion on the part of the State concerned.

362. The expression “substantial pollution of or significant and harmful changes to the marine environment” is not further elaborated upon in article 206 of the Convention. In the Tribunal’s view, the use of the word “or” suggests that article 206 contemplates two alternative thresholds for subjecting a planned activity to an environmental impact assessment: one threshold for “substantial pollution” and another for “significant and harmful changes”. However, the issue of possible alternative thresholds to trigger the obligation to conduct an environmental impact assessment has little relevance in the case of anthropogenic GHG emissions in light of their impact on the marine environment.

363. Article 206 of the Convention does not specify the content of an environmental impact assessment or the procedure to be followed except for the reference to the communication of States' reports under article 205. Such content and procedure are to be determined by each State in its legislation. In this regard, it is worth recalling that the ICJ in *Pulp Mills on the River Uruguay* held that

> it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.
> (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 205)

364. In this context, a certain degree of flexibility is indicated by the expression "as far as practicable", which addresses, in particular, the different capabilities of States, especially developing States, in conducting environmental impact assessments.

365. Concerning the content of an environmental impact assessment, the Tribunal considers that the broad wording of article 206 of the Convention does not preclude such assessment from embracing not only the specific effects of the planned activities concerned but also the cumulative impacts of these and other activities on the environment. In the context of pollution of the marine environment from anthropogenic GHG emissions, planned activities may not be environmentally significant if taken in isolation, whereas they may produce significant effects if evaluated in interaction with other activities. Moreover, the broad wording of article 206 does not preclude the assessment from including the socio-economic impacts of the activities concerned.

366. The Tribunal notes that the BBNJ Agreement contains, *inter alia*, detailed provisions on environmental impact assessments relating to their thresholds and factors, the processes for conducting them and the reports of such assessments.

(d) Conclusion

367. In light of the foregoing, the Tribunal is of the view that articles 204, 205 and 206 of the Convention impose specific obligations on States Parties to monitor the risks or effects of pollution, to publish reports and to conduct environmental impact assessments as a means to address marine pollution from anthropogenic GHG emissions. Under article 204, paragraph 1, States Parties are required to endeavour to observe, measure, evaluate and analyse the risks or effects of pollution of the marine environment from anthropogenic GHG emissions. Under article 204, paragraph 2, States Parties have the specific obligation to keep under continuing surveillance the effects of activities they have permitted, or in which they are engaged, in order to determine whether such activities are likely to pollute the marine environment through anthropogenic GHG emissions. Article 205 requires States Parties to publish the results obtained from monitoring the risks or effects of pollution from anthropogenic GHG emissions or to communicate them to the competent international organizations for their dissemination. Article 206 sets out the obligation to conduct environmental impact assessments. Any planned activity, either public or private, which may cause substantial pollution to the marine environment or significant and harmful changes thereto through anthropogenic GHG emissions, including cumulative effects, shall be subjected to an environmental impact assessment. Such assessment shall be conducted by the State Party under whose jurisdiction or control the planned activity will be undertaken with a view to mitigating and adapting to the adverse effects of those emissions on the marine environment. The result of such assessment shall be reported in accordance with article 205 of the Convention.

VIII. Question (b)

368. The Tribunal will now turn to the second question posed by the Commission. The question reads:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (‘UNCLOS’), including under Part XII: …

> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

369. In its written submission, the Commission described Question (b) as "independent, but complementary to the first", encompassing the general obligation "to protect and preserve the marine environment in regulating the activities that cause climate change impacts, including ocean warming and sea level rise, and ocean acidification." In more precise terms, the Commission stated that "[t]his question concerns the meaning and scope of article 192". Other participants in the proceedings generally agreed with these observations.

370. The Tribunal has already drawn attention to the fact that Question (b) is broader in scope than Question (a) (see paras. 151 and 152 above). Question (b) is formulated in terms that invoke article 192 of the Convention, which provides that "States have the obligation to protect and preserve the marine environment." The obligation is comprehensive in nature and encompasses obligations contained in other provisions of the Convention, including article 194, which set out more specific obligations. The views of the Tribunal on Question (a) are fully applicable to Question (b).

371. The Tribunal notes that in addressing the definition of "pollution of the marine environment", it clarified the term "marine environment" (see paras. 166 to 171 above). This clarification applies to article 192 and other relevant provisions of the Convention that are considered below.

372. The Tribunal confines its observations herein to the specific obligations to protect and preserve the marine environment in relation to climate change impacts and ocean acidification that were not previously identified in its response to Question (a).

A. Clarification of terms and expressions

373. Certain terms employed in the Request are common to the first and second questions as formulated by the Commission. The Tribunal has already clarified some

terms in determining the precise meaning of Question (a), including the references made to “specific obligations”, “climate change” and “ocean acidification”.

374. As previously explained, the Tribunal accepts the definitions and usage of such terms as “climate change” and “ocean acidification” as they are defined in climate change treaties or widely used in authoritative scientific works such as the IPCC reports, which have already been explained in paragraphs 52, 60 and 68 above.

375. Question (b) concerns “climate change impacts”. The Tribunal observes that the word “impacts” is neutral. However, as formulated in the question submitted to the Tribunal, and in the arguments presented in the proceedings, the word is used in relation to circumstances in which drivers of climate change cause deleterious effects to the marine environment. The Tribunal is of the view that Question (b) concerns the negative impacts of climate change and ocean acidification on the marine environment.

376. As regards the term “specific obligations”, the Tribunal has already drawn attention to the fact that the term may denote concrete or particularized obligations in contrast to general obligations. It may also mean obligations specific to the protection and preservation of the marine environment in relation to climate change impacts and ocean acidification. In responding to Question (b), the Tribunal will bear in mind both aspects of the term “specific”.

B. Relevant provisions of the Convention

377. The Tribunal will now proceed to address the specific obligations of States Parties under the Convention to protect and preserve the marine environment in relation to climate change impacts and ocean acidification that go beyond the prevention, reduction and control of marine pollution as addressed in Question (a).

378. In this regard, the Tribunal will first identify the provisions of the Convention relevant to its response to Question (b). It will then interpret those provisions to the extent necessary to respond to the question, and examine how they should be

applied in protecting and preserving the marine environment in relation to climate change impacts and ocean acidification. Subsequently, the Tribunal will set out the specific obligations of States Parties under the Convention to protect and preserve the marine environment against climate change impacts and ocean acidification.

379. The provisions of the Convention which are relevant to answering Question (b) are found in Part XII, as well as other parts of the Convention. The Tribunal has already presented an overview of the system for the protection and preservation of the marine environment set out in Part XII (see paras. 182 to 191 above). The primary provision in this regard is article 192 of the Convention which provides for the general obligation.

380. The relationship between articles 192 and 193 of the Convention is also addressed in the overview of Part XII (see paras. 184 to 187 above). In the overview, it is noted that article 193 places a constraint upon States' exercise of their sovereign right to exploit their natural resources, which has to be exercised in accordance with their duty to protect and preserve the marine environment.

381. In addressing article 194 of the Convention on measures to regulate marine pollution in relation to the first question, the Tribunal observed that measures envisaged under paragraph 5 of that article cover more than those to regulate pollution, and for that reason, this paragraph refers to the measures taken in accordance with "this Part" rather than "this article". Paragraph 5 of article 194 is particularly relevant to the Tribunal's response to the second question concerning specific obligations to protect and preserve the marine environment.

382. The provisions of Part XII of the Convention that are not aimed exclusively at addressing marine pollution include article 196 on the use of technologies or introduction of alien or new species. Other provisions concerning the protection and preservation of the marine environment are found, in particular, in Part V, including articles 61, 63 and 64, and in Part VII, including articles 117, 118 and 119. These provisions are pertinent in addressing climate change impacts and ocean acidification.

383. The Tribunal's response to the first question addressed the provisions of Part XII of the Convention in section 2 on global and regional cooperation, section 3 on technical assistance, and section 4 on monitoring and environmental assessment. These provisions are also relevant to the Tribunal's consideration of the second question. The Tribunal will elaborate, as necessary, on the significance of these provisions in responding to the second question.

C. Obligations to protect and preserve the marine environment in relation to climate change impacts and ocean acidification

1. Obligation under article 192 of the Convention

(a) Scope of the obligation

384. A vast majority of participants argued that article 192 of the Convention must be interpreted so as to cover all contemporary threats to the marine environment, including those that have emerged following the adoption of the Convention. It was further contended that the mere fact that climate change and ocean acidification constitute a specific and considerable threat to the marine environment is already sufficient in and of itself to give rise to a specific obligation with regard to its protection and preservation in the context of article 192. Some participants, however, argued that Part XII of the Convention does not establish any specific obligations to protect and preserve the marine environment in relation to the impacts of climate change; rather, such obligations are found under specific international instruments, although the Convention may play a subsidiary role in protecting and preserving the marine environment from the adverse effects of climate change.

385. The Tribunal is of the view that the obligation contained in article 192 of the Convention has a broad scope, encompassing any type of harm or threat to the marine environment. The obligation under this provision has two distinct elements. The first element is the obligation to protect the marine environment. It is linked to the duty to prevent, or at least mitigate, environmental harm (see para. 246 above). The second element is the obligation to preserve the marine environment, which

entails maintaining ecosystem health and the natural balance of the marine environment.

386. Where the marine environment has been degraded, the Tribunal is of the view that the term “preservation” may include restoring marine habitats and ecosystems. The term “restoration” is not used in article 192 of the Convention but flows from the obligation to preserve the marine environment where the process of reversing degraded ecosystems is necessary in order to regain ecological balance.

387. The two distinct elements of article 192 of the Convention have been expressed in the following terms:

> This “general obligation” extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.
> (*The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award of 12 July 2016*, *RIAA, Vol. XXXIII*, p. 153, at p. 519, para. 941)

388. Article 192 of the Convention does not specify the relevant harms and threats to which it applies. The open-ended nature of the obligation means that it can be invoked to combat any form of degradation of the marine environment, including climate change impacts, such as ocean warming and sea level rise, and ocean acidification. Article 192 does not specify how the marine environment must be protected and preserved against present and future harms. Other provisions of the Convention and external rules inform the content of article 192 and shape the types of measures that may be implemented to protect and preserve the marine environment. In this regard, the Tribunal has addressed the relevance of international instruments on climate change, including the UNFCCC and the Paris Agreement, to the questions before it (see paras. 67 to 82 above). Other agreements, such as the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter “the Fish Stocks Agreement” or “FSA”), which was adopted

on 4 August 1995 and entered into force on 11 December 2001, and the CBD, may also provide relevant guidance, as indicated further below.

(b) Measures

389. Some participants argued that, in the context of climate change and ocean acidification, the specific obligations under article 192 of the Convention fall into three categories: to mitigate climate change; to implement resilience and adaptation measures; and to protect marine ecosystems that sequester carbon dioxide, thereby preventing further harm to the marine environment. In this regard, many participants noted the relevance of the UNFCCC and the Paris Agreement, and the subsequent relevant decisions taken by the governing bodies of these treaties, in interpreting the provisions of Part XII of the Convention.

390. The Tribunal has drawn attention to the role of the ocean in storing heat trapped in the atmosphere caused by increasing concentrations of GHGs and storage of excess carbon dioxide (see paras. 54 and 55 above). The ocean is the world's largest sink. Coastal "blue carbon" ecosystems, such as mangroves, tidal marshes, and seagrass meadows, are also important sinks and can contribute to ecosystem-based adaptation (see para. 56 above). The obligation to protect and preserve the marine environment is therefore of dual significance in that it promotes the conservation and resilience of living marine resources, while also mitigating anthropogenic GHG emissions by enhancing carbon sequestration through measures to restore the marine environment (see also Article 4, paragraph 1(d), of the UNFCCC and Article 5, paragraph 1, of the Paris Agreement).

391. The obligation to take mitigation measures to reduce anthropogenic GHG emissions has been addressed in the response to Question (a). Article 192 of the Convention also requires States to implement measures to protect and preserve the marine environment in relation to climate change impacts and ocean acidification that include resilience and adaptation actions as described in the climate change treaties.

392. The Convention does not use the term “adaptation measures”. As defined by the IPCC, adaptation is “the process of adjustment to actual or expected *climate* and its effects, in order to moderate harm or exploit beneficial opportunities. In *natural systems*, … human intervention may facilitate adjustment to expected *climate* and its effects” (WGII 2022 Report, Annex II, p. 2898). The ultimate objective of the UNFCCC, as stated in its Article 2, includes the “stabilization of greenhouse gas concentrations in the atmosphere … within a timeframe sufficient to allow ecosystems to adapt naturally to climate change”. Other provisions of the UNFCCC address measures to facilitate adequate adaptation to climate change. This is further developed in the Paris Agreement.

393. Article 2 of the Paris Agreement, in enhancing the implementation of the UNFCCC, including its objective, aims to strengthen the global response to the threat of climate change by, *inter alia*, “[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience”. The Paris Agreement establishes the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change in paragraph 1 of Article 7. Paragraphs 5 and 6 of Article 7 of the Paris Agreement address elements of adaptation strategies and read as follows:

> 5. Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.
>
> 6. Parties recognize the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.

394. The Tribunal is of the view that these provisions are compatible with the obligations of the Convention and exemplify how science and other relevant considerations are taken into account by States in implementing adaptation measures. The Tribunal notes that measures of adaptation and resilience-building frequently require significant resources. In this respect, the Tribunal has already

addressed the obligations under Part XII of the Convention on the provision of technical assistance to developing States (see paras. 322 to 339 above).

(c) Nature of the obligation

395. A vast majority of participants in the proceedings stated that article 192 of the Convention reflects an obligation to act with due diligence. Some noted that the principle of prevention is an integral part of the duty of due diligence, which is an obligation of conduct rather than of result. Other participants indicated that they deliberately avoided the binary characterization of obligations of conduct and of result because, in the context of the Convention and international law generally, these labels are largely unhelpful, as many obligations straddle both categories.

396. The Tribunal considers that the obligation to take measures necessary to protect and preserve the marine environment requires States to ensure that non-State actors under their jurisdiction or control comply with such measures. The obligation of the State, in this instance, is one of due diligence.

397. The Tribunal has already addressed the character of a due diligence obligation in responding to Question (a). The content of the due diligence obligation depends on the nature of the specific treaty obligation so qualified and may vary over time. The standard of this obligation is determined by, among other factors, an assessment of the risk and level of harm combined.

398. The impacts of climate change and ocean acidification on the marine environment are described in the IPCC reports as severe. The WGII 2022 Report states that “global sea level rise, as well as warming, ocean acidification and deoxygenation at depth, are irreversible for centuries or longer (*very high confidence*)” (WGII 2022 Report, p. 453). The 2023 Synthesis Report further states that “[t]he likelihood and impacts of abrupt and/or irreversible changes in the climate system, including changes triggered when tipping points are reached, increase with further global warming (*high confidence*)” (2023 Synthesis Report, p. 18). In its Judgment in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ observed that “in the field of environmental protection, vigilance and prevention are required on

account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 78, para. 140). In such circumstances, the standard of the due diligence obligation is stringent.

399. The Tribunal holds the view that, given the risks posed to the marine environment, States, in fulfilment of their obligations under article 192 of the Convention, are required to take measures as far-reaching and efficacious as possible to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment. The standard of due diligence under article 192 is, as stated above, stringent given the high risks of serious and irreversible harm to the marine environment by climate change impacts and ocean acidification.

(d) Conclusion

400. To conclude, article 192 of the Convention imposes a general obligation on States Parties to protect and preserve the marine environment. It applies to all maritime areas and can be invoked to combat any form of degradation of the marine environment, including climate change impacts, such as ocean warming and sea level rise, and ocean acidification. Where the marine environment has been degraded, this may require restoring marine habitats and ecosystems. This obligation is one of due diligence. The standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification.

2. Obligation under article 194, paragraph 5, of the Convention

401. Many participants in the proceedings noted that article 194, paragraph 5, of the Convention gives a specific form to the general obligation enshrined in article 192 in the context of fragile ecosystems, which are particularly threatened by global warming and ocean acidification. Some participants drew attention to the fact that article 194, paragraph 5, refers to Part XII and invokes the phrase "protect and

preserve" contained in article 192. Some also suggested that article 194, paragraph 5, is reinforced by the call in the preamble of the Paris Agreement to protect the ecological integrity of the ocean.

402. The Tribunal observes that the obligation under article 192 of the Convention includes the specific obligation to take measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life", as expressly provided for in article 194, paragraph 5. This paragraph does not provide specific criteria for determining what measures are "necessary". As stated above (see para. 203), the word "necessary" is to be interpreted in accordance with its ordinary meaning and should be understood broadly. The measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life are those which make it possible to achieve that objective.

403. The obligation stated in article 194, paragraph 5, of the Convention requires States to take both measures necessary to protect "rare or fragile ecosystems" and those necessary to protect the "habitat of depleted, threatened or endangered species and other forms of marine life." The Tribunal observes that the Convention does not define either expression. In clarifying the term "marine environment" in relation to article 1, paragraph 1, subparagraph 4, of the Convention, the Tribunal addressed the definition of the term "ecosystem" (see para. 169 above). The Tribunal notes that characteristics of an ecosystem, such as the uniqueness or rarity, and vulnerability, fragility, sensitivity, or slow recovery, may change over time. Consequently, the process of identifying "rare or fragile ecosystems" requires a case-by-case review. Article 234 of the Convention, concerning ice-covered areas, provides an example of fragile ecosystems where special measures may be required to protect and preserve the marine environment.

404. With regard to the phrase "the habitat of depleted, threatened or endangered species and other forms of marine life", the Tribunal notes that Article 2 of the CBD provides a generally accepted definition of the term "[h]abitat" as "the place or type of site where an organism or population naturally occurs." It is not necessary for such

place or site to form part of a rare or fragile ecosystem. The concern is with the conservation of depleted, threatened or endangered species and other forms of marine life and the preservation of their natural environment. The Convention does not identify a list of “depleted, threatened or endangered species”. The Tribunal notes that the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter “CITES”), which was adopted on 3 March 1973 and entered into force on 1 July 1975, classifies species threatened with extinction and those likely to become endangered in the absence of trade regulations. CITES is an agreement to which there is near-universal adherence. The Tribunal considers that the classification of species in the appendices to CITES provides guidance in interpreting the term “depleted, threatened or endangered species” in article 194, paragraph 5 (see *The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award of 12 July 2016*, *RIAA, Vol. XXXIII*, p. 153, at p. 526, para. 956).

405. The Tribunal notes that the obligation imposed by article 194, paragraph 5, of the Convention may call for specific measures, such as the enactment and enforcement of laws and regulations or the undertaking of monitoring and assessment (see paras. 340 to 367 above). These measures are context-specific and call for objectively reasonable approaches to be taken on the basis of the best available science. Their implementation depends on the relevant domestic legal system and allows for the exercise of discretion. However, States do not have absolute discretion with respect to the action that is required. As stated by the Seabed Disputes Chamber in the *Area Advisory Opinion*, a “State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole” (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 71, para. 230). Although the Seabed Disputes Chamber addressed the specific obligations of sponsoring States under article 4, paragraph 4, of Annex III to the Convention, the Tribunal finds that the views it expressed are also applicable to measures taken to protect and preserve the marine environment in relation to the impacts of climate change and ocean acidification.

406. To conclude, article 194, paragraph 5, of the Convention, read together with article 192, imposes specific obligations on States Parties to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life from climate change impacts and ocean acidification.

3. Obligations under other provisions of the Convention

407. The Tribunal will now identify specific obligations under article 192, read with other provisions of the Convention, that require States to take conservation measures, including adaptation and resilience-building, to protect and preserve the marine environment in response to climate change impacts and ocean acidification.

408. Some participants in the proceedings argued that article 192 provides an umbrella obligation that encapsulates several more specific obligations found in different parts of the Convention as well as in the Fish Stocks Agreement. In addition to the Convention, the Fish Stocks Agreement was cited as providing a relevant framework for cooperation on the protection and preservation of the marine environment in relation to climate change impacts and ocean acidification.

409. The Tribunal notes that climate change and ocean acidification affect virtually all forms of marine life, including fish and corals that build structures providing the habitat for large numbers of species. As the Tribunal stated in the *Southern Bluefin Tuna* cases, “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment” (*Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70). The Tribunal observes that the conservation of living resources and marine life, which falls within the general obligation to protect and preserve the marine environment, requires measures that may vary over time depending on the activities involved and the threats to the marine environment.

410. The impacts of climate change and ocean acidification include shifts in fish distribution and decreases in fisheries that affect the “income, livelihoods, and food security of marine resource-dependent communities”, as well as impacts on marine ecosystems which will put “key cultural dimensions of lives and livelihoods at risk” (see para. 66 above). For conservation measures to be effective, such impacts must be taken into account.

411. The specific obligations of the Convention on the conservation of living resources of the sea are stipulated, *inter alia*, in Parts V and VII, in particular article 61, on the conservation of living resources in the exclusive economic zone, and articles 117 and 119, on the conservation of living resources of the high seas.

(a) Obligations under articles 61, 117 and 119 of the Convention

412. Article 61 of the Convention provides for the obligations concerning the conservation of the living resources in the exclusive economic zone and general principles on what such conservation requires. Article 61, paragraphs 2, 3, and 4, reads as follows:

> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.
>
> 3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.
>
> 4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

413. Article 61 of the Convention identifies both the purpose of conservation and management measures and the factors to be taken into account in taking such measures. States retain discretion in determining the particular measures to achieve the stated objectives. As stated by the ICJ, in commenting on articles 61 and 62 of the Convention, in the *Fisheries Jurisdiction Case (Spain* v. *Canada*),

> [a]ccording to international law, in order for a measure to be characterized as a "conservation and management measure", it is sufficient that its purpose is to conserve and manage living resources and that, to this end, it satisfies various technical requirements.
> (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at p. 461, para. 70)

414. The purpose of conservation and management measures under article 61 of the Convention is to ensure that the maintenance of the living resources in the exclusive economic zone is not endangered by overexploitation. To that end, such measures must be informed by the best available science, including internationally coordinated scientific assessments of the magnitude, timing, and potential environmental and socio-economic impacts of climate change and ocean acidification, and realistic response strategies. States are required, in designing such measures, to take into account relevant environmental and economic factors, including the impact of climate change and ocean acidification on marine ecosystems, environmental stressors, stock migration, and the implications for vulnerable communities and specially affected developing States. Consideration should be given to fishing patterns and the effects on associated and dependent species, and the different rates at which different parts of the food web are responding to climate change and ocean acidification, leading to population-level changes, with a view to ensuring their populations are maintained or restored at levels above which their reproduction may become seriously threatened.

415. The general obligation expressed in article 192 of the Convention, to protect and preserve the marine environment, encompasses obligations stated in article 117. According to article 117, all States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. This

obligation is not limited to flag States but applies to all States with respect to their nationals engaged in activities on the high seas.

416. Article 119 of the Convention provides for the obligation to conserve the living resources in the high seas. This obligation substantially replicates that of article 61 of the Convention, as the conservation duty of all States in the high seas and of the coastal State in the exclusive economic zone is fundamentally the same. Paragraph 1 of article 119 reads:

> In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:
>
> > (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;
> >
> > (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

417. Articles 61 and 119 of the Convention establish a consistent framework that promotes the compatibility of measures established for the high seas and those adopted for areas under national jurisdiction in order to ensure the conservation of stocks in their entirety. In the *SRFC Advisory Opinion*, the Tribunal observed that "fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes" (*Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion of 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 60, para. 214). To that end, the Tribunal emphasized that "States may, directly or through relevant subregional or regional organizations, seek the cooperation of non-Member States sharing the same stocks along their migrating routes with a view to ensuring conservation and sustainable management of these stocks in the whole of their geographical distribution or migrating area" (*ibid.*, at p. 61, para. 215). The views

expressed in the *SRFC Advisory Opinion* are relevant to the conservation and management measures relating to climate-driven shifts in the distribution of stocks.

418. To conclude, articles 61 and 119 of the Convention impose specific obligations on States Parties to take measures necessary to conserve living marine resources threatened by climate change impacts and ocean acidification. Under article 61, States Parties must ensure that the maintenance of the living resources in the exclusive economic zone is not endangered by overexploitation. Conservation and management measures must be informed by the best available science. States Parties are required to take into account relevant environmental and economic factors, including the impact of climate change and ocean acidification. This entails the application of the precautionary approach and an ecosystem approach. The obligation imposed on States Parties under article 119 of the Convention substantially replicates that of article 61, as the conservation duty of all States in the high seas and of the coastal State in the exclusive economic zone is fundamentally the same.

(b) Obligations under articles 63, 64 and 118 of the Convention

419. The importance of the obligation on cooperation in addressing climate change impacts and ocean acidification has already been dealt with by the Tribunal above (see paras. 294 to 321). The obligation to cooperate in conserving living marine resources is found not only in articles 61, 117 and 119 but also in other provisions of the Convention, in particular, articles 63, 64 and 118.

420. Article 63 of the Convention reads:

> *Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it*
>
> 1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

> 2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

421. In the case of highly migratory species, article 64, paragraph 1, of the Convention provides:

> The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

422. As noted above, in the *SRFC Advisory Opinion*, the Tribunal clarified the obligations imposed on States by articles 63 and 64 of the Convention in the following terms:

> The Tribunal observes that the obligation to "seek to agree ..." under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.
> (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015,* p. 4, at pp. 59-60, para. 210)

423. The Tribunal is of the view that the above clarifications provided in the *SRFC Advisory Opinion* are relevant in the context of climate change impacts and ocean acidification. The obligation to "seek to agree …" under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention require States, *inter alia*, to consult with one another in good faith with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks, taking into account the impacts of climate change and ocean acidification on living marine resources.

424. Article 118 of the Convention reads:

> *Cooperation of States in the conservation and management of living resources*
>
> States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

According to this provision, States Parties have the specific obligation to cooperate in taking measures necessary for the conservation of living marine resources in the high seas that are threatened by climate change impacts and ocean acidification.

425. The Fish Stocks Agreement establishes an enhanced framework for the conservation and management of straddling and highly migratory fish stocks that is relevant to climate-driven shifts in the distribution of fish stocks. Article 5 of the Fish Stocks Agreement establishes general principles for the conservation and management of such stocks, including the precautionary approach (in accordance with article 6), an ecosystem approach and the protection of biodiversity. Article 7 of the Fish Stocks Agreement requires States, *inter alia*, to consult on necessary conservation measures, without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction, and the right of all States for their nationals to engage in fishing on the high seas.

426. The Tribunal is of the view that articles 5 and 7 of the Fish Stocks Agreement may provide guidance in responding to distributional changes and range shifts of stocks due to climate change and ocean acidification, and inform the relevant provisions of Parts V and VII of the Convention.

427. According to the WGII 2022 Report, “[b]y altering physiological responses, projected changes in ocean warming … will modify growth, migration, distribution, competition, survival and reproduction (*very high confidence*)” of marine life (WGII

2022 Report, p. 400). The Report further states that the "[c]limate-driven movement of fish stocks is causing commercial, small-scale, artisanal and recreational fishing activities to shift poleward and diversify harvests (*high confidence*)" (WGII 2022 Report, pp. 381-382). The Tribunal observes that many uncertainties remain about the extent to which the impacts of climate change and ocean acidification may be manifested in particular regions. It notes that article 192 of the Convention requires States to anticipate risk, depending on the circumstances.

428. To conclude, articles 63, 64, and 118 of the Convention impose specific obligations on States Parties to cooperate, directly or through appropriate international organizations, in implementing conservation and management measures with regard to straddling and highly migratory species and other living resources of the high seas. This obligation requires States Parties, *inter alia*, to consult with one another in good faith with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks, taking into account the impacts of climate change and ocean acidification on living marine resources. Articles 5 and 7 of the Fish Stocks Agreement may provide guidance in responding to distributional changes and range shifts of stocks as a result of climate change and ocean acidification.

(c) Obligation under article 196 of the Convention

429. The possibility of significant and harmful changes to the marine environment, as a consequence of the introduction of alien species to a particular part of the marine environment due to climate change and ocean acidification, invokes article 196 of the Convention. Article 196, paragraph 1, reads:

> States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.

430. Some participants in the present proceedings expressed the view that in responding to Question (b), the Tribunal might have to determine whether other impacts of climate change which would not fall within the definition of pollution could

give rise to specific obligations to protect the marine environment from a future threat. It was suggested that this scenario might occur, for example, were certain invasive species to move in response to ocean warming or changes in ocean currents. Article 196, paragraph 1, of the Convention was identified as relevant in this regard.

431. The Tribunal notes that this provision contains two distinct obligations: the first, concerning the use of technologies, was addressed in the context of Question (a) (see para. 231 above); and the second, concerning the introduction of alien or new species, flows from the general obligation to protect and preserve the marine environment under article 192 of the Convention.

432. The second obligation under article 196, paragraph 1, of the Convention addresses a concern distinct from that of pollution of the marine environment *stricto sensu*, as defined in article 1, paragraph 1, subparagraph 4, of the Convention. The Tribunal notes that this provision is designed to address the disturbance of the ecological balance of the marine environment as a result of human activities which are not pollution, such as the introduction of alien or new living organisms. This is manifested in the proviso stated in paragraph 2 of article 196, which reads: “This article does not affect the application of this Convention regarding the prevention, reduction and control of pollution of the marine environment.” The obligation to take necessary measures concerning the introduction of alien or new species to a particular part of the marine environment, as provided for in article 196, paragraph 1, was not intended to be controlled by the definition of “pollution of the marine environment” as stated in article 1, paragraph 1, subparagraph 4, of the Convention.

433. Article 196 of the Convention may be invoked only where the introduction of alien or new species “may cause significant and harmful changes” to the marine environment. The Tribunal notes that this threshold is also applied in article 206, on the assessment of potential effects of activities, although it is not defined in the Convention. In this regard, the Tribunal observes that the ILC commentary on article 2, paragraph (a), of the Draft articles on Prevention of Transboundary Harm from Hazardous Activities, defining the “Risk of causing significant transboundary harm”, states:

> The term “significant” is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that *“significant” is something more than “detectable” but need not be at the level of “serious” or “substantial”.* The harm must lead to a real detrimental effect [and] … [s]uch detrimental effects must be susceptible of being measured by factual and objective standards.
> (Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 148, at p. 152, para. (4))

434. The Tribunal notes that in establishing a threshold, article 196 of the Convention uses the word “may”, which implies the precautionary approach. It is sufficient that the introduction of non-indigenous species to a particular part of the marine environment due to climate change impacts and ocean acidification may have a real detrimental effect for article 196 to be engaged.

435. According to the WGII 2022 Report,

> [n]on-indigenous marine species are major agents of ocean and coastal biodiversity change, and climate and non-climate drivers interact to support their movement and success (*high confidence*) … . At times, non-indigenous species act invasively and outcompete indigenous species, causing regional biodiversity shifts and altering ecosystem function, as seen in the Mediterranean region (*high confidence*) … . Warming-related range expansions of non-indigenous species have directly or indirectly decreased commercially important fishery species and nursery habitat.
> (WGII 2022 Report, p. 456)

436. The Tribunal finds that the second clause of article 196, paragraph 1, of the Convention requires States to take appropriate adaptive measures to prevent, reduce and control pollution from the introduction of non-indigenous species as a result of climate change impacts and ocean acidification which may cause significant and harmful changes to the marine environment. This does not affect the application of the Convention regarding the prevention, reduction and control of pollution of the marine environment.

4. Area-based management tools

437. Some participants in the proceedings argued that rapidly implementing area-based management tools, including marine protected areas (hereinafter “MPAs”),

both within and beyond national jurisdiction, is one of the most effective ways to implement article 192 of the Convention in relation to climate change impacts and ocean acidification.

438. There is support in the WGII 2022 Report for the use of area-based management tools, including MPAs, as a realistic response strategy to climate change. It states:

> MPAs and other marine spatial-planning tools have great potential to address climate-change mitigation and adaptation in ocean and coastal ecosystems, if they are designed and implemented in a coordinated way that takes into account ecosystem vulnerability and responses to projected climate conditions, considers existing and future ecosystem uses and non-climate drivers, and supports effective governance (*high confidence*).
> (WGII 2022 Report, p. 483)

439. The Tribunal observes that the term “marine protected area” is not found in the Convention. It notes that Article 2 of the CBD defines “[p]rotected area” as a “geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.” State practice in support of implementing MPAs in areas beyond national jurisdiction is based on regional treaties and collaborative arrangements, as evidenced, for example, in the practice of Contracting Parties to the Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter “the OSPAR Convention”), which was adopted on 22 September 1992 and entered into force on 25 March 1998. The OSPAR Convention recognizes

> that it may be desirable to adopt, on the regional level, more stringent measures with respect to the prevention and elimination of pollution of the marine environment or with respect to the protection of the marine environment against the adverse effects of human activities than are provided for in international conventions or agreements with a global scope.
> (Preamble, eleventh paragraph)

440. The Tribunal notes that Part XII of the Convention does not preclude States from adopting more rigorous measures to protect and preserve the marine environment than provided for therein. However, such measures must be consistent with the Convention and other rules of international law. The Tribunal notes that the recently adopted BBNJ Agreement expresses the need for a global framework under

the Convention to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and provides for the use of area-based management tools, including MPAs.

IX. Operative clause

441. For these reasons,

THE TRIBUNAL,

(1) Unanimously

Decides **that it has jurisdiction to give the advisory opinion requested by the Commission.**

(2) Unanimously

Decides **to respond to the request for an advisory opinion submitted by the Commission**.

(3) Unanimously

Replies **to Question (a) as follows:**

(a) Anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.

(b) Under article 194, paragraph 1, of the Convention, States Parties to the Convention have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection. Such measures should be determined objectively, taking into account, *inter alia*, the best available science and

relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal. The scope and content of necessary measures may vary in accordance with the means available to States Parties and their capabilities. The necessary measures include, in particular, those to reduce GHG emissions.

(c) The obligation under article 194, paragraph 1, of the Convention to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence. The standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions. However, the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.

(d) Under article 194, paragraph 2, of the Convention, States Parties have the specific obligation to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage by pollution to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. This obligation applies to a transboundary setting and is a particular obligation in addition to the obligation under article 194, paragraph 1. It is also an obligation of due diligence. The standard of due diligence under article 194, paragraph 2, can be even more stringent than that under article 194, paragraph 1, because of the nature of transboundary pollution.

(e) In terms of specific sources of pollution, marine pollution from anthropogenic GHG emissions can be characterized as pollution from land-based sources, pollution from vessels, or pollution from or through the atmosphere.

(f) Under articles 207 and 212 of the Convention, States Parties have the specific obligation to adopt laws and regulations to prevent, reduce and control marine pollution from GHG emissions from land-based sources and from or through the atmosphere, respectively, taking into account internationally agreed rules,

standards and recommended practices and procedures contained, *inter alia*, in climate change treaties such as the UNFCCC and the Paris Agreement. To this effect, States Parties have the specific obligations to take other necessary measures and, acting especially through competent international organizations or diplomatic conference, to endeavour to establish global and regional rules, standards and recommended practices and procedures.

(g) Under article 211 of the Convention, States Parties have the specific obligation to adopt laws and regulations to prevent, reduce and control marine pollution from GHG emissions from vessels flying their flag or of their registry, which must at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

(h) Under articles 213 and 222 of the Convention, States Parties have the specific obligation to enforce their national laws and regulations and to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from anthropogenic GHG emissions from land-based sources and from or through the atmosphere, respectively.

(i) Under article 217 of the Convention, States Parties have the specific obligation to ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards established through the competent international organization or general diplomatic conference and with their laws and regulations for the prevention, reduction and control of marine pollution from GHG emissions from vessels. To this end, they shall adopt laws and regulations and take other measures necessary for their implementation.

(j) Articles 197, 200 and 201, read together with articles 194 and 192 of the Convention, impose specific obligations on States Parties to cooperate, directly or through competent international organizations, continuously, meaningfully and in good faith, in order to prevent, reduce and control marine pollution from

anthropogenic GHG emissions. Under article 197, States Parties have the specific obligation to cooperate in formulating and elaborating rules, standards and recommended practices and procedures, consistent with the Convention and based on available scientific knowledge, to counter marine pollution from anthropogenic GHG emissions. Under article 200, States Parties have the specific obligations to cooperate to promote studies, undertake scientific research and encourage the exchange of information and data on marine pollution from anthropogenic GHG emissions, its pathways, risks and remedies, including mitigation and adaptation measures. Under article 201, States Parties have the specific obligation to establish appropriate scientific criteria on the basis of which rules, standards and recommended practices and procedures are to be formulated and elaborated to counter marine pollution from anthropogenic GHG emissions.

(k) Under article 202 of the Convention, States Parties have the specific obligation to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions. This article provides for the obligation of appropriate assistance, directly or through competent international organizations, in terms of capacity-building, scientific expertise, technology transfer and other matters. Article 203 reinforces the support to developing States, in particular those vulnerable to the adverse effects of climate change, by granting them preferential treatment in funding, technical assistance and pertinent specialized services from international organizations.

(l) Articles 204, 205 and 206 of the Convention impose on States Parties specific obligations of monitoring, publishing the reports thereof and conducting environmental impact assessments as a means to address marine pollution from anthropogenic GHG emissions. Under article 204, paragraph 1, States Parties have the specific obligation to endeavour to observe, measure, evaluate and analyse the risks or effects of pollution of the marine environment from anthropogenic GHG emissions. Under article 204, paragraph 2, States Parties have the specific obligation to keep under continuing surveillance the effects of activities they have permitted, or in which they are engaged, in order to determine whether such activities are likely to pollute the marine environment through anthropogenic GHG emissions. Under article 205, States Parties have the specific obligation to publish

the results obtained from monitoring the risks or effects of pollution from such emissions or to communicate them to the competent international organizations for their dissemination. Under article 206, States Parties have the specific obligation to conduct environmental impact assessments. Any planned activity, either public or private, which may cause substantial pollution to the marine environment or significant and harmful changes thereto through anthropogenic GHG emissions, including cumulative effects, shall be subjected to an environmental impact assessment. Such assessment shall be conducted by the State Party under whose jurisdiction or control the planned activity will be undertaken with a view to mitigating and adapting to the adverse effects of such emissions on the marine environment. The result of such assessment shall be reported in accordance with article 205 of the Convention.

(4) Unanimously

***Replies* to Question (b) as follows:**

(a) The Tribunal's response to Question (a) is relevant to its response to Question (b). Subparagraphs (j), (k) and (l) of operative paragraph (3) are of particular relevance in this regard.

(b) The obligation under article 192 of the Convention to protect and preserve the marine environment has a broad scope, encompassing any type of harm or threat to the marine environment. Under this provision, States Parties have the specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification. Where the marine environment has been degraded, this obligation may call for measures to restore marine habitats and ecosystems. Article 192 of the Convention requires States Parties to anticipate risks relating to climate change impacts and ocean acidification, depending on the circumstances.

(c) This obligation is one of due diligence. The standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification.

(d) Under article 194, paragraph 5, of the Convention, States Parties have the specific obligation to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life from climate change impacts and ocean acidification.

(e) Under articles 61 and 119 of the Convention, States Parties have the specific obligations to take measures necessary to conserve the living marine resources threatened by climate change impacts and ocean acidification. In taking such measures, States Parties shall take into account, *inter alia*, the best available science and relevant environmental and economic factors. This obligation requires the application of the precautionary approach and an ecosystem approach.

(f) The obligation to seek to agree under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention, require States Parties, *inter alia*, to consult with one another in good faith with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks. The necessary measures on which consultations are required must take into account the impacts of climate change and ocean acidification on living marine resources. Under article 118 of the Convention, States Parties have the specific obligation to cooperate in taking measures necessary for the conservation of living marine resources in the high seas that are threatened by climate change impacts and ocean acidification.

(g) Under article 196 of the Convention, States Parties have the specific obligation to take appropriate measures to prevent, reduce and control pollution from the introduction of non-indigenous species due to the effects of climate change and ocean acidification which may cause significant and harmful changes to the marine environment. This obligation requires the application of the precautionary approach.

Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this twenty-first day of May, two thousand and twenty-four, in three copies, one of which will be placed in the archives of the

Tribunal and the others transmitted to the Commission of Small Island States on Climate Change and International Law and to the United Nations.

(signed)
Albert J. HOFFMANN,
President

(signed)
Ximena HINRICHS OYARCE,
Registrar

Judge JESUS, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(initialled) J.L.J.

Judge PAWLAK, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(initialled) S.P.

Judge KULYK, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(initialled) M.K.

Judge KITTICHAISAREE, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

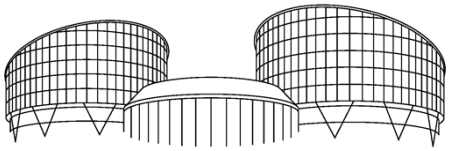
(initialled) K.K.

Judge INFANTE CAFFI, availing herself of the right conferred on her by article 125, paragraph 2, of the Rules of the Tribunal, appends her declaration to the Advisory Opinion of the Tribunal.

(initialled) M.T.I.C.

Annex 621

Verein Klimaseniorinnen Schweiz and Others v Switzerland [2024] ECHR 304



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS v. SWITZERLAND

(Application no. 53600/20)

JUDGMENT

Art 34 • Victim • *Locus standi* • Separate key criteria set out for establishing victim status of individual applicants and *locus standi* (representation) of associations in climate-change context • Need for effective protection of Convention rights taking into account special features of this phenomenon without undermining the exclusion of *actio popularis* from the Convention system • In case-circumstances victim-status criteria not fulfilled by individual applicants • Especially high threshold for fulfilling criteria not met (incompatible *ratione personae*) • Applicant association fulfilled relevant criteria (*locus standi*) and thus had standing to act on behalf of its members • Importance of collective action and intergenerational burden-sharing in climate-change context

Art 8 • Positive obligations • Private and family life • Respondent State's failure to comply with positive obligation to implement sufficient measures to combat climate change • Art 8 applicable • Art 8 encompassing a right for individuals to effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life • Need to develop a more appropriate and tailored approach as regards the various Convention issues arising in the climate-change context not addressed by Court's existing environmental case-law • Importance of intergenerational burden-sharing • Reduced margin of appreciation as regards State's commitment combating climate change, its adverse effects and the setting of aims and objectives in this respect • Wide margin of appreciation as to the choice of means designed to achieve those objectives • Contracting State's primary duty to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change • Enumeration of requirements to which competent authorities need to have due regard • Need for domestic procedural safeguards • Mitigation measures to be supplemented by adaptation measures aimed at alleviating the most serious or imminent consequences of climate-change • Existence of critical lacunae in Swiss authorities' process of putting in place the relevant domestic regulatory framework • Failure to quantify, through a carbon budget or otherwise, national GHG emission limitations • Failure to act in good time

COUNCIL OF EUROPE
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and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework • Wide margin of appreciation exceeded
Art 6 § 1 (civil) • Access to court • Applicability of civil limb concerning the effective implementation of mitigation measures under domestic law • Domestic courts' failure to engage seriously or at all with applicant association's action • Lack of convincing reasons for non-examination of merits of complaints • Failure to consider compelling scientific evidence concerning climate change and to examine applicant association's legal standing • Lack of further legal avenues or safeguards • Very essence of right of access to court impaired • Emphasis on domestic courts' key role in climate -change litigation and of access to justice in this field
Art 46 • Execution of judgment • General measures • Respondent State to assess specific measures to be taken with the assistance of the Committee of Ministers

Prepared by the Registry. Does not bind the Court.

STRASBOURG

9 April 2024

This judgment is final but it may be subject to editorial revision.

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In the case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Síofra O'Leary,
Georges Ravarani,
Marko Bošnjak,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Arnfinn Bårdsen,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski,
Darian Pavli,
Raffaele Sabato,
Lorraine Schembri Orland,
Anja Seibert-Fohr,
Peeter Roosma,
Ana Maria Guerra Martins,
Mattias Guyomar,
Andreas Zünd*, judges*,

and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 30 March 2023, 6 and 7 December 2023 and 14 February 2024,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

1. The case originated in an application (no. 53600/20) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association registered under Swiss law, Verein KlimaSeniorinnen Schweiz, and by four Swiss nationals, Ms Ruth Schaub, Ms Marie-Eve Volkoff Peschon, Ms Bruna Giovanna Olimpia Molinari and Ms Marie Gabrielle Thérèse Budry ("the applicants"), all members of that association, on 26 November 2020.

2. The applicants were represented by Ms C.C. Bähr and Mr M. Looser, lawyers practising in Zürich, Ms J. Simor KC and Mr M. Willers KC, lawyers practising in London, and Mr R. Mahaim, a lawyer practising in Lausanne. The Swiss Government ("the Government") were represented by their Agent, Mr A. Chablais, of the Federal Office of Justice.

3. The applicants alleged, in particular, various omissions of the Swiss authorities in the area of climate-change mitigation. They relied on Articles 2, 6, 8 and 13 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 26 April 2022 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. The President of the Court decided that in the interests of the proper administration of justice the case should be assigned to the same composition of the Grand Chamber as the cases of *Carême v. France* (application no. 7189/21) and *Duarte Agostinho and Others v. Portugal and 32 Others* (application no. 39371/20) (Rule 24, Rule 42 § 2 and Rule 71), which were also relinquished by Chambers of the Fifth and Fourth Sections respectively.

6. The applicants and the Government each filed memorials on the admissibility and merits of the case. In addition, having been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3), third-party comments were received from the Governments of Austria, Ireland, Italy, Latvia, Norway, Portugal, Romania and Slovakia.

7. Upon the leave granted by the President, third-party comments were also received from the following entities: the United Nations High Commissioner for Human Rights; the United Nations Special Rapporteurs on toxics and human rights, and on human rights and the environment, and the Independent Expert on the enjoyment of all human rights by older persons; the International Commission of Jurists (ICJ) and the ICJ Swiss Section (ICJ-CH); the European Network of National Human Rights Institutions (ENNHRI); the coordinated submission of the International Network for Economic, Social and Cultural Rights (ESCR-Net); the Human Rights Centre of Ghent University; Professors Evelyne Schmid and Véronique Boillet (University of Lausanne); Professors Sonia I. Seneviratne and Andreas Fischlin (Swiss Federal Institute of Technology Zurich); Global Justice Clinic, Climate Litigation Accelerator and Professor C. Voigt (University of Oslo); ClientEarth; Our Children's Trust, Oxfam France and Oxfam International and its affiliates (Oxfam); a group of academics from the University of Bern (Professors Claus Beisbart, Thomas Frölicher, Martin Grosjean, Karin Ingold, Fortunat Joos, Jörg Künzli, C. Christoph Raible, Thomas Stocker, Ralph Winkler and Judith Wyttenbach, and Doctors Ana M. Vicedo-Cabrera and Charlotte Blattner); the Center for International Environmental Law and Dr Margaretha Wewerinke-Singh; the Sabin Center for Climate Change Law at Columbia Law School; and Germanwatch, Greenpeace Germany and Scientists for Future.

8. On 11 January 2023 the Grand Chamber decided that in the interest of the proper administration of justice, after the completion of the written stage of the proceedings in the above-mentioned cases, the oral stage would be

staggered so that a hearing in the present case and in the Carême v. France case would be held on 29 March 2023, and a hearing in the Duarte Agostinho and Others v. Portugal and 32 Others case would be held before the same composition of the Grand Chamber at a later stage (the hearing was held on 27 September 2023). At a later stage, Armen Harutyunyan, who was prevented from sitting in the present case, was replaced by Jovan Ilievski, substitute judge (Rule 24 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 29 March 2023 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
MR A. CHABLAIS, *Agent*,
MR F. PERREZ,
MS M. BEELER-SIGRON,
MS L.L. PAROZ,
MS R. BURKARD,
MS S. NGUYEN-BLOCH,
MS I. RYSE *Advisers*;

(b) *for the applicants*
MS J. SIMOR KC,
MR M. WILLERS KC,
MS C.C. BÄHR,
MR M. LOOSER,
MR R. MAHAIM, *Counsel*,
MR R. HARVEY,
MS L. FOURNIER, *Advisers*,
MS B. MOLINARI,
MS M. BUDRY, *Applicants*,
MS A. MAHRER,
MS R. WYDLER-WÄLTI, *Co-Presidents of the applicant association*;

(c) *for the Government of Ireland*
MR B. LYSAGHT, *Agent*,
MS C. DONNELLY SC,
MR D. FENNELLY, *Counsel*,
MR M. CORRY,
MS E. GRIFFIN, *Advisers*;

(d) *for ENNHRI*
MS J. SANDVIG,
MS K. SULYOK,
MS H.C. BRAENDEN,

MR P.W. DAWSON, *Advisers*.

The Court heard addresses by Mr Chablais, Mr Perrez, Ms Simor KC, Mr Willers KC, Ms Donnelly SC and Ms Sandvig, and the answers by Mr Chablais, Mr Perrez and Ms Simor KC to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants' particular situation

1. The first applicant

10. The first applicant – Verein KlimaSeniorinnen Schweiz – is a non-profit association established under Swiss law ("the applicant association"). According to its Statute, the applicant association was established to promote and implement effective climate protection on behalf of its members. The members of the association are women living in Switzerland, the majority of whom are over the age of 70. The applicant association is committed to reducing greenhouse gas ("GHG") emissions in Switzerland and their effects on global warming. The activity of the applicant association is stated to be in the interests of not only its members, but also of the general public and future generations, through effective climate protection. The applicant association pursues its purpose in particular through the provision of information, including educational activities, and by taking legal action in the interests of its members with regard to the effects of climate change. The applicant association has more than 2,000 members whose average age is 73. Close to 650 members are 75 or older.

11. For the purposes of the proceedings before the Grand Chamber, the applicant association solicited submissions by its members about the effects of climate change on them. The members described how their health and daily routines were affected by heatwaves.

2. The second to fifth applicants

12. The second to fifth applicants ("applicants nos. 2-5") are women who are members of the applicant association. The second applicant, Ms Schaub, was born in 1931. She died in the course of the proceedings before the Court (see paragraph 273 below). The third applicant, Ms Volkoff Peschon, was born in 1937 and lives in Geneva. The fourth applicant, Ms Molinari, was born in 1941 and lives in Vico Morcote. The fifth applicant, Ms Budry, was born in 1942 and lives in Geneva.

(a) The second applicant

13. In a written declaration, the second applicant submitted that she had experienced difficulties enduring the heatwaves and had more than once collapsed while exposed to the sun on a balcony in her flat. She had had to adapt her lifestyle to the heatwaves, for instance when going to the shops, and had to stay indoors almost the entire day. She had also received assistance from a nurse, who had given her special clothing to keep cool. She had needed to get medical attention and had suffered extremely painful episodes of gout, which intensified during hot days. She had even been hospitalised once after she had collapsed during a heatwave, but then she had adapted her habits to the heat by going to the shops earlier and getting fresh air at night. All these limitations had led to problems in her social environment.

14. The second applicant also provided a medical certificate of 15 November 2016 describing how in August 2015, during a warm summer's day, she had collapsed in the doctor's waiting room owing to the high temperature. The medical certificate also indicated that the applicant wore a pacemaker.

(b) The third applicant

15. In a written declaration, the third applicant submitted that she had difficulties enduring the heatwaves, such that she needed to organise her life according to the weather forecast. When it was very hot, she had to stay at home the entire day, with the blinds down and the air conditioning turned on. She was also required to refrain from recreational activities and was obliged to regularly measure her blood pressure and then take her medication accordingly. She had also had to see a cardiologist. She would like to move and live somewhere at altitude, but her cardiovascular problems limited her in that respect. She had never been hospitalised, but on several occasions she had felt severely unwell. In addition, owing to the pollution, she had experienced breathing difficulties and extreme sweating. In conclusion, the third applicant stressed that between May and September, the thermometer determined the way she led her life, including her relations with family and friends.

16. The third applicant provided a medical certificate of 19 October 2016 indicating that for the previous two summers she had suffered significantly as a result of the heatwaves. They affected her physical capacities as she had cardiovascular health issues. Another medical certificate of 11 February 2019 indicated that the applicant's health condition and the medication she took were not compatible with heatwaves. During heatwaves she had to stay at home and take the appropriate medication (which needed to be adjusted).

17. A medical certificate of 23 September 2021 confirmed that the applicant suffered from cardiovascular health issues. During heatwaves she generally felt weak and had been unable to continue with her usual therapy.

Moreover, she was required to adjust her daily routines. Another medical certificate of 26 November 2022, which was based on a telephone interview with the applicant and the inspection of her medical file, confirmed that the applicant suffered physically and psychologically during the heatwaves.

(c) The fourth applicant

18. According to a written declaration of the fourth applicant, her mobility was restricted during heatwaves as excessive heat exacerbated her asthma and chronic obstructive pulmonary disease.

19. She provided medical certificates of 7 October 2016 and 15 July 2020 attesting to her medical condition and to the adverse effects of periods of hot weather on it. This was confirmed in a medical certificate of 26 November 2022 according to which it was highly probable that the aggravation of the applicant's health condition was in correlation with the occurrence of climate change-induced heatwaves. Moreover, during heatwaves, the applicant suffered because she had to reduce her activities and she felt isolated.

(d) The fifth applicant

20. In a written declaration, the fifth applicant complained that the heatwaves had the effect of taking away all her energy. During summer she could not face leaving her home and going for a swim. At the same time, she could not afford to take longer holidays in a hotel with a swimming pool. She had never been hospitalised and had not seen a doctor in relation to the heatwaves. Previously she had also worried about her 90-year-old mother, until the latter had moved away to a place with a better climate.

21. The fifth applicant provided a medical certificate of 4 October 2016 attesting that she suffered from asthma.

B. Proceedings instituted by the applicants

1. The applicants' requests to the authorities

22. On 25 November 2016, relying on section 25a of the Federal Administrative Procedure Act of 20 December 1968 ("the APA"), and Articles 6 and 13 of the Convention, the applicants requested the Federal Council, the Federal Department of the Environment, Transport, Energy and Communications ("the DETEC"), the Federal Office for the Environment ("the FOEN") and the Federal Office for Energy ("the SFOE") to take a formal decision on "real acts" (acts based on federal public law that affect rights and obligations, but do not arise from formal rulings) with a view to addressing alleged omissions in climate protection. Their requests for a legal remedy read as follows:

"1. By 2020, the Respondents [the above-noted authorities] shall take all necessary actions within their competence to reduce [GHG] emissions to such an extent that Switzerland's contribution aligns with the target of holding the increase in global average temperature to well below 2°C above pre-industrial levels, or at the very least, does not exceed the 2°C target, thereby putting an end to the unlawful omissions undermining these targets.

Specifically:

a. Respondent 1 shall examine the duties of the Confederation under Article 74 § 1 of the Federal Constitution and their implementation in the climate sector [under] the current climate goal and regarding compliance with:

– Article 74 § 2 and Article 73 of the Constitution and the constitutional duty of the government to protect the individual in accordance with Article 10 § 1 of the Constitution; and

– Articles 2 and 8 of the European Convention on Human Rights (ECHR);

and shall develop, without delay, a new plan to be implemented immediately and through 2020 that will permit Switzerland to achieve the 'well below 2°C' target or, at the very least, not [to] exceed the 2°C target, which requires a reduction of domestic [GHG] emissions by at least 25% below 1990 levels by 2020;

b. Respondent 1 shall communicate to the Federal Assembly (Parliament) and the general public that – in order to comply with Switzerland's obligation to protect and [with] the principles of precaution and sustainability – a reduction of [GHG] emissions is necessary by 2020 in order to meet the 'well below 2°C' target or, at the very least, not exceed [the] 2°C target, which requires a domestic [GHG] reduction of at least 25% below 1990 levels by 2020;

c. Through a decision at the level of the Federal Council, department or federal office, Respondents 1, 2, or 3 shall initiate, without delay, a preliminary legislative procedure for an emission reduction target as laid out in the request [at] 1 (a); and

d. Respondent 1 shall inform Parliament as stated in the request [at] 1 (c) [whether] the proposed emissions reduction target is in compliance with the Constitution and the ECHR.

2. The respondents shall take all necessary mitigation measures within their competence to meet the [GHG] reduction target defined in the request [at] 1, namely reducing [GHG] emissions by at least 25% below 1990 levels by 2020, thereby putting an end to their unlawful omissions. In particular:

a. Respondent 1 shall consider measures to achieve the target as defined in the request [at] 1 (a);

b. Respondent 1 shall communicate the appropriate measures to reach the target as stated in the request [at] 1 (b);

c. Respondents 1, 2, or 3 shall, with regard to the request [at] 1 (c) above, include measures to achieve the target in the preliminary legislative procedure.

3. Respondents shall carry out all acts, within their competence, required to lower emissions by 2030 to such an extent that Switzerland's contribution aligns with the 'well below 2°C' target or, at the very least, does not exceed [the] 2°C target, thus ending the unlawful omissions inconsistent with these targets. In particular:

a. Respondents 1, 2, or 3 shall, in the course of the preliminary legislative procedure, carry out all actions that allow Switzerland to do its share to meet the 'well below 2°C'

target or, at the very least, to not exceed [the] 2°C target, which means a domestic reduction of [GHG] emissions of at least 50% below 1990 levels by 2030;

b. Respondents 1, 2, or 3 shall include in the preliminary legislative procedure all necessary mitigation measures required to meet the [GHG] reduction target as defined in the request [at] 3 (a).

4. The respondents shall implement all mitigation measures, within their competence, required to achieve the current [GHG] reduction target of 20%, thus ending the unlawful omissions. In particular:

a. Respondent 3 shall obtain without delay the reports of cantons detailing the technical measures adopted to reduce the CO_2 emissions from buildings;

b. Respondent 3 shall verify that the cantonal reports include data about CO_2 reduction measures that have already been taken or are planned and their effectiveness; demonstrate the progress made to reduce CO_2 emissions from buildings in their territory; and require improvements if necessary;

c. Respondent 3 shall verify that cantons are issuing state of the art building standards for new and existing buildings;

d. Respondents 1, 2 and 3 shall take the necessary actions if cantons fail to comply with the verification requirement as stated in the request at 4 (c); if necessary they shall become active in [the] preparation of new state of the art federal building standards for new and existing buildings;

e. Respondent 2, having determined that the interim building sector target for 2015 was not achieved, shall examine the need for improvements by cantons and propose additional effective mitigation measures to Respondent 1;

f. Respondents 1, 2, and 3 shall take steps aimed at rapidly increasing the CO_2 tax on thermal fuels;

g. Respondent 4 shall require the importers of passenger cars to submit data showing actual CO_2 emissions of passenger cars;

h. Respondent 2, given that the interim transport sector target 2015 will likely not be achieved, shall immediately draft additional and effective mitigation measures and propose them to Respondent 1; in particular, Respondent 1 shall take actions to promote electromobility or otherwise demonstrate that the sector interim target in section 3(2) of the CO_2 Ordinance can be achieved without such promotion; and Respondents l, 2, and 3 shall take steps to raise the compensation rate for the CO_2 emissions from motor fuels;

i. Respondent 1 shall make a comprehensive assessment of the effectiveness of measures enacted under the CO_2 Act and consider whether additional measures are necessary, report the findings of the assessment to Parliament, and immediately initiate steps to implement the necessary measures for the period ending in 2020.

5. Alternatively, with regard to the requests 1, 2, 3 and 4, a declaratory ruling shall be issued finding the respective omissions unlawful.

as well as the following procedural motion:

The requests for legal remedies 1-5 shall be enacted in a timely manner."

23. In their memorial submitted to the DETEC, the applicants pointed out, in particular, that the aim of their request was to compel the authorities, in the interest of safeguarding their lives and health, to take all necessary measures

required by the Constitution and the Convention to prevent the increase of the global temperature.

24. As regards their individual circumstances, the applicants pointed to the nature and mission of the applicant association and, as regards the rest of them, contended that they were members of a most vulnerable group affected by climate change. Evidence showed that the life and health of older women were more severely impacted by periods of heatwaves than the rest of the population. They submitted that this could be seen in their cases as they all had various health impairments affected by heatwaves, and such adverse effects would exacerbate with time owing to the predicted rise in the frequency and duration of heatwaves.

25. The applicants further explained that they considered the current domestic emissions reduction targets insufficient, unconstitutional and incompatible with the Convention and international law. They also considered the mitigation measures taken by the authorities to be insufficient. In their view, the authorities had no justification for their inaction in the field of climate change.

26. The applicants contended that the above-noted omissions violated the sustainability principle (Article 73 of the Constitution), the precautionary principle (Article 74 § 2 of the Constitution) and the right to life (Article 10 of the Constitution), and also their rights under the Convention, in particular "the right to life, to health, and to physical integrity protected in Article 2 and Article 8 [of the Convention]" in relation to the positive duty to protect. Specifically, they argued that the State had a duty to put in place the necessary regulatory framework and administration, taking into account the particular situation in question and the level of risk.

27. Furthermore, the applicants relied on Articles 6 and 13 of the Convention. They argued, in particular, that their request concerned a serious and genuine dispute over their civil rights and obligations within the meaning of Article 6 § 1 of the Convention, since the omissions at issue posed a serious risk to their lives, health and physical integrity. They were therefore entitled to have their request assessed by the authorities and ultimately a court. This was, in their view, the intention and purpose of the remedy under section 25a of the APA, which, by the nature of things, was being used in the present case to contest omissions and claim protection under the Convention. However, and independently of section 25a of the APA, the applicants considered that their request should be examined, having regard to the requirements of Articles 6 and 13 of the Convention.

28. On 25 April 2017 the DETEC rejected the applicants' request for lack of standing. The DETEC explained that an action under section 25a of the APA was subject to the following conditions: (a) there had to be a "real act"; (b) the request had to concern federal public law; (c) the authority concerned had to be a federal administrative authority; (d) the real act had to affect rights

or obligations; (e) there had to be an "interest worthy of protection"; and (f) the principle of subsidiarity had to be observed.

29. While, in principle, the DETEC accepted that the conditions under (a) to (c) had been fulfilled, it considered that the condition under (d) – namely, that the real act had to affect rights or obligations – had not been met, which made it irrelevant to discuss the conditions under (e) to (f).

30. The DETEC held that the main aim of the applicants' request to the federal administrative authorities had been to initiate the enactment of legislative provisions to reduce CO_2 emissions. That action was not comparable with an order (individual-specific order) or at least with a general order (general-specific order), as required by section 25a of the APA. In the DETEC's view, the general purpose of the applicants' request was to achieve a reduction in CO_2 emissions worldwide and not only in their immediate surroundings. The DETEC considered that no individual legal positions were affected in the case in issue as the applicants' request did not serve to specifically realise such individual positions, but rather aimed to have general, abstract regulations and measures put in place. The DETEC therefore considered that section 25a of the APA did not apply, as legislative procedures were not regulated by that Act and the applicants had other means at their disposal to engage in the exercise of their political rights.

31. For similar reasons, the DETEC rejected the applicants' Convention arguments. Focusing on Article 13 of the Convention, the DETEC found that the applicants were pursuing general-public interests, which could not provide the basis for them having victim status under the Convention. The DETEC also held that Article 13 of the Convention allowed only the review of a concrete State act in relation to an individual person, which was not the situation in the case at hand.

2. Proceedings in the Federal Administrative Court

(a) The applicants' appeal

32. On 26 May 2017 the applicants lodged an appeal with the Federal Administrative Court ("the FAC") against the DETEC's decision. They requested that the impugned decision be quashed and remitted to the DETEC for re-examination.

33. In their appeal the applicants reiterated their arguments regarding the effects of climate change made before the DETEC (see paragraphs 22-27 above) and argued that their request was not aimed at obtaining the adoption of general, abstract regulations, but rather specific actions in the context of preliminary legislative proceedings as well as the correct implementation of the existing law. Such a request, in the applicants' view, fell within the scope of section 25a of the APA. The applicants also argued that the DETEC had violated their right to be heard by not entering into the details of their request and particularly their arguments based on the Convention.

(b) The FAC's decision

34. On 27 November 2018 the FAC dismissed the applicants' appeal.

35. With regard, first, to the applicants' standing to lodge the appeal, the FAC held that applicants nos. 2-5 had an "interest worthy of protection" in the revocation or amendment of the impugned DETEC decision, which made the appeal admissible from that perspective. The FAC therefore considered that it was unnecessary to determine whether the applicant association had such an interest as well.

36. The FAC then examined the applicants' complaint as regards the breach of their right to be heard. It found that, while the DETEC decision lacked reasoning, in the circumstances of the case at hand it was clear that the applicants' request had been rejected because the DETEC considered it to be of an *actio popularis* nature.

37. As regards the remainder of the applicants' arguments, the FAC explained that section 25a of the APA reflected the guarantee of access to a court provided in Article 29a of the Constitution and Article 6 of the Convention, in so far as "real acts" were concerned. It also pointed out that neither the law nor the case-law defined the concept of "real acts". However, the FAC considered that, as regards the substantive area of application of section 25a of the APA, the decisive factor was the question whether a need for individual legal protection existed. Moreover, in order to restrict the area of application as was necessary to exclude *actio popularis* claims, the other criteria mentioned in section 25a(l) of the APA – namely, an "interest worthy of protection", and rights and obligations being affected – were to be applied. The concept of an "interest worthy of protection", which derived primarily from fundamental rights, required that there should be an existing interest and a practical benefit in pursuing it. Moreover, the appellant had to be affected in a way that differed from the general population, which was a criterion intended to exclude *actio popularis* proceedings. As regards potential infringements of fundamental rights, it was necessary to examine the material scope of the right in question in order to determine whether the right was affected or not. This assessment was to be carried out in the circumstances of a particular case.

38. Examining the applicants' case from the perspective of these considerations, and relying on the Federal Supreme Court's case-law on *actio popularis* complaints, the FAC held that the applicants' claim relating to the consequences of climate change, and demanding the issuance of a material ruling under section 25a of the APA, required the existence of a close proximity between the applicants and the matter in dispute, which – as opposed to *actio popularis* claims – went beyond the existence of a possible proximity which the general public might claim. In this connection, while accepting that over the course of the twenty-first century climate change would affect Switzerland in all its regions and seasons, the FAC considered that the impacts of climate change on people, animals and plants would be of

a general nature, even if not all would be impacted equally. The FAC reasoned, in particular, as follows:

> "The adverse effects vary among different population groups in terms of economic and health impacts. For the population in cities and agglomerations, for example, heatwaves are a health burden because of the formation of heat islands. Heatwaves in the summer can put infants and small children at risk as well because of their susceptibility to dehydration, and high ozone levels owing to the heat can bring about respiratory disorders and impairment of pulmonary function. In addition, the changed geographic areas of carriers of disease such as ticks and mosquitoes will newly affect parts of the population which had previously not been exposed to such risks. Climate change, and in particular the associated change of average temperature and average amounts of precipitation also impact forestry, agriculture, winter tourism and water management, for example. In addition, because of the thawing permafrost, the danger of rockslides is increasing, and, particularly in the winter, also the risk of flooding, debris flows and landslides."

39. However, the FAC considered that the group of women older than 75 would not be particularly affected by the impacts of climate change such as to allow them to lodge an action under section 25a APA. It noted the following:

> "Although different groups are affected in different ways, ranging from economic interests to adverse health effects affecting the general public, it cannot be said from the perspective of the administration of justice, having regard to the case-law as described above, that the proximity of the appellants to the matter in dispute – climate protection on the part of the Confederation – was close, compared with the general public ... Thus, the appellants have no sufficient interest worthy of protection, for which reason the authority of first instance rightly refused to issue a material ruling in terms of section 25a APA."

40. As regards the applicants' reliance on Article 6 § 1, and subsidiarily on Article 13, of the Convention, concerning the protection of their rights under Articles 2 and 8 of the Convention, the FAC held that the applicability of Article 6 § 1 of the Convention required, *inter alia*, the existence of a genuine dispute of a serious nature, the outcome of which was directly decisive for the civil claim in question. According to the FAC, this meant that a claim should be asserted in formal terms in a reasonable way and that Article 6 § 1 should be interpreted in conjunction with Article 34 of the Convention, which regulated the conditions for lodging individual applications before the Court and excluded the possibility of *actio popularis* complaints.

41. In this respect, as regards the applicants' specific complaints, the FAC reasoned as follows:

> "Neither preliminary legislative proceedings nor the requested provision of information to the public [as requested by the appellants] can make a direct contribution toward reducing [GHG] emissions in Switzerland in line with the case-law summarised above. Rather, this depends on the decisions of the legislature and regulators as well as of each individual concerned. The requested actions are therefore not appropriate for reducing the risk of heatwaves during the summer. The same applies inasmuch as the

appellants demand the introduction of emission reduction measures not currently provided for by law ...

In this factual situation, it cannot be said that a genuine dispute of a serious nature was brought before the first-instance authority the outcome of which would have proven to be directly decisive for any possible civil claims by the appellants; a reduction of the general risk of danger cannot be achieved directly through the requested actions. The first-instance authority was therefore not obliged on the basis of Article 6 § 1 [of the Convention] to enter into the matter of the appellants and to issue a material ruling which would open up the path to appeal and thus provide for protection through the courts. With this outcome, it is not necessary to examine Article 13 [of the Convention], either ... the guarantee in terms of Article 13 [of the Convention] is absorbed in full by Article 6 [of the Convention] in civil disputes."

42. Finally, the FAC summarised its findings in the following manner:

"In summary, the appellants are not affected by the Confederation's climate protection measures in a way that goes beyond that of the general public. Their legal requests, inasmuch as they are based on section 25a of the APA and demand (further) actions to reduce [GHG] emissions, are therefore to be qualified as inadmissible *actio popularis*; the first-instance authority rightly did not enter into the matter. Further claims to the issuance of a material ruling do not result from the [Convention] either. Therefore, the appeal is to be dismissed."

3. Proceedings in the Federal Supreme Court

(a) The applicants' appeal

43. On 21 January 2019 the applicants lodged an appeal in the Federal Supreme Court ("the FSC") against the FAC's judgment. They requested that it be quashed, and the case remitted to the DETEC for examination on the merits or, alternatively, to the FAC for its reassessment. In their appeal, the applicants relied on Articles 9, 10, 29 and 29a of the Constitution and Articles 2, 6, 8, 13 and 34 of the Convention.

44. The applicants argued that they had an "interest worthy of protection", which was current and practical, since, in the absence of a remedial action, Switzerland continued to emit excessive GHG emissions which increasingly impacted their lives and health. As regards the applicant association, they stressed that it was appealing on its own behalf but also in the interests of its members, which represented a vulnerable group whose health, and potentially lives, were particularly impacted by the consequences of global warming.

45. The applicants further contended that the FSC needed to make the necessary determination of the facts of the case since the FAC had failed to do that or had done it only in a rudimentary way, particularly in relation to the possible impacts of climate change. In their view, the FAC had failed to consider the issues relating to more frequent deaths and the adverse health impacts in the population group of women aged 75 to 84 linked to climate change. They referred to the various health ailments suffered by applicants nos. 2-5, which made them even more vulnerable to climate change.

46. Moreover, as regards the object of the appeal before the FSC, the applicants explained that they were challenging, in particular, the lower bodies' determination of the procedural prerequisites for examination of the substance of their case in terms of section 25a of the APA and Articles 6 § 1 and 13 of the Convention, in conjunction with Articles 10 and 29 § 2 of the Constitution and Articles 2 and 8 of the Convention. They complained of a breach of their right to be heard, namely the right to have a proper examination of their case by the DETEC and the FAC. The applicants also referred to Article 9 § 3 of the Aarhus Convention[1] (see paragraph 141 below) as regards their standing to bring the present proceedings before the courts.

47. The applicants further argued that the FAC had incorrectly considered that their complaint was of an *actio popularis* nature. In their view, as a group which was particularly vulnerable to climate change, they had a right to seek protection under Article 10 of the Constitution and under Article 2 of the Convention. Moreover, pointing to the risks to their health, physical integrity and well-being as a result of global warming, the applicants argued that excessive GHG emissions were similar to harmful air pollution and were to be considered as dangerous activities within the meaning of Article 8 of the Convention. On the basis of these considerations, the applicants also considered that they had victim status under Article 34 of the Convention.

48. As regards, in particular, their reliance on Article 6 of the Convention, the applicants argued that the FAC had examined the wrong question by reviewing the connection between their legal requests and GHG emissions (which it had, moreover, assessed incorrectly), whereas it had been supposed to examine the connection between GHG emissions and the State's obligation to protect their right to life under Article 10 of the Constitution.

49. In this connection, the applicants alleged that they had not had effective legal protection as required by the Convention. In their view, the FAC had misconstrued the concept of a dispute of a genuine and serious nature relevant for the applicability of Article 6. The applicants argued that their request had been aimed at addressing the omissions in climate protection on the part of the State, thereby leading to a reduction in excessive GHG emissions and the heatwaves linked to them. In other words, the outcome of the proceedings they sought to achieve was the reduction of GHG emissions and heatwaves. However, the FAC had incorrectly considered that there needed to be a direct connection between their requests and the reduction of GHG emissions. In any event, in the applicants' view, the FAC had not properly examined the existence of a link between some of the demands they had made (such as the institution of preliminary legislative proceedings or the

[1] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, United Nations, Treaty Series, vol. 2161, p. 447. This Convention was adopted on 25 June 1998 in Aarhus, Denmark and entered into force on 30 October 2001.

provision of information to the public and Parliament) and the reduction of GHG emissions and heatwaves, and, by extension, the protection of their right to life guaranteed under the relevant domestic law, namely Article 10 of the Constitution.

50. According to the applicants, there was a sufficient connection between this protected civil right under domestic law and the outcome of the proceedings which they sought to achieve. Moreover, citing the Court's case-law in *Bursa Barosu Başkanlığı and Others v. Turkey* (no. 25680/05, § 128, 19 June 2018), the applicants argued that Article 6 was applicable even if their claim did not benefit only them exclusively, but also benefited the general public. The applicants also considered that the FAC's interpretation of Article 6 in conjunction with Article 34 of the Convention had had no legal basis and been arbitrary. In summary, the applicants noted as follows:

> "The appellants' dispute is genuine and serious because the outcome of the proceedings – the reduction of [GHG] – is directly decisive for their right to protection of their lives as well as for the implementation of CO_2 legislation. The appellants thus have the right to access to a court in terms of Article 6 [of the Convention]."

51. As regards Article 13 of the Convention, the applicants argued that even if the FAC had considered Article 6 to be inapplicable, it had been required to examine the complaint under Article 13 in conjunction with the existence of adverse effects of climate change on their right to life under Article 2, and their right to respect for private and family life under Article 8 of the Convention.

(b) The FSC's decision

52. On 5 May 2020 the FSC dismissed the applicants' appeal.

53. The FSC considered that applicants nos. 2-5 had standing to lodge an appeal against the FAC's judgment. The FSC, however, left it open whether the applicant association also had standing to lodge the appeal and considered it more appropriate to limit its considerations to applicants nos. 2-5.

54. As regards the merits of the applicants' appeal, the FSC first found that the decisions of the DETEC and the FAC had been duly reasoned, as required by Article 29 § 2 of the Constitution and Article 6 § 1 of the Convention (assuming that it applied).

55. With respect to the applicants' reliance on section 25a of the APA, the FSC stressed that this provision was intended to provide legal protection against "real acts" and not for an *actio popularis* avenue. This necessitated a careful examination in the particular circumstances of each case of whether the person was affected in a different way from the general public. In other words, it was essential that an applicant's own rights were affected. Moreover, the FSC explained that the term "real acts" under section 25a of the APA referred to a broad concept of State acts (or failures to act). However, the legal protection guaranteed under that provision was restricted by the application of other admissibility criteria, notably the requirement that the

"real act" affect rights or obligations and that the person have an "interest worthy of protection". The requirement of being affected presupposed an interference (actual or potential) of a certain gravity with the rights of an individual. Linked to that, the "interest worthy of protection" was primarily concerned with fundamental rights, although other legal titles might also be taken into account.

56. Applying these considerations to the case in issue, the FSC first noted that the applicants had requested a large number of measures of different nature and scope which essentially amounted to a request to institute preparatory work for the enactment of laws and secondary legislation. However, finding that in the light of other considerations it was not necessary to engage further with this issue, the FSC stressed that, according to Swiss constitutional law, proposals for shaping current policy areas should in principle be pursued by way of democratic participation.

57. The FSC further considered that the fact that the DETEC and the other authorities had not taken the actions requested by the applicants did not in itself mean that the rights invoked by the applicants would be violated. Moreover, it did not follow from that alleged omission alone that the applicants' fundamental rights would be affected with the necessary intensity, as required under section 25a of the APA.

58. In this connection, the FSC held that the limit of "well below 2°C" in terms of the Paris Agreement[2] was not expected to be exceeded in the near future. Relying on the 2018 Special report "1.5°C global warming" of the Intergovernmental Panel on Climate Change (IPCC), the FSC concluded that global warming would reach 1.5°C around the year 2040 (likely range 2030 to 2052), provided that it continued at the current rate (0.2°C per decade, likely range 0.1 to 0.3°C per decade). The limit of "well below 2°C" would accordingly be reached at a later time. The FSC considered that the Paris Agreement and the international climate protection regime based on it, including the relevant Swiss law, were based on the assumption that the limit of "well below 2°C" would not be exceeded in the near future and that there was still some time to prevent global warming from exceeding this limit.

59. On the basis of the above considerations, the FSC found as follows:

> "In the circumstances mentioned above, the appellants' right to life under Article 10 § 1 of the Constitution and Article 2 [of the Convention] does not appear to be threatened by the alleged omissions to such an extent at the present time that one could speak of their own rights being affected in terms of section 25a of the APA with sufficient intensity ... The same applies to their private and family life and their home in terms of Article 8 [of the Convention] and Article 13 § 1 of the Constitution. The alleged domestic omissions do not achieve the fundamental rights relevance required under section 25a to guarantee the protection of individual rights. Therefore, section 25a of the APA, which ensures the protection of individual rights, does not apply ... Nor do the appellants appear to be victims of a violation of the above-mentioned Convention rights in terms of Article 34 [of the Convention] ... Their

[2] Paris Agreement, 12 December 2015, United Nations, Treaty Series, vol. 3156.

above-mentioned rights are not affected and they are not victims within the meaning of Article 34 [of the Convention] because their rights are not affected with sufficient intensity. This is not altered by the fact that – as they argue – in certain cases potential victims can be victims in terms of Article 34 [of the Convention]. This also requires being affected with a certain intensity ..., which requirement is not met here.

In view of what has been said above, it follows that the rights of the appellants – like the rest of the population – are not affected by the alleged omissions with sufficient intensity in terms of section 25a of the APA. Accordingly, their request to the above-mentioned authorities for issuance of a ruling on real acts does not have the aim of ensuring their individual legal protection. Rather, it aims to have the climate protection measures at the federal level existing today and planned up to the year 2030 examined in the abstract for their compatibility with State obligations to protect. Indirectly – through the requested action of State authorities – it aims to initiate the tightening of these measures. Such a procedure or *actio popularis* is inadmissible in terms of section 25a of the APA, which guarantees the protection of individual rights only. Article 9 § 3 of the Aarhus Convention ... to which the appellants referred, cannot alter this finding ..."

60. Moreover, the FSC considered that, in terms of section 25a of the APA, the applicants' legal action was of an *actio popularis* nature and aimed at achieving something which should more appropriately be achieved not by legal action but by political means. The DETEC had therefore not acted in breach of section 25a of the APA when rejecting the applicants' requests.

61. As regards the applicants' reliance on Article 6 § 1 of the Convention, the FSC reasoned as follows:

"[The] condition [that the disputed claim existing in domestic law must at least be "arguable"] is not met in the present case. In terms of domestic law, the appellants base their alleged subjective right to have the impugned omissions ceased and to have the requested actions performed, on the right to life under Article 10 § 1 of the Constitution. However, as noted above, the alleged omissions do not affect this fundamental right in a legally relevant way. Therefore, they cannot derive the requests mentioned from this right. Accordingly, they have no subjective right to the declaratory ruling requested in the alternative, namely that the alleged omissions breach (fundamental) rights. The [FAC] therefore rightly confirmed the DETEC's decision not to examine the case in this respect. It is therefore not necessary to address the further requirements of Article 6 § 1 [of the Convention] ..."

62. Lastly, as regards the applicants' complaint under Article 13 of the Convention, the FSC found that, in the light of the findings above, the applicants did not have an arguable claim under another provision of the Convention triggering the application of Article 13.

63. In conclusion, the FSC stressed as follows:

"It is clear from the considerations above that the appellants cannot use the means of individual legal protection invoked to protect themselves against the alleged omissions of the abovementioned authorities in the field of climate protection. Therefore, even though their concern is readily comprehensible given the possible consequences of insufficient implementation of the Paris Climate Agreement for older women which they highlighted, their appeal must be dismissed."

II. FACTS CONCERNING CLIMATE CHANGE

A. Submissions by the applicants

1. General observations on climate change

64. The work of the IPCC demonstrated that increases in GHG concentrations since around 1750 had unequivocally been caused by human activities and that the human-caused global surface temperature increase from the period 1850-1900 to the period 2010-19 was 1.07°C. The IPCC had also found with high confidence that there was a near-linear relationship between cumulative anthropogenic GHG emissions and global warming: human-induced global warming resulted in more frequent and more intense heatwaves[3]. The IPCC had emphasised that reductions this decade largely determined whether warming could be limited to 1.5°C or 2°C[4].

65. Increasing temperatures and heatwaves increased mortality which could be attributed to human-induced climate change[5]. Indeed, climate change and related extreme events would significantly increase ill health and premature deaths in the near to long term[6]. Globally, heat-related mortality in people over 65 had increased by approximately 68% between 2000-04 and 2017-21[7]. Of all the climate hazards, heat was by far the most significant cause of death in Europe[8].

66. Increasing temperatures and heatwaves not only entailed increased mortality but also posed a serious health risk. Heatwaves placed strain on the human body and caused dehydration and the impairment of heart and lung function, leading to an increase in emergency hospital admissions: older people and infants were particularly at risk. They also contributed to dehydration, hyperthermia, fatigue, loss of consciousness, heat cramps and heat strokes, including the aggravation of existing medical conditions such as

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[3] Citing IPCC, "Climate Change 2021: The Physical Science Basis", Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change ("AR6 WGI").

[4] Citing AR6 Synthesis Report: Climate Change 2023 ("AR6SR").

[5] Citing, *inter alia*, IPCC, "Climate Change 2022: Impacts, Adaptation and Vulnerability", Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change ("AR6 WGII"); and study Vicedo-Cabrera/Scovronick/Sera et al., "The burden of heat-related mortality attributable to recent human-induced climate change", *Nature Climate Change* 11, 492-500 (2021).

[6] Citing, *inter alia*, AR6 WGII (cited above); study Evan De Schrijver/Sidharth Sivaraj/Christoph Raible et al., "Nationwide Projections of Heat and Cold-Related Mortality under Different Climate Change and Population Development Scenarios in Switzerland" (2003).

[7] Citing "The 2022 report of the Lancet Countdown on health and climate change: health at the mercy of fossil fuels".

[8] Citing AR6 WGII (cited above).

cardiovascular, respiratory and kidney conditions or mental illnesses and stress[9].

67. Older adults, women and persons with chronic diseases were at the highest risk of temperature-related morbidity and mortality[10]. Overall, women aged above 75 (such as applicants nos. 2-5) were at greater risk of premature loss of life, severe impairment of life and of family and private life, owing to climate change-induced excessive heat than the general population[11].

68. While any increase in global warming was projected to affect heat-related morbidity and mortality, the global scientific consensus was that many premature deaths and health impairments could be prevented by adhering to the 1.5°C limit[12].

2. The situation in Switzerland

69. Per capita GHG emissions in Switzerland in 2020 had been 5.04 tonnes of CO_2eq. Total domestic GHG emissions in Switzerland in 2020 had amounted to 43.40 Mt CO_2e[13]. In the same year, Switzerland's share of global cumulative CO_2 emissions had been 0.18%[14].

70. These figures, however, excluded emissions attributable to Switzerland but occurring outside of its territory ("external emissions") such as GHG emissions from international aviation and shipping fuels tanked in Switzerland (these emissions had nearly doubled since 2004 and in 2019 had been equivalent to about 13.2% of total domestic GHG emissions in Switzerland[15]) and consumption-based GHG emissions, created by the import of goods (Switzerland being the world's largest importer of such emissions relative to its domestic emissions[16]). The per capita footprint in that respect

[9] Citing, *inter alia*, FOEN "Climate Change in Switzerland" (2020); FOEN report "La canicule et la sécheresse de l'été 2018" (2019); Report of Ragettli and Röösli, the Swiss Tropical and Public Health Institute (2020); AR6 WGII (cited above).

[10] Citing, *inter alia*, the IPCC 2018 Special report (cited above); AR6 WGII (cited above); study Ana M. Vicedo-Cabrera/Evan De Schrijver/Dominik Schumacher et al., "The Footprint of Anthropogenic Climate Change on Heat-Related Deaths in Summer 2022 in Switzerland" (2003).

[11] Citing, *inter alia*, Swiss Tropical and Public Health Institute (TPH) report "Hitze und Gesundheit" (2022); study Saucy et al., "The role of extreme temperature in cause-specific acute cardiovascular mortality in Switzerland: A case-crossover study", *Science of The Total Environment*, vol. 790, 10 October 2021; report of Ragettli and Röösli, the Swiss Tropical and Public Health Institute (2021).

[12] Citing, *inter alia*, IPCC 2018 Special report (cited above).

[13] Citing FOEN "Kenngrössen zur Entwicklung der Treibhausgasemissionen in der Schweiz 1990-2020".

[14] Citing Our World in Data portal (1 October 2019); available at www.ourworldindata.org (last accessed 14.02.2024).

[15] Citing FOEN report "Greenhouse gas emissions from aviation" (2022).

[16] Citing Our World in Data chart.

had been 13 tonnes of CO_2eq[17]. Such a GHG footprint had been found to be excessively high by the FOEN[18].

71. Moreover, to this had to be added the emissions caused by finance flows (such as investing, underwriting, lending, insurance). A 2015 study commissioned by the FOEN had shown that the investments made by the largest equity funds authorised in Switzerland tended to a contribution to global warming of 4-6°C[19]. The FOEN had therefore considered that more could be done at this level[20].

72. In Switzerland, the annual temperature had increased around 2.1°C since the measurements had begun in 1864[21]. The summers of 2003, 2015, 2018, 2019 and 2022 had been the five warmest summers on record in Switzerland, with those of 2003 and 2022 being the first and second hottest since records had begun[22].

73. In Switzerland more deaths than average occurred during hot summers[23]. Almost 1,000 additional heat-related deaths had occurred in June and August 2003, approximately 800 in June, July and August 2015, 185 in August 2018 and 521 in June, July and August 2019. Between June and August 2022, 1,700 more people over 65 had died than statistically expected (the reasons having still not been completely analysed)[24].

74. During the 2003 heatwave, 80% of the additional deaths had occurred in persons over 75. The most significant rise in mortality risk during the hot summer of 2015 had been for 75 to 84-year-olds. In August 2018, nearly 90% of heat-related deaths had occurred in older women, almost all of whom were older than 75. During the 2019 heatwave, older persons had been at the highest risk of mortality, and people aged 85 and over had been most affected (448 of 521). Similarly, the 2022 heatwaves appeared predominantly to have affected people over 65[25].

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[17] Citing FOEN report 1990-2020 (cited above).

[18] Citing FOEN report "Indicator Economy and Consumption, GHG footprint" (2021).

[19] Citing report "Kohlenstoffrisiken für den Finanzplatz Schweiz" (2015).

[20] Citing FOEN communication "Le test climatique 2022 révèle le potentiel du marché financier" (2022).

[21] Citing Federal Office of Meteorology and Climatology MeteoSwiss portal on Climate Change (last modified 14 January 2022).

[22] Citing FOEN report "La canicule et la sécheresse de l'été 2018" (2019); MeteoSwiss Climate Report 2019 (2020); Michel, *Die Republik*, "Ein tödlicher Sommer" assessment (2022).

[23] Citing FOEN "La canicule et la sécheresse" (cited above).

[24] Citing FOEN "Climate Change in Switzerland" (2020); Ragettli and Röösli 2020 (cited above); Michel (cited above).

[25] Citing IPCC, "Climate Change 2014: Impacts, Adaptation, and Vulnerability", Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change ("AR5 WGII"); FOEN report "Hitze und Trockenheit im Sommer 2015" (2016); FOEN "La canicule et la sécheresse" (cited above); Ragettli and Röösli 2020 (cited above); Michel (cited above).

3. Measures taken by the Swiss authorities

75. Switzerland had not transposed its Nationally Determined Contributions (NDC) under international law into domestic law:

– The current CO_2 Act 2011 merely contained a binding emissions reduction target for 2020 and 2024;

– A new CO_2 Act 2020[26], containing a binding target for 2030, had been rejected in a referendum on 13 June 2021;

– On 16 September 2022 the government had submitted to Parliament a draft amendment of the CO_2 Act 2011[27] which was intended to apply for the period from 2025 to 2030[28]. Parliament had, however, agreed on another proposed amendment[29] to the Act;

– Moreover, Switzerland had never carried out an analysis of its carbon budget.

76. According to the applicants, Switzerland's climate reduction targets and actions could be summarised as follows:

– 2007-13: in accordance with the CO_2 Act 2011 (in force since 2013), domestic GHG needed to be reduced by 20% below 1990 levels by 2020. However, in 2007, the IPCC had stated that developed countries like Switzerland had to reduce their domestic emissions by 25%-40% below 1990 levels by 2020 to meet the (now outdated) 2°C limit with a 66% probability[30]. The inadequacy of the solution had been recognised by the government[31].

– 2014-17: in 2017 the government had presented a new CO_2 Act (which had later become the rejected 2020 CO_2 Act) proposing an overall reduction of 50% and a domestic emissions reduction of 30% below 1990 levels by 2030[32]. However, in 2014, the IPCC had found that countries such as Switzerland had to achieve domestic reductions of at least 40% and possibly as much as 100% by 2030 for there to be a 66% probability of remaining

[26] FF 2020 7607 – Loi fédérale sur la réduction des émissions de gaz à effet de serre (Loi sur le CO_2).
[27] FF 2022 2652 – Loi fédérale sur la réduction des émissions de CO_2 (Loi sur le CO_2) (Projet).
[28] Citing "Politique climatique : le Conseil fédéral adopte le message relatif à la révision de la loi sur le CO_2".
[29] Put forward by the Glacier initiative.
[30] Citing IPCC, "Climate Change 2007: Mitigation of Climate Change", Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Mitigation of Climate Change.
[31] Citing FF 2009 6723 "Message relatif à la politique climatique suisse après 2012 (Révision de la loi sur le CO2 et initiative populaire fédérale « pour un climat sain »)"; FF 2012 1857 "Message concernant l'évolution future de la politique agricole dans les années 2014-2017 (Politique agricole 2014–2017)".
[32] Citing FF 2018 229 "Message relatif à la révision totale de la loi sur le CO2 pour la période postérieure à 2020"; FF 2018 373 Loi fédérale sur la réduction des émissions de gaz à effet de serre (Loi sur le CO_2).

within the (now outdated) 2°C limit. This implied the need for an on average domestic reduction of 50% by 2030[33].

– In 2020 Switzerland had submitted an updated NDC, stating that it was committed to following scientific recommendations in order to limit warming to 1.5°C and that in view of its climate neutrality target by 2050, Switzerland's NDC was to reduce its GHG emissions by at least 50% by 2030 compared with 1990 levels[34].

– 2018-2030: There had been no real progression in the formally updated NDC by Switzerland[35] and the text of the current and planned national climate legislation did not reflect a commitment to the 1.5°C limit. Moreover, the emission reduction pathways were not in line with the 1.5°C limit: in comparison to the period up to 2020 (which the applicants considered as entailing an annual decrease of 2%), in 2021 they had even decreased (see paragraph 123 below; section 3(1^{bis}) and (1^{ter}) of the CO_2 Act 2011). The Swiss authorities had accepted that the reduction pathway would not be sufficient to achieve Switzerland's NDC and that compensating for the delay in emissions reduction would be a major challenge and the share of measures taken abroad would have to be significantly higher than planned[36]. For the period from 2025 to 2030, it was planned that it would be within the competence of the government to determine the spread of domestic measures within the reduction target of at least 50% by 2030. The intention was a domestic reduction of around 34% by 2030 compared to 1990 (1.52% per year). At the same time, the State had not explained how the delay could be compensated for with this domestic reduction pathway[37].

– 2031-50: for the period from 2031 onwards, the Swiss authorities' goal was to reduce GHG emissions by 75% below 1990 levels by 2040 and to net zero by 2050. However, the applicants pointed out that according to that legislation these targets were to be achieved only "as far as possible" through domestic measures[38]. They also considered that these targets were not in line with the 1.5°C objective.

77. In this connection, taken globally, the IPCC had considered that immediate action to limit the warming to 1.5°C required a reduction in net global GHG emissions from 2019 levels of 43% by 2030 and by 84%

[33] Citing AR5 WGII (cited above).
[34] Citing Switzerland's submissions within the framework of international climate negotiations (UNFCCC): 2020.
[35] Citing Emissions Gap Report 2022 (available at www.unep.org; last accessed 14.02.2024), figure 3.1; and Climate Analytics, "A 1.5°C compatible Switzerland" (2021).
[36] Citing FF 2021 2252 – Initiative parlementaire. Prolongation de l'objectif de réduction de la loi sur le CO_2. Projet et rapport explicatif de la Commission de l'environnement, de l'aménagement du territoire et de l'énergie du Conseil national.
[37] Citing "Message relatif à la révision de la loi sur le CO_2 pour la période postérieure à 2024".
[38] Citing FF 2022 1537 Loi fédérale relative aux objectifs en matière de protection du climat (LCl) (Projet), sections 3(3) and (4).

by 2050[39]. To limit the global temperature increase required limiting the overall cumulative CO_2 emissions within a carbon budget. To have a 67% chance of meeting the 1.5°C limit, the remaining global carbon budget was 400 $GtCO_2$ and to have an 83% chance, 300 $GtCO_2$[40]. Thus, according to the applicants' calculation, even applying the method of same "per capita burden-sharing" for emissions from 2020 onwards (the applicants challenged the validity of the method of "equal per capita emissions" as compared to "highest possible ambition"), Switzerland would have a remaining carbon budget of 0.44 $GtCO_2$ for a 67% chance of meeting the 1.5°C limit, or 0.33 $GtCO_2$ for an 83% chance. In a scenario with a 34% reduction in CO_2 emissions by 2030 and 75% by 2040, Switzerland would have used the remaining budget around 2034 (or 2030 for an 83% chance).

78. The Climate Action Tracker ("the CAT")[41] had found that if all States followed Switzerland's approach, warming would reach up to 3°C. In addition, the CAT had rated Switzerland's fair share target as "insufficient" and its climate finance as "insufficient", indicating that "substantial improvements" were needed to be consistent with limiting warming to 1.5°C[42]. The CAT had concluded that to do its fair share to limit global warming to 1.5°C, Switzerland had to reduce its GHG emissions to significantly below zero by 2030 (a reduction of between 160% and more than 200% below 1990 emissions)[43]. Similar findings had been reached in other studies[44].

79. However, Switzerland was pursuing a strategy of purchasing emission reductions abroad and taking them into account in the national emission reduction target for 2030, which had the effect of postponing the reduction efforts Switzerland itself had to undertake to be net zero in 2050. Such a strategy would require Switzerland, after 2030, to reduce domestic emissions to zero within a very short period of time with high annual emission reduction rates that would become increasingly difficult to achieve[45].

80. Furthermore, most of the GHG emissions attributable to Switzerland occurred abroad. The Swiss authorities had at first recognised that they should be taken into account when setting climate targets[46]. However, this did not

[39] Citing IPCC, "Climate Change 2022: Mitigation of Climate Change", Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change ("AR6 WGIII").
[40] Citing AR6 WGI (cited above).
[41] Available at www.climateactiontracker.org (last accessed 14.02.2024).
[42] Ibid.
[43] Ibid; citing also Rajamani et al., "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law", *Climate Policy* 21:8, pp. 983-1004, 2021.
[44] Citing Climate Analytics "A 1.5°C compatible Switzerland".
[45] Citing Emissions Gap Report (cited above); IPCC 2018 Special report (cited above).
[46] Citing FF 2018 229 (cited above).

form part of their current legislative proposals or of the updated 2021 NDC[47]. In this context, the financial sector had a considerable influence on GHG emissions[48]. However, according to the amended CO_2 Act 2011, the finance sector would be included in national climate law only in 2025 and with a limited effect, since it would merely be obliged to review the financial risks of climate change and not to make financial flows compatible with a climate-compatible emissions pathway.

81. The Swiss authorities also recognised that they had missed their own 2020 climate target. Even after the COVID-19 restrictions, GHG emissions were rising again significantly[49]. Some sectors (and most notably the building and transport sectors in the cantons) were not properly supervised and some sectors (such as the agricultural and financial sectors) were not regulated.

82. The (planned) emission reduction measures for 2030 were similar to those in the CO_2 Act 2011 and these measures would not be able to achieve a domestic reduction of around 34% by 2030[50]. At the same time, a 1.5°C compatible domestic pathway was technically and economically feasible[51]. However, Switzerland would need to achieve full decarbonisation in line with the 1.5°C limit and should step up the taking of the measures abroad in order to meet its "fair share" target.

B. Submissions by the Government

83. The Government considered that the situation concerning climate change in Switzerland, and the measures taken in that respect, should be viewed in two separate phases: the first concerned the measures taken before the adoption of the FSC's judgment of 5 May 2020 in the applicants' case (see paragraphs 52-63 above); and the second related to the measures taken after the adoption of that judgment.

1. The first phase

84. The CO_2 Act 2011, applying the Kyoto Protocol[52], envisaged that GHG emissions in Switzerland should be reduced by 20% compared to 1990 levels by 2020. This corresponded to an average reduction of 15.8% in the period between 2013 and 2020, which was the international objective fixed

[47] Citing "Switzerland's information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 of its updated and enhanced nationally determined contribution (NDC) under the Paris Agreement (2021-2030)".
[48] Citing FOEN "Climate and financial markets" (2020); FOEN "Testing for climate goal alignment" (2022).
[49] Citing FOEN "Inventaire des gaz à effet de serre 2020 : la Suisse manque de peu son objectif climatique".
[50] Citing Climate Analytics (cited above); CAT (cited above).
[51] Citing CAT Targets (cited above).
[52] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, United Nations, Treaty Series, vol. 2303, p. 162.

by Switzerland under the Kyoto Protocol. The Federal Council had relied on the available scientific data when fixing the objective for the period up until 2020.

85. The fourth IPCC report of 2007[53] had noted that the concentration of GHG in the atmosphere should be stabilised at a level of 445 to 490 ppm of the equivalent CO_2 in order to avoid dangerous climate change. In this way, it would have been possible to limit the rise in temperature to 2 or even 2.4°C compared to the pre-industrial period. To achieve this objective, it was necessary to reduce GHG emissions at the global level from 5.8 t to 1 to 1.5 t of CO_2 equivalent per inhabitant at most. Such an objective would have required a reduction in GHG emissions of at least 50 to 85% globally and an 80 to 95% reduction at the national level of industrialised countries until 2050 compared to 1990. Industrialised countries therefore had to reduce their emissions by 25 to 40% until 2020 compared to 1990. In this connection, the objective fixed by Switzerland (20% compared to 1990 levels) corresponded to the objective set by its principal commercial partners, notably the European Union. Moreover, although the Federal Council had envisaged the possibility of increasing the relevant level of reduction of GHG emissions to 30%, it had not ultimately pursued this possibility.

86. By the end of 2020, the relevant legislation on climate had envisaged the following measures: (a) imposing a CO_2 tax on fossil fuels and creating benefits for the construction sector, technology, households and enterprises; (b) requiring all installations emitting significant levels of GHG emissions to participate in the EU Emissions Trading System[54]; (c) ensuring the undertaking of emissions reduction by small and mid-size installations emitting GHG emissions; (d) aligning domestic legislation with EU requirements relating to the GHG emissions emanating from passenger cars; (e) obliging the importers of fossil fuels to compensate for a certain proportion of CO_2 emissions; (f) taking measures in the field of waste management in order to reduce GHG emissions; (g) coordination of the relevant adaptation measures; and (h) provision of information and education on climate change.

87. These measures, as well as measures taken in other areas, in particular agriculture and energy, should have enabled Switzerland to reduce its emissions by 20% to 2020 compared to 1990. According to the relevant assessment[55], Switzerland had just barely missed this target: in 2020 GHG emissions had been some 19% below 1990 levels. Owing to the mild winter, in 2020 emissions had been particularly low in buildings and the measures to contain the coronavirus pandemic had further contributed to a reduction of transport-related emissions. However, only the industrial sector had achieved

[53] Citing IPCC, Fourth Assessment Report, AR4 Climate Change 2007, ("AR4").
[54] See EU Emissions Trading System (EU ETS) (available at www.europa.eu; last accessed 14.02.2024).
[55] Citing FOEN report "Examen de l'objectif 2020 (pour la période de 2013 à 2020)".

the fixed objective. Emissions from the building and transport sectors and other emissions had been above the target level. On average over the period from 2013 to 2020, Switzerland had reduced its GHG emissions by around 11% compared to 1990 levels.

88. Since 2012 the Federal Council had put in place the national strategy of climate change adaptation measures which identified the measures that needed to be taken in different sectors to address the issues of climate change.[56] While this strategy was at the federal level, at the local and cantonal levels many measures could be taken by the relevant authorities under the CO_2 Act.

89. The Federal Council had envisaged sixty-three adaptation measures for the period between 2014 and 2019, which included, among others, measures of protection against heatwaves. Some further scientific reports on the matter had also been published[57], including a FOEN report which had found that the increase in heat stress and the damage to human health it caused were among the main risks of climate change in Switzerland[58]. Other adaptation measures had also been adopted[59].

90. In 2015 Switzerland had also established a National Centre for Climate Services which was in charge of coordinating various climate services at the federal level. Moreover, and in reaction to the heatwaves in the summer of 2003, since 2005 the Federal Office of Meteorology and Climatology (MeteoSwiss) had been publishing heatwaves alerts, and the Federal Office for Public Health had been publishing recommendations on how to deal with the effects of heatwaves[60]. Various adaptation measures had accordingly been taken at the cantonal level to protect the population during heatwaves.

91. Furthermore, as regards the planning for the period between 2030 and 2050, on 27 February 2015 Switzerland had been the first country to provide its NDC[61]. It was committed to reducing its GHG emissions by 50% by 2030 compared to 1990, which represented an average reduction of 35% over the period from 2021 to 2030. It had also set an indicative reduction target of 70 to 85% by 2050. When setting these targets, Switzerland had relied on the available scientific evidence contained notably in the fifth IPCC report (2014)[62]. Switzerland considered that its commitment to reduce emissions by

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[56] Citing FOEN "Federal Council strategy for adaptation to climate change in Switzerland".
[57] Citing the report "Boite outils contre chaleur" (2021) prepared by the Swiss Tropical and Public Health Institute under the authority of the Federal Office for Public Health, and the FOEN report "Quand la ville surchauffe" (2018).
[58] Citing FOEN study "Climate-related risks and opportunities" (2018).
[59] Citing FOEN Pilot programme "Adaptation to climate change".
[60] Citing FOEN publication "Chaleur", available at www.bag.admin.ch (last accessed 14.02.2024)
[61] Citing Federal Council's communication "Switzerland targets 50% reduction in greenhouse gas emissions by 2030".
[62] IPCC, Fifth Assessment Report, AR5 Climate Change 2014 ("AR5").

50% by 2030 compared to 1990 would correspond to the recommendations in the IPCC report, namely of reducing global emissions by 40 to 70% by 2050 compared to 2010. Switzerland also noted that its responsibility for GHG emissions had been limited since it only produced around 0.1% of global emissions and its per capita emissions had been within the international average. Moreover, it was taking measures to reduce GHG emissions.

92. By ratifying the Paris Agreement, Switzerland had made a definite commitment to halve its GHG emissions by 2030 and reduce them by on average 35% per year over the period from 2021 to 2030 compared to 1990. In 2017 the Federal Council had proposed legislation to implement this commitment but, despite its acceptance by Parliament, it had been rejected in a referendum on 13 June 2021.

93. The parliamentary deliberations on the complete revision of the CO_2 Act had been delayed. In 2019 Parliament had therefore decided to proceed with a partial revision of the CO_2 Act in force at the time by extending the time-limit for the measures provided for and setting a reduction target for 2021, according to which GHG emissions were to be limited by 1.5% compared to 1990. The 2021 objective represented, in particular, a legal basis for determining the applicable compensation rate for importers of fossil fuels and the level of the CO_2 tax increase. In August 2019 the Federal Council had decided that as of 2050, Switzerland should no longer emit more GHG than could be absorbed by natural sinks and stored by technical installations (net zero emissions target)[63]. This corresponded to the scientific evidence established in the IPCC 2018 Special report "1.5°C global warming" (cited above). The same scientific basis underpinned the objectives set out in the 2021 strategy adopted by Switzerland (see paragraph 100 below).

2. The second phase

94. On 25 September 2020 Parliament had enacted a new CO_2 Act which had been intended to implement Swiss commitments under the Paris Agreement and fix the objectives for the period until 2030 (reduce emissions by 50% by 2030 and by 35% for the period from 2021 to 2030, each time relative to 1990). The new CO_2 Act, envisaging a comprehensive set of measures to achieve those objectives, had been supposed to come into force on 1 January 2022. However, on 13 June 2021 it had been rejected in a referendum.

95. In order to avoid a legislative lacuna, on 17 December 2021 Parliament had decided to enact a partial revision of the existing CO_2 Act 2011[64]. In accordance with this solution, the reduction target for the years

[63] Citing Federal Council's communication "Federal Council aims for a climate-neutral Switzerland by 2050".

[64] Citing communication "Prolongation de l'objectif de réduction de la loi sur le CO_2" (2021).

2021 to 2024 was 1.5% per year compared to 1990, on the understanding that from 2022, a maximum of 25% of this reduction could be achieved by measures implemented abroad. These objectives were independent of the reduction objective of 20% set for the period until 2020, and they were susceptible to further amendments.

96. In the meantime, on 17 September 2021 the Federal Council had defined the next steps of Swiss climate policy[65]. It had sought to address, in particular, the concerns expressed in the popular vote relating to fears of an increase in the cost of living and in particular a possible rise in the price of petrol, which had led to the rejection of the new CO_2 Act. The Federal Council had therefore established the following guiding principles for the new legislation: (a) keeping the instruments of the existing CO_2 Act; (b) no new taxes; (c) additional financial aid to the sectors and population affected; and (d) the development of sustainable aviation fuel.

97. Furthermore, on 17 December 2021 the Federal Council had started the consultation process on the revision of the CO_2 Act for the period after 2024[66]. The consultation process had ended in April 2022 and in September of that year the Federal Council had issued a communication regarding a revision of the CO_2 Act for the period after 2024[67]. The following measures had been envisaged: (a) reintroduction of the CO_2 tax and, for a determined period, an increase in climate-protection benefits; (b) financial support for biogas installations and the encouragement of energetic planning in the municipalities; (c) lowering of the CO_2 emission target values applicable to new vehicles in cooperation with the European Union; (d) introduction of the relevant climate-protection measures in the transport sector; (e) the development of sustainable aviation fuel in coordination with the European Union; (f) an increase in the maximum share of emissions that had to be offset by petrol importers to 90% (compensation measures in Switzerland and abroad); (g) introduction of a possible CO_2 tax exemption for companies which were willing to put in place the relevant offsetting measures; and (h) introduction of an obligation for the financial sector supervision authorities to review the risks linked to climate change. All these measures, combined with the use of new developing technologies, should allow Switzerland to maintain its reduction target of 50% by 2030. The Federal Council had considered that the measures implemented in Switzerland should lead to a reduction of emissions by some 34%. The legislative process with a view to enacting this legislation was currently ongoing.

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[65] Citing Federal Council's communication "Politique climatique : le Conseil fédéral pose les jalons pour un nouveau projet de loi".

[66] Citing Federal Council's communication "Politique climatique : le Conseil fédéral met la loi révisée sur le CO2 en consultation".

[67] Citing Federal Council's communication FF 2022 2651 "Message relatif à la révision de la loi sur le CO2 pour la période postérieure à 2024".

98. There had also been developments in the domestic legislation in relation to popular initiatives to combat climate change, in particular the "Initiative pour les glaciers" that sought to establish in the Constitution a prohibition of GHG emission by 2050. The Federal Council had opposed certain aspects of this initiative, considering that it had gone too far. On 11 August 2021 the Federal Council had made a counter legislative proposal considering that it would be more appropriate to introduce an obligation to reduce consumption of fossil fuels, save in some exceptional circumstances (such as when needed for the military, police or other security services).

99. Parliament had finally, on 30 September 2022, passed the Law on climate protection, innovation and strengthening energy security ("the Climate Act")[68], which had put in place the principle of a net zero emissions target by 2050. This Act – approved by a popular vote on 18 June 2023 – provided for an intermediate target for 2040 (75% reduction compared to 1990) and for the years 2031 to 2040 (average reduction of 64%) and 2041 to 2050 (average reduction of 89%). It had also set indicative values for the reduction of emissions in the building, transport and industry sectors for the years 2040 and 2050. A significant budget had already been put in place in order to meet the objectives of this Act.

100. The Climate Act corresponded to the climate strategy for 2050 drafted by the Federal Council in January 2021[69], several months before the publication of the sixth IPCC report[70]. In adopting this strategy, Switzerland had, albeit with a month's delay, complied with its commitments under the Paris Agreement by showing that it could reduce its GHG emissions to close to 90% by 2050. The building and transport sectors would be able to cut their emissions by 2050 and emissions from energy consumption in the industry sector could also be eliminated by 2050. A reduction in emissions of at least 40% compared to 1990 was also possible in the agricultural sector.

101. As regards the adaptation measures, on the basis of preliminary assessments of the situation, in August 2020 the Federal Council had adopted the second climate-change adaptation plan.[71] The major novelty of this plan was the putting in place of the "prevention of heat stress" measure, which aimed to protect the population from the heat, specifically the workforce. Moreover, various other measures had been put in place to address the adverse effects of heatwaves. Switzerland was currently in the process of drafting its next climate-change adaptation plan for the period after 2025.

102. At the international level, on 9 December 2020 Switzerland had submitted its new NDC, setting out the target of reducing GHG emissions by at least 50% by 2030 compared to 1990. Compared to the objective

[68] Citing FF 2022 2403 Loi fédérale sur les objectifs en matière de protection du climat, sur l'innovation et sur le renforcement de la sécurité énergétique.
[69] Citing "Long-term climate strategy to 2050".
[70] Citing Sixth Assessment Report – IPCC.
[71] Citing "Adaptation aux changements climatiques en Suisse: Plan d'action 2020-2025".

announced in 2015, that of 2020 had been characterised by the following elements: the reduction target had gone from 50% to at least 50%, and the indicative reduction target from below 70% to below 85% until 2050, complemented by the target of GHG neutrality by 2050.[72] Switzerland had also kept the parties to the Paris Agreement duly informed of developments at the domestic level.

C. Facts in relation to climate change emerging from the material available to the Court

103. With a view to its examination of the present case, and having regard to the two other cases being examined by the Grand Chamber (see paragraph 5 above), in which rulings are being delivered on the same day, as well as other pending cases stayed at the Chamber level, the Court deems it necessary to highlight the following factual elements which emerge from the material available to it.

104. As early as 1992, when there was less scientific evidence and knowledge than there is at present, the United Nations Framework Convention on Climate Change (UNFCCC)[73] noted in its Preamble that "human activities have been substantially increasing the atmospheric concentrations of GHG, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind". This was further developed in the operationalisation of the commitments under the UNFCCC by the adoption of the Kyoto Protocol 1997 (including its Doha Amendment) and of the Paris Agreement 2015, as a legally binding international treaty on climate change. The Preamble to the latter instrument acknowledged, in particular, that "climate change is a common concern of humankind, [and that] Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

105. More recently, in 2021, the acknowledgment expressed in the Paris Agreement was reiterated in the Glasgow Climate Pact[74], which also expressed "alarm and utmost concern" as regards human activity-induced global warming, and the Paris Agreement was also endorsed in the 2022

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[72] Citing "Protection du climat : cinq ans après l'Accord de Paris".

[73] United Nations Framework Convention on Climate Change, 9 May 1992, United Nations, Treaty Series, vol. 1771, p. 107. All Council of Europe member States are members of the UNFCCC system.

[74] Available at unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact-key-outcomes-from-cop26; last accessed 14.02.2024.

COP 27 Sharm el-Sheikh Implementation Plan and similar findings have been reached in the 2023 COP28 decision (see paragraph 140 below). For its part the EU recognised in the European Climate Law "[t]he existential threat posed by climate change" which required "enhanced ambition and increased climate action by the Union and the Member States". A similar position has been adopted in the recent developments on climate change in the various initiatives and instruments adopted at the UN level, notably as regards the recognition of a human right to a clean, healthy and sustainable environment (UN General Assembly Resolution 76/300[75]).

106. The Court further notes that by defining the Paris Agreement targets the States formulated, and agreed to, the overarching goal of limiting warming to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels", recognising that this would significantly reduce the risks and impacts of climate change (Article 2 § 1 (a)). Since then, scientific knowledge has developed further and States have recognised that "the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C" and thus resolved "to pursue further efforts to limit the temperature increase to 1.5°C" (see Glasgow Climate Pact, paragraph 21, and Sharm el-Sheikh Implementation Plan, paragraph 4).

107. Indeed, in this connection, the Conference of Parties to the UNFCCC, in its decision adopting the Paris Agreement, invited the IPCC to provide a special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global GHG emission pathways (1/CP.21, paragraph 21). The IPCC report in question – IPCC 2018 Special report "1.5°C global warming" (cited above) – found that human-induced warming had reached approximately 1°C above pre-industrial (the period 1850-1900) levels in 2017, increasing at 0.2°C per decade (*high confidence*). Ambitious mitigation actions were therefore considered indispensable to limit warming to 1.5°C[76]. The report further found that any increase in global temperature (such as +0.5°C) was projected to affect human health, with primarily negative consequences (*high confidence*). Lower risks were projected at 1.5°C than at 2°C for heat-related morbidity and mortality (*very high confidence*), and for ozone-related mortality if emissions needed for ozone formation remained high (*high confidence*)[77].

108. The report also noted with alarm that in line with the then existing emission commitments under the Paris Agreement (NDCs), global warming was expected to surpass 1.5°C above pre-industrial levels, even if those pledges were supplemented with very challenging increases in the scale and ambition of mitigation, after 2030 (*high confidence*). Thus, net zero CO_2

[75] UN General Assembly Resolution The human right to a clean, healthy and sustainable environment, A/RES/76/300, 28 July 2022.
[76] Chapter 1, Executive summary, pp. 51-52.
[77] Chapter 3, Executive summary, p. 177.

emissions would be required in less than fifteen years, and lower GHG emissions in 2030 would lead to a higher chance of keeping peak warming to 1.5°C (*high confidence*). In particular, limiting warming to 1.5°C implied reaching net zero CO_2 emissions globally around 2050 and concurrent deep reductions in emissions of non-CO_2 forcers (*high confidence*)[78].

109. The IPCC report sought to quantify mitigation requirements in terms of 1.5°C pathways that refer to "carbon budgets". The report explained that cumulative CO_2 emissions would be kept within a budget by reducing global annual CO_2 emissions to net zero. This assessment suggested a remaining budget of about 420 $GtCO_2$ for a two-thirds chance of limiting warming to 1.5°C, and of about 580 $GtCO_2$ for an even chance (*medium confidence*). At the same time, staying within a remaining carbon budget of 580 $GtCO_2$ implied that CO_2 emissions would have to reach carbon neutrality in about thirty years, reduced to twenty years for a 420 $GtCO_2$ remaining carbon budget (*high confidence*). Moreover, non-CO_2 emissions contributed to peak warming and affected the remaining carbon budget[79].

110. In its subsequent Assessment Reports ("AR"), the IPCC came to similar conclusions confirming and updating its findings in the 2018 Special Report. Thus, in AR6 "Climate Change 2021: The Physical Science Basis" (cited above), the IPCC unequivocally confirmed that anthropogenic climate change has produced various adverse effects for humans and nature and created risks for further such effects in the future, in particular in relation to global warming. According to the report, global surface temperature would continue to increase until at least the middle of the century under all emissions scenarios considered, and global warming of 1.5°C and 2°C would be exceeded during the twenty-first century unless deep reductions in CO_2 and other GHG emissions occurred in the coming decades. On the other hand, with further global warming, changes in several climatic impact-drivers would be more widespread at 2°C compared to 1.5°C global warming and even more widespread and/or pronounced for higher warming levels[80]. The report also confirmed the IPCC's earlier findings (*high confidence*) that there was a near-linear relationship between cumulative anthropogenic CO_2 emissions and the global warming they caused. Thus, limiting human-induced global warming to a specific level required limiting cumulative CO_2 emissions, reaching at least net zero CO_2 emissions, together with strong reductions in other GHG emissions. Furthermore, the report nuanced the relevant estimated remaining carbon budgets from the beginning of 2020. It explained that to have a 67% chance of meeting the 1.5°C limit, the remaining global carbon budget was 400 $GtCO_2$ and to have an 83% chance, 300 $GtCO_2$.[81]

[78] Chapter 2, Executive summary, p. 95.
[79] Ibid., p. 96.
[80] Summary for Policymakers, pp. 14 and 24.
[81] Ibid., pp. 27-29.

111. In AR6 "Climate Change 2022: Mitigation of Climate Change" (cited above), the IPCC found that total net anthropogenic GHG emissions had continued to rise during the period 2010-2019. During that period, average annual GHG emissions had been higher than in any previous decade (*high confidence*). Net anthropogenic GHG emissions had increased across all major sectors globally[82]. The report further pointed out that a consistent expansion of policies and laws addressing mitigation had led to the avoidance of emissions that would otherwise have occurred. However, global GHG emissions in 2030 associated with the implementation of NDCs announced prior to the Glasgow Climate Conference (COP26) would make it likely that warming would exceed 1.5°C during the twenty-first century. It was likely that limiting warming to below 2°C would then rely on a rapid acceleration of mitigation efforts after 2030. Policies implemented by the end of 2020 were projected to result in higher global GHG emissions than those implied by NDCs (*high confidence*). In other words, according to the findings of the IPCC, the world was currently on a trajectory that would lead to very significant adverse impacts for human lives and well-being.

112. According to the above-mentioned IPCC report, global GHG emissions would be projected to peak between 2020 and at the latest before 2025 in global modelled pathways that limited warming to 1.5°C with no or limited overshoot and in those that limited warming to 2°C and assumed immediate action (in both types of modelled pathways, rapid and deep GHG emissions reductions follow throughout 2030, 2040 and 2050). However, without a strengthening of policies beyond those already implemented by the end of 2020, the report predicted GHG emissions to rise beyond 2025, leading to a median global warming of 3.2°C (2.2 to 3.5°C) by 2100 (*medium confidence*)[83].

113. Furthermore, the report stressed that global net zero CO_2 emissions would be reached in the early 2050s in modelled pathways that limited warming to 1.5°C with no or limited overshoot, and around the early 2070s in modelled pathways that limited warming to 2°C. These pathways also included deep reductions in other GHG emissions. Reaching and sustaining global net zero GHG emissions would result in a gradual decline in warming (*high confidence*).[84]

114. In the latest AR6 "Synthesis Report: Climate Change 2023", the IPCC noted that human activities, principally through GHG emissions (increasing with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals), had unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900

[82] Summary for Policymakers, pp. 6, 8 and 14.
[83] Ibid., p. 17.
[84] Ibid., p. 23.

levels between 2011 and 2020. According to the report, human-caused climate change was already affecting many weather and climate extremes in every region across the globe, which had led to widespread adverse impacts and related losses and damages to nature and people (*high confidence*)[85].

115. The IPCC further stressed that policies and laws addressing mitigation had consistently expanded and had already been deployed successfully in some countries, leading to avoided and in some cases reduced or removed emissions (*high confidence*). Global GHG emissions in 2030 implied by NDCs announced by October 2021 made it likely that warming would exceed 1.5°C during the twenty-first century and made it harder to limit warming below 2°C. There were gaps between projected emissions from implemented policies and those from NDCs. Moreover, finance flows fell short of the levels needed to meet climate goals across all sectors and regions (*high confidence*). The IPCC warned that continued GHG emissions would lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term (2021-2040). At the same time, every increment of global warming would intensify multiple and concurrent hazards. However, deep, rapid and sustained reductions in GHG emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years (*high confidence*). While some future changes were unavoidable and/or irreversible, they could be limited by deep, rapid and sustained global GHG emissions reductions. The likelihood of abrupt and/or irreversible changes increased with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increased with higher global warming levels (*high confidence*). Adaptation options that were feasible and effective today would become constrained and less effective with increasing global warming; losses and damages would also increase and additional human and natural systems would reach adaptation limits (*high confidence*).[86]

116. In the same report, the IPCC stressed the importance of carbon budgets and policies for net zero emissions. It noted that limiting human-caused global warming required net zero CO_2 emissions. Cumulative carbon emissions until the time of reaching net-zero CO_2 emissions and the level of GHG emission reductions this decade would largely determine whether warming could be limited to 1.5°C or 2°C. Projected CO_2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%) (*high confidence*). As regards mitigation pathways, the IPCC noted that all global modelled pathways that limited warming to 1.5°C (>50%) with no or limited overshoot, and those that limited warming to 2°C (>67%), involved rapid and deep and,

[85] Summary for Policymakers, pp. 4-5.
[86] Ibid., pp. 10-19.

in most cases, immediate GHG emissions reductions in all sectors this decade. Global net zero CO_2 emissions would be reached for these pathway categories in the early 2050s and around the early 2070s, respectively (*high confidence*).[87]

117. However, the IPCC stressed that if warming exceeded a specified level such as 1.5°C, it could gradually be reduced again by achieving and sustaining net negative global CO_2 emissions, which would require additional deployment of carbon dioxide removal, compared to pathways without overshoot. This would, however, lead to greater feasibility and sustainability concerns as overshoot entailed adverse impacts, some irreversible, and additional risks for human and natural systems, all growing with the magnitude and duration of overshoot (*high confidence*)[88].

118. The IPCC stressed the urgency of near-term integrated climate action. It noted that climate change was a threat to human well-being and planetary health. There was a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). Climate-resilient development integrated adaptation and mitigation to advance sustainable development for all, and was enabled by increased international cooperation, including improved access to adequate financial resources and inclusive governance and coordinated policies (*high confidence*). The choices and actions implemented in this decade would have impacts now and for thousands of years (*high confidence*).[89]

119. According to the IPCC, deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems (finding with *very high confidence*). On the other hand, delayed mitigation and adaptation action would lock in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages (*high confidence*)[90].

120. The IPCC noted that effective climate action was enabled by political commitment, well-aligned multilevel governance, institutional frameworks, laws, policies and strategies and enhanced access to finance and technology. Clear goals, coordination across multiple policy domains and inclusive governance processes facilitated effective climate action. Regulatory and economic instruments could support deep emissions reductions and climate resilience if scaled up and applied widely (*high confidence*).[91]

[87] Ibid., pp. 20-23.
[88] Ibid., p. 24.
[89] Ibid., p. 25.
[90] Ibid., pp. 27-29.
[91] Ibid., p. 34.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL FRAMEWORK

A. Constitution

121. The relevant provisions of the Federal Constitution of the Swiss Confederation, adopted on 18 April 1999 (Cst., RS 101), read as follows:

Article 10 Right to life and to personal freedom

"1. Every person has the right to life. The death penalty is prohibited.

2. Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement.

..."

Article 13 Right to privacy

"1. Every person has the right to respect for their private and family life and their home, and the relations established via mail and telecommunications.

..."

Article 29 General procedural guarantees

"1. Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

2. Each party to a case has the right to be heard.

..."

Article 29a Guarantee of access to the courts

"In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the cantons may by law preclude the determination by the courts of certain exceptional categories of case."

Article 73 Sustainable development

"The Confederation and the cantons shall endeavour to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population."

Article 74 Protection of the environment

"1. The Confederation shall legislate on the protection of the population and its natural environment against damage or nuisance.

2. It shall ensure that such damage or nuisance is avoided. The costs of avoiding or eliminating such damage or nuisance are borne by those responsible for causing it.

3. The cantons are responsible for the implementation of the relevant federal regulations, except where the law reserves this duty for the Confederation."

Article 189 Jurisdiction of the Federal Supreme Court

"...

4. Acts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court. Exceptions may be provided for by law."

B. Federal Act on the Protection of the Environment

122. The relevant provisions of the Federal Act on the Protection of the Environment of 7 October 1983 (EPA, RS 814.01) read as follows:

Section 1 Aim

"(1) [The Environmental Protection] Act is intended to protect people, animals and plants, their biological communities and habitats against harmful effects or nuisances and to preserve the natural foundations of life in the long term, in particular biological diversity and the fertility of the soil.

(2) Early preventive measures must be taken in order to limit effects which could become harmful or a nuisance."

Section 3 Reservation of other legislation

"(1) Stricter regulations in other federal legislation are reserved.

..."

Section 4 Implementing provisions based on other federal legislation

"(1) Regulations on the environmental effects of air pollution, noise, vibrations and radiation that are based on other federal legislation must comply with the principles of limitation of emissions (Art. 11), ambient limit values (Art. 13-15), alarm values (Art. 19) and planning values (Art. 23-25).

..."

Section 11 Principles

"(1) Air pollution, noise, vibrations and radiation are limited by measures taken at their source (limitation of emissions).

(2) Irrespective of the existing environmental pollution, as a precautionary measure emissions are limited as much as technology and operating conditions allow, provided that this is economically acceptable.

(3) Emissions are limited more strictly if the effects are found or expected to be harmful or a nuisance, taking account of the existing level of environmental pollution."

Section 12 Limitation of emissions

"(1) Emissions are limited by issuing:

(a) maximum emission values;

(b) regulations on construction and equipment;

(c) traffic or operating regulations;

(d) regulations on the heat insulation of buildings;

(e) regulations on thermal and motor fuels.

(2) Limits are prescribed by ordinance or, in cases where an ordinance makes no such provision, by rulings based directly on this Act."

Section 13 Ambient limit values

"(1) The Federal Council stipulates by ordinance the ambient limit values for assessing harmful effects or nuisances.

(2) In doing so, it also takes account of the effects of pollution levels on particularly sensitive groups such as children, the sick, the elderly and pregnant women."

Section 14 Ambient limit values for air pollution

"The ambient limit values for air pollution must be set so that, in the light of current scientific knowledge and experience, ambient air pollution below these levels:

(a) does not endanger people, animals or plants, their biological communities and habitats;

(b) does not seriously affect the well-being of the population;

(c) does not damage buildings;

(d) does not harm soil fertility, vegetation or waters."

C. CO_2 Act

123. The relevant provision of the Federal Act on the Reduction of CO2 Emissions of 23 December 2011 (CO2 Act, RS 641.71), read as follows:

Section 1 Aim

"(1) This Act is intended to reduce [GHG] emissions and in particular CO_2 emissions that are attributable to the use of fossil fuels (thermal and motor fuels) as energy sources with the aim of contributing to limiting the global rise in temperature to less than 2 degrees Celsius.

..."

Section 3 Reduction target

"(1) Domestic [GHG] emissions must be reduced overall by 20 per cent as compared with 1990 levels, by 2020. The Federal Council may set sector-specific interim targets.

(1^{bis}) [GHG] emissions must be reduced by a further 1.5 per cent annually by 2024 compared with 1990 levels. The Federal Council may specify sectoral interim targets.

(1^{ter}) At least 75 per cent of the reduction in [GHG] emissions in accordance with paragraph 1^{bis} must be achieved through domestic measures.

(3) The total volume of [GHG] emissions is calculated on the basis of the [GHG] emitted in Switzerland. Emissions from the use of aviation fuel on international flights are not taken into account.

...

(4) The Federal Council may set reduction targets for individual economic sectors by agreement with the parties concerned.

(5) It shall at the due time submit proposals to the Federal Assembly on the reduction targets for the period after 2020. It shall consult the parties concerned beforehand."

124. The Federal Council set interim targets for various sectors (section 3(1) of the Ordinance on the Reduction of CO_2 Emissions [CO_2 Ordinance, SR 641.711] in conjunction with section 3(1)(2) of the CO_2 Act). If a sectoral interim target is not achieved, the DETEC, after hearing the cantons and the parties concerned, applies to the Federal Council for further measures (section 3(2) of the CO_2 Ordinance) or – for the fuels sector – the CO_2 tax is automatically increased (section 94(1) of the CO_2 Ordinance in conjunction with section 29 of the CO_2 Act). The CO_2 Act provides for various measures to achieve the reduction target. These are, first of all, technical measures for the reduction of CO_2 emissions in the building sector (enactment of building standards for new and old buildings by the cantons, combined with a reporting obligation for the attention of the FOEN – section 9 of the CO_2 Act in conjunction with section 16 of the CO_2 Ordinance) and in the transport sector (overall target values for the CO_2 emissions of all new passenger cars placed on the market in Switzerland and, since 1 January 2018, also for vans and light articulated vehicles placed on the market for the first time, combined with individual targets and penalty payments – sections 10 et seq. of the CO_2 Act).

125. In the transport sector, part of the CO_2 emissions resulting from the use of motor fuels as an energy source must be compensated, for example, through emissions-reduction projects. The Federal Council determines the compensation rate according to, among other things, the achievement of the reduction target pursuant to section 3 of the CO_2 Act (section 26(1) and (2) of the CO_2 Act in conjunction with section 89(1) of the CO_2 Ordinance).

126. The Federal government levies the above-mentioned CO_2 tax on the production, extraction and import of fuels (section 29 of the CO_2 Act). The enforcement of the CO_2 Act and the issuance of implementing regulations is the responsibility of the Federal Council (section 39(1) of the CO_2 Act). It then periodically reviews the effectiveness of the legal measures and the need for further measures (section 40(1) of the CO_2 Act). The implementation of the CO_2 Ordinance is generally the responsibility of the Federal Office for the Environment (section 130(1) of the CO_2 Ordinance).

D. Climate Act

127. The relevant provisions of the Federal Act on climate protection, innovation and strengthening energy security of 30 September 2022 (the Climate Act, FF 2022 2403), read as follows:

Section 1 Aim

"The purpose of the present Act is to set the following objectives, in accordance with the Agreement of 12 December 2015 on climate change:

(a) reduction of [GHG] emissions and use of negative-emissions technologies;

(b) adaptation to and protection from the effects of climate change;

(c) directing of financial flows so as to render them compatible with climate-resilient low-emission development."

Section 3 Targets for emissions reduction and negative-emissions technologies

"(1) The Confederation shall ensure a reduction to net zero by 2050 of human-induced [GHG] emitted in Switzerland (net-zero objective) through the following measures:

(a) reducing [GHG] emissions as far as possible, and

(b) offsetting the impact of residual [GHG] emissions through the use of negative-emissions technologies in Switzerland and abroad.

(2) After 2050, the quantity of CO_2 removed and stored using negative-emissions technologies must be greater than the residual [GHG] emissions.

(3) The Confederation shall ensure a reduction in [GHG] emissions compared with 1990 levels. The intermediate reduction targets shall be the following:

(a) between 2031 and 2040: at least 64% on average;

(b) by 2040: at least 75%;

(c) between 2041 and 2050: at least 89% on average.

(4) The reduction targets must be technically feasible and economically sustainable. As far as possible, they should be achieved through emissions reductions in Switzerland.

(5) Within the scope of their powers, the Confederation and the cantons shall ensure that, by 2050 at the latest, carbon sinks are available in Switzerland and abroad in sufficient quantity to achieve the net-zero objective. The Federal Council may set indicative values for the use of negative-emissions technologies.

(6) Emissions from international air and sea transport refuelling in Switzerland shall be taken into account for the achievement of the targets referred to in subsections 1 and 2."

Section 4 – Indicative values for different sectors

"(1) The reduction targets referred to in section 3, subsections 1 and 3, are to be achieved by reducing [GHG] emissions in Switzerland compared with 1990 levels by at least the following amounts:

(a) in the construction sector:

1. by 2040: 82%,

2. by 2050: 100%;

(b) in the transport sector:

1. by 2040: 57%,

2. by 2050: 100%;

(c) in the industrial sector:

1. by 2040: 50%,

2. by 2050: 90%.

(2) After consultation with the relevant actors the Federal Council may, in accordance with subsection 1, set indicative values for other sectors and for [GHG] and emissions from fossil-based energy sources. It shall take into account the latest scientific knowledge, the availability of new technologies, and developments within the European Union."

Section 11 – Achievement of the objectives

"(1) After hearing the views of the relevant actors and taking into account the most recent scientific knowledge, the Federal Council shall submit to the Federal Assembly, in good time, proposals for the realisation of the objectives set in the present Act:

(a) for the period from 2025 to 2030;

(b) for the period from 2031 to 2040;

(c) for the period from 2041 to 2050.

(2) The proposals referred to in subsection 1 are to be implemented primarily in the CO_2 Act of 23 December 2011.

(3) The proposals of the Federal Council shall aim to strengthen the economy and ensure social acceptance.

(4) Within the scope of their powers, the Confederation and the cantons shall undertake efforts, in Switzerland and internationally, to limit the risks and effects of climate change, in accordance with the objectives of the present Act."

E. The Federal Administrative Procedure Act

128. The relevant provision of the Federal Administrative Procedure Act of 20 December 1968 (APA, RS 172.021), determining standing for a ruling on real acts, namely acts based on federal public law that affect rights and obligations, but do not arise from formal rulings, provides as follows:

Section 25a Ruling on real acts

"(1) Any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it:

(a) refrains from, discontinues or revokes unlawful acts;

(b) rectifies the consequences of unlawful acts;

(c) confirms the illegality of such acts.

(2) The authority shall decide by way of a ruling."

129. For further relevant provisions of the Act, see *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 28, ECHR 2000-IV.

F. Relevant domestic case-law

130. According to the Federal Supreme Court's case-law, Article 73 of the Constitution does not provide for individual claims (ATF [judgments of the Federal Supreme Court] 132 II 305, at 4.3). Conversely, it is not a mere declaration or interpretation aid, "but a binding instruction for action addressed to the competent authorities" (FOJ, VPB 65.2, A.III). The Constitution therefore recognises the pursuit of sustainability as a (never completed) permanent task. The addressees are the Confederation and the cantons, each within the scope of their competence. The political authorities (legislature, parliaments and governments) are to be addressed first and foremost, and only subsidiarily – within the scope of their competence – also the authorities applying the law.

131. Similarly to Article 73, Article 74 of the Constitution is also not a justiciable norm. It simply provides a guideline for legislation. The addressee is primarily the legislature. The authorities applying the law must, however, take into account the requirements of Article 74 § 2 of the Constitution within the framework and limits of constitutional interpretation (see ATF 132 II 305, at 4.3, concerning the concept of precaution). The "precautionary principle" as a constitutional guideline is intended to prevent a lack of scientific certainty from becoming a pretext for government inaction (ATF 132 II 305, at 4.3). Paragraph 2 leaves the (federal) legislature a certain scope for assessment and design of the necessary legislative measures to be taken. In line with Article 74 § 2 of the Constitution, Article 1 § 2 of the Environmental Protection Act interprets this constitutional mandate to mean that impacts that could become harmful or a nuisance are to be "limited at an early stage".

132. Furthermore, Article 189 § 4 of the Constitution excludes the abstract review of norms by way of appeal. It does not, however, prejudice action against an ordinance by way of concrete legal action. The preliminary review of an ordinance in the particular circumstances of a case in which it has been applied is not excluded (concrete norm control; see ATF 141 V 473, at 8.3, and ATF 141 II 169, at 3.4) and neither is the preliminary review of another Federal Council or parliamentary act (see ATF 139 II 499, at 4.1). Article 189 § 4 of the Constitution can also not allow the constitutional guarantee of legal recourse under Article 29a of the Constitution to be circumvented. The content of the latter must be taken into account in the interpretation and implementation of Article 189 of the Constitution, as must the requirements of international law arising from Article 6 § 1 or Article 13 of the Convention (see message of the Federal Council accompanying the Constitution, p. 531).

II. RELEVANT INTERNATIONAL MATERIALS

A. United Nations

1. The system of the United Nations Framework Convention on Climate Change

(a) United Nations Framework Convention on Climate Change

133. The relevant parts of the UNFCCC provide as follows:

"Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind,

Concerned that human activities have been substantially increasing the atmospheric concentrations of [GHG], that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind,

Noting that the largest share of historical and current global emissions of [GHG] has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs,

...

Noting that there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof,

Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions,

...

Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,

...

Recognizing that States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries,

...

Recognizing that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas,

Recognizing that various actions to address climate change can be justified economically in their own right and can also help in solving other environmental problems,

Recognizing also the need for developed countries to take immediate action in a flexible manner on the basis of clear priorities, as a first step towards comprehensive response strategies at the global, national and, where agreed, regional levels that take into account all [GHG], with due consideration of their relative contributions to the enhancement of the greenhouse effect,

...

Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty,

...

Determined to protect the climate system for present and future generations ...”

Article 1
Definitions

“For the purposes of this Convention:

1. ’Adverse effects of climate change’ means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.

2. ’Climate change’ means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

...

4. ’Emissions’ means the release of [GHG] and/or their precursors into the atmosphere over a specified area and period of time.

5. ’[GHG]’ means those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.

...

9. ’Source’ means any process or activity which releases a [GHG], an aerosol or a precursor of a [GHG] into the atmosphere.”

Article 2
Objective

“The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow

ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

Article 3
Principles

"In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost ...

4. The Parties have a right to, and should, promote sustainable development ...

5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties ..."

Article 4
Commitments

"1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(a) Develop, periodically update, publish and make available to the Conference of the Parties ... national inventories of anthropogenic emissions ...

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all [GHG] not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

(c) Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices ...

(d) Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs ...

(e) Cooperate in preparing for adaptation to the impacts of climate change ...

(f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

(g) Promote and cooperate in scientific, technological, technical, socio-economic and other research ...

2. The developed country Parties ... commit themselves specifically as provided for in the following:

(a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of [GHG] and protecting and enhancing its [GHG] sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other [GHG] not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph;

(b) In order to promote progress to this end, each of these Parties shall communicate ... detailed information on its policies and measures referred to in subparagraph (a) above, ... with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other [GHG] not controlled by the Montreal Protocol ..."

(b) The Kyoto Protocol

134. The UNFCCC was first operationalised through the Kyoto Protocol (1997). This Protocol committed industrialised countries and economies in transition to limit and reduce GHG emissions in accordance with agreed individual targets and the principle of "common but differentiated responsibility and respective capabilities". The relevant part of the Kyoto Protocol provides as follows:

Article 3 § 1

"The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the [GHG] listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

135. Annex B of the Kyoto Protocol set quantified emission limitation or reduction commitment (percentage of base year or period) for Switzerland at 92%.

(c) The Paris Agreement

136. The Paris Agreement – adopted at the UN Climate Change Conference (COP21) in Paris on 12 December 2015 – is an international treaty setting out the overarching goal of GHG emissions reduction. The relevant parts of it provide as follows:

> "In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,
>
> Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge,
>
> ...
>
> Recognizing that Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it,
>
> ...
>
> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,
>
> ..."

Article 2

> "1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low [GHG] emissions development, in a manner that does not threaten food production; and
>
> (c) Making finance flows consistent with a pathway towards low [GHG] emissions and climate-resilient development.
>
> 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

Article 3

"As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts ..."

Article 4

"1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of [GHG] emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of [GHG] in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."

(d) COP26 and COP27

137. At the UNFCCC Conference of the Parties (COP26) in Glasgow, which took place between 31 October and 13 November 2021, the Glasgow Climate Pact was adopted, which provides, *inter alia*, as follows:

"The Conference of the Parties

...

Also acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

...

I. Science and urgency

1. Recognizes the importance of the best available science for effective climate action and policymaking;

...

3. Expresses alarm and utmost concern that human activities have caused around 1.1 ºC of warming to date, that impacts are already being felt in every region and that carbon budgets consistent with achieving the Paris Agreement temperature goal are now small and being rapidly depleted;

4. Recalls Article 2, paragraph 2, of the Paris Agreement, which provides that the Paris Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances;

5. Stresses the urgency of enhancing ambition and action in relation to mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement;

...

IV. Mitigation

20. Reaffirms the Paris Agreement temperature goal of holding the increase in the global average temperature to well below 2 ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 ºC above pre-industrial levels;

21. Recognizes that the impacts of climate change will be much lower at the temperature increase of 1.5 ºC compared with 2 ºC and resolves to pursue efforts to limit the temperature increase to 1.5 ºC;

22. Recognizes that limiting global warming to 1.5 ºC requires rapid, deep and sustained reductions in global [GHG] emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century as well as deep reductions in other [GHG];

23. Also recognizes that this requires accelerated action in this critical decade, on the basis of the best available scientific knowledge and equity, reflecting common but differentiated responsibilities and respective capabilities in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty;

...

26. Emphasizes the urgent need for Parties to increase their efforts to collectively reduce emissions through accelerated action and implementation of domestic mitigation measures in accordance with Article 4, paragraph 2, of the Paris Agreement;

..."

138. The UNFCCC Conference of the Parties (COP27) took place in Sharm el-Sheikh from 6 to 20 November 2022. The relevant parts of the adopted Sharm el-Sheikh Implementation Plan provide as follows:

"The Conference of the Parties

...

Acknowledging that climate change is a common concern of humankind, and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

...

57. Encourages Parties to increase the full, meaningful and equal participation of women in climate action and to ensure gender-responsive implementation and means of implementation, including by fully implementing the Lima work programme on gender and its gender action plan, to raise climate ambition and achieve climate goals;

...

59. Recognizes the role of children and youth as agents of change in addressing and responding to climate change and encourages Parties to include children and youth in their processes for designing and implementing climate policy and action, and, as appropriate, to consider including young representatives and negotiators into their

national delegations, recognizing the importance of intergenerational equity and maintaining the stability of the climate system for future generations;"

(e) COP28

139. In preparation for the UNFCCC Conference of the Parties (COP28) in Dubai, held between 30 November and 12 December 2023, the synthesis report on the technical dialogue of the first global stocktake under the Paris Agreement[92], made the following key findings:

"Key finding 1: since its adoption, the Paris Agreement has driven near-universal climate action by setting goals and sending signals to the world regarding the urgency of responding to the climate crisis. While action is proceeding, much more is needed now on all fronts.

Key finding 2: to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty, governments need to support systems transformations that mainstream climate resilience and low GHG emissions development. Credible, accountable and transparent actions by non-Party stakeholders are needed to strengthen efforts for systems transformations.

Key finding 3: systems transformations open up many opportunities, but rapid change can be disruptive. A focus on inclusion and equity can increase ambition in climate action and support.

Key finding 4: global emissions are not in line with modelled global mitigation pathways consistent with the temperature goal of the Paris Agreement, and there is a rapidly narrowing window to raise ambition and implement existing commitments in order to limit warming to 1.5 ºC above pre-industrial levels.

Key finding 5: much more ambition in action and support is needed in implementing domestic mitigation measures and setting more ambitious targets in NDCs to realize existing and emerging opportunities across contexts, in order to reduce global GHG emissions by 43 per cent by 2030 and further by 60 per cent by 2035 compared with 2019 levels and reach net zero CO2 emissions by 2050 globally.

Key finding 6: achieving net zero CO2 and GHG emissions requires systems transformations across all sectors and contexts, including scaling up renewable energy while phasing out all unabated fossil fuels, ending deforestation, reducing non-CO2 emissions and implementing both supply- and demand-side measures.

Key finding 7: just transitions can support more robust and equitable mitigation outcomes, with tailored approaches addressing different contexts.

Key finding 8: economic diversification is a key strategy to address the impacts of response measures, with various options that can be applied in different contexts.

Key finding 9: as climate change threatens all countries, communities and people around the world, increased adaptation action as well as enhanced efforts to avert, minimize and address loss and damage are urgently needed to reduce and respond to increasing impacts, particularly for those who are least prepared for change and least able to recover from disasters.

[92] FCCC/SB/2023/9, 8 September 2023.

Key finding 10: collectively, there is increasing ambition in plans and commitments for adaptation action and support, but most observed adaptation efforts are fragmented, incremental, sector-specific and unequally distributed across regions.

Key finding 11: when adaptation is informed and driven by local contexts, populations and priorities, both the adequacy and the effectiveness of adaptation action and support are enhanced, and this can also promote transformational adaptation.

Key finding 12: averting, minimizing and addressing loss and damage requires urgent action across climate and development policies to manage risks comprehensively and provide support to impacted communities.

Key finding 13: support for adaptation and funding arrangements for averting, minimizing and addressing loss and damage need to be rapidly scaled up from expanded and innovative sources, and financial flows need to be made consistent with climate-resilient development to meet urgent and increasing needs.

Key finding 14: scaled-up mobilization of support for climate action in developing countries entails strategically deploying international public finance, which remains a prime enabler for action, and continuing to enhance effectiveness, including access, ownership and impacts.

Key finding 15: making financial flows – international and domestic, public and private – consistent with a pathway towards low GHG emissions and climate-resilient development entails creating opportunities to unlock trillions of dollars and shift investments to climate action across scales.

Key finding 16: existing cleaner technologies need to be rapidly deployed, together with accelerated innovation, development and transfer of new technologies, to support the needs of developing countries.

Key finding 17: capacity-building is foundational to achieving broad-ranging and sustained climate action and requires effective country-led and needs-based cooperation to ensure capacities are enhanced and retained over time at all levels."

140. The relevant parts of the COP28 First Global Stocktake[93] provide as follows:

The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement,

Recalling Article 2, paragraph 1, of the Paris Agreement, which provides that the Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty,

Also recalling Article 2, paragraph 2, of the Paris Agreement, which provides that the Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,

...

Acknowledging that climate change is a common concern of humankind and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of Indigenous Peoples, local

[93] FCCC/PA/CMA/2023/L.17, 13 December 2023.

communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

...

I. Context and cross-cutting considerations

1. Welcomes that the Paris Agreement has driven near-universal climate action by setting goals and sending signals to the world regarding the urgency of responding to the climate crisis;

2. Underlines that, despite overall progress on mitigation, adaptation and means of implementation and support, Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals;

3. Reaffirms the Paris Agreement temperature goal of holding the increase in the global average temperature to well below 2 ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 ºC above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

4. Underscores that the impacts of climate change will be much lower at the temperature increase of 1.5 ºC compared with 2 ºC and resolves to pursue efforts to limit the temperature increase to 1.5 ºC;

5. Expresses serious concern that 2023 is set to be the warmest year on record and that impacts from climate change are rapidly accelerating, and emphasizes the need for urgent action and support to keep the 1.5 ºC goal within reach and to address the climate crisis in this critical decade;

6. Commits to accelerate action in this critical decade on the basis of the best available science, reflecting equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty;

7. Underscores Article 2, paragraph 2, of the Paris Agreement, which stipulates that the Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances;

...

15. Notes with alarm and serious concern the following findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change:

(a) That human activities, principally through emissions of [GHG], have unequivocally caused global warming of about 1.1 ºC;

(b) That human-caused climate change impacts are already being felt in every region across the globe, with those who have contributed the least to climate change being most vulnerable to the impacts, and, together with losses and damages, will increase with every increment of warming;

(c) That most observed adaptation responses are fragmented, incremental, sector-specific and unequally distributed across regions, and that, despite the progress made, significant adaptation gaps still exist across sectors and regions and will continue to grow under current levels of implementation;

16. Notes the following findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change:

(a) That mitigation efforts embedded within the wider development context can increase the pace, depth and breadth of emissions reductions, as well as that policies that shift development pathways towards sustainability can broaden the portfolio of available mitigation responses and enable the pursuit of synergies with development objectives;

(b) That both adaptation and mitigation financing would need to increase manyfold, and that there is sufficient global capital to close the global investment gap but there are barriers to redirecting capital to climate action, and that Governments through public funding and clear signals to investors are key in reducing these barriers and investors, central banks and financial regulators can also play their part;

(c) That feasible, effective and low-cost mitigation options are already available in all sectors to keep 1.5 ºC within reach in this critical decade with the necessary cooperation on technologies and support;

17. Notes with concern the pre-2020 gaps in both mitigation ambition and implementation by developed country Parties and that the Intergovernmental Panel on Climate Change had earlier indicated that developed countries must reduce emissions by 25–40 per cent below 1990 levels by 2020, which was not achieved;

II. Collective progress towards achieving the purpose and long-term goals of the Paris Agreement ...

A. Mitigation

...

25. Expresses concern that the carbon budget consistent with achieving the Paris Agreement temperature goal is now small and being rapidly depleted and acknowledges that historical cumulative net carbon dioxide emissions already account for about four fifths of the total carbon budget for a 50 per cent probability of limiting global warming to 1.5 ºC;

...

28. Further recognizes the need for deep, rapid and sustained reductions in [GHG] emissions in line with 1.5 ºC pathways and calls on Parties to contribute to the following global efforts, in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches:

...

(d) Transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science;

..."

2. The Aarhus Convention

141. The relevant parts of the 1998 Aarhus Convention read as follows:

"The Parties to this Convention,

...

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

...

Have agreed as follows:"

Article 2
Definitions

"4. 'The public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. 'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

Article 9
Access to justice

"2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

142. The relevant parts of the Aarhus Convention Implementation Guide[94] provide as follows (footnotes omitted):

[94] United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, Second Edition, 2014.

"While narrower than the 'public,' the 'public concerned' is nevertheless still very broad. With respect to the criterion of 'being affected', this is very much related to the nature of the activity in question. Some of the activities subject to article 6 of the Convention may potentially affect a large number of people. For example, in the case of pipelines, the public concerned is usually in practice counted in the thousands, while in the case of nuclear power stations the competent authorities may consider the public concerned to count as many as several hundred thousand people across several countries.

With respect to the criterion of 'having an interest', the definition appears to go well beyond the kind of language that is usually found in legal tests of 'sufficient interest' (see next paragraph). In particular it should be read to include not only members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity. Potentially affected interests may also include social rights such as the right to be free from injury or the right to a healthy environment. It also applies, however, to a category of the public that has an unspecified interest in the decision-making procedure.

It is significant that article 2, paragraph 5, does not require that a person must show a legal interest to be a member of the public concerned. Thus, the term may encompass both 'legal interest' and 'factual interest' as defined under continental legal systems, such as those of Austria, Germany and Poland. Under national law, persons with a mere factual interest do not normally enjoy the full panoply of rights in proceedings accorded to those with a legal interest. In contrast, the Convention accords the same status (at least in relation to article 6) regardless of whether the interest is a legal or factual one.

Article 2, paragraph 5, explicitly includes within the category of the interested public NGOs whose statutory goals include promoting environmental protection, so long as they meet 'any requirements under national law'. Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, such as through its charter, by-laws or activities. 'Environmental protection' can include any purpose consistent with the implied definition of environment found in article 2, paragraph 3. The requirement for 'promoting environmental protection' would thus be satisfied in the case of NGOs focusing on any aspect of the implied definition of environment in article 2, paragraph 3. For example, if an NGO works to promote the interests of those with health concerns due to water-borne diseases, this NGO would be considered to fulfil the definition of article 2, paragraph 5.

The reference to 'meeting any requirements under national law' should not be read as leaving absolute discretion to Parties in defining these requirements. Their discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation and the clear requirement of article 3, paragraph 4, to provide 'appropriate recognition' for NGOs. In its findings on communication ACCC/C/2004/05 (Turkmenistan), the Compliance Committee found that 'Non-governmental organizations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public'.

Parties may set requirements for NGOs under national law, but in the light of the integral role that NGOs play in the implementation of the Convention, Parties should ensure that these requirements are not overly burdensome or politically motivated, and that each Party's legal framework encourages the formation of NGOs and their constructive participation in public affairs. Moreover, any requirements should be consistent with the Convention's principles, such as non-discrimination and the

avoidance of technical and financial barriers. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary.

For example, a possible requirement for environmental NGOs to have been active in that country for a certain number of years might not be consistent with the Aarhus Convention, because it may violate the non-discrimination clause of article 3, paragraph 9. Furthermore, the requirement 'to have been active' in itself might be overly exclusive in countries that have permitted the formation of NGOs for only a relatively short period of time, and where they are therefore relatively undeveloped.

There are also sometimes requirements for NGOs to have a certain number of active members. This was one of the issues considered by the ECJ in Case C-263/08 (Sweden), discussed in the box above. Such a membership requirement would also be considered overly strict under the Convention, if the threshold is set at such a high level that only a handful of NGOs can meet it in a given country. In 2009, Slovenia amended its Environmental Protection Act to remove the requirement that NGOs promoting environmental protection undergo a financial audit of operations in order to qualify as the 'public concerned' under article 2, paragraph 5.

If an NGO meets the requirements set out in article 2, paragraph 5, it is deemed to be a member of the 'public concerned' under article 6 and article 9, paragraph 2. But for NGOs that do not meet such requirements ab initio, and for individuals, the Convention is not entirely clear whether the mere participation in a public participation procedure under article 6, paragraph 7, would qualify a person as a member of the 'public concerned'. Because article 9, paragraph 2, is the mechanism for enforcing rights under article 6, however, it is arguable that any person who participates as a member of the public in a hearing or other public participation procedure under article 6, paragraph 7, should have an opportunity to make use of the access to justice provisions in article 9, paragraph 2. In this case, he or she would fall under the definition of 'public concerned'.

...

Nothing in the Convention prevents the Parties from granting standing to any person without distinction. However, the Convention requires – as a minimum – that members of the 'public concerned' either having a sufficient interest or maintaining impairment of a right have standing to review the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 ...

With respect to NGOs, the Convention states clearly that NGOs meeting the requirements of article 2 paragraph 5, are deemed to have a 'sufficient interest' or a right capable of being impaired...

Proper implementation of, and compliance with, the Convention requires that the objective of wide access to justice is upheld when determining the scope of persons – both natural and legal with standing. Several Parties to the Convention apply some kind of test to establish standing, often in terms of a direct, sufficient, personal or legal interest, or of a legally protected individual right. While some such criteria, for instance limiting standing only to members of the public with private property rights, would not be in line with the Convention, the permissibility of other criteria will depend on how they are construed by the reviewing body in practice. In other words, even criteria such as having a sufficient interest or a right that can be impaired may be incompatible with the Convention if understood too narrowly in the case law of the reviewing bodies.

As illustrated by the Compliance Committee's findings on communication ACCC/C/2005/11 (Belgium), meeting the Convention's objective of giving the public concerned wide access to justice may require a significant shift of thinking in countries where NGOs have previously lacked standing in cases because they were held not to

have a sufficient interest, or an impaired right. In ACCC/C/2005/11, the Belgian judiciary had applied the general criteria for standing under Belgian law to NGOs, meaning that NGO applicants had to show a direct, personal and legitimate interest as well as a 'required quality'. The Compliance Committee concluded that even though the wording of the relevant Belgian laws did not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as developed before the entry into force of the Convention for Belgium, implied a too restrictive access to justice to environmental organizations, and thus did not meet the requirements of the Convention. ...

An example of national criteria for standing that would clearly not be in compliance with the Convention was the former Swedish criteria for NGOs. According to former Swedish law, to be able to appeal environmental permits, environmental associations were required to be active in Sweden for more than three years and to have at least 2,000 members. This was found by the CJEU to be in violation of the EU legislation intended to implement the Aarhus Convention ..."

143. The relevant part of the 2015 Maastricht Recommendations[95] on the implementation of the Aarhus Convention provides as follows:

"c. 'The public concerned' includes, inter alia, non-governmental organizations (NGOs) promoting environmental protection and meeting any requirements under national law. To ensure the framework for public participation is as transparent, clear and consistent as possible, the following may be clearly specified through national law:

i. What constitutes 'having an interest in' environmental decision-making;

ii. The requirements, if any, which NGOs promoting environmental protection must meet in order to be deemed to have an interest. What constitutes a sufficient interest should be determined in accordance with the objective of giving the public concerned wide access to justice."

3. The United Nations General Assembly

(a) Resolution on the human right to a clean, healthy and sustainable environment

144. Upon the invitation of the Human Rights Council formulated in its Resolution 48/13 of 8 October 2021, the General Assembly of the United Nations adopted its Resolution 76/300 on the human right to a clean, healthy and sustainable environment on 28 July 2022.

145. It was adopted with 161 votes in favour (of the 169 member States present), 8 abstentions[96] and no votes against[97]. 45 of the 46 member States of the Council of Europe voted in favour.[98]

146. In the Preamble to the Resolution, the General Assembly noted the following:

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[95] United Nations Economic Commission for Europe, *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters*, 2015.

[96] China, Russian Federation, Belarus, Cambodia, Iran, Syria, Kyrgyzstan and Ethiopia.

[97] Official Records: A/76/PV.97.

[98] Türkiye does not appear in the Official records as a voting country.

"[A] vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies."

147. Its four operative paragraphs provide as follows:

"1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right;

2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;

3. *Affirms* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;

4. *Calls upon* States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all."

(b) Other General Assembly material

148. Nearly every year since its first Resolution on the subject, namely Resolution no. 43/53 on the protection of global climate for present and future generations of mankind adopted on 6 December 1988, the issue of global climate protection for future generations has been put on the agenda of the General Assembly, resulting in the adoption of numerous resolutions[99].

149. In its Resolution 69/220 adopted on 19 December 2014, the General Assembly made explicit reference to the necessity to protect the climate system for the benefit of present and future generations of humankind, referring to the UNFCCC.

150. In the Preamble to its Resolution 72/219 adopted on 20 December 2017, the General Assembly made a statement which it has retained ever since in the Preamble of each of the resolutions adopted on this subject[100]:

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[99] Resolutions nos. 43/53, 6 December 1988; 44/207, 22 December 1989; 45/212, 21 December 1990 ; 46/169, 19 December 1991; 47/195, 22 December 1992; 48/189, "United Nations Framework Convention on Climate Change", 21 December 1993; 49/120, 19 December 1994; 50/115, 20 December 1995; 51/184, 16 December 1996; 52/199, 18 December 1997; 54/222, 22 December 1999; Decision no. 55/443, 20 December 2000; Resolutions nos. 56/199, 21 December 2001; 57/257, 20 December 2002; 58/243, 23 December 2003; 59/234, 22 December 2004; 60/197, 22 December 2005; 61/201, 20 December 2006; 62/86, 10 December 2007; 63/32, 26 November 2008; 64/73, 7 December 2009; 65/159, 20 December 2010; 66/200, 22 December 2011; 67/210, 21 December 2012; 68/212, 20 December 2013; 69/220; 70/205, 22 December 2015; 71/228, 21 December 2016; 72/219, 20 December 2017; 73/232, 20 December 2018; 74/219, 19 December 2019; 75/217, 21 December 2020; 76/205, 17 December 2021.

[100] Including in its last Resolution under this item, namely Resolution 76/205 on the protection of global climate for present and future generations of mankind, 17 December 2021.

> "Recognizing that, in undertaking its work, the United Nations should promote the protection of the global climate for the well-being of present and future generations of humankind ..."

4. The Secretary-General of the United Nations

151. In 2009, the Secretary-General of the United Nations noted that:

> "The United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water and to housing (see A/HRC/10/61)".[101]

152. In May 2022, pursuant to the request of the Human Rights Council[102], the Secretary-General issued a report on "The impacts of climate change on the human rights of people in vulnerable situations"[103], in which he presented the legal and policy framework applying to persons in vulnerable situations in the context of climate change (footnotes omitted):

> "The nine core international human rights instruments set forth binding legal obligations on the States that are party to them, including some that are relevant to climate change. In the context of climate change, fulfilling these obligations may require States to, among other things, take action to protect people against climate change-related harms that impact on the enjoyment of human rights and to implement inclusive climate policies. Climate action should empower people in vulnerable situations, ensuring their full and effective participation as rights holders."

153. In the report, the Secretary-General made a series of recommendations to States and other stakeholders to address the impacts of climate change on the human rights of people in vulnerable situations (paragraphs 48-58).

5. The Human Rights Council

(a) Resolutions

154. In 2018, in its Resolution 37/8, the Human Rights Council acknowledged that "more than 100 States [had] recognized some form of a right to a healthy environment in, inter alia, international agreements, their constitutions, legislations or policies".[104]

155. In Resolution 46/7 on human rights and the environment[105] the Human Rights Council noted as follows:

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[101] "Climate change and its possible security implications", Report of the Secretary-General to the General Assembly A/64/350, distr. 11 September 2009.
[102] Human Rights Council, Resolution 47/24, adopted on 14 July 2021.
[103] "The impacts of climate change on the human rights of people in vulnerable situations", Report of the Secretary General, A/HRC/50/57, distr. 6 May 2022.
[104] Human Rights Council Resolution 37/8, adopted on 22 March 2018, A/HRC/RES/37/8, last preambular paragraph.
[105] Human Rights Council Resolution 46/7, Human rights and the environment, 20 March 2021, A/HRC/RES/46/7.

"Recalling also the Paris Agreement, adopted on 12 December 2015 by the parties to the United Nations Framework Convention on Climate Change, in which they acknowledged in the preamble that they should, when taking action to address climate change, respect, promote and consider their respective obligations with regard to human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, the empowerment of women and intergenerational equity,

...

Taking note of the outcomes of the twenty-fifth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, and encouraging States to consider, among other aspects, respect for and the promotion of human rights at the twenty-sixth session, to be held in Glasgow, United Kingdom of Great Britain and Northern Ireland, from 1 to 12 November 2021,

..."

156. In Resolution 48/13 of 8 October 2021, the Human Rights Council formally recognised the right to a clean, healthy and sustainable environment as a human right and invited the General Assembly to consider the matter (see the General Assembly Resolution 76/300, cited above). The relevant parts of the Resolution read as follows:

"Recalling also States' obligations and commitments under multilateral environmental instruments and agreements, including on climate change, and the outcome of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in June 2012, and its outcome document entitled "The future we want", which reaffirmed the principles of the Rio Declaration on Environment and Development,

Recalling further all its resolutions on human rights and the environment, the most recent of which are resolutions 45/17 of 6 October 2020, 45/30 of 7 October 2020 and 46/7 of 23 March 2021, and relevant resolutions of the General Assembly,

Recognizing that sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute to and promote human well-being and the enjoyment of human rights, including the rights to life, to the enjoyment of the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to housing, to safe drinking water and sanitation and to participation in cultural life, for present and future generations,

Reaffirming the importance of international cooperation, on the basis of mutual respect, in full compliance with the principles and purposes of the Charter, with full respect for the sovereignty of States while taking into account national priorities,

Recognizing that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment, and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights,

...

1. Recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights;

2. Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;

3. Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;"

157. The Human Rights Council also adopted Resolution 50/9 on human rights and climate change of 7 July 2022, in which it focused more closely on the implications of climate change for the full enjoyment of the right to food, but also called upon all States to adopt

"a comprehensive, integrated, gender-responsive, age-inclusive and disability-inclusive approach to climate change adaptation and mitigation policies, consistent with the United Nations Framework Convention on Climate Change and the objective and principles thereof".

158. On 6 October 2022 the Human Rights Council adopted Resolution 51/4 on the human rights of older persons, in which it recognised the essential contribution that older persons made to the functioning of societies and to the achievement of the 2030 Agenda for Sustainable Development (see also Resolution 44/7 of 16 July 2020).

(b) Special procedures

(i) Special Rapporteur on the promotion and protection of human rights in the context of climate change

159. The mandate of the Special rapporteur on the promotion and protection of human rights in the context of climate change was established in October 2021 by the Human Rights Council.

160. In the thematic report of July 2022 to the United Nations General Assembly – entitled "Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation" (A/77/226) – the Special rapporteur provided a series of recommendations:

"Recommendations with respect to bridging the mitigation gap

89. The Special Rapporteur maintains that all of the recommendations made by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in his report to the General Assembly in 2019 with respect to mitigation action are still relevant and should be considered as recommended in the present report. In addition, the below recommendations should be considered.

90. With respect to mitigation, the Special Rapporteur on the promotion and protection of human rights in the context of climate change recommends that the General Assembly:

...

(d) Establish an international human rights tribunal to hold accountable Governments, business and financial institutions for their ongoing investments in fossil fuels and carbon intensive industries and the related human rights effects that such investments invoke;

...

97. The Special Rapporteur also recommends that the General Assembly encourage all Member States to include youth representatives in national parliaments to highlight climate change concerns.

98. The Special Rapporteur further recommends that the General Assembly encourage all States to give standing to children and young people, including indigenous children and young people international, national and subnational court systems."

(ii) Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

161. In 2018 the then Special Rapporteur issued a report which summarised the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment under the title of "Framework principles on human rights and the environment"[106].

162. The subsequent Rapporteur issued two thematic reports in 2019 (one to the Human Rights Council, the other to the General Assembly).

163. In his 2019 report to the Human Rights Council of 8 January 2019 (A/HRC/40/55), the Special Rapporteur focused on the right to breathe clean air as one of the human rights to a safe, clean, healthy and sustainable environment. He detailed the scope and content of human rights obligations relating to clean air in the following terms:

"IV. Human rights obligations relating to clean air

57. As the previous mandate holder made clear, States have obligations to protect the enjoyment of human rights from environmental harm (A/HRC/25/53). The foreseeable adverse effects of poor air quality on the enjoyment of human rights give rise to extensive duties of States to take immediate actions to protect against those effects. In a joint statement issued in 2017, a group of United Nations experts said 'a threat like this can no longer be ignored. States have a duty to prevent and control exposure to toxic air pollution and to protect against its adverse effects on human rights.'[107]

58. The framework principles on human rights and the environment clarify the three categories of State obligations: procedural, substantive, and special obligations towards those in vulnerable situations. Therefore, the framework principles can be operationalized in the context of air pollution in order to respect, protect and fulfil human rights.

59. The procedural obligations of States in relation to the right to breathe clean air include duties related to promoting education and public awareness; providing access

[106] The Framework principles on human rights and the environment are annexed to the Special Rapporteur's Report, A/HRC/37/59, distr. 24 January 2018.

[107] "Toxic air pollution: UN rights experts urge tighter rules to combat 'invisible threat'", press release, 24 February 2017.

to information; ensuring freedom of expression, association and assembly; facilitating public participation in the assessment of proposed projects, policies and environmental decisions; and ensuring affordable, timely access to remedies.

60. With respect to substantive obligations, States must not violate the right to breathe clean air through their own actions; must protect the right from being violated by third parties, especially businesses; and must establish, implement and enforce laws, policies and programmes to fulfil the right. States also must avoid discrimination and retrogressive measures.

61. There are seven key steps that States must take in fulfilling the right to breathe clean air: monitor air quality and impacts on human health; assess sources of air pollution; make information publicly available, including public health advisories; establish air quality legislation, regulations, standards and policies; develop air quality action plans at the local, national and, if necessary, regional levels; implement an air quality action plan and enforce the standards; and evaluate progress and, if necessary, strengthen the plan to ensure that the standards are met.

62. At each of these stages, States must ensure that the public is fully informed and has an opportunity to participate in decision-making processes. Extra effort should always be made to reach out to women, children and others in vulnerable situations whose voices are too often not heard in environmental policy processes. States must pay special attention to environmental defenders working to protect the right to clean

164. In the 2019 report to the General Assembly (A/74/161), the Special Rapporteur built on the above-mentioned 2018 framework principles on human rights and the environment (see paragraph 161 above) and detailed the content of State obligations (footnotes omitted):

"63. The framework principles on human rights and the environment clarify three categories of State obligations: procedural, substantive, and special obligations towards those in vulnerable situations. The framework principles can be operationalized in the context of climate change in order to respect, protect and fulfil human rights.

64. Pursuant to international human rights law, States have procedural obligations to:

(a) Provide the public with accessible, affordable and understandable information regarding the causes and consequences of the global climate crisis, including incorporating climate change into the educational curriculum at all levels;

(b) Ensure an inclusive, equitable and gender-based approach to public participation in all climate-related actions, with a particular emphasis on empowering the most affected populations, namely women, children, young people, indigenous peoples and local communities, persons living in poverty, persons with disabilities, older persons, migrants, displaced people, and other potentially at-risk communities;

(c) Enable affordable and timely access to justice and effective remedies for all, to hold States and businesses accountable for fulfilling their climate change obligations;

(d) Assess the potential climate change and human rights impacts of all plans, policies and proposals, including both upstream and downstream effects (i.e. both production- and consumption-related emissions);

(e) Integrate gender equality into all climate actions, enabling women to play leadership roles;

(f) Respect the rights of indigenous peoples in all climate actions, particularly their right to free, prior and informed consent;

(g) Provide strong protection for environmental and human rights defenders working on all climate-related issues, from land use to fossil fuels. States must vigilantly protect defenders from harassment, intimidation and violence.

65. With respect to substantive obligations, States must not violate the right to a safe climate through their own actions; must protect that right from being violated by third parties, especially businesses; and must establish, implement and enforce laws, policies and programmes to fulfil that right. States also must avoid discrimination and retrogressive measures. These principles govern all climate actions, including obligations related to mitigation, adaptation, finance, and loss and damage.

66. Human rights obligations are reinforced by international environmental law, as States are obliged to ensure that polluting activities within their jurisdiction or control do not cause serious harm to the environment or peoples of other States or to areas beyond the limits of national jurisdiction. Given the foreseeability of increasing climate impacts, this well-established 'no harm' rule of customary international law is being violated as a result of [GHG] emissions, which, regardless of where they are emitted, are contributing, cumulatively, to adverse effects in other States, including small island developing States. The Urgenda case in the Netherlands is an important precedent, as the Court relied on international human rights law to hold the Government of the Netherlands accountable for fulfilling commitments the Government itself says are necessary to prevent dangerous climate change.

...

68. States have an obligation to cooperate to achieve a low-carbon, climate resilient and sustainable future, which means sharing information; the transfer of zero-carbon, low-carbon and high-efficiency technologies from wealthy to less wealthy States; building capacity; increasing spending on research and development related to the clean energy transition; honouring international commitments; and ensuring fair, legal and durable solutions for migrants and displaced persons. Wealthy States must contribute their fair share towards the costs of mitigation and adaptation in low-income countries, in accordance with the principle of common but differentiated responsibilities. Climate finance to low-income countries should be composed of grants, not loans. It violates basic principles of justice to force poor countries to pay for the costs of responding to climate change when wealthy countries caused the problem.

69. Climate actions, including under new mechanisms being negotiated pursuant to article 6 of the Paris Agreement, must be designed and implemented to avoid threatening or violating human rights. In the past, policies supporting biofuel production contributed to spikes in food prices, riots, and a major increase in the total number of people suffering from hunger. Forest preservation policies raise similar concerns about the impact on rights, as such policies may limit access to lands used for hunting, fishing, gathering, cultivation and other important cultural activities. Integrating actions to achieve climate targets and the Sustainable Development Goals, in cooperation with affected communities, will ensure that these types of adverse outcomes are avoided.

70. In 2018, the Committee on Economic, Social and Cultural Rights warned States that a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of their obligation to respect, protect and fulfil all human rights for all. States must, therefore, dedicate the maximum available financial and material resources to shift to renewable energy, clean transport and agroecological farming; halt and reverse deforestation and soil deterioration; and increase adaptive capacity, especially in vulnerable and marginalized communities ...

74. A failure to fulfil international climate change commitments is a prima facie violation of the State's obligations to protect the human rights of its citizens. ...

75. A dramatic change of direction is needed. To comply with their human rights obligations, developed States and other large emitters must reduce their emissions at a rate consistent with their international commitments. To meet the Paris target of limiting warming to 1.5ºC, States must submit ambitious nationally determined contributions by 2020 that will put the world on track to reducing [GHG] emissions by at least 45 per cent by 2030 (as calculated by the Intergovernmental Panel on Climate Change). All States should prepare rights-based deep decarbonization plans intended to achieve net zero carbon emissions by 2050, in accordance with article 4, paragraph 19, of the Paris Agreement. Four main categories of actions must be taken: addressing society's addiction to fossil fuels; accelerating other mitigation actions; protecting vulnerable people from climate impacts; and providing unprecedented levels of financial support to least developed countries and small island developing States."

165. In the 2020 Report to the Human Rights Council, entitled "Right to a healthy environment: good practices" (A/HRC/43/53), the Special Rapporteur summarised good practices in implementing the human right to a safe, clean, healthy and sustainable environment, drawn from more than 175 States. He argued that the legal recognition of this right could itself be considered a good practice. The relevant parts of the report read as follows:

"III. Good practices in the implementation of the right to a safe, clean, healthy and sustainable environment

A. Legal recognition

9. In the present report, the Special Rapporteur focuses on the implementation of the right to a safe, clean, healthy and sustainable environment. The legal recognition of this right can itself be considered a good practice, whether by means of constitutional protection, inclusion in environmental legislation or through ratification of a regional treaty that includes the right.

10. In cooperation with the Vance Center for International Justice, the Special Rapporteur prepared an updated list of States that legally recognize the right to a safe, clean, healthy and sustainable environment (see annex II). There are 110 States where this right enjoys constitutional protection. Constitutional protection for human rights is essential, because the constitution represents the highest and strongest law in a domestic legal system. Furthermore, the constitution plays an important cultural role, reflecting a society's values and aspirations.

11. The right to a healthy environment is explicitly included in regional treaties ratified by 126 States. This includes 52 States that are parties to the African Charter on Human and Peoples' Rights, 45 States that are parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 16 States that are parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and 16 States that are parties to the Arab Charter on Human Rights. As at 1 December 2019, five States had ratified the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement); this recent treaty requires, however, 11 ratifications to enter into force. Ten States adopted the non-binding Declaration on Human Rights of the Association of South-East Asian Nations.

> 12. It is also important that legislation be enacted and implemented to respect, protect and fulfil the right to a safe, clean, healthy and sustainable environment. There are 101 States where this right has been incorporated into national legislation. Especially good practices can be seen in Argentina, Brazil, Colombia, Costa Rica, France, the Philippines, Portugal and South Africa, where the right to a healthy environment serves as a unifying principle that permeates legislation, regulations and policies.
>
> 13. In total, more than 80 per cent of States Members of the United Nations (156 out of 193) legally recognize the right to a safe, clean, healthy and sustainable environment. The Special Rapporteur has collected the texts of the constitutional and legislative provisions that recognize this right."

166. The Special Rapporteur also issued thematic reports on "Human rights and the global water crisis: water pollution, water scarcity and water-related disasters" (A/HRC/46/28, 2021); Healthy and sustainable food: reducing the environmental impacts of food systems on human rights (A/76/179, 2021); and "The right to a clean, healthy and sustainable environment: non-toxic environment" (A/HRC/49/53, 2022).

167. In the recent thematic report – entitled "The human right to a clean, healthy and sustainable environment: a catalyst for accelerated action to achieve the Sustainable Development Goals" (A/77/284, 2022) – the Special Rapporteur wanted to "challeng[e] the conventional wisdom that the Sustainable Development Goals are mere aspirations, by highlighting the extensive human rights obligations that underlie the Goals". The relevant recommendations in this respect include the following:

> "(a) Incorporate the right to a clean, healthy and sustainable environment at all levels (global, regional and national), including in a legally binding global instrument, the Universal Declaration of Human Rights, post-2020 global biodiversity framework, the European Convention on Human Rights and national constitutions, legislation and policies;
>
> (b) Acknowledge that the Goals are built on a robust foundation of human rights law, establishing legally binding obligations;"

(iii) Independent expert on human rights and international solidarity

168. In a 2020 Report submitted to the Human Rights Council – entitled "International solidarity and climate change" (A/HRC/44/44) – the Independent expert on human rights and international solidarity made a series of recommendations for human rights based reform, in relation to threats posed by climate change, in particular:

> "(a) All States, corporations and international organizations should take all necessary separate and joint steps towards achieving net-zero emissions by 2050, consistent with their highest possible ambitions to reduce emissions and the common objective of keeping the global temperature rise below 1.5°C under the Paris Agreement;
>
> (b) To that end, States, corporations and financial institutions, particularly the highest emitting States, in historical and contemporary terms, should consider ceasing to pursue the exploration of and new investments in fossil fuels as a matter of human rights-based

international solidarity, since the shared carbon budget will be exceeded if already existing and proposed fossil fuel developments proceed;

(c) States, corporations and financial institutions should cooperate to ensure that any transformation of the fossil fuel economy (which is imperative) does not perpetuate asymmetries between richer and poorer States and peoples. As countries phase down or even phase out their fossil fuel operations, wealthier countries should provide poorer countries that are less adaptable to the transition with support based on the right to development of the poorer States, and the social and economic rights of their people that are tied to energy systems;

...

(g) States should cooperate through the international climate regime and international human rights community, including through ILO, to guarantee access to justice in the context of climate change with respect to the following:

(i) Rectifying loss and damage associated with the inequalities perpetuated by climate change, including by giving this agenda the same priority as mitigation and adaptation and providing meaningful financial support to affected countries and peoples;

(ii) Safeguarding the enjoyment of international human rights among indigenous peoples and local communities affected by climate change-related projects, including protecting environmental defenders from criminalization;

(iii) Formulating and implementing concrete plans from the global to the local levels for a just transition towards sustainable economies that ensures the right to decent work for all;

(iv) Cooperating to realize international human rights obligations as they apply to marginalized groups uniquely affected by climate change, including indigenous peoples, the elderly, children, persons with disabilities, persons living in poverty and women."

(iv) Independent Expert on the enjoyment of all human rights by older persons

169. The 2019 Report (A/HRC/42/43) of the Independent Expert noted the following negative impacts of climate change on older people:

"101. The Independent Expert reiterates her view that the lack of a comprehensive and integrated international legal instrument to promote and protect the rights and dignity of older persons has significant practical implications, including for older persons in emergency situations. She stresses in particular that current instruments do not make the issues of ageing specific or sufficiently visible, and therefore preclude older persons from the full enjoyment of their human rights, particularly in emergency situations."

170. In the 2021 Report entitled "Human rights of older women: the intersection between ageing and gender" (A/76/157), the Independent Expert added that "in emergencies brought on by climate change impacts, older women might be viewed as a burden and therefore be vulnerable to abuse and neglect ... The specific risks and impacts for older women are, however, generally invisible."

6. The Human Rights Committee

171. The International Covenant on Civil and Political Rights ("ICCPR")[108] does not contain any provisions explicitly aimed at environmental protection. Nevertheless, the Human Rights Committee ("the HRC") derives specific obligations related to environmental protection from the right to life (Article 6) and the right to private and family life (Article 17).

172. In its General Comment No. 36 on the right to life, adopted in 2019[109], the HRC reiterated the link between environmental protection and the duty to protect life (a connection already made by the HRC in a communication from 2001):

> "26. The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include ... degradation of the environment ..."

173. Referring to international instruments, such as the Paris Agreement, the HRC further detailed the connection between States' obligations regarding the right to life and environmental preservation (footnotes omitted):

> "62. Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach."

174. In the case of *Portillo Cáceres v. Paraguay*[110] the HRC held as follows:

> "6.3 The Committee takes note of the State party's argument that the communication is inadmissible ratione materiae because environmental rights are not provided for in the Covenant. The Committee also notes, however, that the authors have stated that they are not claiming a violation of the right to a healthy environment but rather violations of their right to life, physical integrity, privacy, family life and an effective remedy and

[108] International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.

[109] HRC, General comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019.

[110] *Portillo Cáceres v. Paraguay*, Communication No. 2751/2016, CCPR/C/126/D/2751/2016, 20 September 2019.

that they are doing so on the grounds that the State party has not honoured its positive obligation to protect those rights, which, in the case at hand, would entail enforcing environmental standards. The Committee considers, therefore, that article 3 of the Optional Protocol does not constitute an obstacle to a finding of admissibility in respect of the present communication.

...

7.4 The Committee also takes note of developments in other international tribunals that have recognized the existence of an undeniable link between the protection of the environment and the realization of human rights and that have established that environmental degradation can adversely affect the effective enjoyment of the right to life. Thus, severe environmental degradation has given rise to findings of a violation of the right to life.

7.5 In the present case, the Committee is of the view that heavily spraying the area in question with toxic agrochemicals – an action which has been amply documented – poses a reasonably foreseeable threat to the authors' lives given that such large-scale fumigation has contaminated the rivers in which the authors fish, the well water they drink and the fruit trees, crops and farm animals that are their source of food. (...) Consequently, in view of the acute poisoning suffered by the authors, as acknowledged in the amparo decision of 2011 (paras. 2.20 and 2.21), and of the death of Mr. Portillo Cáceres, which has never been explained by the State party, the Committee concludes that the information before it discloses a violation of article 6 of the Covenant in the cases of Mr. Portillo Cáceres and the authors of the present communication.

...

7.8 ... When pollution has direct repercussions on the right to one's private and family life and home, and the adverse consequences of that pollution are serious because of its intensity or duration and the physical or mental harm that it does, then the degradation of the environment may adversely affect the well-being of individuals and constitute violations of private and family life and the home. Consequently, in the light of the information that it has before it, the Committee concludes that the events at issue in the present case disclose a violation of article 17 of the Covenant."

175. In *Teitiota v. New Zealand*[111] the HRC noted as follows:

"9.4 The Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures. The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3). The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life. Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.

[111] *Teitiota v. New Zealand*, Communication No. 2728/2016, CCPR/C/127/D/2728/2016, 23 September 2019.

9.5 Moreover, the Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life.

...

9.7 [In relation to the author's claims regarding the risk of violence during land-disputes] the Committee considers that a general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under articles 6 or 7 of the Covenant in the most extreme cases, where there is a real risk of harm simply by virtue of an individual being exposed to such violence on return, or where the individual in question is in a particularly vulnerable situation. ... [T]he author has not demonstrated clear arbitrariness or error in the domestic authorities' assessment as to whether he faced a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of violent acts resulting from overcrowding or private land disputes in Kiribati.

9.8 ... While recognizing the hardship that may be caused by water rationing, the Committee notes that the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death.

9.9 ... The Committee recognizes that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change. ... The information made available to the Committee does not indicate that when the author's removal occurred, there was a real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food and extreme precarity that could threaten his right to life, including his right to a life with dignity. ...

9.11 ... The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.

9.12 In the present case, the Committee accepts the author's claim that sea level rise is likely to render Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined that issue and found that Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. Based on the information made available to it, the Committee is not in a position to conclude that the domestic authorities' assessment that the measures taken by Kiribati would suffice to protect the author's right to life under article 6 of the Covenant was clearly arbitrary or erroneous in that regard, or amounted to a denial of justice."

176. In its views adopted on 21 July 2022 in Communication No. 3624/2019 (*Daniel Billy et al. v. Australia*; "Torres Strait Islanders case"), although not finding a violation of Article 6 in that particular case, the

HRC considered that adverse climate-change impacts could qualify as a reasonably foreseeable threat to life:

> "Article 6
>
> 8.3 The Committee notes the authors' claim that the events in this case constitute a violation by act and omission of their right to a life with dignity under article 6 of the [International Covenant on Civil and Political Rights], owing to the State party's failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives, including their way of life. With respect to the State party's position that article 6 (1) of the Covenant does not obligate it to prevent foreseeable loss of life from climate change, the Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures to protect the right to life.[112] The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3).[113] The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.[114] States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life. The Committee considers that such threats may include adverse climate change impacts, and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The Committee recalls that States parties should take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity.
>
> 8.4 The Committee takes note of the State party's position that the extension of article 6 (1) of the Covenant to a right to life with dignity through general comment No. 36 is unsupported by the rules of treaty interpretation, with reference to article 31 of the 1969 Vienna Convention on the Law of Treaties. However, the Committee is of the view that the language at issue is compatible with the latter provision, which requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this regard, the Committee notes that under article 31 of the Convention, the context for interpretation of a treaty includes in the first place the text of the treaty, including its preamble and annexes. The preamble of the Covenant initially recognizes that the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and further recognizes that those rights derive from the inherent dignity of the human person. While the State party notes that socioeconomic entitlements are protected under a separate Covenant, the Committee observes that the preamble of the present Covenant recognizes that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy their civil and political rights, as well as their economic, social and cultural rights.

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[112] For example, *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), paragraph 9.4, and *Toussaint v. Canada*, paragraph 11.3.
[113] See also *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), paragraph 7.3.
[114] *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), paragraph 11.3, and *Portillo Cáceres et al. v. Paraguay*, paragraph 7.5.

> 8.5 The Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life."

7. Committee on the Elimination of Discrimination against Women

177. The Convention on the Elimination of All Forms of Discrimination against Women does not make explicit reference to environmental rights. However, in its General Recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change, issued in 2018[115], the Committee identified general (§§ 25-38) as well as specific (§§ 39-54) principles of that Convention applicable to disaster risk reduction and climate change.

8. Committee on the Rights of the Child

178. The Committee on the Rights of the Child ("the CRC") dealt with the issue of the effects of climate change on children in General comment No. 26 on children's rights and the environment, with a special focus on climate change.[116]

179. In *Sacchi and Others v. Argentina* (CRC/C/88/D/104/2019, 22 September 2021), the CRC dealt[117] with a complaint lodged by sixteen children of various nationalities against Argentina (the same complaint was also lodged against Brazil, France, Germany and Türkiye). The authors claimed to be victims of climate change, and that the respondent States were responsible for (a) failing to prevent foreseeable human rights violations caused by climate change by reducing their emissions at the "highest possible ambition", and (b) delaying the steep cuts in carbon emissions needed to protect the lives and welfare of children at home and abroad. While the Committee established jurisdiction of the respondent States, it declared the case inadmissible for non-exhaustion of domestic remedies. For further details, see *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC], no. 39371/20, §§ 58-60, 9 April 2024.

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[115] CEDAW, General recommendation No. 37 on gender-related dimensions of disaster risk reduction in a changing climate, CEDAW/C/GC/37, distr. 13 March 2018.

[116] General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change, RC/C/GC/26, 23 August 2023.

[117] Under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, A/RES/66/138, 19 December 2011.

9. Committee on Economic, Social and Cultural Rights

180. In its Statement on climate change and the Covenant of 8 October 2018[118], the Committee on Economic, Social and Cultural Rights noted as follows:

> "3. The Committee welcomes the pledges already made. Quite apart from such voluntary commitments made under the climate change regime however, all States have human rights obligations, that should guide them in the design and implementation of measures to address climate change.
>
> ...
>
> 5. Under the International Covenant on Economic, Social and Cultural Rights, States parties are required to respect, protect and fulfil all human rights for all. They owe such duties not only to their own populations, but also to populations outside their territories, consistent with articles 55 and 56 of the United Nations Charter. In doing so they should, consistent with the Covenant, act on the basis of the best scientific evidence available.
>
> 6. This Committee has already noted that a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation.
>
> The nationally determined contributions (NDCs) that have been announced until now are insufficient to meet what scientists tell us is required to avoid the most severe impacts of climate change. In order to act consistently with their human rights obligations, the NDCs should be revised to better reflect the 'highest possible ambition' referred to in the Paris Agreement (article 4.3). The future implementation guidelines of the Agreement should require from States that they take into account their human rights duties in the design of the NDCs. This implies acting in accordance with the principles of gender sensitivity, participation, transparency and accountability; and building on local and traditional knowledge.
>
> Moreover, States parties should adopt measures to adapt to the negative consequences of climate change, and integrate such measures within existing social, environmental and budgetary policies at domestic level. Finally, as part of their duties of international assistance and cooperation for the realization of human rights, high-income States should also support adaptation efforts, particularly in developing countries, by facilitating transfers of green technologies, and by contributing to the Green Climate Fund. This would be consistent with the requirement under the Covenant that States ensure 'the right of everyone to enjoy the benefits of scientific progress', and with the Covenant's acknowledgement of 'the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific ... field'.
>
> ...
>
> 8. ... Human rights mechanisms have an essential role to play in protecting human rights by ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures that could mitigate climate change. Such measures include accelerating the shift to renewable sources of energy such as wind or solar; slowing down deforestation

[118] OHCHR, Climate change and the International Covenant on Economic, Social and Cultural Rights, Statement of the Committee on Economic, Social and Cultural Rights of 8 October 2018.

and moving to agroecological farming allowing soils to function as carbon sinks; improving the insulation of buildings; and investing in public transport. A fundamental shift in the global energy order is urgently required from hydrocarbon to renewable energy sources, in order to avoid dangerous anthropogenic interference with the climate system and the significant human rights violations that such interference would cause.

9. Complying with human rights in the context of climate change is a duty of both State and non-State actors. This requires respecting human rights, by refraining from the adoption of measures that could worsen climate change; protecting human rights, by effectively regulating private actors to ensure that their actions do not worsen climate change; and fulfilling human rights, by the adoption of policies that can channel modes of production and consumption towards a more environmentally sustainable pathway.
...

The role of the Committee on Economic, Social and Cultural Rights

10. In its future work, the Committee shall continue to keep under review the impacts of climate change on economic, social and cultural rights, and provide States guidance as to how they can discharge their duties under the International Covenant on Economic, Social and Cultural Rights in the mitigation of climate change and adaptation to its unavoidable effects."

181. In the relevant parts of General Comment No. 25 (2020) on science and economic, social and cultural rights[119], the Committee on Economic, Social and Cultural Rights held as follows:

"B. Participation and the precautionary principle

56. Participation also includes the right to information and participation in controlling the risks involved in particular scientific processes and its applications. In this context, the precautionary principle plays an important role. This principle demands that, in the absence of full scientific certainty, when an action or policy may lead to unacceptable harm to the public or the environment, actions will be taken to avoid or diminish that harm. Unacceptable harm includes harm to humans or to the environment that is: (a) threatening to human life or health; (b) serious and effectively irreversible; (c) inequitable to present or future generations; or (d) imposed without adequate consideration of the human rights of those affected. Technological and human rights impact assessments are tools that help to identify potential risks early in the process and the use of scientific applications.

...

International cooperation

...

81. Fourth, international cooperation is essential because the most acute risks to the world related to science and technology, such as climate change, the rapid loss of biodiversity, the development of dangerous technologies, such as autonomous weapons based on artificial intelligence, or the threat of weapons of mass destruction, especially nuclear weapons, are transnational and cannot be adequately addressed without robust international cooperation. States should promote multilateral agreements to prevent these risks from materializing or to mitigate their effects."

[119] Committee on Economic, Social and Cultural Rights, General Comment No. 25 (2020) on science and economic, social and cultural rights, E/C.12/GC/25, 30 April 2020.

182. The relevant parts of General Comment No. 14 on the right to health (2000)[120] read as follows (footnotes omitted):

> "11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health -related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.
>
> ...
>
> 15. 'The improvement of all aspects of environmental and industrial hygiene' (art. 12.2 (b)) comprises, inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. ...
>
> 36. The obligation to fulfil requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation ... States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. ..."

183. The relevant parts of General Comment No. 26 (2022) on land and economic, social and cultural rights[121] read as follows:

> "Climate change
>
> 56. The impact of climate change on access to land, affecting user rights, is severe in many countries. In coastal zones, sea level rise has an impact on housing, agriculture and access to fisheries. Climate change also contributes to land degradation and desertification. Rising temperatures, changing patterns of precipitation and the increasing frequency of extreme weather events such as droughts and floods are increasingly affecting access to land. States shall cooperate at the international level and comply with their duty to mitigate emissions and their respective commitments made in the context of the implementation of the Paris Agreement. States have these duties also under human rights law, as the Committee has highlighted previously. Moreover, States shall avoid adopting policies to mitigate climate change, such as carbon sequestration through massive reforestation or protection of existing forests, that lead to different forms of land grabbing, especially when they affect the land and territories of populations in vulnerable situations, such as peasants or Indigenous Peoples. Mitigation policies should lead to absolute emissions reductions through the phasing out of fossil fuel production and use.

[120] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000.
[121] Committee on Economic, Social and Cultural Rights, General Comment No. 26 (2022) on land and economic, social and cultural rights, E/C.12/GC/26, 24 January 2023.

57. States have an obligation to design climate change adaptation policies at the national level that take into consideration all forms of land use change induced by climate change, to register all affected persons and to use the maximum available resources to address the impact of climate change, particularly on disadvantaged groups.

58. Climate change affects all countries, including those that may have contributed to it the least. Thus, those countries that have historically contributed most to climate change and those that are currently the main contributors to it shall assist the countries that are most affected by climate change but are least able to cope with its impact, including by supporting and financing land-related adaptation measures. Cooperation mechanisms for climate change mitigation and adaptation measures shall provide and implement a robust set of environmental and social safeguards to ensure that no project negatively affects human rights and the environment and to guarantee access to information and meaningful consultation with those affected by such projects. They shall also respect the free, prior and informed consent of Indigenous Peoples."

10. Office of the High Commissioner for Human Rights

184. Since presenting a general report on the relationship between climate change and human rights to the Human Rights Council in 2009, the Office of the High Commissioner for Human Rights has submitted several reports to the Human Rights Council focused on the effects of climate change on the enjoyment of human rights of several categories of persons, including on persons with disabilities[122], women[123], migrants and displaced persons[124], children[125] and on persons suffering from mental health issues[126].

185. In its Analytical study on the promotion and protection of the rights of older persons in the context of climate change (A/HRC/47/46) published in 2021, the Office of the High Commissioner for Human Rights addressed multiple and intersecting forms of discrimination in relation to climate change, the relevant parts of which read as follows (footnotes omitted):

"34. Both ageing and climate change have differential effects when it comes to gender. Because women tend to live longer, there are more older women than older men, and women in heterosexual partnerships tend to outlive their partners, so more older women live alone. Physiological and physical differences, social norms and roles,

[122]Analytical study on the promotion and protection of the rights of persons with disabilities in the context of climate change, A/HRC/44/30, distr. 2 April 2020.
[123] Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women, A/HRC/41/26, distr. 1 May 2019.
[124] Addressing human rights protection gaps in the context of migration and displacement of persons across international borders resulting from the adverse effects of climate change and supporting the adaptation and mitigation plans of developing countries to bridge the protection gaps, A/HRC/38/21, distr. 23 April 2018.
[125] Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, A/HRC/35/13, distr. 4 May 2017.
[126] Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/32/23, distr. 6 May 2016.

and gender discrimination and inequities in access to resources and power all play a role in making older women face particular risk of vulnerability to climate impacts.

35. Older women experience higher rates of poverty than older men and face other economic hardships that are aggravated by climate change. They also face disproportionate health risks, including a greater likelihood of experiencing chronic diseases and air pollution harms, and have higher rates of mortality and other health complications from extreme heat events than any other demographic group. Conversely, during typhoons, older men have been found to be more at risk of death.

36. Gendered social roles and expectations have complex effects on climate risks for older people. In some societies, older men are more socially isolated and thus have more difficulty in accessing assistance to cope with the negative effects of climate change. However, in situations of emergency or strained family resources brought on by climate impacts, older women are sometimes more likely to be viewed as a burden and to suffer abuse or neglect. In some countries, older women are blamed for extreme weather through accusations of witchcraft or sorcery, and face violence or exclusion as a result. Transformation of traditional livelihoods and of cultural and social practices also has varying effects on men and women because of their different social roles. Social norms around gender orientation and sexual identity may also compound the negative human rights effects of climate change for lesbian, gay, bisexual, transgender and intersex older persons."

11. Other developments

186. In 2019 the UN Treaty Bodies (Committee on the Elimination of Discrimination against Women; Committee on Economic, Social and Cultural Rights; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families; Committee on the Rights of the Child; and Committee on the Rights of Persons with Disabilities) issued a Joint Statement on human rights and climate change[127], the relevant parts of which provide as follows (footnotes omitted):

"3. [The report released in 2018 by the Intergovernmental Panel on Climate Change on global warming of 1.5°C above pre-industrial levels] confirms that climate change poses significant risks to the enjoyment of the human rights protected by the International Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities. The adverse impacts identified in the report threaten, among others, the right to life, the right to adequate food, the right to adequate housing, to health and to water, and cultural rights. These negative impacts are also illustrated in the damage suffered by the ecosystems which in turn affect the enjoyment of human rights. The risk of harm is particularly high for those segments of the population already marginalized or in vulnerable situations or that, owing to discrimination and pre-existing inequalities, have limited access to decision-making or resources, such as women, children, persons with disabilities, indigenous peoples and persons living in rural areas. Children are at a

[127] OHCHR Joint Statement on human rights and climate change, HRI/2019/1, 16 September 2019.

particularly heightened risk of harm to their health, owing to the immaturity of their body systems.

...

States' Human Rights Obligations

10. Under the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities, States parties have obligations, including extraterritorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations.

11. In order for States to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions. These policies must reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.

12. In their efforts to reduce emissions, States parties should contribute effectively to phasing out fossils fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. Additionally, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure which are not consistent with low [GHG] emissions pathways, whether undertaken by public or private actors as a mitigation measure to prevent further damage and risk.

13. When reducing emissions and adapting to climate impacts, States must seek to address all forms of discrimination and inequality, including advancing substantive gender equality, protecting the rights of indigenous peoples and of persons with disabilities, and taking into consideration the best interests of the child.

...

Role of the Committees

18. In their future work, the Committees shall continue to keep under review the impacts of climate change and climate-induced disasters on the rights holders protected under their respective treaties. They will also continue to provide States parties with guidance on how they can meet their obligations under these instruments in relation to mitigation and adaptation to climate change."

187. On 12 December 2022 the International Tribunal for the Law of the Sea received a request from the Commission of Small Island States on Climate Change and International Law to deliver an advisory opinion on the scope and content of the "specific obligations of States Parties to the United Nations Convention on the Law of the Sea ('UNCLOS') including under Part XII thereof".[128] The questions put in the request were the following:

[128] The detailed questions and the obligations at stake can be found in the press release ITLOS/Press 327, 12 December 2022.

"What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:

(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic [GHG] emissions into the atmosphere?

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"

188. On 29 March 2023, under Article 96 of the Charter of the United Nations, the UN General Assembly adopted a Resolution[129] requesting the International Court of Justice to provide an advisory opinion on States' obligations in respect of climate change. The questions put to that court were the following:

"Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of [GHG] for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

B. Council of Europe

1. Parliamentary Assembly of the Council of Europe

189. In a Recommendation adopted on 29 September 2021, entitled "Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe"[130], the Parliamentary Assembly of the Council of Europe (PACE) recommended that the Committee of Ministers draw up an additional protocol to the European Convention on Human Rights and an additional protocol to the European Social Charter on the right to a safe, clean,

[129] Resolution A/RES/77/276, 29 March 2023.
[130] PACE, Recommendation 2211 (2021), adopted on 29 September 2021.

healthy and sustainable environment, based on the terminology used by the United Nations.

190. More generally, in a Resolution similarly entitled, PACE recommended that the member States build and consolidate a legal framework – domestically and at European level – to anchor the right to a safe, clean, healthy and sustainable environment, based on the United Nations guidance on this matter.[131] The relevant part of the Resolution reads as follows:

> "3. The Parliamentary Assembly notes that already in 1972, the Stockholm Declaration of the United Nations Conference on the Human Environment explicitly linked environmental protection and first generation human rights, indirectly referring to the right to a healthy environment. Since then, about half the countries of the world have recognised the right to a healthy environment in their constitutions, including 32 Council of Europe member States. The right to a healthy environment is also recognised through a series of regional agreements and arrangements worldwide – with the exception of the European region.
>
> 4. The Assembly believes that the European vision of contemporary human rights protection could nevertheless become a benchmark for ecological human rights in the 21st century, if action is taken now. So far this vision has been limited to civil and political rights enshrined in the European Convention on Human Rights and its Protocols (ETS No. 5, hereafter 'the Convention') and socio-economic rights recognised in the European Social Charter (ETS Nos. 35 and 163, hereafter 'the Charter').
>
> 5. The Assembly notes that the Convention does not make any specific reference to the protection of the environment, and the European Court of Human Rights (hereafter the 'Court') can thus not deal effectively enough with this new generation human right. The Assembly's call for action, in particular in Recommendation 1885 (2009) 'Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment', was unfortunately not followed by the Committee of Ministers.
>
> 6. The Court's case law provides for indirect protection of a right to the environment by sanctioning only environmental violations that simultaneously result in an infringement of other human rights already recognised in the Convention. The Court thus favours an anthropocentric and utilitarian approach to the environment which prevents natural elements from being afforded any protection per se. The Assembly encourages the Council of Europe to recognise, in time, the intrinsic value of Nature and ecosystems in the light of the interrelationship between human societies and Nature.
>
> 7. The Assembly is convinced that the Council of Europe as the European continent's leading human rights and rule of law organisation should stay proactive in the evolution of human rights and adapt its legal framework accordingly. A legally binding and enforceable instrument, such as an additional protocol to the Convention, would finally give the Court a non-disputable base for rulings concerning human rights violations arising from environment-related adverse impacts on human health, dignity and life.
>
> 8. The Assembly considers that an explicit recognition of a right to a healthy and viable environment would be an incentive for stronger domestic environmental laws and a more protection-focused approach by the Court. It would make it easier for

[131] Resolution 2396 (2021), adopted on 29 September 2021.

victims to lodge applications for remedies and would also act as a preventive mechanism to supplement the currently rather reactive case law of the Court.

9. Recognising an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached and would therefore raise the profile of this right. In this context, the Assembly notes that the United Nations (UN), in its studies and resolutions on human rights and the environment, mainly refers to the human rights obligations linked to the enjoyment of 'a safe, clean, healthy and sustainable environment'. The Council of Europe should be encouraged to use this terminology for its own legal instruments – though it may want to go even further and guarantee the right to a 'decent' or 'ecologically viable' environment."

191. In Recommendation 2211 (2021)[132], PACE recommended that the Committee of Ministers draw up an additional protocol to the European Convention on Human Rights on the right to a safe, clean, healthy and sustainable environment. The relevant part of the Recommendation reads as follows:

"1. The Parliamentary Assembly refers to its Resolution 2396 (2021) 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe' and reiterates the need for the Council of Europe to modernise its standard setting activity so as to embrace the new generation of human rights. The Assembly is highly concerned by the speed and extent of environmental degradation, loss of biodiversity, and the climate crisis that directly impact on human health, dignity and life. It considers that it is high time for the Council of Europe to show ambition and strategic vision for the future by facing up to this major transformative challenge for human rights and securing their enhanced protection in the era of systemic environmental threats to the present and future generations.

2. The Assembly notes that harmful environmental impacts are increasingly affecting the enjoyment of first and second generation human rights by individuals and society at large, hurting the shared values that the Council of Europe is called upon to defend. Those impacts are being recognised through environmental litigation at national level across Europe and beyond; they constitute a compelling case for consolidating and updating the Council of Europe legal arsenal, and linking up national action with commitments under the relevant international treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.

3. To this end, the Assembly recommends that the Committee of Ministers:

3.1 draw up an additional protocol to the European Convention on Human Rights (ETS No. 5, hereafter 'the Convention') on the right to a safe, clean, healthy and sustainable environment, based on the terminology used by the United Nations and drawing on the text reproduced below, which is an integral part of this recommendation. The inclusion of this right in the Convention would establish the clear responsibility of member States to maintain a good state of the environment that is compatible with life in dignity and good health and the full enjoyment of other fundamental rights; this would also support a much more effective protection of a safe, clean, healthy and sustainable environment at national level, including for generations to come;

3.2 draw up an additional protocol to the European Social Charter (ETS Nos. 35 and 163, hereafter 'the Charter') on the right to a safe, clean, healthy and sustainable

[132] Recommendation 2211 (2021), adopted on 29 September 2021.

environment; the inclusion of this right in the ESC would make it possible to recognise the interrelationship between protection of social rights and environmental protection; it would also enable non-governmental organisations to lodge collective complaints on environmental issues;

3.3 launch the preparation of a feasibility study for a '5P' convention on environmental threats and technological hazards threatening human health, dignity and life; the drawing-up of such a convention would afford an opportunity to incorporate therein the principles of prevention, precaution and non-regression, which are necessary if humanity's right to a healthy environment is to be properly protected; the convention could also include a supranational monitoring mechanism modelled on independent expert committees such as the Group of Experts on Action against Trafficking in Human Beings (GRETA) and The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO);

3.4 revise Recommendation CM/Rec(2016)3 on human rights and business with a view to strengthening corporate environmental responsibility for the adequate protection of the human right to a safe, clean, healthy and sustainable environment."

192. PACE also adopted a Recommendation[133] and a Resolution[134] entitled "The climate crisis and the rule of law". In the latter, it referred to the Court's case-law in relation to environmental damage. In particular, it urged the member States to do the following:

"5.1 promote the rule of law and employ a transparent, accountable and democratic legislative process for implementing the aim of 'net zero emissions', based on clear and credible plans to meet commitments to keep the global temperature increase in line with the preferred objective of the Paris Agreement, amounting to an increase in average temperatures of 1.5°C;"

2. Committee of Ministers

193. The Committee of Ministers issued replies to the above-mentioned recommendations of the Parliamentary Assembly. In a reply issued on 4 October 2022, it addressed the recommendation to adopt a new protocol to the European Convention on Human Rights, indicating that it had instructed the Steering Committee for Human Rights (CDDH) to undertake other possible work, including the preparation of a study on the need for and feasibility of a further instrument or instruments on human rights and the environment[135].

194. The Committee of Ministers adopted its Recommendation CM/Rec(2022)20 to member States on human rights and the protection of the environment on 27 September 2022. In the Preamble, the Committee of Ministers noted:

[133] Recommendation 2214 (2021), adopted on 29 September 2021.
[134] Resolution 2399 (2021), adopted on 29 September 2021.
[135] Committee of Ministers, Reply to Recommendation 2211(2021), Doc. 15623, adopted at the 1444th meeting of the Ministers' Deputies (27 September 2022), 4 October 2022, paragraphs 3-4.

"the increased recognition of some form of the right to a clean, healthy and sustainable environment in, *inter alia*, international instruments, including regional human rights instruments, and national constitutions, legislation and policies;"

195. The Committee of Ministers then recommended that the member States undertake the following:

"1. reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law;

2. review their national legislation and practice in order to ensure that they are consistent with the recommendations, principles and guidance set out in the appendix to this recommendation;

..."

196. The appendix to this Recommendation, containing six paragraphs, reads as follows:

"1. In the implementation of this recommendation, member States should ensure the respect of general principles of international environmental law, such as the no harm principle, the principle of prevention, the principle of precaution and the polluter pays principle, and take into account the need for intergenerational equity.

2. Member States should ensure, without discrimination, the effective enjoyment of the rights and freedoms set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms and, when applicable, the European Social Charter and the European Social Charter (revised), including in relation to the environment.

3. Member States should take adequate measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

4. Member States should ensure access without discrimination, *inter alia*, to information and justice in environmental matters, participation in environmental decision making and environmental education. Member States should ensure that human rights are taken into account at all stages of the environmental decision-making process.

5. Taking into consideration their vital role in the protection of the environment, member States should consult and co-operate in the implementation of this recommendation with sub-national entities, civil society, national human rights institutions, regional institutions for the protection and promotion of human rights, environmental human rights defenders, economic stakeholders, indigenous peoples and local communities, cities and regions.

6. Member States should encourage or, where appropriate, require business enterprises to act in compliance with their human rights responsibilities related to the environment, including by applying a smart mix of measures– national and international, mandatory and voluntary."

197. In the Explanatory memorandum to the Recommendation[136] the CDDH stated that the Recommendation in question did not have any effect

[136] CM(2022)141-add3final, 27 September 2022.

on the legal nature of the instruments on which it was based, or on the extent of States' existing legal obligations; nor did it seek to establish new standards or obligations.

3. Council of Europe Commissioner for Human Rights

198. In the human rights comment "Living in a clean environment: a neglected human rights concern for all of us"[137], the Commissioner stressed as follows:

> "The Council of Europe bodies overseeing the implementation of the European Convention of Human Rights and the European Social Charter have produced an extensive body of case law that delineates states parties' obligations in the field of the environment. Despite the absence in the Convention of a specific reference to the environment, the European Court of Human Rights has clearly established that various types of environmental degradation can result in violations of substantive human rights, such as the right to life, to private and family life, the prohibition of inhuman and degrading treatment, and the peaceful enjoyment of the home. Moreover, the European Committee of Social Rights has interpreted the right to health included in the Charter to encompass the right to a healthy environment.
>
> ...
>
> States must adopt – and adhere to – ambitious, holistic policies and measures to preserve the environment and biodiversity, combat air, water and soil pollution, mitigate climate change and ensure proper waste disposal. In doing so, they should pay extra attention to protect the rights of those most vulnerable, including children, the poor and marginalised communities who tend to be disproportionally affected by environmental degradation. Rather than a piecemeal approach that merely reacts to individual complaints, what is needed is a preventive approach at national and local level grounded in the human rights standards of the Council of Europe. This also means ensuring that environmental policies are accompanied by measures to protect the rights of those they may impact, including the right to work and to an adequate standard of living of those working in mining or heavy industries, for example. It is extremely important for states to educate people from an early age of the need to preserve the environment and teach them how to do so. Further, states must ensure people's rights to information, participation and redress, and demonstrate their commitment to doing so by ratifying the Aarhus convention."

4. Other materials

199. In 2020 the European Commission for Democracy through Law ("the Venice Commission") addressed the question of judicial control in the field of environmental protection:

> "114. The Venice Commission is aware of the problems of judicial control in the area of protection of the environment. Critics or sceptics will claim that this area is not suitable for judicial control, as it will take the courts into sophisticated discussions on natural sciences. They might also claim that as the environmental protection is an area for discretion and political compromises, in case a parliament or government made a

[137] Commissioner for Human Rights Human rights comment "Living in a clean environment: a neglected human rights concern for all of us", 4 June 2019.

political compromise on the protection of the environment, the judicial branch should not intervene. However, an important argument to counter such a conclusion is that the protection of the environment is not like the traditional human rights conflict, where the minority needs protection against the majority. In the area of protection of the environment, there is a totally new dimension: the protection of the rights of future generations. As the future generations do not take part in present day democracy and do not vote in present day elections, the judicial branch appears to be best placed to protect the future generations against the decisions of present-day politicians."[138]

200. In Appendix V of the Reykjavík Declaration[139] the following was declared:

"We, the Heads of State and Government, underline the urgency of taking co-ordinated action to protect the environment by countering the triple planetary crisis of pollution, climate change and loss of biodiversity. We affirm that human rights and the environment are intertwined and that a clean, healthy and sustainable environment is integral to the full enjoyment of human rights by present and future generations.

...

We note that the right to a healthy environment is enshrined in various ways in several constitutions of the Council of Europe member States and the increased recognition of the right to a clean, healthy and sustainable environment in, inter alia, international instruments, regional human rights instruments, national constitutions, legislation and policies.

We recall the extensive case law and practice on environment and human rights developed by the European Court of Human Rights and the European Committee of Social Rights. We appreciate the ongoing work of the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of the Council of Europe, the Commissioner for Human Rights, the youth sector and other parts of the Council of Europe to strengthen the protection of human rights linked to the protection of the environment.

Together we commit to:

i. strengthening our work at the Council of Europe on the human rights aspects of the environment based on the political recognition of the right to a clean, healthy and sustainable environment as a human right, in line with United Nations General Assembly Resolution 76/300 'The human right to a clean, healthy and sustainable environment', and by pursuing the implementation of Committee of Ministers Recommendation CM/Rec(2022)20 on human rights and the protection of the environment; ...

v. initiating the 'Reykjavík process' of strengthening the work of the Council of Europe in this field, with the aim of making the environment a visible priority for the Organisation. The process will focus and streamline the Organisation's activities, with a view to promoting co-operation among member States. We will identify the challenges raised by the triple planetary crisis of pollution, climate change and loss of

[138] European Commission for Democracy through Law, Opinion No. 997/2020, 9 October 2020, CDL-AD(2020)020-e. The opinion was issued on four draft constitutional bills on the protection of the environment, on natural resources, on referendums and on the President of Iceland, the government, the functions of the executive and other institutional matters.

[139] Declaration of the Fourth Summit of Heads of State and Government of the Council of Europe (Reykjavík, Iceland, 16-17 May 2023).

biodiversity for human rights and contribute to the development of common responses thereto, while facilitating the participation of youth in these discussions. We will do this by enhancing and co-ordinating the existing Council of Europe activities related to the environment and we encourage the establishment of a new intergovernmental committee on environment and human rights ('Reykjavík Committee')."

C. European Union

1. Primary legislation

201. The relevant part of the Treaty on European Union (OJ 2012/C 326, pp. 13-390) provides as follows:

Article 3 § 3

"The Union ... shall work for the sustainable development of Europe ... aiming at ... a high level of protection and improvement of the quality of the environment ..."

202. The relevant parts of the Treaty on the Functioning of the European Union (OJ 2012/C 326, pp. 47-390) provide as follows:

Article 11

"Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."

Article 191

"1. Union policy on the environment shall contribute to pursuit of the following objectives:

– preserving, protecting and improving the quality of the environment,

– protecting human health,

– prudent and rational utilisation of natural resources,

– promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

– available scientific and technical data,

– environmental conditions in the various regions of the Union,

– the potential benefits and costs of action or lack of action,

– the economic and social development of the Union as a whole and the balanced development of its regions.

..."

Article 263

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

...

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

..."

203. Article 37 of the Charter of Fundamental Rights of the European Union (OJ 2012/C 326, pp. 391-407) provides as follows:

Article 37
Environmental protection

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

2. Legislative acts

(a) Concerning GHG emissions

204. By Decision No. 94/69/EC of the Council of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 2009/L 140, pp. 136-48), the Council approved the UNFCCC on behalf of the European Community (now the European Union).

205. Decision No. 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their GHG emissions to meet the Community's GHG emission reduction commitments up to 2020 (OJ 2009/L 140, pp. 136-48) provides that each Member State is to limit its GHG emission according to a percentage set for that Member State (Article 3). Detailed percentages by Member States can be found in Annex II.

206. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009/L 140, pp. 16-62), establishes a common framework for the promotion of energy from renewable sources (Article 1) and sets mandatory national overall targets for the use of energy from renewable sources (Article 3 and Annex 1).

207. Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012/L 315, pp. 1-56) establishes a common framework of measures for the promotion of energy efficiency within the Union in order to ensure the achievement of the Union's 2020 20% headline target on energy efficiency (Article 1).

208. Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual GHG emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ 2018/L 156, pp. 26-42) defines obligations on Member States with respect to their minimum contributions for the period from 2021 to 2030 to fulfilling the Union's target of reducing its GHG emissions by 30% below 2005 levels in 2030 in specific sectors. It provides that each Member State will, by 2030, limit its GHG emissions at least by the percentage set for that Member State in relation to its GHG emissions in 2005 (Article 4 § 1; Annex 1).

209. By Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action ("the Governance Regulation", OJ 2018/L 328, pp. 1-77), the European Union established a governance mechanism, based on long-term strategies, to implement strategies and measures designed to meet the objectives and targets of the Energy Union and the long-term Union GHG emissions commitments consistent with the Paris Agreement (Article 1).

210. Through the adoption on 6 April 2022 of Decision (EU) 2022/591 on a General Union Environment Action Programme to 2030 (OJ 2022/L 114, pp. 22-36), the European Parliament and the Council set out a general action programme in the field of the environment for the period up to 31 December 2030 (the "8th Environment Action programme" or "8th EAP").

211. Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law") (OJ 2021/L 243, pp. 1-17), established a framework for the irreversible and gradual reduction of anthropogenic GHG

emissions by sources and enhancement of removals by sinks regulated in Union law. It sets out a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2 § 1 of the Paris Agreement, as well as a binding Union target of a net domestic reduction in GHG emissions for 2030. The Regulation also requires that the projected indicative Union GHG budget be established and based on the best available science.

(b) Concerning access to information, public participation and access to justice in environmental matters

212. Through Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006/L 264, pp. 13-19), the then European Community guaranteed the right of public access to environmental information received or produced by Community institutions and bodies (Article 1).

213. This Regulation was recently amended, following the 2017 findings and recommendations of the Aarhus Convention Compliance Committee with regard to a communication brought by an NGO concerning compliance of the European union with the Aarhus Convention (in particular with its Article 3 § 1 and Article 9 §§ 2, 3, 4 and 5).[140]

214. Consequently, Regulation (EU) 2021/1767 of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies broadened the scope of the type of acts that can be subject to internal review and the range of persons entitled to request an internal review. The relevant provisions of the consolidated Regulation (EC) No 1367/2006 read as follows:

Article 2
Definitions

"...

(g) 'administrative act' means any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1);

[140] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union, adopted by the Compliance Committee on 17 March 2017, ECE/MP.PP/C.1/2017/7.

(h) 'administrative omission' means any failure of a Union institution or body to adopt a non-legislative act which has legal and external effects, where such failure may contravene environmental law within the meaning of point (f) of Article 2(1)."

Article 10
Request for internal review of administrative acts

"1. Any non-governmental organisation or other members of the public that meet the criteria set out in Article 11 shall be entitled to make a request for internal review to the Union institution or body that adopted the administrative act or, in the case of an alleged administrative omission, should have adopted such an act, on the grounds that such an act or omission contravenes environmental law within the meaning of point (f) of Article 2(1).

..."

Article 11
Criteria for entitlement at Union level

"1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:

(a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;

(b) it has the primary stated objective of promoting environmental protection in the context of environmental law;

(c) it has existed for more than two years and is actively pursuing the objective referred to under (b);

(d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

1a. A request for internal review may also be made by other members of the public, subject to the following conditions:

(a) they shall demonstrate impairment of their rights caused by the alleged contravention of Union environmental law and that they are directly affected by such impairment in comparison with the public at large; or

(b) they shall demonstrate a sufficient public interest and that the request is supported by at least 4 000 members of the public residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States.

In the cases referred to in the first subparagraph, the members of the public shall be represented by a non-governmental organisation which meets the criteria set out in paragraph 1 or by a lawyer authorised to practise before a court of a Member State. That non-governmental organisation or lawyer shall cooperate with the Union institution or body concerned in order to establish that the quantitative conditions in point (b) of the first subparagraph are met, where applicable, and shall provide further evidence thereof upon request."

3. Case-law of the Court of Justice and the General Court of the European Union

215. In 1991 the European Commission adopted a decision granting Spain financial assistance from the European Regional Development Fund for the construction of two power stations in the Canary Islands. In 1993 Greenpeace brought an action before the Court of First Instance ("the CFI", now the General Court) seeking annulment of the Commission's decision to disburse these funds to Spain, and of another decision which the Commission had allegedly subsequently taken to reimburse further expenses incurred in the construction of the power stations. In 1995 the CFI dismissed the annulment action of the applicant association for lack of standing. On appeal, the applicant association argued, on the one hand, that by applying case-law on standing developed by the Court of Justice of the European Union (CJEU) in relation to economic issues, the CFI had failed to take account of the nature and specific character of the environmental interests underpinning their action and, on the other, that "the approach adopted by the [CFI] [had created] a legal vacuum in ensuring compliance with Community environmental legislation, since in this area the interests [were], by their very nature, common and shared, and the rights relating to those interests [were] liable to be held by a potentially large number of individuals so that there could never be a closed class of applicants satisfying the criteria adopted by the [CFI]" (judgment of the CJEU of 2 April 1998 in *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission*, C-321/95 P, EU:C:1998:153, paragraphs 17-18). In reply, the CJEU held as follows (ibid., paragraphs 27-30 and 33):

> "The interpretation of the fourth paragraph of Article 173 of the Treaty [now Article 263 TFEU] that the [CFI] applied in concluding that the appellants did not have locus standi is consonant with the settled case-law of the Court of Justice.
>
> As far as natural persons are concerned, it follows from the case-law ... that where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act.
>
> The same applies to associations which claim to have locus standi on the basis of the fact that the persons whom they represent are individually concerned by the contested decision. For the reasons given in the preceding paragraph, that is not the case.
>
> In appraising the appellants' arguments purporting to demonstrate that the case-law of the Court of Justice, as applied by the [CFI], takes no account of the nature and specific characteristics of the environmental interests underpinning their action, it should be emphasised that it is the decision to build the two power stations in question which is liable to affect the environmental rights arising under Directive 85/337 that the appellants seek to invoke.
>
> ... in the circumstances of the present case those rights are fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under Article 177 of the Treaty [now Article 267 TFEU]."

216. This line of reasoning, on the strict requirements for natural and legal persons to have standing to institute annulment actions, was confirmed by the CJEU in its judgment of 25 July 2002 in *Unión de Pequeños Agricultores v. Council of the European Union*, C-50/00 P, EU:C:2002:462, paragraphs 40-41:

> "By Article 173 and Article 184 [now Article 263 and Article 277 TFEU], on the one hand, and by Article 177 [now Article 267 TFEU], on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts v. Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty [now Article 263 TFEU], directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty [now Article 277 TFEU] or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity.
>
> Thus, it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection."

217. In 2021 two annulment actions concerning climate change were rejected by the CJEU. In one case the applicants sought the annulment of the legislative package relating to GHG emissions (*Armando Carvalho and Others*[141]), while in the other the applicants sought the annulment of part of Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources (*Peter Sabo and Others*[142]). The CJEU, referring to its well-established case-law in relation to Article 263 § 4 of the Treaty on the Functioning of the European Union (TFEU) (OJ 2016/C 202/01, p. 47) on the standing of natural and legal persons to bring actions for annulment, confirmed that the latter had to be able to demonstrate that they were individually concerned by the impugned acts – a condition not fulfilled by the applicants in either of those cases.

218. The relevant parts of the judgment of the CJEU in *Armando Carvalho and Others*, which was decided by a Chamber of three judges, read as follows:

> "40 The General Court held, in essence ... that the fact that the effects of climate change may be different for one person than they are for another and that they depend on the personal circumstances specific to each person does not mean that the acts at issue distinguish each of the appellants individually. In other words, the fact that the appellants, owing to the alleged circumstances, are affected differently by climate

[141] *Armando Carvalho and Others v. European Parliament and Council of the European Union*, C-565/19 P, EU:C:2021:252.
[142] *Peter Sabo and Others v. European Parliament and Council of the European Union*, C-297/20 P, EU:C:2021:24.

change is not in itself sufficient to establish the standing of those appellants to bring an action for annulment of a measure of general application such as the acts at issue.

41 Accordingly, the General Court held, in paragraph 50 of the order under appeal, that the appellants' interpretation of the circumstances alleged by them as establishing that they were individually concerned would render the requirements of the fourth paragraph of Article 263 TFEU meaningless and would create locus standi for all without the criterion of individual concern referred to in the judgment in *Plaumann* being fulfilled.

42 Consequently, the appellants cannot claim that the General Court did not take into account, in the order under appeal, the characteristics specific to them in order to determine whether they were individually concerned.

43 Moreover, the appellants' argument that the General Court made no reference, in the order under appeal, to the evidence showing that the appellants were affected in different ways by climate change is, in the light of the foregoing, ineffective.

...

46 According to settled case-law, which has not been altered by the Treaty of Lisbon, natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 71 and 72 and the case-law cited).

47 In that regard, as is noted by the Parliament, the appellants' reasoning, in addition to its generic wording, leads to the conclusion that there is locus standi for any applicant, since a fundamental right is always likely to be concerned in one way or another by measures of general application such as those contested in the present case.

48 As was recalled by the General Court in paragraph 48 of the order under appeal, the claim that the acts at issue infringe fundamental rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless (see, to that effect, orders of 10 May 2001, *FNAB and Others v Council*, C-345/00 P, EU:C:2001:270, paragraph 40, and of 14 January 2021, *Sabo and Others v Parliament and Council*, C-297/20 P, not published, EU:C:2021:24, paragraph 29 and the case-law cited).

49 Since, as is apparent from paragraph 46 of the order under appeal, the appellants merely invoked, before the General Court, an infringement of their fundamental rights, inferring individual concern from that infringement, on the ground that the effects of climate change and, accordingly, the infringement of fundamental rights are unique to and different for each individual, it cannot be held that the acts at issue affect the appellants by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguish them individually just as in the case of the person addressed.

50 Therefore, the General Court was fully entitled to hold, in paragraph 49 of the order under appeal, that the appellants had not established that the contested provisions of the acts at issue distinguished them individually from all other natural or legal persons concerned by those provisions just as in the case of the addressee."

219. Referring to the fact that, under EU law, actions for annulment by associations had been held to be admissible where, *inter alia*, the association represented the interests of its members, who would themselves be entitled to bring proceedings, the CJEU held as follows (ibid.):

> "89 Indeed, in so far as the appellants, as natural persons, were considered not to be individually concerned for the purposes of the fourth paragraph of Article 263 TFEU, the same consideration applies to the members of that association. Those members cannot therefore claim that they possess attributes which distinguish them individually from the other potential addressees of the acts at issue.
>
> 90 Concerning the first condition, it should be borne in mind that associations have a right to bring proceedings against an act of the Union where the provisions of EU law specifically recognise those associations as having procedural rights (see, to that effect, judgment of 4 October 1983, *Fediol v Commission*, 191/82, EU:C:1983:259, paragraph 28). However, the association Sáminuorra has not claimed that such provisions exist in its favour.
>
> 91 As regards the argument that the General Court should have recognised the existence of another situation in which associations would be entitled to bring proceedings, namely 'the action of a collective defending a collective good', that argument was not put forward at first instance and must therefore, pursuant to Article 170(1) of the Rules of Procedure of the Court of Justice, be rejected as inadmissible in the context of the present appeal.
>
> 92 To allow the appellants to raise for the first time before the Court of Justice arguments which they have not raised before the General Court would be to authorise them to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the lower court (see, to that effect, judgment of 17 June 2010, *Lafarge v Commission*, C-413/08 P, EU:C:2010:346, paragraph 52)."

220. In the case of *Peter Sabo and Others*, the CJEU also held as follows:

> "29 ... [T]he claim that an act infringes fundamental rights is not sufficient in itself for it to be established that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless. Indeed, it is apparent from the settled case-law of the Court that the extent of the alleged adverse impact on the observance of the appellants' fundamental rights cannot give rise to non-application of the rules for admissibility expressly laid down by the fourth paragraph of Article 263 TFEU ..."

221. The CJEU also has extensive case-law on the Aarhus Convention, which the EU ratified in 2005, following which various pieces of EU legislation were enacted, including the 2006 Aarhus Regulation (Regulation 1367/2006). More recently, in the context of a request for a preliminary ruling under Article 267 TFEU, the scope and content of obligations under Article 9 § 3 of the Aarhus Convention (access to justice) were examined in relation to EU rules regarding emissions from motor

vehicles in the judgment of 8 November 2022 of the CJEU (Grand Chamber) in *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland*.[143]

222. The relevant parts of the reasoning provide as follows:

> "1. Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a situation where an environmental association, authorised to bring legal proceedings in accordance with national law, is unable to challenge before a national court an administrative decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.
>
> ...
>
> 65. Secondly, where a Member State lays down rules of procedural law applicable to the matters referred to in Article 9(3) of the Aarhus Convention concerning the exercise of the rights that an environmental organisation derives from Article 5(2) of Regulation No 715/2007, in order for decisions of the competent national authorities to be reviewed in the light of their obligations under that article, the Member State is implementing EU law for the purposes of Article 51(1) of the Charter and must, therefore, ensure compliance, inter alia, with the right to an effective remedy, enshrined in Article 47 thereof (see, to that effect, judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraphs 44 and 87 and the case-law cited).
>
> 66. Consequently, while it is true that Article 9(3) of the Aarhus Convention does not have direct effect in EU law and cannot, therefore, be relied on, as such, in a dispute falling within the scope of EU law, in order to disapply a provision of national law which is contrary to it, the fact remains that, first, the primacy of international agreements concluded by the European Union requires that national law be interpreted, to the fullest extent possible, in accordance with the requirements of those agreements and, secondly, that Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law (judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 45).
>
> 67. However, the right to bring proceedings provided for in Article 9(3) of the Aarhus Convention, which is intended to ensure effective environmental protection (judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 46), would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing criteria laid down by national law, certain categories of 'members of the public' – a fortiori 'the public concerned', such as environmental associations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention – were to be denied of any right to bring proceedings against acts and omissions by private persons and public authorities which contravene certain categories of provisions of national law relating to the environment (see, to that effect,

[143] C-873/19, EU:C:2022:857.

judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 46).

68. Imposing those criteria must not deprive environmental associations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those associations is to defend the public interest (judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, EU:C:2017:987, paragraph 47 and the case-law cited)."

D. Material from other regional human rights mechanisms

1. Inter-American system

(a) Relevant instruments

223. The American Convention on Human Rights[144] does not contain any specific provision relating to the protection of a human right to a healthy environment. However, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[145] provides as follows:

Article 11
Right to a Healthy Environment

"1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment."

224. The Inter-American Convention on Protecting the Human Rights of Older Persons[146] provides the following:

Article 25
Right to a healthy environment

"Older persons have the right to live in a healthy environment with access to basic public services. To that end, States Parties shall adopt appropriate measures to safeguard and promote the exercise of this right, *inter alia*:

a. To foster the development of older persons to their full potential in harmony with nature;

[144] American Convention on Human Rights, adopted on 22 November 1969 and entered into force 18 July 1978, OAS Treaty Series No. 36.
[145] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", adopted on 17 November 1988 and entered into force on 16 November 1999, OAS Treaty Series No. 69.
[146] Inter-American Convention on Protecting the Human Rights of Older Persons, adopted in Washington on 15 June 2015 and entered into force on 11 January 2017.

b. To ensure access for older persons, on an equal basis with others, to basic public drinking water and sanitation services, among others."

(b) The Inter-American Court of Human Rights

225. On 15 November 2017 the Inter-American Court of Human Rights delivered an Advisory Opinion entitled "The Environment and Human Rights"[147] in which it derived the right to a healthy environment from Article 26 of the American Convention (Economic, social, and cultural rights). The relevant concluding part of the Advisory Opinion reads as follows:

"Conclusion ...

242. Based on the above, in response to the second and third questions of the requesting State, it is the Court's opinion that, in order to respect and to ensure the rights to life and to personal integrity:

a. States have the obligation to prevent significant environmental damage within or outside their territory, in accordance with paragraphs 127 to 174 of this Opinion.

b. To comply with the obligation of prevention, States must regulate, supervise and monitor the activities within their jurisdiction that could produce significant environmental damage; conduct environmental impact assessments when there is a risk of significant environmental damage; prepare a contingency plan to establish safety measures and procedures to minimize the possibility of major environmental accidents, and mitigate any significant environmental damage that may have occurred, even when it has happened despite the State's preventive actions, in accordance with paragraph 141 to 174 of this Opinion.

c. States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in the case of potential serious or irreversible damage to the environment, even in the absence of scientific certainty, in accordance with paragraph 180 of this Opinion.

d. States have the obligation to cooperate, in good faith, to protect against environmental damage, in accordance with paragraphs 181 to 210 of this Opinion.

e. To comply with the obligation of cooperation, States must notify other potentially affected States when they become aware that an activity planned under their jurisdiction could result in a risk of significant transboundary harm and also in cases of environmental emergencies, and consult and negotiate in good faith with States potentially affected by significant transboundary harm, in accordance with paragraphs 187 to 210 of this Opinion.

f. States have the obligation to ensure the right of access to information, established in Article 13 of the American Convention, concerning potential environmental impacts, in accordance with paragraphs 213 to 225 of this Opinion;

g. States have the obligation to ensure the right to public participation of the persons subject to their jurisdiction established in Article 23(1)(a) of the American Convention,

[147] Inter-American Court of Human Rights, *State Obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2*, Advisory Opinion OC-23/17 on the environment and human rights, 15 November 2017.

in policies and decision-making that could affect the environment, in accordance with paragraphs 226 to 232 of this Opinion, and

h. States have the obligation to ensure access to justice in relation to the State obligations with regard to protection of the environment set out in this Opinion, in accordance with paragraphs 233 to 240 of this Opinion.

243. The obligations described above have been developed in relation to the general obligations to respect and to ensure the rights to life and to personal integrity, because these were the rights that the State referred to in its request (supra paras. 37, 38, 46 and 69). However, this does not mean that the said obligations do not exist with regard to the other rights mentioned in this Opinion as being particularly vulnerable in the case of environmental degradation (supra paras. 56 to 69)."

226. In the 2020 case of the *Indigenous communities of the Lhaka Honhat Association (Our Land) v. Argentina*[148], the Inter-American Court of Human Rights held Argentina responsible for violating indigenous communities' human rights through its failure to recognise and protect their lands. In that case, the Court examined the rights to a healthy environment, adequate food, water, and cultural identity autonomously.

227. In January 2023 a new request[149] for an Advisory Opinion was submitted to the Inter-American Court of Human Rights by Colombia and Chile asking it to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups, as well as on nature and on human survival on the planet.

(c) The Inter-American Commission on Human Rights

228. In March 2022, the Inter-American Commission on Human Rights and the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights[150] published a resolution recognising that climate change was a human rights emergency.

2. African system

229. The relevant part of the African Charter on Human and Peoples' Rights[151] reads as follows:

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[148] *Case of the indigenous communities of the Lhaka Honhat Association (Our Land) v. Argentina*, 6 February 2020.

[149] Request for an advisory opinion on the climate emergency and human rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile, 9 January 2023.

[150] Resolution No. 3/21 Climate Emergency: Scope of Inter-American human rights obligations.

[151] African Charter on Human and Peoples' Rights, adopted in Nairobi on 1 June 1981 and entered into force on 21 October 1981.

Article 24

"All people shall have the right to a general satisfactory environment favourable to their development."

230. On 14 May 2019, the African Commission on Human and Peoples' Rights adopted a Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change[152] in which it addressed the implications of climate change on human rights.

231. In the case of *Social and Economic Action Rights Centre v. Nigeria*[153], the African Commission held as follows (footnotes omitted):

"50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter ...

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, 'an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.'

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.

53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for

[152] ACHPR/Res. 417 (LXIV) 2019, adopted at its 64th Ordinary Session, held in Sharm el-Sheikh, Arab Republic of Egypt, from 24 April to 14 May 2019.

[153] African Commission on Human and People's Rights, *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, 27 May 2002.

individuals to be heard and to participate in the development decisions affecting their communities.

...

68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter."

III. COMPARATIVE LAW

A. Relevant comparative materials concerning the Aarhus Convention

232. Of the forty-six Council of Europe member States only five have not ratified the Aarhus Convention.[154] In a great majority of the thirty-eight member States surveyed by the Court[155], environmental non-governmental associations are allowed to bring cases in the interests of the protection of the environment and/or in the interests of private individuals who may be affected by specific environmental hazards or industrial projects (in at least thirty-four States).

233. However, the non-governmental association in question has to fulfil certain criteria. In almost all the member States surveyed, the corporate goals of the association have to be linked to the interests it seeks to protect. In eleven member States such associations have to have existed, or to have been actively involved in the protection of the environment, for some time before bringing a case, and in eight member States the association bringing a case has to operate in a particular geographical zone. Some member States provide for additional criteria for recognising the standing of associations, but these are less common: the size of the association; prior participation in the decision-making process; internal organisation; prohibition for the association or its leadership to participate in for-profit activities; and a general requirement of the lawfulness of the activities of the association. Moreover, in some systems the question of the standing of the association may depend on the question of the standing of natural persons who may be directly affected by the environmental hazards. The standing of the association may

[154] Andorra, Lichtenstein, Monaco, San Marino, and Türkiye.

[155] Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Republic of Moldova, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, the Slovak Republic, Slovenia, Spain, Türkiye, Ukraine, and the United Kingdom.

be established directly by the court or, in six member States, through a mechanism of preliminary accreditation by an administrative authority.

234. As to climate-change cases, in most member States, it appears that while a theoretical possibility of an environmental association bringing a climate-change case may exist, or cannot be ruled out, there is no conclusive case-law on the matter, or no case-law at all. In seven member States such claims by an environmental association would probably not be acceptable in the national legal order, while in five others a possibility for an environmental association to bring legal cases concerning climate change, under certain conditions (linked to the actionability of the claim), has been examined by domestic courts (Belgium, France, Germany, Ireland and the Netherlands).

B. Overview of domestic case-law concerning climate change

235. The following overview of domestic case-law provides extracts from some cases on climate change brought before national courts in Council of Europe member States.

1. France

(a) The *Grande-Synthe* case

236. The detailed circumstances of the *Grande-Synthe* case of the *Conseil d'État* are set out in the case of *Carême v. France* (dec.) [GC], no. 7189/21, 9 April 2024. In that case, upon an action brought by Mr Carême acting on his own behalf and in his capacity as mayor of Grande-Synthe, and in the name and on behalf of the latter municipality, the *Conseil d'État* declared admissible the action brought by the municipality and inadmissible the action brought by Mr Carême. The *Conseil d'État* found that the measures taken by the authorities to tackle climate change had not been sufficient and ordered the authorities to take additional measures by 31 March 2022 to meet the GHG emissions reduction targets set out in the domestic legislation and Annex I of Regulation (EU) 2018/842.

(b) Applications for judicial review seeking to secure compliance with the limit values for concentrations of particulate matter and nitrogen dioxide

237. By a decision of 12 July 2017, the *Conseil d'État*, on an application for judicial review, set aside the tacit refusals of the President of the Republic, the Prime Minister and the Ministers responsible for the environment and health and ordered the Prime Minister and the Minister responsible for the environment to take all appropriate measures before 31 March 2018 and to draw up plans in accordance with Article 23 of Directive 2008/50/EC of 21 May 2008 in order to reduce the concentrations of particulate matter and nitrogen dioxide throughout the national territory (*Conseil d'État* (plenary), 10 July 2020, *Association Les Amis de la Terre France et autres*, no. 428409).

238. Referring in particular to the limit values for concentrations of particulate matter and nitrogen dioxide laid down by the Directive of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe[156] and to the fact that, in certain areas of French territory, those values had been exceeded each year between 2012 and 2014, the *Conseil d'État* found that the regulatory authority had failed to fulfil its obligations by omitting to draw up air-quality plans for the areas concerned in accordance with the provisions of the Directive and those transposing the Directive into domestic law.

239. The *Conseil d'État* stated in that judgment that the setting-aside of the decisions tacitly refusing to take action necessarily entailed taking all the measures necessary to ensure that the appropriate air-quality plans were drawn up and implemented.

(c) Full administrative-law actions seeking to secure compliance with GHG emissions reduction targets

240. In another more recent case, known as the "Case of the century", which concerned GHG emissions reduction targets, the Paris Administrative Court, drawing on the *Grande-Synthe* case, acknowledged, this time in the context of a full administrative-law action and in a judgment of 3 February 2021, that environmental associations were "justified in arguing that, to the extent [that the State] had made commitments which it had not complied with in the context of the first carbon budget, [it should] be regarded as liable for part of the ecological damage within the meaning ... of Article 1246 of the Civil Code". That Article, as amended by Law no. 2016-1087 of 8 August 2016 on the recovery of biodiversity, nature and landscapes, provides that "[a]ny person who causes ecological damage has the duty to afford redress" (Paris Administrative Court, 3 February 2021, *Oxfam France et autres*, no. 1904967).

241. As regards the commitments of the French State and the general obligation to combat climate change, the Paris Administrative Court found support in the same texts referred to in the *Grande-Synthe* case, namely: France's commitments under the UNFCCC, the Paris Agreement, Decision No 406/2009/EC of 23 April 2009 on the effort of Member States to reduce their GHG emissions, and Regulation (EU) 2018/842 of 30 May 2018 on binding annual GHG emission reductions; and Article L. 100-4 of the Energy Code and Article L. 222-1 B of the Environment Code. The Administrative Court also referred to Article 3 of the Environment Charter, which recalls the existence of the preventive principle already enshrined in law, and provides that "[e]veryone shall, in accordance with the conditions laid down by law, avoid causing any damage to the

[156] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ 2008/L 152, pp. 1-44.

environment or, failing that, limit its consequences". The Administrative Court inferred that it was clear from all the above provisions that the French State "[had] recognised the urgency of combating current climate change and acknowledged its capacity to take effective action in relation to that phenomenon in order to limit the causes and mitigate the adverse consequences" and "[had] chosen ... to exercise its regulatory powers, in particular by pursuing a public policy of reducing GHG emissions from French territory, through which it [had] undertaken to achieve, within specific and successive deadlines, a certain number of targets in this sphere ...".

242. As to the implementation of those State commitments in the light of the GHG emissions reduction targets, the Administrative Court concluded that "the State [had to] be regarded as having failed to adhere to the first carbon budget and [as not having] ... carried out the actions which it itself [had] recognised as apt to reduce GHG emissions". In reaching that conclusion the Administrative Court found support, *inter alia*, in the same reports of the High Council on Climate cited by the *Conseil d'État* in its decision in the *Grande-Synthe* case.

243. Observing that "the State [could not] be held liable for the alleged ecological damage ... except in so far as the failure to adhere to the first carbon budget [had] contributed to the increase in GHG emissions", the Administrative Court, in an interlocutory judgment, ordered further investigations. It found that, as the evidence stood, it could not determine the specific measures to be ordered to enable the State to achieve the targets that France had set itself in terms of reducing GHG emissions.

244. Following that investigative measure, in a subsequent judgment of 14 October 2021, the Administrative Court ordered the Prime Minister and the competent ministers to take, by 31 December 2022, all appropriate measures to remedy the environmental damage and prevent aggravation of the damage, in an amount equal to the uncompensated share of GHG emissions under the first carbon budget, namely 15 Mt CO_2e, and subject to an adjustment in line with the CITEPA's (Interprofessional Technical Centre for Studies on Air Pollution – *Centre interprofessionnel technique d'études de la pollution atmosphérique*) estimated data as at 31 January 2022. In the Administrative Court's view, those concrete measures were apt to afford redress for the alleged damage (Paris Administrative Court, 14 October 2021, *Oxfam France et autres*, no. 1904967). The court did not impose a coercive fine at that stage.

245. In his opinion on the second decision of the *Conseil d'État* of 1 July 2021 in the *Grande-Synthe* case, the public rapporteur set out the following considerations regarding the specific nature of the climate cases examined in France compared with other European States:

> "The case before you belongs ... [to the category of actions directed against the States' climate policy], applications for judicial review, within which climate-related cases again take various forms. One of the main distinctions between these cases is the rule

relied upon in seeking the setting-aside of the decision. The application may be based on an alleged breach of human rights, as recognised in particular by the Supreme Court of the Netherlands in the *Urgenda* case, or on specific GHG emission standards that are binding on States or governments. These standards may be derived from international law, where it can be relied upon before the national courts, from constitutional law, as in the case before the [German Constitutional Court] ..., or from legislation, as in the present case and in the *Friends of the Irish Environment* case.

The last aspect to be addressed in order to determine the case before you is undoubtedly the most delicate: all these cases seek to criticise shortcomings in climate policy."

246. In an address to the Court of Cassation on 21 May 2021 entitled "*L'environnement: les citoyens, le droit, les juges*"[157] ("The environment: citizens, the law and judges"), the Vice-President of the *Conseil d'État*, Bruno Lasserre, made the following remarks on the first decisions given by the administrative courts (the decision of the *Conseil d'État* of 19 November 2020 in the *Grande-Synthe* case, the decision of the *Conseil d'État*, sitting in plenary, of 10 July 2020 in the case of *Association Les Amis de la Terre France*, and the ruling of the Paris Administrative Court of 3 February 2021 in the "Case of the century"):

"... [one of the innovations of this line of case-law] concerns the legal scope conferred, first, on the Paris Agreement, which the *Conseil d'État*, followed by the Paris Administrative Court, recognised for the first time as having interpretative force; and, secondly, on the [GHG] emissions reduction targets laid down in EU law and national law, since the Administrative Court took a decisive step in finding that those targets are not merely aspirational, but binding. Thus, the *Conseil d'État* has opened a new avenue in relation to climate cases, which the [national] courts had hitherto viewed mainly through the lens of fundamental rights, at least in their most emblematic decisions. These include, for example, the *Urgenda* decisions, based on Articles 2 and 8 of the European Convention on Human Rights, and the recent decision of the Karlsruhe Constitutional Court based on a provision of the Basic Law protecting 'the natural foundations of life'. However, the approach of the courts varies significantly depending on whether they are verifying the State's compliance with specific and detailed undertakings or examining whether its actions are compatible with such general principles as the right to life or the right to respect for private life. Two standards which therefore influence the method and, more fundamentally, the stance adopted by the courts. ...

Finally, the *Conseil d'État* has adapted to current efforts to tackle climate change by inaugurating a new type of review, which could be termed a 'pathway review'. The time-limits laid down in law for achievement of the targets may be distant – 2030, 2040, and even 2050 – but for the courts to wait ten, twenty or thirty years to verify whether they have been achieved would mean denying the urgency of taking action now and depriving their review of all meaningful effect from the outset, given the very high inertia of the climate system. A pathway review is thus akin to monitoring compliance in advance. This means that the court must be satisfied, at the point at which it takes its decision, not that the targets have been achieved, but that they may be achieved, that

[157] Available at www.conseil-etat.fr; last accessed 14.02.2024.

they are in the process of being achieved, that they form part of a credible and verifiable pathway."

(d) Examples of orders and coercive fines imposed in climate cases

247. In the case of *Association Les Amis de la Terre France et autres*, on an application for judicial review, the *Conseil d'État*, having ordered the Prime Minister and the Minister responsible for the environment to take all necessary measures by 31 March 2018, gave a decision on 10 July 2020 in which it ordered the State to pay a coercive fine unless it could demonstrate, within six months of service of the decision, that it had implemented the decision of 12 July 2017 in each of the areas concerned. The *Conseil d'État* fixed the amount of the fine at EUR 10 million for each six-month period until the date of enforcement (*Conseil d'État*, 10 July 2020, *Association Les Amis de la Terre France et autres*, no. 428409).

248. The *Conseil d'État* subsequently assessed the interim amount of the fine.

249. By a decision of 4 August 2021, it ordered the State to pay the sum of EUR 10 million in respect of the six-month period from 11 January to 11 July 2021.

250. In his opinion on this case, the public rapporteur made the following remarks concerning the issue of the proper recipient of the sums payable by the State by way of fines in climate cases:

"4. ... This is where the innovative reasoning of your plenary judgment comes in, since the applicable provision is the second sub-paragraph of Article L. 911-8, according to which the portion not paid to the applicant is allocated to the State budget: 'However, since the purpose of the coercive fine is to compel a public-law entity ... to perform the obligations imposed on it by a court decision, those provisions are not applicable where the coercive fine in question is payable by the State. In such cases, where it appears necessary for effective enforcement of the judicial decision, the court may, even of its own motion, and having obtained the observations of the parties and of the legal entity or entities concerned on this point, decide to allocate that portion to a public-law entity which has sufficient autonomy *vis-à-vis* the State and whose activities relate to the subject matter of the dispute, or to a private-law, non-profit entity which, in accordance with its articles of association, carries out actions in the general interest that are likewise connected to that subject matter.' That is the wording of your plenary judgment.

4.1 In order to determine which persons other than the State may receive the proceeds of all or part of the coercive fine, ... it is important to bear in mind the purpose of coercive fines, which is to compel the State to enforce a judicial decision as is incumbent upon it in accordance with the rule of law."

251. In line with that opinion, the *Conseil d'État* therefore ordered that the sum of EUR 10 million be paid out as follows: EUR 8,800,000 mainly to four public institutions active in the environmental field, namely the Environment and Energy Management Agency (ADEME), the Centre for Studies and Expertise on Risk, Environment, Mobility and Planning (CEREMA), the National Health, Food, Environment and Work Safety

Agency (ANSES) and the National Institute for the Industrial Environment and Risk (INERIS), with the remainder to be paid to the air-quality monitoring associations in the most affected regions.

252. In a decision of 17 October 2022, the *Conseil d'État* again assessed the interim amount of the coercive fine, for the two six-month periods from 12 July 2021 to 12 July 2022, and ordered the State to pay the sum of EUR 20 million, of which EUR 16,950,000 was to be paid out mainly to the same public institutions. In a further decision of 24 November 2023, the *Conseil d'État* found that the decision of 12 July 2017 had been partially executed and ordered the State to pay the sum of EUR 10 million to the above-mentioned public institutions and associations, as well as to the association *Les Amis de la Terre France*.

253. Lastly, that case also resulted in a judgment of the CJEU finding an infringement in view of France's failure to comply with the limit values for concentrations of nitrogen dioxide and particulate matter laid down in Directive 2008/50/EC (judgment of 24 October 2019 in *Commission v. France*, C-636/18, EU:C:2019:900, paragraphs 44-45).

2. Germany

254. In the case of *Neubauer and Others v. Federal Republic of Germany*[158], the German Federal Constitutional Court ("the GFCC") examined four constitutional complaints directed against certain provisions of the Federal Climate Change Act of 12 December 2019 (*Bundes-Klimaschutzgesetz*) and against the State's failure to take further measures to reduce GHG emissions.

255. The applicants grounded their claims on the right to life and integrity (Article 2 § 2, first sentence, of the Basic Law), the right to property and the right of inheritance (Article 14 § 1 of the Basic Law), as well as on a fundamental right to a future consistent with human dignity and a fundamental right to an ecological minimum standard of living, which they derived from Article 2 § 1 in conjunction with Article 20a and from Article 2 § 1 in conjunction with Article 1 § 1, first sentence, of the Basic Law.

256. The GFCC held that the provisions of the Federal Climate Change Act were incompatible with fundamental rights in so far as they lacked sufficient specifications for further emission reductions from 2031 onwards. In all other respects, the constitutional complaints were rejected. The GFCC held that it could not be ascertained that the legislature, in introducing these provisions, had violated its constitutional duty to protect the complainants from the risks of climate change or failed to satisfy the obligation arising from Article 20a of the Basic Law to take climate action. However, the challenged provisions did violate the freedoms of the complainants, some of whom were

[158] Order of the First Senate of 24 March 2021, 1 BvR 2656/18 DE:BVerfG:2021:rs20210324.1bvr265618.

still very young, because the provisions irreversibly shifted major emission reduction burdens into periods after 2030. The fact that GHG emissions had to be reduced followed from the Basic Law, among other things the constitutional climate goal arising from its Article 20a. These future obligations to reduce emissions had an impact on practically every type of freedom because virtually all aspects of human life still involved the emission of GHG and were thus potentially threatened by drastic restrictions after 2030. Therefore, the legislature should have taken precautionary steps to mitigate these major burdens in order to safeguard the freedoms guaranteed by fundamental rights.

257. The official Headnotes of the Order summarised the findings as follows:

> "1. The protection of life and physical integrity under Art. 2(2) first sentence of the Basic Law encompasses protection against impairments of constitutionally guaranteed interests caused by environmental pollution, regardless of who or what circumstances are the cause. The state's duty of protection arising from Art. 2(2) first sentence of the Basic Law also encompasses the duty to protect life and health against the risks posed by climate change. It can furthermore give rise to an objective duty to protect future generations.
>
> 2. Art. 20a of the Basic Law obliges the state to take climate action. This includes the aim of achieving climate neutrality.
>
> a. Art. 20a of the Basic Law does not take absolute precedence over other interests. In cases of conflict, it must be balanced against other constitutional interests and principles. Within the balancing process, the obligation to take climate action is accorded increasing weight as climate change intensifies.
>
> b. If there is scientific uncertainty regarding causal relationships of environmental relevance, a special duty of care imposed upon the legislator by Art. 20a of the Basic Law – also for the benefit of future generations – entails an obligation to take account of sufficiently reliable indications pointing to the possibility of serious or irreversible impairments.
>
> c. As an obligation to take climate action, Art. 20a of the Basic Law has an international dimension. The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate change at the global level and is required to promote climate action within the international framework. The state cannot evade its responsibility by pointing to [GHG] emissions in other states.
>
> d. In exercising its mandate and prerogative to specify the law, the legislator has formulated the climate goal of Art. 20a of the Basic Law in a constitutionally permissible manner, currently setting out that the increase in the global average temperature should be limited to well below 2°C and preferably to 1.5°C above pre-industrial levels.
>
> e. Art. 20a of the Basic Law is a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations.

3. Compatibility with Art. 20a of the Basic Law is required in order to justify under constitutional law any state interference with fundamental rights.

4. Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. In their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the [GHG] reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future. Furthermore, in its objective dimension, the protection mandate laid down in Art. 20a of the Basic Law encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence.

Respecting future freedom also requires initiating the transition to climate neutrality in good time. In practical terms, this means that transparent specifications for the further course of [GHG] reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty.

5. The legislator itself must set out the necessary provisions specifying the overall emission amounts that are allowed for certain periods. As regards the method by which the legal framework for the allowed emission amounts is adopted, the legislative process cannot be replaced by a reduced form of parliamentary involvement in which the Bundestag merely approves the Federal Government's ordinances. This is because it is precisely the special public function of the legislative process that makes the adoption of parliamentary legislation necessary here. It is true that having parliamentary legislation in areas of law that are constantly subject to new developments and knowledge can in some cases be detrimental to the protection of fundamental rights. This notion draws on the concept of dynamic fundamental rights protection (foundationally, see BVerfGE 49, 89 <137>). However, this concept cannot be used here as an objection against the requirement for parliamentary legislation. The challenge is not to protect fundamental rights by ensuring that the legal framework keeps pace with new developments and knowledge. The challenge is to create a framework that makes further developments aimed at protecting fundamental rights possible in the first place."

3. Ireland

258. In the case of *Friends of the Irish Environment CLG v. the Government of Ireland, Ireland and the Attorney General*[159], the Supreme Court of Ireland was asked to examine the adequacy of domestic measures taken in relation to climate change in the light of statutory provisions enacted in 2015, as well as rights-based arguments under the Constitution and the Convention in relation to the right to life and the right to bodily integrity.

259. The relevant concluding part of the judgment, delivered by the then Chief Justice, reads as follows:

"9.1 In this judgment I first consider the argument put forward by FIE to the effect that the Plan does not comply with its legislative remit under the 2015 Act and is, therefore, ultra vires. It is noted that there was no question raised at the hearing as to

[159] Supreme Court of Ireland, *Friends of the Irish Environment CLG v. The Government of Ireland, Ireland and the Attorney General*, Appeal No: 205/19, 31 July 2020.

the standing of FIE to make arguments along those lines. For the reasons set out in this judgment I conclude that, contrary to the submissions made on behalf of the Government, FIE should be entitled to pursue the wider range of argument on this issue addressed in their written submissions. I also conclude that the issues are justiciable and do not amount to an impermissible impingement by the courts into areas of policy. What might once have been policy has become law by virtue of the enactment of the 2015 Act.

9.2 I also conclude that the 2015 Act, and in particular s.4, requires a sufficient level of specificity in the measures identified in a compliant plan that are required to meet the National Transitional Objective by 2050 so that a reasonable and interested person could make a judgement both as to whether the plan in question is realistic and as to whether they agree with the policy options for achieving the NTO which such a plan specifies. The 2015 Act as a whole involves both public participation in the process leading to the adoption of a plan but also transparency as to the formal government policy, adopted in accordance with a statutory regime, for achieving what is now the statutory policy of meeting the NTO by 2050. A compliant plan is not a five-year plan but rather a plan covering the full period remaining to 2050. While the detail of what is intended to happen in later years may understandably be less complete, a compliant plan must be sufficiently specific as to policy over the whole period to 2050.

9.3 For the reasons also set out in this judgment, I have concluded that the Plan falls well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act. On that basis, I propose that the Plan be quashed.

9.4 I have also considered in this judgment whether it is appropriate to go on to deal with any of the further issues raised, given that I propose that the Plan be quashed and that it follows that an identical plan cannot be made in the future. However, as the issues of standing debated in this appeal could well arise in any future challenge to a new plan, I do address those questions. For the reasons set out in this judgment I conclude that FIE, as a corporate entity which does not enjoy in itself the right to life or the right to bodily integrity, does not have standing to maintain the rights based arguments sought to be put forward whether under the Constitution or under the ECHR. I also conclude that it has not been shown that it is necessary to allow FIE to have standing under the exception to the general rule, which arises in circumstances where refusing standing would make the enforcement of important rights either impossible or excessively difficult.

9.5 On that basis I did not consider it appropriate to address the rights-based arguments put forward, but do offer views on the question of whether there is an unenumerated or, as I would prefer to put it, derived right under the Constitution to a healthy environment. While not ruling out the possibility that constitutional rights and obligations may well be engaged in the environmental field in an appropriate case, I express the view that the asserted right to a healthy environment is either superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or is excessively vague and ill-defined (if it does go beyond those rights). As thus formulated, I express the view that such a right cannot be derived from the Constitution. I would reserve the position of whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial."

4. The Netherlands

260. In *State of the Netherlands v. Stichting Urgenda* (20 December 2019, NL:HR:2019:2007), the Supreme Court of the Netherlands upheld the lower

courts' order directing the State to reduce GHG by the end of 2020 by at least 25% compared to 1990.

261. The official summary of the judgment reads as follows:

"The issue in this case is whether the Dutch State is obliged to reduce, by the end of 2020, the emission of [GHG] originating from Dutch soil by at least 25% compared to 1990, and whether the courts can order the State to do so.

Urgenda's claim and the opinions of the District Court and the Court of Appeal

Urgenda sought a court order directing the State to reduce the emission of [GHG] so that, by the end of 2020, those emissions will have been reduced by 40%, or in any case at by at least 25%, compared to 1990.

In 2015, the District Court allowed Urgenda's claim, in the sense that the State was ordered to reduce emissions by the end of 2020 by at least 25% compared to 1990.

In 2018, the Court of Appeal confirmed the District Court's judgment.

Appeal in cassation

The State instituted an appeal in cassation in respect of the Court of Appeal's decision, asserting a large number of objections to that decision.

The deputy Procurator General and the Advocate General advised the Supreme Court to reject the State's appeal and thus to allow the Court of Appeal's decision to stand.

Opinion of the Supreme Court

The Supreme Court concludes that the State's appeal in cassation must be rejected. That means that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce [GHG] by the end of 2020 by at least 25% compared to 1990, will stand as a final order.

The Supreme Court's opinion rests on the facts and assumptions which were established by the Court of Appeal and which were not disputed by the State or Urgenda in cassation. In cassation, the Supreme Court determines whether the Court of Appeal properly applied the law and whether, based on the facts that may be taken into consideration, the Court of Appeal's opinion is comprehensible and adequately substantiated. The grounds for the Supreme Court's judgment are laid down below in sections 4-8 of the judgment. These grounds will be summarised below. This summary does not supersede the grounds for this judgment and does not fully reflect the Supreme Court's opinion.

Dangerous climate change (see paras. 4.1-4.8, below)

Urgenda and the State both endorse the view of climate science that a genuine threat exists that the climate will undergo a dangerous change in the coming decades. There is a great deal of agreement on the presence of that threat in climate science and the international community. In that respect and briefly put, this comes down to the following.

The emission of [GHG], including CO_2, is leading to a higher concentration of those gases in the atmosphere. These [GHG] retain the heat radiated by the Earth. Because over the last century and a half since the start of the industrial revolution, an ever-increasing volume of [GHG] is being emitted, the Earth is becoming warmer and warmer. In that period, the Earth has warmed by approximately 1.1°C, the largest part of which (0.7°C) has occurred in the last forty years. Climate science and the international community largely agree on the premise that the warming of the Earth

must be limited to no more than 2°C, and according to more recent insights to no more than 1.5°C. The warming of the Earth beyond that temperature limit may have extremely dire consequences, such as extreme heat, extreme drought, extreme precipitation, a disruption of ecosystems that could jeopardise the food supply, among other things, and a rise in the sea level resulting from the melting of glaciers and the polar ice caps. That warming may also result in tipping points, as a result of which the climate on Earth or in particular regions of the Earth changes abruptly and comprehensively. All of this will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands. Some of these consequences are already happening right now.

Protection of human rights based on the ECHR (see paras. 5.2.1-5.5.3, below)

The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) requires the states which are parties to the convention to protect the rights and freedoms established in the convention for their inhabitants. Article 2 ECHR protects the right to life, and Article 8 ECHR protects the right to respect for private and family life. According to the case law of the European Court of Human Rights (ECtHR), a contracting state is obliged by these provisions to take suitable measures if a real and immediate risk to people's lives or welfare exists and the state is aware of that risk.

The obligation to take suitable measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialise over the long term. While Articles 2 and 8 ECHR are not permitted to result in an impossible or disproportionate burden being imposed on a state, those provisions do oblige the state to take measures that are actually suitable to avert the imminent hazard as much as reasonably possible. Pursuant to Article 13 ECHR, national law must offer an effective legal remedy against a violation or imminent violation of the rights that are safeguarded by the ECHR. This means that the national courts must be able to provide effective legal protection.

Global problem and national responsibility (see paras. 5.6.1-5.8, below)

The risk of dangerous climate change is global in nature: [GHG] are emitted not just from Dutch territory, but around the world. The consequences of those emissions are also experienced around the world.

The Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC). The objective of that convention is to keep the concentration of [GHG] in the atmosphere to a level at which a disruption of the climate system through human action can be prevented. The UNFCCC is based on the premise that all member countries must take measures to prevent climate change, in accordance with their specific responsibilities and options.

Each country is thus responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce [GHG] emissions from its territory in proportion to its share of the responsibility. This obligation of the State to do 'its part' is based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.

What, specifically, does the State's obligation to do 'its part' entail? (see paras. 6.1-7.3.6, below)

When giving substance to the positive obligations imposed on the State pursuant to Articles 2 and 8 ECHR, one must take into account broadly supported scientific insights and internationally accepted standards. Important in this respect are, among other things, the reports from the IPCC. The IPCC is a scientific body and intergovernmental organisation that was set up in the context of the United Nations to handle climatological studies and developments. The IPCC's 2007 report contained a scenario in which the warming of the Earth could reasonably be expected to be limited to a maximum of 2°C. In order to achieve this target, the Annex I countries (these being the developed countries, including the Netherlands) would have to reduce their emissions in 2020 by 25-40%, and in 2050 by 80 95%, compared to 1990.

At the annual climate conferences held in the context of the UNFCCC since 2007, virtually every country has regularly pointed out the necessity of acting in accordance with the scenario of the IPCC and achieving a 25-40% reduction of [GHG] emissions in 2020. The scientifically supported necessity of reducing emissions by 30% in 2020 compared to 1990 has been expressed on multiple occasions by and in the EU.

Furthermore, since 2007, a broadly supported insight has arisen that, to be safe, the warming of the Earth must remain limited to 1.5°C, rather than 2°C. The Paris Agreement of 2015 therefore expressly states that the states must strive to limit warming to 1.5°C. That will require an even greater emissions reduction than was previously assumed.

All in all, there is a great degree of consensus on the urgent necessity for the Annex I countries to reduce [GHG] emissions by at least 25-40% in 2020. The consensus on this target must be taken into consideration when interpreting and applying Articles 2 and 8 ECHR. The urgent necessity for a reduction of 25-40% in 2020 also applies to the Netherlands on an individual basis.

The policy of the State (see paras. 7.4.1-7.5.3, below)

The State and Urgenda are both of the opinion that it is necessary to limit the concentration of [GHG] in the atmosphere in order to achieve either the 2C target or the 1.5C target. Their views differ, however, with regard to the speed at which [GHG] emissions must be reduced.

Until 2011, the State's policy was aimed at achieving an emissions reduction in 2020 of 30% compared to 1990. According to the State, that was necessary to stay on a credible pathway to keep the 2C target within reach.

After 2011, however, the State's reduction target for 2020 was lowered from a 30% reduction by the Netherlands to a 20% reduction in an EU context. After the reduction in 2020, the State intends to accelerate the reduction to 49% in 2030 and 95% in 2050. Those targets for 2030 and 2050 have since been laid down in the Dutch Climate Act. The State has not explained, however, that – and why – a reduction of just 20% in 2020 is considered responsible in an EU context, in contrast to the 25-40% reduction in 2020, which is internationally broadly supported and is considered necessary.

There is a broad consensus within climate science and the international community that the longer reduction measures to achieve the envisaged final target are postponed, the more comprehensive and more expensive they will become. Postponement also creates a greater risk of an abrupt climate change occurring as the result of a tipping point being reached. In light of that generally endorsed insight, it was up to the State to explain that the proposed acceleration of the reduction after 2020 would be feasible and sufficiently effective to meet the targets for 2030 and 2050, and thus to keep the 2C target and the 1.5C target within reach. The State did not do this, however. The Court

of Appeal was thus entitled to rule that the State must comply with the target, considered necessary by the international community, of a reduction by at least 25% in 2020.

The courts and the political domain (see paras. 8.1-8.3.5, below)

The State has asserted that it is not for the courts to undertake the political considerations necessary for a decision on the reduction of [GHG] emissions.

In the Dutch system of government, the decision-making on [GHG] emissions belongs to the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in taking their decisions, the government and parliament have remained within the limits of the law by which they are bound. Those limits ensue from the ECHR, among other things. The Dutch Constitution requires the Dutch courts to apply the provisions of this convention, and they must do so in accordance with the ECtHR's interpretation of these provisions. This mandate to the courts to offer legal protection, even against the government, is an essential component of a democratic state under the rule of law.

The Court of Appeal's judgment is consistent with the foregoing, as the Court of Appeal held that the State's policy regarding [GHG] reduction is obviously not meeting the requirements pursuant to Articles 2 and 8 ECHR to take suitable measures to protect the residents of the Netherlands from dangerous climate change. Furthermore, the order which the Court of Appeal issued to the State was limited to the lower limit (25%) of the internationally endorsed, minimum necessary reduction of 25-40% in 2020.

The order that was issued leaves it up to the State to determine which specific measures it will take to comply with that order. If legislative measures are required to achieve such compliance, it is up to the State to determine which specific legislation is desirable and necessary.

Conclusion

In short, the essence of the Supreme Court's judgment is that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce [GHG] by the end of 2020 by at least 25% compared to 1990, will be allowed to stand. Pursuant to Articles 2 and 8 ECHR, the Court of Appeal can and may conclude that the State is obliged to achieve that reduction, due to the risk of dangerous climate change that could have a severe impact on the lives and welfare of the residents of the Netherlands."

5. Norway

262. In a judgment of 22 December 2020[160], the Supreme Court of Norway ruled on the compliance with the right to a healthy environment (Article 112 of the Constitution) of a Royal Decree of 10 June 2016 concerning petroleum production licences awarded for blocks on the Norwegian continental shelf in the marine areas (referred to as the south Barents Sea South and the southeast Barents Sea). The case also raised the issue of whether the decisions complied with Article 93 on the right to life or Article 102 on the right to respect for private and family life, and with the

[160] Supreme Court of Norway, *Nature and Youth Norway and Greenpeace Nordic v. the Ministry of Petroleum and Energy*, HR-2020-2472-P (case no. 20-051052SIV-HRET).

corresponding Articles 2 and 8 of the Convention. The Supreme Court concluded that the decision in question to award the licences violated neither Article 2 nor Article 8 of the Convention. Nor did it find a violation of Article 112 of the Constitution. The case is currently pending before the Court (*Greenpeace Nordic and Others v. Norway*, application no. 34068/21).

263. The relevant parts of the judgment read as follows:

"Subject matter

(2) This case concerns the validity of a royal decree of 10 June 2016. The decree – the decision – concerns ten petroleum production licences awarded for a total of 40 blocks or parts of blocks on the Norwegian continental shelf in the marine areas referred to as the south Barents Sea South and the southeast Barents Sea – the 23rd licensing round.

(3) The decision has its legal basis in section 3-3 of the Petroleum Act. The key issue raised is the decision's compliance with Article 112 of the Constitution on the right to a healthy environment. The case also raises the issue of whether the decisions complies with Article 93 on the right to life or Article 102 on the right to respect for private and family life, and with the corresponding Articles 2 and 8 of the European Convention on Human Rights – ECHR – or whether the decision is otherwise invalid due to procedural errors. The crux of the matter is the interpretation of Article 112 of the Constitution and to which extent it confers substantive rights on individuals that may be asserted in court.

(4) The parties agree that we are facing major challenges related to climate change, that at least a considerable share of the last century's temperature increase on Earth is due to [GHG] emissions, and that these emissions must be reduced to halt, and hopefully reverse, the trend.

(5) The overall constitutional issue is which role the courts are to play in the environmental work. The case touches upon the principle of separation of powers and the tripartite system of the legislature, the executive and the judiciary.

...

Is the decision incompatible with Article 2 or 8 of the ECHR, or Article 93 or 102 of the Constitution?

(167) There is no doubt that the consequences of climate change in Norway may lead to loss of human lives, for instance through floods or landslides. The question is yet whether there is an adequate link between production licences in the 23rd licensing round and possible loss of human lives, which would meet the requirement of 'real and immediate' risk.

(168) In my view, the answer is no. First, it is uncertain whether or to which extent the decision will actually lead to [GHG] emissions. Second, the possible impact on the climate will be discernible in the more distant future. Although the climate threat is real, the decision does not involve, within the meaning of the ECHR, a 'real and immediate' risk of loss of life for citizens in Norway. Thus, no violation of Article 2 of the ECHR is found.

...

(171) To this point, the Court of Human Rights has not assessed applications related to climate. However, the Court has recently communicated an application from six youths against Norway and 32 other countries. The case concerned the failure to cut emissions with particular reference to forest fires and heatwaves in Portugal in 2017

and 2018. Nonetheless, there is nothing in present case law to suggest that the subject matter in climate cases will differ from that in cases concerning environmental harm in general. With the significance the Court until now has ascribed to 'direct and immediate', I find it clear that the effects of possible future emissions due to the licences awarded in the 23rd licensing round do not fall within Article 8 of the ECHR.

(172) During the appeal hearing, particular attention has been given to the Urgenda case from the Netherlands. In this case, a declaratory judgment was sought by the Dutch environmental organisation Urgenda against the Dutch State. Urgenda requested a judgment affirming that the Dutch state had a duty within 2020 to reduce [GHG] emissions by 40 percent, or at least 25 percent, compared with 1990. The Dutch Supreme Court – Hoge Raad – upheld in a judgment 20 December 2019 (ECLI:NL:HR:2019:2007, unofficial English translation) the rulings of the lower instances, ordering the Dutch state to reduce [GHG] emissions by 25 percent within 2020, compared with 1990. Among other things, Hoge Raad cited Articles 2 and 8 of the ECHR.

(173) The judgment from the Netherlands has little transfer value to the case at hand. First, the Urgenda case questioned whether the Dutch government could reduce the general emission targets it had already set. It was thus not a question of prohibiting a particular measure or possible future emissions. Secondly, it was not a question of challenging the validity of an administrative decision.

(174) The environmental groups have finally mentioned that the Court of Human Rights may identify the content of the rights on the basis of international agreements constituting 'common ground' between the Member States, see the Grand Chamber judgment 12 November 2008 Demir and Baykara v. Turkey paragraphs 85–86. Such a principle may hardly be applied to environmental issues, as the ECHR does not have a separate environment provision. In any case, it has not been demonstrated that the production licences constitute a breach of our international obligations.

(175) I add that most of the supporting documents that have been submitted and added to the case in accordance with section 15-8 of the Dispute Act, generally relate to international obligations, both under the ECHR and international law in general. These contain nothing that changes my assessments.

(176) Against this background, the decision is not a violation of Article 2 or 8 of the ECHR."

6. Spain

264. In the case of *Greenpeace Spain and Others v. Spain*, several associations and five individuals challenged the relevant national Energy and Climate Plan on the grounds that its GHG emissions reduction target (reduction of GHG emissions of 23% by 2030, compared to 1990 levels) did not comply with the Paris Agreement. They asked the courts to modify the Plan by imposing a 55% GHG reduction target, compared to 1990 levels, by 2030.

265. On 24 July 2023 the Supreme Court (STS 3556/2023) dismissed the claimants' action holding that under the relevant domestic law, courts could not impose on the government a measure such as that requested in the present case unless there was a clear conflict of regulations with a higher norm that left no discretion to the executive, which had not been the case in the case at

hand. The Supreme Court noted that GHG reduction targets had very significant implications for the national economy and the government's socio-economic policies. Tightening them would impose significant sacrifices on present generations and granting the claim would amount to an excessive invasion into the prerogatives of the government. Moreover, the Plan was compliant with EU law, which reflected ambitious efforts in the fight against climate change. The European Union was in the process of updating its GHG reduction targets and Spain would have to coordinate its actions with EU law.

7. The United Kingdom

266. In *Plan B Earth and four other citizens v. Prime Minister*[161], the appellants unsuccessfully challenged before the High Court of Justice the lawfulness of the policies of the United Kingdom government relating to climate change. They alleged a breach of section 6 of the Human Rights Act 1998 by way of Article 2 and/or Article 8 of the Convention.

267. Discussing these claims, Mr Justice Bourne held, in particular:

> "The insuperable problem with the Article 2 claim (and with any Article 8 claim based on the physical or psychological effects of climate change on the Claimants) is that there is an administrative framework to combat the threats posed by climate change, in the form of the 2008 Act and all the policies and measures adopted under it.
>
> 49. That framework includes and contemplates the role of the CCC in advising on, and assessing, policies and measures. That framework is constantly evolving.
>
> ...
>
> 51. ... [T]he Court is not well equipped to form its own views on the matters in question. I am being invited to adopt the views expressed in selective quotations from the work of the CCC and others. When I refer to selective quotation I am not questioning the good faith of any of the parties. Rather I am pointing out that the Court does not have and cannot acquire expertise in this complex area, and will always be dependent on competing extracts from a global debate. Even if I could overcome the problem of selective quotation, I would not be equipped to assess the correctness of what is being quoted."

268. In the same case, ruling on an application to the Court of Appeal for permission to appeal against the High Court's refusal to grant permission to apply for judicial review, Lord Justice Singh refused the application and noted as follows[162]:

> "5. ... The fundamental difficulty which the Claimants face is that there is no authority from the European Court of Human Rights on which they can rely, citing the Paris Agreement as being relevant to the interpretation of the ECHR, Articles 2 and 8. They do rely on decisions of the highest courts of other parties to the ECHR, in particular the Supreme Court of the Netherlands, but, as the Judge observed in the present case, we do not know what the constitutional context was for such decisions.

[161] High Court of Justice, 21 December 2021, [2021] EWHC 3469 (Admin).
[162] Court of Appeal, 18 March 2022, CA-2021-003448.

> Section 2 of the HRA requires courts in this country to take into account relevant decisions of the European Court of Human Rights. In general, we follow those decisions."

8. Belgium

269. In the case of *VZW Klimaatzaak v. the Kingdom of Belgium and Others*, an association and 58,000 individuals brought an action against the Federal government, the Walloon Region, the Flemish Region and the Brussels-Capital Region, alleging that they had failed to meet the relevant GHG emissions reduction targets and asking the court to order the necessary measures to be undertaken in that respect.

270. On 17 June 2021 the Brussels Court of First Instance, accepting the standing of the association and the individuals, held that the defendants had breached their duty of care under the relevant domestic law, and the preventive duty under Articles 2 and 8 of the Convention, by failing to take necessary measures as regards the harmful effects of climate change. The court declined to set specific reduction targets on the grounds of the separation of powers.

271. On 30 November 2023 the Brussels Court of Appeal confirmed the finding of breaches of the domestic law and Articles 2 and 8 of the Convention by the defendants, save the Walloon Region. Considering, in particular, that the courts would not be infringing the principle of the separation of powers provided that the judge did not take the place of the authorities in choosing the means to remedy the breaches found, that court ordered the defendants to reduce GHG emissions by at least 55% compared to 1990 levels by 2030.

272. Unlike the domestic case-law noted in paragraphs 236 to 266 above, the Brussels Court of Appeal's judgment is, as at today, susceptible to a further challenge before the Court of Cassation.

THE LAW

I. PRELIMINARY ISSUES

A. The second applicant

273. In the course of the proceedings before the Court, the second applicant passed away. By letters of 12 August and 8 September 2021, Ms Schaub's representative informed the Court that her son and heir, Mr André Seidenberg, wished to continue the proceedings before the Court on his mother's behalf. The respondent Government did not object to this. In these circumstances, having regard to the Court's well-established case-law, the Court is the view that Ms Schaub's son has a legitimate interest and is entitled to pursue the proceedings (see *Taşkın and Others v. Turkey*,

no. 46117/99, § 102, ECHR 2004-X; *Jivan v. Romania*, no. 62250/19, §§ 25-26, 8 February 2022; and *Pavlov and Others v. Russia*, no. 31612/09, § 51, 11 October 2022). Indeed, having regard to the fact that the second applicant was a woman of advanced age, and that her complaint was linked to the effects of climate change on the category of population to which she belonged, it could be considered contrary to the Court's mission to refrain from ruling on the complaints raised by the recently deceased applicant just because she did not have the strength, owing to her advanced age, to live long enough to see the outcome of the proceedings before it (see, *mutatis mutandis*, *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 73, ECHR 2012 (extracts)).

274. For practical reasons, Ms Schaub will continue to be considered the second applicant in the present judgment.

B. Scope of the complaint

275. In their additional observations of 13 October 2021 in the proceedings before the Chamber, the applicants explicitly elaborated on the issue of GHG emissions generated abroad and attributed to Switzerland through the import of goods for household consumption and as such forming part of Switzerland's "embedded emissions". The question arose, however, whether this complaint formed part of the applicants' complaints or "claims" referred to the Court in their original application. In the course of the Grand Chamber proceedings, this question was explicitly put to the parties and their answers to it differ.

1. The parties' submissions

276. The Government argued that the issue of GHG emissions generated abroad and attributed to Switzerland had not formed part of the applicants' complaints or "claims" made in the original application before the Court. The applicants had only raised this issue in their additional observations of 13 October 2021 before the Chamber. In any event, they had not raised this issue before the domestic courts but had rather explicitly asked the latter to oblige Switzerland to reduce GHG emissions on its own territory. In addition, a major part of the applicants' arguments before the Court was based on the State's commitments under the Paris Agreement, which concerned the level of national contributions and the domestic measures that needed to be taken. The Government were therefore of the view that the issue of GHG emissions generated abroad was either outside the scope of the present case or inadmissible for non-exhaustion of domestic remedies or for non-compliance with the six-month time-limit.

277. The applicants argued that the arguments they had raised in their observations during the Chamber proceedings concerning GHG emissions generated abroad and attributed to the respondent State formed part of their

complaints or "claims" made in the original application before the Court. In particular, in their observations they had explained that the effort that the State was obliged to make should be determined by reference not merely to the emissions that occurred on its territory but also by reference to external emissions. That had been an elaboration on their original complaint made in the application form, namely that the State had failed to take preventive measures to reduce emissions in line with the 1.5°C limit. Moreover, the Court could also *ex officio* seek to clarify their original complaint by taking the aspect of external emissions into account.

2. The Court's assessment

278. The relevant principles of the Court's case-law concerning the scope of the case before it may be summarised as follows (see, for instance, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018, and, most recently, *Grosam v. the Czech Republic* [GC], no. 19750/13, § 88, 1 June 2023):

> "126. [T]he scope of a case 'referred to' the Court in the exercise of the right of individual application is determined by the applicant's complaint. A complaint consists of two elements: factual allegations and legal arguments. By virtue of the *jura novit curia* principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant. It cannot, however, base its decision on facts that are not covered by the complaint. To do so would be tantamount to deciding beyond the scope of a case; in other words, to deciding on matters that have not been 'referred to' it, within the meaning of Article 32 of the Convention."

279. In the case at hand, it is important to note that it has been accepted in the reports by the relevant Swiss authorities[163], and elsewhere[164], that the GHG emissions attributable to Switzerland through the import of goods and their consumption form a significant part (an estimate of 70% for 2015)[165] of the overall Swiss GHG footprint. Indeed, the FOEN has stressed the following: "In a globalised economy, both the GHG emitted in Switzerland and those emitted abroad as a result of Swiss final demand must be recorded (total final consumption expenditure of households and the public sector). A large part of Switzerland's footprint is created abroad because imports make up a high proportion of the country's total consumption."[166]

280. It would therefore be difficult, if not impossible, to discuss Switzerland's responsibility for the effects of its GHG emissions on the

[163] See FOEN "Climate Change in Switzerland" (2020).
[164] See Our World in Data "CO_2 emissions embedded in trade" (available at www.ourworldindata.org; last accessed 14.02.2024).
[165] FOEN "Climate Change in Switzerland" (2020), p. 6.
[166] FOEN, Indicator Economy and Consumption (available at www.admin.ch ; last accessed 14.02.2024).

applicants' rights without taking into account the emissions generated through the import of goods and their consumption or, as the applicants labelled them, "embedded emissions". As the FOEN noted, these emissions "must be" taken into account in the overall assessment of Switzerland's GHG emissions. This means, in terms of the above-noted principles of the Court's case-law, that the Court needs to clarify, if necessary even of its own motion, these facts when assessing the applicants' original – and rather general – complaint that Switzerland had failed to reduce its GHG emissions in line with the 1.5°C target.

281. Moreover, it is important to note that in an annex submitted together with the application form, when elaborating on their complaints, the applicants underlined that the "Respondent [should] do everything in its power to do its share to prevent a *global temperature increase* of more than 1.5°C above pre-industrial levels" (emphasis added). As far as the present discussion is concerned, this suggests that the applicants did indeed intend to cover in their complaints the overall Swiss contribution to the global effects of climate change. It is therefore acceptable, in terms of the Court's case-law, that they sought to complete and clarify their complaints later in the written proceedings by elaborating on, *inter alia*, the issue of "embedded emissions".

282. As regards the Government's argument that the applicants failed to raise this issue at the domestic level, it should be noted that in their request for a legal remedy they raised the same issue as the one raised before the Court relating to Switzerland's overall contribution to global temperature increase (see paragraph 22 above). While it is not possible to draw any conclusion as regards the domestic courts' position on this matter (including the issue of "embedded emissions"), as they did not examine the merits of the applicants' legal action, it is indicative to note that the DETEC rejected the applicants' action on the grounds that the general purpose of their request was to achieve a reduction in CO_2 emissions worldwide and not only in their immediate surroundings (see paragraph 30 above).

283. In these circumstances, it follows that the applicants' complaint regarding the "embedded emissions" falls within the scope of the case and that the respondent Government's objection in that respect must be dismissed. This is, of course, without prejudice to the examination of the actual effects of "embedded emissions" (namely Switzerland's import of goods for household consumption) on the State's responsibility under the Convention.

C. Jurisdiction

1. The parties' submissions

284. The Government did not contest that Switzerland had jurisdiction in regard to the applicants as regards the complaint about the domestic GHG emissions and their effects on climate change. However, as regards GHG emissions generated abroad, the Government, relying on the Court's

well-established case-law (citing, *inter alia*, *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020), argued that the issue did not fall under any of the exceptional criteria for establishing the State's extraterritorial jurisdiction.

285. In the Government's view, the only issue that could arise was whether the Court had jurisdiction to examine whether Switzerland had complied with any obligations it might have to take measures within the limits of its own jurisdiction and its own powers to reduce GHG emissions generated abroad. However, the Government pointed out, in particular, that the Court's case-law did not accept the cause-effect notion of jurisdiction and that the sole capacity of a State to act could not establish its jurisdiction (citing, *inter alia*, *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, § 199, 14 September 2022). The Government therefore argued that GHG emissions generated abroad could not be considered to attract the responsibility of Switzerland as those emissions could not be directly linked to any alleged omissions on the part of Switzerland, whose authorities did not have direct control over the sources of emissions. Moreover, the whole system established by the UNFCCC, the Kyoto Protocol and the Paris Agreement was based on the principle of territoriality and the responsibility of States for emissions on their territory. In this context, the Government also submitted that the principle of interpreting the Convention as a living instrument was not applicable as regards the issue of jurisdiction under Article 1 of the Convention (citing *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 63-66, ECHR 2001-XII). Thus, in their view, establishing jurisdiction for GHG emissions generated abroad would go too far and would run counter to the very nature of the concept of jurisdiction under the Convention.

286. The applicants argued that no issue arose as to jurisdiction under Article 1 of the Convention. Their complaint concerned the failure of the respondent State to take the necessary measures to reduce GHG emissions within its territorial jurisdiction. The applicants did not argue that the State should take or had taken measures outside of its territory, nor that it was violating the rights of persons outside of its territory nor that it should exercise jurisdiction over persons outside its territory.

2. The Court's assessment

287. The Court is of the view that no genuine issue of jurisdiction, within the meaning of Article 1 of the Convention, arises in the context of the complaint about "embedded emissions". The Court notes in particular that all the applicants are residents of Switzerland, and thus under its territorial jurisdiction, which means that under Article 1 of the Convention Switzerland must answer for any infringement attributable to it of the rights and freedoms protected by the Convention in respect of the applicants (see *Duarte Agostinho and Others*, cited above, § 178). Thus, the applicants' complaint

concerning "embedded emissions", although containing an extraterritorial aspect, does not raise an issue of Switzerland's jurisdiction in respect of the applicants, but rather one of Switzerland's responsibility for the alleged effects of the "embedded emissions" on the applicants' Convention rights. The issue of responsibility, however, is a separate matter to be examined, if necessary, in relation to the merits of the complaint (ibid.).

288. Against the above background, the Court dismisses the Government's objection concerning the lack of jurisdiction.

D. Compliance with the six-month time-limit

289. The Government pointed out that the application had been lodged with the Court on 26 November 2020, and the final domestic court decision had been adopted on 5 May 2020, namely more than six months earlier. Although in the relevant period the Court had published a press release indicating that the time-limit for the lodging of individual applications had been extended owing to the exceptional circumstances of the COVID-19 pandemic, the Government were of the view that the six-month time-limit set out in Article 35 § 1 of the Convention could not be extended in this manner. In any event, the applicants had not been affected by any *force majeure* in the relevant period and could have lodged their application within the relevant six-month time-limit.

290. The Court notes that the issue raised by the Government in the present case as regards the extension of the time-limit for the lodging of individual applications in the context of the exceptional circumstances of the COVID-19 pandemic has already been clarified in the case-law (see *Saakashvili v. Georgia* (dec.), nos. 6232/20 and 22394/20, §§ 57-58, 1 March 2022; *Makarashvili and Others v. Georgia*, nos. 23158/20 and 2 others, §§ 47-48, 1 September 2022; *Kitanovska and Barbulovski v. North Macedonia*, no. 53030/19, § 40, 9 May 2023; and *X and Others v. Ireland*, nos. 23851/20 and 24360/20, § 58, 22 June 2023). The Court sees no reason to revisit this case-law. The Government's objection is therefore dismissed.

II. INTRODUCTORY REMARKS REGARDING THE COMPLAINTS RAISED IN THE PRESENT CASE

291. Complaining about the failures by the Swiss authorities to mitigate climate change, and in particular the effects of global warming, including a lack of access to a court in that connection, the applicants relied on Articles 2, 6, 8 and 13 of the Convention.

292. The Court notes that there is a close link between the substantive obligations under the various Convention provisions which come into play in the present context. This is owing to the fact that the Convention should be interpreted so as to achieve internal consistency and harmony between the

various provisions (see paragraph 455 below) and the fact that the State's positive obligations in the environmental context under Articles 2 and 8 largely overlap (see *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, §§ 85 and 102, 24 July 2014).

293. Similarly, while Article 6 affords a procedural safeguard, namely the "right to a court" for the determination of one's "civil rights and obligations", Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, private life. The decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8 (see, for instance, *Zammit Maempel v. Malta*, no. 24202/10, § 32, 22 November 2011, with further references). It may, therefore, in some instances be sufficient to examine the case, including the issues of the requisite procedural safeguards, from the perspective of Article 8 (ibid., § 33), while in others, the Court may decide to examine both provisions separately (see, for instance, *Taşkın and Others*, cited above, §§ 118-25 and 135-38). This is a matter that can only be decided on the basis of the circumstances of a particular case.

294. The same approach applies as regards the procedural safeguards under Article 13 of the Convention, which the Court may or may not find it necessary to examine in addition to its assessment under the relevant substantive provision (see, for instance, *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, §§ 227-28, 28 February 2012, and *Cordella and Others v. Italy*, nos. 54414/13 and 54264/15, §§ 175-76, 24 January 2019). In any event, and as regards the relationship between Articles 6 and 13, it is the established case-law of the Court that the requirements of the latter are less strict than those of the former. Thus, the Court often considers that the requirements of Article 13 are absorbed by those of Article 6 (see, for instance, *FU QUAN, s.r.o. v. the Czech Republic* [GC], no. 24827/14, § 85, 1 June 2023; see also *Association Burestop 55 and Others v. France*, nos. 56176/18 and 5 others, § 64, 1 July 2021).

295. With these considerations in mind, the Court will first proceed by identifying the content of the State's obligations under the substantive Convention provisions – Articles 2 and 8 of the Convention. It will examine separately the complaints raised under Articles 6 and 13.

III. ALLEGED VIOLATION OF ARTICLES 2 AND 8 OF THE CONVENTION

296. The applicants complained of various failures by the Swiss authorities to mitigate climate change – and in particular the effect of global warming – which had adversely affected the lives, living conditions and health of the individual applicants and members of the applicant association. They relied on Articles 2 and 8 of the Convention.

297. The relevant part of Article 2 provides as follows:

"1. Everyone's right to life shall be protected by law ..."

298. The relevant part of Article 8 reads as follows:

"1. Everyone has the right to respect for his private and family life, his home ..."

A. The parties' submissions

1. The applicants

(a) Preliminary remarks

299. According to the applicants, there was no doubt that climate change-induced heatwaves had caused, were causing and would cause further deaths and illnesses to older people and particularly women. This message had been part of the respondent State's communication with its citizens regarding the public-health impacts of climate change.

300. The individual applicants argued that they were part of a vulnerable group owing to their age and gender. In particular, many members of the applicant association explained how they were affected by climate change. The second applicant had suffered, and the third applicant still suffered, from cardiovascular diseases, while the fourth and fifth applicants suffered from respiratory diseases. The relevant risk to the second to fourth applicants had already materialised, as evidenced by their medical certificates. In addition, the second to fifth applicants had described in personal statements how their health and well-being were affected by heatwaves.

301. The Swiss authorities were well aware of the risks associated with climate change and the necessity to address them. They had acknowledged these risks in their public communications, by endorsing the findings of the IPCC and by taking part in the UNFCCC and in the Paris Agreement. However, the authorities had failed to set binding climate targets for 2030 and 2050 and their climate strategy was not in line with the 1.5°C limit. Moreover, the authorities had failed to meet their own inadequate climate targets. At the same time, Switzerland was able to do its share, namely, to reduce the risk of heat-related excess mortality and morbidity.

302. In this connection, the applicants argued that Switzerland's 2020 climate target had been intended to meet the (outdated) 2°C limit. After committing to the 1.5°C limit, the Swiss 2030 target underwent only a superficial update. The intended reductions were not only wholly inadequate, but their inadequacy had been aggravated by a reduction in domestic ambition. Neither the 1.5°C long-term temperature goal itself nor 1.5°C compatible emission reduction targets had been enshrined in national law, nor was there an intention to do so. The applicants' complaint therefore related to the current climate situation in Switzerland and to the inadequacy of the targets set for 2030 and 2050.

303. Under its current climate strategy, Switzerland planned to emit more emissions than an "equal per capita emissions" quantification approach

would entitle it to do. In any event, an "equal per capita emissions" burden-sharing approach was not a valid approach to determine national "fair shares" in reducing GHG emissions. The general understanding, embodied in the Paris Agreement and the Rio Declaration[167], was that a fair level of contribution reflected the "highest possible ambition" and "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

304. The applicants argued that Switzerland's current climate strategy fell far short of meeting a "fair share" contribution towards the global mitigation target of 1.5°C. A fair contribution would require Switzerland to strengthen domestic reductions and – through financing emission reduction in other countries – attain a net-negative GHG emission level in 2030 with reductions of 160% and up to 200% below the 1990 emission levels for a 50% chance of meeting the 1.5°C limit. As regards the strengthening of the domestic emission reduction commitments within the "fair share" standard, Switzerland would need to ensure domestic GHG emission reductions of more than 60% below 1990 levels by 2030. However, this could not be realistically achieved with the measures currently envisaged in the domestic legislation.

(b) Victim status

305. The applicants contended that they were all (the applicant association and applicants nos. 2-5) victims, within the autonomous meaning of Article 34 of the Convention, of a violation of Articles 2 and 8 of the Convention on account of the ongoing failure of the respondent State to afford them effective protection against the effects of global warming. In particular, the applicants considered that they were victims as they were directly affected by the impugned measures. The term "victim" was an autonomous concept which should be interpreted in an evolutive manner and not applied in a rigid, mechanical, or inflexible way. It was sufficient that a violation was conceivable, whether it had materialised should be decided on the merits.

(i) The applicant association

306. As regards, specifically, the victim status of the applicant association, the applicants submitted that, albeit it had legal personality, it should simply be seen as a group of individuals, every single member of which was an individual directly affected by the failures of the respondent State in a similar way to applicants nos. 2-5 (who are also members of the applicant association). Accordingly, this complaint was not an *actio popularis*. The applicant association was not bringing an action in the general or public interest (even if the interests of its members aligned with those of the general public) since climate change mitigation measures could never

[167] Rio Declaration on Environment and Development, 1992.

benefit certain population groups exclusively. Rather, the applicant association should be seen as a means enabling the physical persons to bring their complaint before the Court. To preclude the applicant association's application under Articles 2 and 8 by virtue of the fact that it was a legal person, would be to ignore reality and would be out of line with the principle that the Convention rights should be practical and effective. Moreover, the Court should ensure that its approach to the notion of victim status was in line with the Aarhus Convention which essentially provided for a possibility that associations could substitute individuals in pursuit of environmental actions.

307. Referring to *Gorraiz Lizarraga and Others v. Spain* (no. 62543/00, ECHR 2004-III), the applicants pointed out that, similar to in that case, the applicant association had been set up for the specific purpose of bringing its members' interests before the courts. Its members, as part of a particularly vulnerable group, were directly concerned by the respondent State's omissions regarding climate protection and the applicant association was there to ensure that they had the ability to bring their claim before the Court. Thus, allowing the applicant association to claim victim status in respect of its individual members meant ensuring that members of this particular group were able to exercise their rights in the long term. This was particularly true given the fact that bringing a standalone case of this dimension through the domestic courts in Switzerland before approaching the Court would have been prohibitively expensive for most individuals. Indeed, given the complexity and cost of climate litigation it was not surprising that associations had played an increasingly significant role in such cases in recent years and had been more successful than individual plaintiffs in doing so.

(ii) Applicants nos. 2-5

308. Applicants nos. 2-5 had suffered and continued to suffer directly and personally from heat-related afflictions, and with every heatwave they had been and continued to be at a real and serious risk of mortality and morbidity greater than the general population solely because they were women over the age of 75. The risk to the present applicants was even higher compared with other older women owing to their respiratory and cardiovascular diseases. Applicants nos. 2-5 were also direct victims owing to the cumulative effect of all the consequences they had already experienced and would experience in the future. Thus, their complaint was specific and did not concern a general degradation of the environment.

309. In the applicants' view, it was beyond reasonable doubt that the risks posed by climate change-induced heatwaves to the particularly vulnerable group of older women would inevitably materialise in individual cases. The burden of proof was therefore on the State to show that their health afflictions had not been caused by excessive heat, contrary to the medical evidence provided by them.

310. In addition, applicants nos. 2-5 were potential victims because the respondent State's ongoing failure to take the necessary steps to reduce emissions in line with the 1.5°C limit would significantly increase their risk of heat-related mortality and morbidity. In their view, it was beyond doubt that climate change-induced heatwaves would increasingly cause further deaths and illnesses in older women with chronic diseases, which was a group of people to which they belonged. The applicants submitted that they had established this by reference to sound and detailed evidence (epidemiological data and other scientific evidence) so as to demonstrate the real probability of the occurrence of further violations of their rights. The IPCC had found that, on current trajectories, 1.5°C would be reached by the first half of the 2030s, or even the late 2020s.[168] The applicants hoped and expected to be alive at that time.

311. The applicants were members of a particularly vulnerable group. Heat-related deaths were not distributed randomly across the population but occurred especially in older women. Both the members of the applicant association and applicants nos. 2-5 belonged to this specific segment of the population which was particularly affected by climate change owing to their age and gender. Applicants nos. 2-5 were even more vulnerable owing to their chronic diseases. They were both personally, and as members of the particularly vulnerable group of women aged over 75, especially affected by the effects of rising temperatures in comparison with the general population.

(c) Applicability of the relevant Convention provisions

(i) Article 2 of the Convention

312. The applicants argued that Article 2 was engaged by the failure of the respondent State to take the necessary steps to reduce emissions in line with the 1.5°C limit so as to mitigate the effect of increasing temperatures. As a result of increasing temperatures, the lives of applicants nos. 2-5 and of the members of the applicant association were at real and serious risk. The recurring heatwaves had already led to heat-related excess mortality and morbidity in the older-women group; there was evidence of the seriousness of the risk presented to the applicants by ongoing climate change and proof that the applicants had, owing to their chronic diseases, already suffered harm and continued to be at particularly high risk.

313. In these circumstances, under Article 2, the State had the obligation to take appropriate steps to safeguard the lives of applicants nos. 2-5 and of the members of the applicant association. This related, in particular, to the positive obligation of the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. In the applicants' view, this obligation arose where there was a known and serious risk to life. However, for this obligation to arise it was not

[168] Citing AR6 (cited above), Summary for policymakers, B.1 and footnote 29.

necessary to demonstrate the existence of an imminent or immediate risk to life, which was relevant only in relation to an operational duty, and that duty was not at issue in the present case.

314. In any event, there was an immediate risk posed by climate change related to the adverse events to which it led, as had been demonstrated with sufficient scientific evidence. Even assuming that there was any lack of certainty as to the effects of climate change, consistent with the principle that the Convention could not be interpreted in a vacuum, the precautionary principle would have to be applied, so as to encompass the concepts of directness, inevitability and irreversibility.

315. The applicants argued that they had provided sufficient evidence to demonstrate the facts as regards the causal link between the respondent State's failure to tackle climate change and the physical and psychological effects on them. As regards the causation test, they stressed that the fact that multiple States were responsible for GHG emissions did not absolve the respondent State of its responsibility. The causal test that should be applied in the context of climate change was whether there was individual, partial or joint responsibility to contribute to the fight against dangerous climate change (which they considered to be in line with Article 47 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts[169]). In this context, partial responsibility arose from partial causation, even if a single State could not prevent an outcome on its own. This accorded with the Court's approach to causation in the context of the rejection of the "but for" test (citing, *inter alia*, *O'Keeffe v. Ireland* [GC], no. 35810/09, § 149, ECHR 2014 (extracts)) and with the approach taken at the level of national jurisdictions in the context of climate-change litigation. Moreover, in this latter context, the argument of States that their emissions were only a small contributing cause to climate change (the so-called "drop-in-the-ocean argument") had been rejected. That could not absolve the State of its responsibility. Indeed, a single State's actions in combating climate change contributed substantively to creating the mutual trust necessary for other States to act.

(ii) Article 8 of the Convention

316. The applicants argued that the serious threat to their health, well-being and quality of life posed by dangerous climate change sufficed to trigger positive obligations under Article 8, which would also have been the case even if their state of health had not deteriorated or had not been seriously endangered. In the applicants' view, Article 8 included their right to personal autonomy and their right to age with dignity.

317. When examining the applicability of Article 8, the Court should have regard to the fact that the relevant circumstances and data established the real

[169] International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001 ("ILC Articles").

and serious risk posed by climate change-induced heatwaves to their health and well-being. The respondent State was aware of the real and serious risk of harm to the applicants. The applicants considered that they had established a direct causal link between the respondent State's omissions contributing to climate change and its harmful effects on them. In any event, proof of a direct causal link was not a necessary precondition for Article 8 to be engaged (citing *Tătar v. Romania*, no. 67021/01, § 107, 27 January 2009).

318. The applicants rejected the possibility that the respondent State could take the position that increased temperatures caused by climate change should be treated as a normal part of everyday life. The extreme consequences of climate change and the fact that Switzerland had engaged itself under international law to take steps to mitigate its effects showed that it was anything other than part of "normal life". Referring to their submissions under Article 2, the applicants argued that the cumulative effects of all the consequences they had already experienced and would experience showed that the necessary threshold for applicability of Article 8 had been reached.

(d) Merits

319. The applicants submitted that under Article 2 of the Convention the Court needed to determine whether, given the circumstances of the case, the State had done all that could have been required of it to prevent their life from being avoidably put at risk (citing *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III). The risks climate change posed to the lives of applicants nos. 2-5 and the other members of the applicant association were comparable to, and potentially greater than, those with which the Court had been faced to date. In particular, in view of the magnitude of the risks posed by climate change, the clear science, the urgency of the situation and the clear ultimate objective of the UNFCCC, the State had a positive obligation to take all measures that were not impossible or disproportionately economically burdensome with the objective of reducing GHG emissions to a safe level. The situation required the State to do everything in its power to protect the applicants.

320. The scope of the respondent State's obligation to protect derived in particular from relevant rules and principles of international law, evolving norms of national and international law, and the consensus emerging from specialised international instruments and from the practice of Contracting States. Having regard to the harmonious interpretation of the Convention taken together with these considerations, the applicants argued that to comply with its positive obligation to protect them effectively, the State was required to do everything in its power to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels. This necessarily included establishing a legislative and administrative framework to achieve that objective. The principle of harmonious interpretation also helped to clarify the ambiguity around the respondent State's exact "fair share" of the

required global mitigation effort, and the question whether the scope of the obligation to protect extended to emissions occurring abroad. In this respect, the commitments undertaken by the State under the UNFCCC and the Paris Agreement were of particular importance as they, together with the IPCC findings, demonstrated the State's knowledge of the real and serious risk of harm posed to the applicants by climate change, including extreme heatwaves. Moreover, the relevant scientific studies and the established standards[170] needed to inform the scope of the State's obligations.

321. In view of these considerations, the applicants contended that the respondent State had failed to take the necessary steps to mitigate the harm and risk to them caused by climate change. Specifically, it had done significantly less than its share to prevent a global temperature increase of more than 1.5°C. Contrary to what was required, the Swiss climate strategy was not in line with the 1.5°C limit. Instead, there was a long history of failed climate action. Also, the State had failed to set any domestically binding climate targets for 2030 and 2050 and had failed to meet its (inadequate) 2020 climate target. The mitigation potential in Switzerland remained largely unused, partly without any justification, partly on the justification of high costs, which was not evidenced and was – in so far as Switzerland was concerned – not a relevant consideration. The applicants stressed that the burden of proof was on the Government to demonstrate, using detailed and rigorous data, that the State had taken the necessary action. However, in Switzerland, the decisions had not been based on scientific studies and the State had in fact decided to dispense with its consultative body on climate change which had pointed to the inadequacy of the climate targets as long ago as 2012.

322. With respect to the Government's explanation as to Switzerland's failure to determine a national carbon budget – and thus to establish its climate policy on the basis of a quantitative assessment (see paragraph 360 below) – the applicants were of the view that there were fundamental misconceptions underlying the State's approach.

323. In this connection, the applicants had commissioned an expert report[171] to assess the methodology used in the 2012 Policy Brief on which the State relied[172]. The expert report applied the methodology of the Policy Brief to the remaining global 1.5°C budget from the IPCC's AR6 and determined a remaining budget for Switzerland of 381 Mt CO_2e from 1 January 2022 onwards. The expert report calculated that, based on Switzerland's current and planned emission reduction targets, this budget would be depleted by between 2030 and 2033. On the basis of its current and planned targets, Switzerland would apportion itself 0.2073% of the remaining

[170] Citing, *inter alia*, the 2015 Oslo Principles on Global Climate Change Obligation.
[171] Robiou du Pont and Nicholls, "Calculation of an emissions budget for Switzerland based on Bretschger's (2012) methodology" (2023).
[172] See footnote 180 below.

global CO_2 budget as of 2022, compared to a population share of 0.1099%. For Switzerland to stay within the budget as defined by the methodology of the Policy Brief, it would need to achieve net-zero emissions by 2040, and thus well before its current target of net zero by 2050. The expert report also noted several shortcomings of the methodology in the Policy Brief which made it unsuitable to inform "fair share" targets for countries.

324. The IPCC had also engaged with assessments of effort-sharing methodologies. In its most recent AR6, the IPCC had explicitly recognised the importance for countries to explain how fairness principles were "operationalised" and to express their targets in terms of the portion of the remaining global budget.[173] The same approach of the necessity to quantify a State's fair share had been followed in the national climate litigation in Germany and the Netherlands. On the other hand, and as regards the respondent State's reliance on the IPCC's global emission reduction pathways, the applicants stressed that it had been recognised by the IPCC itself that these could not be taken as explicit assumptions about global equity, environmental justice or intra-regional income distribution[174].

325. The studies provided by the applicants – notably by the CAT and Climate Analytics[175] and Rajamani et al. – provided an appropriate common ground for the applicants' submissions. They built upon the assessment of effort-sharing studies as reported by the IPCC in its AR5, updated with more recent studies and historical data. They therefore covered an even broader spectrum of effort-sharing methodologies as compared to the AR4 assessment. In contrast, the respondent State had not provided *any* quantified justification for the fairness of its emission target. Its reliance on an approach that came close to a budgetary approach was flawed and clearly insufficient. Upon the applicants' explicit request for it to do so, in a letter of 10 March 2021, the FOEN had, however, failed to demonstrate that in its assessment of Switzerland's climate policy it had relied on the Policy Brief or the internal assessment now provided by the Government before the Court, which were in any event documents based on flawed methodology (see paragraph 323 above).

326. The effort-sharing studies provided by the applicants only determined the "fair share" level of emission reductions for a country, and whether these reductions needed to be achieved domestically. Alleged technical difficulties and the high costs of reducing emissions within the respondent State's territory were irrelevant for the determination of the level of responsibility for overall emission reductions, which could also be achieved through supporting countries with lower levels of responsibility and

[173] Citing AR6 WGIII (full report), p. 1468.
[174] AR6 SYR (cited above), p. 29.
[175] The applicants provided letters by Climate Analytics and CAT of 26 April 2023 providing further explanations as regards the applied methodologies.

capability. Switzerland would therefore clearly be capable of achieving the requisite mitigation measures.

327. In short, the applicants submitted that Switzerland's action to tackle climate change was inadequate for the following reasons: (a) Switzerland had failed to legislate for the minimum possible requisite emissions reduction targets for 2020, and had then failed to meet that inadequate emissions reduction target; (b) the 2030 proposed target was manifestly inadequate and had not even been given legislative effect; and (c) Switzerland's 2050 proposed target was inadequate in so far as it did not commit Switzerland to net-zero domestic emissions and this too had not yet even been given legislative effect.

328. Against the above background, the applicants contended that the State had failed and continued to fail to protect them effectively, in violation of their right to life under Article 2 of the Convention.

329. The applicants also pointed out that in environmental matters, the scope of the positive obligations under Article 2 largely overlapped with those under Article 8 (citing, *inter alia*, *Kolyadenko and Others*, cited above, § 216). They therefore considered that the same considerations outlined above concerning Article 2 also applied to their complaint under Article 8. In addition, as regards a fair balance between the competing interests of the individual and the community as a whole (which was of relevance under Article 8), the applicants stressed that in the present context there was no conflict of interest. On the contrary, it was in the interests of the community as a whole that the State adopt preventive measures to reduce the likelihood of global temperatures exceeding the 1.5°C limit, as provided in the Paris Agreement. However, it would be a misrepresentation of their complaint to consider that they sought from the Court for the Paris Agreement to be applied. They only asked the Court to rule on whether Switzerland had violated their rights under the Convention.

330. The scope of the State's margin of appreciation was limited because the complaint concerned an issue of compliance with international standards recognised by the State itself. It also concerned the risk of a man-made disaster and a violation of fundamental rights protected by Article 2 of the Convention. The urgency of the situation and the risk of irreversible harm also pointed to a narrow margin of appreciation. While the applicants accepted that it was for Switzerland to decide what measures to take to give effect to targets and to that extent it had a margin of appreciation, no such margin existed in relation to the fixing of the targets themselves, nor the need for legislation to give them practical effect. This was because there was only one way to prevent the 1.5°C limit from being breached and that was for global emissions to not exceed the remaining carbon budget, which should be shared fairly between States.

331. The scope of the respondent State's obligation to protect under Articles 2 and 8 needed to be interpreted in the light of the relevant

international instruments, which manifested an international trend (and international obligations) on the measures that needed to be taken to address the serious and profound risks of climate change. This related, in particular, to the commitments undertaken by the State under the UNFCCC and the Paris Agreement, as well as the 2021 Glasgow Climate Pact which had confirmed 1.5°C as the primary global temperature rise ceiling.

332. The prevention principle and the precautionary principle were important sources in determining the scope of the obligation to protect through harmonious interpretation of the Convention (citing Article 3 § 3 of the UNFCCC and the Draft Articles on Prevention of Transboundary Harm[176]). The requirements of "prevention" and "precaution" covered the full range of preventive measures, whether taken in the context of scientific uncertainty or not. In its case-law, the Court had also referred to the precautionary principle (citing *Tătar*, cited above, §§ 109-20).

333. Further important sources for determining the scope of the obligation to protect through harmonious interpretation of the Convention were evolving norms of national and international law and the consensus emerging from specialised international instruments and from the practice of States. Over the past decade, a wide range of judicial, quasi-judicial and other institutions at the national, regional and international level had recognised the significant impact that climate change was already having, and would have in future, on the enjoyment of a wide range of human rights, including the rights to life and health. In this respect, the UN General Assembly Resolution 76/300 was to be seen as a major and recent development at the international level which explicitly recognised "the right to a clean, healthy and sustainable environment as a human right". All the Contracting States had voted in favour of this Resolution. The common ground could also be seen in the European Climate Law[177], which contained the agreement as to the minimum emissions reductions that had to be made and which was far more ambitious than the reductions envisaged by Switzerland.

334. As scientific developments had shown, there was now no doubt as to the catastrophic implications of climate change and the real urgency of taking the necessary measures to address it. This had been recognised in the UNFCCC. However, since its adoption, the urgency had increased significantly, as recognised in the need for and adoption of the Paris Agreement. The scientific consensus now was that there remained very little time, if any, to prevent catastrophic temperature increases. Accordingly, in the applicants' view, in construing and applying Convention rights, the Court had to have regard to this scientific consensus: that climate change had existential implications for life on Earth, that there was a real risk of exceeding critical further thresholds known as "tipping points", and that

[176] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, 2001.
[177] Regulation (EU) 2021/1119, cited above.

significant climate change mitigation measures had to be taken as a matter of extreme urgency to avoid the most catastrophic impacts, even if all impacts could no longer be avoided.

335. Although the applicants could agree that adaptation was also crucial, it was not an answer to what Switzerland should have done to mitigate climate change. Even with adaptation measures, there would be increases in heat-related mortality overall, and with increasing temperatures, the potential for adaptation was increasingly limited.[178]

336. It was widely recognised internationally that averting climate change was an inherent part of the obligation on States to protect human rights.[179] This had also been recognised at the national level by the domestic courts. Were the Court to decide that those domestic courts had been wrong in their analysis that the failure of States and corporate entities to take sufficient measures to mitigate climate change engaged (and indeed on the facts of those cases, violated) Articles 2 and 8 of the Convention, that would amount to a significant setback in tackling climate change. The risks associated with such a setback could not be adequately averted by a possible reliance by the Court on the fact that under Article 53 of the Convention, domestic courts were entitled to go beyond what was required by the Convention.

2. The Government

(a) Preliminary remarks

337. The Government pointed out that global warming was one of the most important challenges for humanity. It had already created effects in different regions of the world and would certainly be felt even more in the future. There was therefore urgency to put in place, and effectively apply, a series of measures to tackle climate change and to limit its effects to the maximum possible extent. Only collective action by the States, combined with the individual effort of citizens, could provide a durable solution to the effects of global warming. Switzerland, as an Alpine State particularly affected by climate change, had already recognised the problem of global warming and had taken various measures to address it. However, it was important to note that globally Switzerland's contribution to GHG emissions was only some 0.1%.

338. While the Government accepted that in democratic societies the public legitimately sought to put pressure on the authorities to address climate change, they were of the view that the system of individual application under the Convention was not the appropriate means to do that given, in particular, the principle of subsidiarity. The democratic institutions in the political

[178] Citing AR6 WGII (cited above); study Rupert Stuart-Smith, Ana Vicedo-Cabrera, Sihan Li et al., "Quantifying heat-related mortality attributable to human-induced climate change" (2023).
[179] Citing HRC, *Daniel Billy et al. v. Australia*, cited above.

system of Switzerland provided sufficient and appropriate means to address concerns relating to climate change, and a "judicialisation" of the matter at the international level would only create tension from the perspective of the principle of subsidiarity and the separation of powers. In any event, the Court could not act as a supreme court for the environment, given, in particular, the evidentiary and scientific complexity of the matter. In the present case the Court could examine the facts relating to climate change only up to 5 May 2020, which was the date of the final domestic court decision in the applicants' case, since the period after that date had not been examined by the domestic courts.

339. Moreover, the present case could only be relevant in so far as Articles 6 and 13 were concerned in relation to a complaint that the domestic courts had not examined the merits of the applicants' complaint (owing to their failure to meet the admissibility requirements). However, as regards Articles 2 and 8 of the Convention the Court could not act as a first-instance court concerning climate-change issues.

(b) Victim status

(i) The applicant association

340. The Government noted that in the present case the domestic courts had left open the question whether the applicant association had victim status. However, it was clear that nothing prevented the applicant association from exercising its activities in the realisation of the objectives for which it had been established.

341. They further stressed that since the Convention did not recognise the possibility of an *actio popularis* complaint, associations could not have victim status unless they were directly affected by the impugned measure. Moreover, some Convention rights could not, by definition, be exercised by associations. In the Government's view, the applicant association could not claim to be the victim of a violation of Articles 2 and 8 as it could not rely on the right to life or the right to respect for private and family life.

(ii) Applicants nos. 2-5

342. The Government accepted that heatwaves (temperatures above 30°C for several days and not falling below 20°C at night) could pose a health risk and could even be fatal for older persons or those suffering from (chronic) illnesses, pregnant women or young children. However, studies had found that not all deaths caused by heat were linked to global warming. While applicants nos. 2-5 belonged to one of the categories at risk from heatwaves, the exact age of the person concerned was only one factor, which made it impossible to take all older persons as a single category at particular risk. It would not appear that women were at a higher risk compared to men of the same age. In any event, it was not possible to establish the victim status of an

applicant solely on the grounds that he or she belonged to a vulnerable group. In the present case, the applicants had failed to demonstrate the existence of a sufficient link between the harm they had allegedly suffered (or would suffer in the future) and the alleged omissions on the part of the State. Their complaint was essentially of an *actio popularis* nature.

343. As regards the individual circumstances of applicants nos. 2-5, the Government considered that the impugned effects they had suffered had not been sufficiently specific to them, nor of a sufficient intensity for them to be accorded direct victim status under the Convention. Thus, for instance, the adaptation to heatwaves they needed to make were a common feature during heatwaves which affected the rest of the population as well, and it had not been sufficiently demonstrated that the health issues from which the applicants suffered were linked to the alleged omissions and actions of the State. Moreover, the applicants' different health issues had either not been solely related to heatwaves or their complaints in that respect had been vague.

344. As regards the applicants' status as potential victims of a violation of Articles 2 and 8, the IPCC work had demonstrated that a real risk of them seeing their rights under Articles 2 and 8 of the Convention violated in the near future could not be established. Acknowledging potential risks for the future was uncertain and raised the question whether the applicants, who were women already over the age of 80, would themselves be individually affected by the effects invoked when global warming reached 1.5°C in 2040 in line with the relevant predictions. The further away the date damage would occur was, the more uncertain it was that it would occur and what the impact on the persons concerned would be.

345. In view of these considerations, the Government considered that the applicants were neither direct nor potential victims under Articles 2 and 8 of the Convention.

(c) Applicability of the relevant Convention provisions

346. The Government maintained that the applicants had not established a causal link between the alleged omissions of Switzerland and the interferences with their Articles 2 and 8 rights. Global warming was a global phenomenon and only resolute action by all States, combined with changes in behaviour on the part of private actors and all citizens, could make it possible to find lasting solutions to this immense challenge. GHG emissions were caused by the community of States and different States emitted different GHG emissions. Given Switzerland's current low GHG intensity, the omissions imputed to Switzerland were not of such a nature as to cause, on their own, the suffering claimed by the applicants and to have serious consequences for their lives and private and family life. There was therefore not a sufficient link between polluting emissions and the respondent State to raise the question of its positive obligations under Articles 2 and 8 of the Convention.

(i) Article 2 of the Convention

347. As regards more specifically Article 2, the Government argued that although the reality of the dangers linked to global warming was obvious, the applicants had failed to demonstrate the existence of an "imminent" risk to their lives, necessary to trigger the applicability of that provision. In addition, the gravity of the adverse effects of global warming was not such as to reach the necessary intensity for Article 2 to come into play.

(ii) Article 8 of the Convention

348. With respect to Article 8, having regard to the fact that the Court had recognised that serious damage to the environment could affect the well-being of a person and deprive him or her of the peaceful enjoyment of his or her home in such a way as to harm his or her private and family life, the Government could not completely exclude that this provision might apply in the context of climate change. Indeed, it was well known that the acceleration of global warming was an extremely worrying phenomenon for humanity and that it resulted from CO_2 emissions of human origin. Global warming was undoubtedly likely to impact the quality of life of individuals, even if their health was not seriously endangered.

349. However, global warming had not reached the necessary level to create a tangible effect on the private and family life of applicants nos. 2-5, including on their mental well-being. The applicants had not argued that GHG emissions were directly harmful to their health. They had rather argued that these emissions caused global warming and heatwaves which would be harmful to their health. However, the applicants were not constantly exposed to such effects and thus affected in their daily lives. Moreover, there were simple measures of prevention that could be taken in order to reduce the mortality risk during heatwaves.

350. In these circumstances, the Government expressed doubts as to the applicability of Article 8 but considered that this question could be left open given their arguments on the merits of this complaint.

(d) Merits

351. The Government argued that in a technical and complex area such as climate change, the State needed to have a wide margin of appreciation and the Court's scrutiny should be limited to verifying that there had not been a manifest error in the assessment by the State. As for the factors to be taken into account in this context, the Government stressed that global warming posed unprecedented questions and challenges of a high degree of complexity. The problem also included difficult social and technical issues. Its treatment required the study of scientific data and a risk assessment. The choice of the best means to combat global warming was delicate and should take into account many different, even competing, interests. Measures to

protect the climate could also restrict fundamental rights and individual freedoms. It was therefore necessary to find the most appropriate solutions after balancing all the interests at stake. Operational choices required setting priorities, including in the allocation of resources. In accordance with the principle of subsidiarity, the definition and choice of the measures to be taken, the range of which was wide, fell within the competence of national governments and parliaments as well as, in the case of Switzerland, within a system of direct democracy and choice of the people. This all spoke in favour of according a wide margin of appreciation to the State in the present case.

352. As regards the principle of harmonious interpretation of the Convention, the Government were of the view that it could not be used to fill an alleged gap in the international legal framework in relation to climate change and – as the applicants in reality wanted – to circumvent the mechanism established under the Paris Agreement by seeking to establish an international judicial control mechanism to review the measures to limit GHG emissions. Indeed, when negotiating the Paris Agreement, the parties had decided not to create a binding mechanism of control of States' commitments. Thus, the applicants could not seek for such a mechanism to be established under the Convention, particularly since not all the parties to the Paris Agreement were parties to the Convention, which risked creating inequality between them should issues regulated by the Paris Agreement be subject to judicial control under the Convention. It followed that the issues of climate change would be better addressed under international instruments other than the Convention.

353. However, if the Court considered that it should take some international instruments on climate change into account, all these instruments were the result of negotiations between sovereign States and provided for a collective objective and individual obligations, leaving various aspects of the matter to the discretion of the States. This was, in particular, the case for the UNFCCC and the Paris Agreement.

354. The Draft Articles on Prevention of Transboundary Harm were not of direct relevance for the present case given that it did not concern transboundary harm. Similarly, the European Climate Law was not relevant as Switzerland was not a European Union member State and, in any event, that document post-dated the domestic courts' decisions. As regards the developments under UN General Assembly Resolution 76/300, the Government stressed that this was not a legally binding document. The same was the case for Recommendation CM/Rec(2022)20 (cited above) and the current work being carried out by the Council of Europe in the field of climate change.

355. In this context, noting that the Convention did not guarantee the right to a healthy environment, the living-instrument doctrine did not allow the Convention to be interpreted in a way that undermined the basic principles of the system, such as the principle of subsidiarity. The living-instrument

doctrine could not be invoked to justify a radical change in the Court's case-law which would disregard the situation prevailing in the High Contracting Parties. It was in this light that the evolutive interpretation of the fundamental rights at the national level in the field of climate change (notably in the Netherlands, Ireland, France and Germany) should be viewed.

356. As regards the substance of the State's obligations, Switzerland had put in place an adequate legislative and administrative framework aimed at ensuring a reduction of GHG emissions and was committed to adapting this framework depending on the evolution of the situation, scientific discoveries and political and legal developments. The series of measures put in place at the domestic level were compatible with the objective of the Paris Agreement.

357. The Government further explained that the various actions taken at the domestic level demonstrated the desire to be within the range indicated by the IPCC to contribute to stabilisation of global warming at 1.5°C. The adoption of the net-zero emissions target by 2050 would be used as the starting-point for the development of a long-term climate strategy. The fact that the new CO_2 Act had been rejected in a referendum did not mean that Switzerland was not committed to tackling climate change or that its NDC had changed. In fact, citizens had not rejected the idea of the necessity of combating global warming but rather the proposed means to do so. Moreover, the Federal Council had envisaged a series of measures aimed at finding other solutions. In any event, it was within the State's margin of appreciation to find the best means to address climate change and Switzerland and its population were best placed to find the appropriate solutions. Since Switzerland had fulfilled, and had undertaken to fulfil, fully its commitments under the Paris Agreement, it had not exceeded and would not exceed its margin of appreciation.

358. The Government also argued that Switzerland had met its international objective under the Kyoto Protocol (to reduce GHG emissions between 2013 and 2020 by an average of 15.8% compared to 1990) by, in particular, reducing its emissions by an average of 11%. Moreover, at the national level, the objective set out in the existing CO_2 Act (20% by 2020 compared to 1990) had only been negligibly missed (19% GHG reduction). In this connection, however, it was important to bear in mind that the costs of reducing GHG emissions in Switzerland were high as the only sectors where reductions could be made were the housing and transport sectors, which required longer periods of conversion.

359. The Government were of the view that the assessments relating to the Swiss mitigation measures on which the applicants had relied – notably by the CAT, Climate Analytics and Rajamani et al. (2021) (see paragraph 325 above) – had been based on subjective hypotheses and could not be taken as suggesting that the pathway set by the State could not be achieved. In particular, the CAT's classification of countries into categories was debatable, and the methodology unclear. The CAT itself had acknowledged

that there was no single, agreed framework for what constituted a fair contribution to global efforts. And some studies used other methodologies. As regards Climate Analytics, its analysis did not propose a statistical range in their projections and the modelling was practically linear, with a starting-point in 2020 and an end point in 2030. It was not clear how Climate Analytics had accurately calculated a modelled pathway for 1.5°C warming. Climate Analytics had analysed the rejected amendments to the CO_2 Act, however, there was a new law that would be subject to a popular vote in 2023. Climate Analytics had not taken into account bilateral agreements into which Switzerland had entered with other countries concerning mitigation measures and had suggested reductions in GHG emissions which would have put a disproportionate strain on the domestic system. For its part, the study of Rajamani et al. (2021) had been based on considerations of various principles of international environmental law and was therefore partially subjective and also suggested measures which would have placed a disproportionate strain on the domestic system.

360. In any event, there was no established methodology to determine a country's carbon budget or a country's "fair share".[180] Switzerland had not determined a specific carbon budget, although its national climate policy could be considered as being close to an approach of establishing a carbon budget. Swiss climate policy was based on the relevant internal assessments[181], and through its NDCs Switzerland had determined its carbon reduction targets and was on a clear trajectory to achieving net-zero emissions by 2050. The Swiss NDC reflected its fair share through the principles of: responsibility (having regard to the low global contribution to GHG emissions), capacity to contribute to the resolution of the problem of climate change, and the potential to bear the financial burden of measures to reduce GHG emissions.

361. The adaptation measures were also important in this context, particularly since Switzerland could not prevent global warming through its own efforts alone. Switzerland had put in place various effective adaptation measures. Thus, the mortality rates linked to heat had been much lower in 2018 and 2019 when compared to the period between 2003 and 2015. There had been various initiatives at the cantonal and federal level to raise awareness about the risks posed by global warming and heatwaves.

362. The legislative and decision-making process concerning the development of measures to reduce Switzerland's GHG emissions had been characterised by openness and total transparency. There had also been the systematic inclusion of surveys and scientific studies as well as very broad

[180] Citing, in this context, study L. Bretschger, "Climate Policy and Equity Principles: Fair Burden Sharing in a Dynamic World", Center of Economic Research at ETH Zurich, Policy Brief 12/16, March 2012.

[181] Citing an internal document (available to the Court) "Klimawandel und das Pariser Abkommen: Welcher NDC der Schweiz ist 'fair und ambitiös'?" (2020).

participation of all interested stakeholders. A referendum on the matter had also been organised. The system of direct democracy in Switzerland was not a threat to minorities but rather a means of their integration and protection.

363. The above-noted efforts at the domestic level had been in line with the principles set out in the Aarhus Convention, although it had only later come into force as regards Switzerland (1 June 2014) and did not provide for such details as the necessity to have scientific studies when engaging public participation. Public participation and information had also been ensured by other means, notably through the Consultative Body on Climate Change (*Organe consultatif sur le changement climatique*) and the National Centre for Climate Services, as well as on the basis of the principle of transparency in the work of the administration.

364. In so far as the applicants relied on the principle of precaution, this principle had not been established as an uncontroversial rule of international law and had in fact been relied upon by the Court only in a rather specific context in the *Tătar* case (cited above). While the Government accepted that the precautionary principle could shed some light on the positive obligation of States under Articles 2 and 8 of the Convention, it considered that this principle was too vague to properly guide the decision-making process. In any event, Switzerland had never relied on scientific uncertainty in order to delay the adoption of measures in the field of climate change. Similarly to the principle of precaution, the principle of intergenerational solidarity had not been established as a rule of international law and was, in any event, irrelevant in the present case.

365. In sum, the Government argued that Switzerland had complied with its obligations under Articles 2 and 8 of the Convention and that the applicants' complaints should be declared inadmissible as manifestly ill-founded.

B. The third-party interveners

1. Intervening Governments

(a) The Government of Austria

366. The Government of Austria considered it important to clarify the nature of the Paris Agreement. They stressed that only some provisions of the Agreement were legally binding (Articles 2-4) while others were recommendations. The Paris Agreement provided that each State could autonomously define its intent to reduce emissions as regards quantity and means, on the basis of the respective national circumstances (the concept of "self-differentiation"). Moreover, the obligations under Articles 2 to 4 of the Agreement were obligations of conduct, and not of result. The Agreement did not provide for legal sanctions for non-achievement of the reduction goals or for non-compliance with the NDCs. In the intervening Government's view,

the present application represented an attempt to make the Paris Agreement justiciable and, *de facto*, to introduce the possibility for an application under the Convention in relation to the Agreement, which would not be in line with the very nature and purpose either of the Convention mechanism or the Paris Agreement. There was no room to establish the right to a healthy environment under the Convention and, in any event, it was not possible to do so under the Paris Agreement. Moreover, as to any relevance of the precautionary principle, it was not a universal principle under customary international law.

(b) The Government of Ireland

367. The Government of Ireland recognised the severity of the threat facing the global community as a result of climate change and the imperative for urgent action to address that threat. However, they considered that the response should be an effective global response and that the Court could not engage in a form of law-making and regulation which would bypass the role of the democratic process and institutions in the response to climate change. The intervening Government further argued that any notion of jurisdiction in this context should be territorial. They also considered that an association could not claim victim status under Articles 2 and 8 by reason of a risk to life and health, and that the age factor could not be sufficient to regard a group of applicants as victims in relation to climate change. Furthermore, the intervening Government pointed to the high threshold necessary for Articles 2 and 8 to apply in this context. They also submitted that, in accordance with the principle of subsidiarity and the wide margin of appreciation, the Court's main role in environmental claims was the procedural assessment of the decision-making process and only in "exceptional circumstances" should the Court proceed to a substantive assessment of environmental policy.

368. While the intervening Government accepted that the Convention should be interpreted in harmony with other norms of international law, they suggested that the current state of international law under the UNFCCC and the Paris Agreement should serve to inform the limits of the scope of obligation arising under the Convention. The Convention should be interpreted in line with, and in the light of, these specialised international instruments which were the more pertinent reference points in the field. The interpretation adopted by one or more domestic courts – particularly where it went beyond the settled case-law of this Court – could not be regarded as setting the standard under the Convention.

369. In sum, the intervening Government were of the view that the present application sought to create a far-reaching expansion of the Court's case-law on the admissibility and merits of Articles 2 and 8, that it sought to bypass the democratic process through which climate action should take place if it was to be legitimate and effective and that the application was inconsistent

with the dedicated international framework governing climate change to which the Contracting Parties were committed.

(c) The Government of Italy

370. The Government of Italy considered it important to stress that the Court's jurisdiction was primarily territorial. In their view, the "special" circumstances of a given case did not, as such, imply extraterritorial jurisdiction, nor was the "living instrument" principle of interpretation applicable to Article 1 of the Convention. Furthermore, in order to claim victim status as regards environmental damage and risk, the applicants would have to show that they were directly affected, and mere conjecture of a violation would not suffice. In order for Article 2 to apply, life should be put at risk, and from the perspective of Article 8 the adverse effects of environmental pollution should attain a certain minimum level of seriousness. In any event, in difficult and technical spheres, the State enjoyed a wide margin of appreciation.

(d) The Government of Latvia

371. The Government of Latvia were of the view that the international consensus on the need to tackle climate change created a very wide margin of appreciation for the States in the determination of what the appropriate balance of the competing interests should be. The choice of means and terms within which they ought to be implemented belonged to the State concerned. The principle of subsidiarity underpinning the Convention system was of particular importance, especially in the context of a possible application of Article 46 of the Convention. In the present context the Court's jurisdiction should be territorial and any developments at the international level should not be interpreted as extending that jurisdiction. While the intervening Government agreed that the relevant international instruments on climate change should be taken into account by the Court in determining the scope of States' obligations under the Convention, the Court could not establish an autonomous right for individuals to request that States adopt specific actions and measures or policies to tackle climate change, as such a right did not exist in the international instruments in question.

(e) The Government of Norway

372. The Government of Norway stressed that Norway was deeply committed to reducing national emissions and contributing to the global long-term target set out in Article 2 of the Paris Agreement. However, establishing climate and energy policy should be predominantly a political and democratic exercise. The Convention was not an instrument for the protection of collective interests, and the Court was not a supervisor of society-wide policy decisions. There was no legal basis for the expansion of

the territorial, personal, and material scope of the obligations under the Convention in the present context as that would run counter to the principle of subsidiarity and the State's margin of appreciation. In particular, there was no basis to extend the notion of territorial jurisdiction in the present climate context, or to call into question the Court's rejection of the "cause and effect" notion of jurisdiction. The various international instruments on climate change had no bearing on the interpretation of the Convention. They rather reflected the fact that the sovereign States retained their competence in the field of climate change. This was also evidenced by the fact that the Council of Europe member States were actually negotiating to decide whether they wished to introduce enforceable rights pertaining directly to the environment and climate. In any event, at present, the right to a healthy environment was not recognised as a rule of customary international law. When adopting UN General Assembly Resolution 76/300, Norway had made it clear that that Resolution had provided for a political recognition and that it had not had any legal effect.

(f) The Government of Portugal

373. The Government of Portugal recognised the urgency of climate change but stressed that it was for the States to take the initiative and put in place the relevant strategies to tackle climate change. With respect to the Convention requirements for establishing victim status, the intervening Government stressed the necessity for the applicants to provide evidence to show that they were directly affected by the measure complained of in the context of climate change. Thus, as regards the applicants belonging to a particular age group, they would need to demonstrate that: (a) there was an actual inaction on the part of the authorities, (b) such an inaction or omission actually affected differently distinct groups or segments of the population, and (c) this inaction amounted to a failure to afford effective protection against the effects of climate change. Moreover, as regards the applicability of Articles 2 and 8 of the Convention in the context of the environment, the measure complained of should reach a minimum threshold of severity. There should therefore be a real and imminent risk to life or health, or a direct and serious effect on an applicant's right to respect for his or her private and family life or home. The intervening Government also stressed that the Paris Agreement essentially established procedural obligations and the substantive obligation was only for the States to take appropriate measures to achieve the aims pursued. However, the Paris Agreement established no sanctioning or enforcement mechanism, and it was therefore questionable whether the Court had jurisdiction or competence to intervene in this context.

(g) The Government of Romania

374. The Government of Romania submitted that climate change represented a global challenge that required international reaction. It was by definition a transboundary challenge, and coordinated action – particularly at the EU level – was needed to effectively supplement and reinforce national policies. As regards the applicability of the Convention in relation to complaints concerning climate change, applicants needed to demonstrate the existence of a direct and immediate link between the effect on their rights and the impugned situation. Moreover, the violation complained of needed to reach a certain level of severity. In any event, the Convention system did not recognise the possibility of lodging *actio popularis* complaints and the Convention could not be expanded to cover the UNFCCC and the Paris Agreement. The intervening Government also considered it important that the Court should take into account the fact that national jurisdictions had often dealt with cases pertaining to climate change, in accordance with national and international standards related to the domain of environmental law. However, the Court should be mindful of its subsidiary role and the States' margin of appreciation. In the intervening Government's view, it was highly debatable whether a State or any other entity could be held directly responsible today – individually and separately from other entities – for the cumulative consequences of a process which had started more than a hundred years ago.

(h) The Government of Slovakia

375. The Government of Slovakia agreed that there was a real urgency to the need to implement a series of effective measures to combat global warming and to minimise its effects. In their view, nowadays it was commonly accepted that human rights and the environment were interdependent even to the point that it was suggested that environmental rights belonged to a "third generation of human rights". However, the Convention rights were not specifically designed to provide for a general protection of the environment as such. Given the global nature of the threat posed by climate change and its effects, it was not possible to interpret the concept of victim status under Article 34 of the Convention so as to cover every potentially vulnerable group. It would therefore be inappropriate, and could lead to an inaccurate outcome, if the Court were to try to deduce from statistical data the existence of a particular risk to a group or if it were to otherwise generalise the effects of climate change, such as global warming. The States should have a wide margin of appreciation when addressing the issues relating to climate change.

2. United Nations High Commissioner for Human Rights

376. The intervener submitted that according to the available data, Switzerland had not undertaken the efforts needed to meet the GHG

emissions reduction target for 2020. Moreover, its emission reduction target for 2030 was not compatible with climate change mitigation objectives set by the international community. With regard to victim status in climate-change cases, the intervener pointed out that international and national case-law developments suggested that the alleged victim's risk of being affected needed to be more than a theoretical possibility. However, the fact that a large segment of the population was affected by climate change did not preclude the applicants from being individually affected. The criterion of imminent harm should also be addressed holistically, taking into account the particular characteristic of slower onset impacts such as those often posed by climate change in which evolving risks could become irreparable given the extended timelines needed for effective remediation. The legal assessment of victim status had to take into account best available science. Moreover, the obligations associated with the adverse impacts of climate change required the existence of a remedial role of courts giving effect to such legal obligations.

377. The intervener also noted that the UN Human Rights Committee had "made clear that the duty to protect life also [implied] that states parties should take appropriate measures to address the general conditions in society that [could] give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity" including environmental degradation.[182] The intervener further referred to the studies finding that older persons', and in particular older women's, right to life and enjoyment of health were disproportionately affected by the adverse impacts of climate change. The enjoyment of health fell under the right to respect for private and family life and home which was in turn violated by the degradation of the environment. The States' obligations under Articles 2 and 8 should be read in the light of the precautionary principle, the principle of intergenerational equity and the duty of international cooperation.

3. United Nations Special Rapporteurs on toxics and human rights; on human rights and the environment; and the Independent Expert on the enjoyment of all human rights by older persons

378. The interveners submitted that the world faced a climate crisis. The climate emergency was causing widespread adverse impacts already and posed an existential threat to the effective enjoyment of human rights in the future. In climate cases, the interests of the individual and the community were not competing. Both the individual and the community shared a common interest in a safe climate system. This interest was common to all Convention Parties, as well as to the international community as a whole. There was therefore no room for the Court to balance between the competing

[182] CCPR, General comment No. 36 on article 6: right to life, CCPR/C/GC/36, 2019, paragraph 26.

interests of the individual and the community. When assessing whether a State was adequately carrying out its positive protective obligations to avert climate risks, the Court should be guided by scientific progress which could aid it to scrutinise the sufficiency of governmental action in the face of the catastrophic risks posed by climate change. The interveners noted that the best available science had reaffirmed the reality of anthropogenic climate change, including in respect of extreme weather events, and the necessity for an urgent and dramatic reduction of GHG emissions. The interveners further submitted that climate change had an effect on the full enjoyment of human rights of older persons. Ageing and climate change also had differential impacts when it came to gender, and older women faced a particular risk of vulnerability to climate impacts, including in relation to a greater likelihood of facing chronic diseases and air pollution harms, and had higher rates of mortality from extreme heat events.

379. Noting the legal developments at the international and national levels, the interveners stressed that the question was no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights. There was a need for a dialogue between human rights and environmental norms. To the extent that international environmental law contained customary and conventional norms and general principles which imposed substantive obligations – such as in relation to the principles of precaution and prevention of harm; the duty to conduct an environmental impact assessment; rights of access to information, participation and justice; and intergenerational equity – that enabled their use by human rights bodies. In this context, the Court's examination of the climate cases should, in particular, focus on the following: the precautionary principle (providing for a normative basis for ambitious climate action by governments, requiring them to act with determination to reduce their GHG emissions); the principle of prevention of environmental harm (duty to prevent significant transboundary environmental harm); extraterritorial human rights obligations; and the principle of highest possible ambition (premised on due-diligence requirements) set out in the Paris Agreement.

4. International Commission of Jurists (ICJ) and the ICJ Swiss Section (ICJ-CH)

380. The interveners pointed out that the fact that an applicant's climate-change action would contribute to the general public interest did not qualify that complaint as an *actio popularis*. The Court's case-law allowed for the possibility of recognising the victim status of applicants who were exposed to the broader effects of pollution, and it did not therefore require an element of immediate proximity. Moreover, it was critical to recognise the possibility for associations to bring climate-change complaints before the Court. That was mandated by the fact that in a demanding area such as climate change (in terms of costs and scientific evidence), associations were uniquely

positioned to bring such complaints to the Court. In any event, the interveners argued that in climate-related cases, which addressed the issues considered under the Paris Agreement as "a common concern of humankind", the assessment of victim status required documented scientific evidence and was thus closely linked to the substance of the applicants' complaints.

381. The interveners further submitted that it was critical to ensure that applicants had access to courts in matters concerning climate change. As regards Articles 2 and 8, scientific evidence confirmed the existence of a particular risk posed by climate change on, *inter alia*, older persons and women. The scale, intensity and imminence of the environmental damage posed by anthropogenic climate change were such as to engage Articles 2 and 8. Under those provisions, States had a positive obligation to take the necessary mitigation and adaptation measures. The State's positive obligations should be interpreted in the light of the goals established under the Paris Agreement and the precautionary principle under the UNFCCC and the Rio Declaration. In this regard, the State's margin of appreciation should be constrained by their international environmental-law undertakings, which required the implementation of NDCs and long-term strategies for reducing GHG emissions.

5. European Network of National Human Rights Institutions (ENNHRI)

382. The intervener submitted that since it was often difficult to quantify the negative effects of environmental pollution in each individual case, applicants should not need to prove a direct causal link between an environmental issue and its effect on them. Causality could be proved on the basis of statistical evidence. Moreover, the Court could take other materials into account, such as studies in scientific journals, and the reports of the IPCC should carry particular weight. The IPCC and other scientific studies had found that climate change induced by GHG emissions had already caused a significant increase in heatwave frequency, intensity and duration in Europe, and this was projected to worsen if warming exceeded 1.5°C, particularly in central European cities. Several heatwaves in Europe over the past twenty years would have been extremely unlikely to occur without human-induced climate change and extreme temperatures were likely to become commonplace by the 2040s. The negative impacts of heatwaves on mortality and morbidity were well documented and were projected to worsen with every incremental increase in warming. In Switzerland, between 1991 and 2018, 31.3% of heat-related deaths were attributable to human-induced climate change, with older women and infants being particularly affected. Older persons, especially those living in urban areas, were particularly vulnerable to heatwaves owing to both social and physiological factors. Women over 75 had the highest risk of heat-related health impacts in Switzerland.

383. The fact that climate change was caused by cumulative, global emissions did not absolve individual States from responsibility for the conduct attributable to them. Since GHG emissions caused territorial harm no matter where in the world they were combusted, a State's jurisdiction for the purposes of Article 1 of the Convention should encompass all emissions under the State's effective control. Moreover, as regards victim status, the above-noted scientific data demonstrated the existence of an immediate and direct impact of climate change on individuals and it also showed the existence of a real, rather than hypothetical, risk of future adverse impacts of climate change. Older women were a class of people particularly at risk from climate-attributed heat. In this context, as recognised in the Aarhus Convention, the environmental associations played an essential role. When examining their victim status, it was important to bear in mind that individuals might be prevented from lodging an application with the Court and effective protection of individuals' long-term interest in living in a safe environment might depend on environmental associations being able to bring complaints to protect against irreversible climate harm while there was still time to prevent it.

384. As regards the applicability of Article 2 of the Convention, GHG-induced climate change was inherently dangerous and thus the right to life might be at stake. In this context, when interpreting the immediacy of the risk to life, flexibility was required. It should also be taken into account that dangerous climate change had already posed a serious, real, and immediate risk to life, particularly for vulnerable individuals, and that every incremental increase in emissions led to further warming, with a certain and exponential increase in heat mortality. Similar considerations should be taken into account as regards the assessment of the applicability of Article 8, which applied not only where there was direct and immediate or serious and substantial risks of pollution or nuisance, but also to exposure of future environmental risks with a sufficiently close link to the enjoyment of home, private or family life.

385. The Convention was relevant to climate harm because it had to be interpreted in the light of present-day conditions. In this context, the Court had not been asked to break new ground but simply to confirm the jurisprudential developments in Europe (notably in the Netherlands and Germany) and elsewhere concerning climate change. Furthermore, scrutiny of emission cuts would strengthen democracy and that would be consistent with the requirements of international law. In the intervener's view, there would be a violation of the Convention in three instances: first, if the State adopted adaptation measures without mitigation; secondly, if the State pursued policies that undermined efforts to limit the warming to 1.5°C; and, thirdly, if the State failed to substantiate that its emission reduction measures were compatible with its fair share of the remaining carbon budget to limit the warming to 1.5°C.

6. The coordinated submission of the International Network for Economic, Social and Cultural Rights (ESCR-Net)

386. The interveners submitted that various international bodies had found that environmental degradation and climate change interfered with the enjoyment of the right to health and the right to life. In this context, the human rights mechanisms played a role in protecting human rights by ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures that could mitigate climate change. There had been national and regional judicial findings of violations of the right to a healthy environment and the right to life by the States for failing to sufficiently address climate change and reduce emissions. Older persons were particularly vulnerable in relation to climate change. There was therefore a need for States to take positive measures to ensure that this vulnerability was addressed. The States had a duty to take measures within their territories to prevent the effects of a foreseeable harm of climate change abroad.

7. The Human Rights Centre of Ghent University

387. The intervener submitted that the negative impact of climate change on human lives was increasingly recognised in international law as a human rights issue. Several international judicial and quasi-judicial bodies had outlined States' human rights obligations in this regard. Moreover, the domestic courts were increasingly recognising the links between climate change and human rights. Indeed, the past few years had seen a surge in complaints concerning climate change introduced before national courts and several pending cases had made explicit reference to the rights enshrined in the Convention. In this context, as regards the issue of causality, the domestic courts (in the Netherlands, Germany and Belgium) had held that State responsibility should be established not on the basis of causality, but on the basis of the principle of attribution, which meant that individual States were responsible, *pro rata*, for their own contribution to climate change. In the domestic litigation, the precautionary principle had also been very important when discussing the States' positive obligations, as well as the relevant climate science and the States' corresponding duties assumed under international climate-change treaties, in particular the Paris Agreement. This approach should also inform the Court's examination of the climate cases.

388. The recognition in the Court's case-law of the potentially adverse impact on human rights of environmental disasters and degradation (of both anthropogenic and natural causes) should, *a priori*, be expanded to climate change because climate change represented a longer-lasting, more forceful and potentially graver harm than more isolated, local and situational environmental damages. Similarly, the Court's existing vulnerability jurisprudence, including the rights of older people, should be acknowledged

and applied in the climate-change context. The interveners also suggested that recognising applicants as belonging to a particularly vulnerable group should lead to a narrow margin of appreciation for the States.

389. The issue of evidence was the key aspect of the climate cases. Attribution science had demonstrated more precisely the causal relationship between GHG emissions and climaterelated events. The interveners also invited the Court to recognise the specific evidentiary difficulties that applicants faced in climate-change cases and that Governments were better placed to control much of the domestic production of evidence. Thus, the burden of proof should not rest solely on the applicants. Where Governments argued that their environmental policies were sufficient to protect individuals against the adverse effects of climate change, they should be required to substantiate these assertions. Moreover, the precautionary principle could further guide the Court in setting the appropriate standard of proof.

8. Professors Evelyne Schmid and Véronique Boillet (University of Lausanne)

390. The interveners pointed out that it was important to differentiate between, on the one hand, the protective positive obligation (which addressed punctual specific threats) and, on the other hand, the positive obligation to provide a legislative and administrative framework ensuring the protection of the Convention rights (which addressed danger that was not necessarily punctual, specific and emanating from a specific source). In the present climate-change context, there was no doubt as regards the issue of attribution in terms of the responsibility of the State organs for the impugned omissions. However, when interpreting the issue of victim status under Article 34 it would be important to examine, first, the positive obligations under Articles 2 and 8, and then the link between the alleged omissions in this context and the actual applicants. Moreover, the issue of victim status should be examined in the light of the principles of prevention and precaution. In any event, by undertaking the obligations under various international climate-change initiatives, the States admitted to limiting their margin of appreciation regarding climate risks and the implementation of positive obligations under the Convention.

391. As regards the holding of a referendum concerning the issues of climate change, the interveners pointed to the principle under Article 27 of the Vienna Convention on the Law of Treaties[183] according to which a State could not invoke its internal law to justify non-compliance with its international obligations. In any event, a popular initiative could not be considered as a means to put in place the relevant obligations to protect the fundamental rights of applicants.

[183] Vienna Convention on the Law of Treaties, 1969.

9. Professors Sonia I. Seneviratne and Andreas Fischlin (Swiss Federal Institute of Technology Zurich)

392. The interveners submitted that there was a clear scientific consensus that humans had interfered with the climate system and caused global warming. There was also a clear scientific consensus on the role of global warming in the impacts and risks that were caused by climate change, notably for the most vulnerable. Impacts on health associated with increasing human-induced global warming were also well established. Limiting global warming to 1.5°C, as mentioned in the Paris Agreement, offered at present a large reduction of risk compared to higher levels of global warming (2°C or more). However, failing to halt global warming led to additional health risks and impacts for humans, especially for the most vulnerable.

393. On the basis of an analysis of the relevant GHG emissions measurements, the interveners submitted that despite some progress in climate policies made in recent years, Switzerland's contribution to human-induced climate change, including its historical responsibility, were roughly as high as, if not higher than, those of many other European countries. At the same time, Switzerland was long overdue in implementing legislation to reduce CO_2 emissions and other GHG emissions. The scientific evidence made it obvious that Switzerland was currently not contributing sufficiently to limit global warming to 1.5°C. While it was clear that no solely science-based set of criteria could be used to determine precisely and quantitatively what a country's ultimate fair share to limit global warming consisted of, in the case of Switzerland, all criteria pointed in the same direction, namely that Switzerland was obliged to make a bigger contribution than the average of all countries of which many had, for instance, a much lower consumption or historical responsibility. However, Switzerland was actually lagging behind the average of countries in a comparable situation.

10. Global Justice Clinic, Climate Litigation Accelerator and Professor C. Voigt (University of Oslo)

394. The interveners submitted that since 2015 there had been more than eighty human rights-based climate-change cases filed in courts around the world. The recurring issues in these cases were victim status and the substantive human rights obligations of States in the light of their commitments under international climate law. In the interveners' view, older persons could appropriately be considered both direct and potential victims under Article 34 of the Convention in climate cases given the climate impacts on them, notably heat, flooding and other extreme weather events, and disease, which placed them at increased risk of suffering grievous harms, including serious bodily injury and death. Moreover, NGOs could appropriately be considered victims of Convention violations owing to climate change if they could demonstrate that their personal interests had

been directly impacted by the harms alleged to violate the Convention. In any event, the Court should interpret the concept of victim status with some flexibility. The interveners also considered that the mere fact that the challenged act or omission impacted a large swath of the population – or even virtually all of the population – should not stop the Court from recognising the victim status of the particular applicants and assessing the merits of the case.

395. The interveners further submitted that the States' duties under Articles 2 and 8 of the Convention should be interpreted in the light of the provisions and commitments under the Paris Agreement. While this did not mean that the Court should be prescriptive in what the State had to do or what exact type of measures it had to adopt, it would need to determine whether the measures were adopted with due diligence, namely whether they were reasonable and adequate to prevent risk to the enjoyment of human rights from climate change. More specifically, the Court should assess whether the climate measures were at the level of the highest possible ambition and aimed at and effective for achieving rapid and deep reductions of GHG emissions so as to achieve a global net phaseout of GHG emissions around 2050, in line with the Paris Agreement.

11. ClientEarth

396. The intervener submitted that the science of climate change had shown that there were both present and future effects of global temperature increases on human health. Failing to act with sufficient urgency and scale posed grave threats to the health and well-being of current and future generations, with over nine million climate-related deaths per year projected by the end of the century. In this context, adaptation (measures to adapt to climate change and reduce its impacts) formed a vital part of States' climate-change duties. However, adaptation measures could not replace taking adequate mitigation measures (measures to reduce GHG emissions). Only with the required emissions reductions was the scale of required adaptation likely to be manageable.

397. When assessing the adequacy of action by States, the following key conclusions of the international scientific consensus on climate change were to be borne in mind: there was an urgency to reduce emissions to limit warming to 1.5ºC (the IPCC reports showed that the overall trend of global GHG emissions had not yet gone in the right direction, let alone reduced at the necessary rate); there was a likely irreversibility of temperature increases (global warming involved the risk of long-lasting and irreversible impacts); there was a real risk of "tipping points" (natural events that could result in major shifts in the scale and pace of climate change and related impacts) being exceeded and of dramatically worse impacts than under high-confidence projections; and there was a significant "lag" in the geophysical effects of

GHG emissions and in actions to transform human systems and reduce emissions.

398. The intervener also suggested that States were under a duty under international climate-change law to take the mitigation and adaptation measures arising in particular from the UNFCCC and the Paris Agreement. In this context, it would be important to develop the due-diligence standard under the Convention addressing the "highest possible ambition'" principle and the urgency of reducing global emissions. The requirement for State action in this context should include: early action on reducing emissions; credible and effective action based on binding near-term and long-term targets that aligned with a State's highest possible ambition; a "whole-systems" approach that recognised the need for action at all levels of government and in all sectors of the economy; independent expert advisory bodies to allow for effective scrutiny of the adequacy of targets and progress; and transparency regarding government plans and progress to allow for civil society scrutiny with a clear allocation of responsibilities within government to allow for accountability (including legal accountability through recourse to the courts).

12. Our Children's Trust, Oxfam France and Oxfam International and its affiliates (Oxfam)

399. The interveners submitted that the Court should base its decisions on the most up-to-date and best available scientific evidence, which meant evidence that: maximised the quality, objectivity and integrity of information, including statistical information; used multiple peer-reviewed and publicly available data; and clearly documented and communicated risks and uncertainties in the scientific basis for its conclusions. In this connection, the interveners were of the view that the 1.5°C and 2°C temperature targets specified in the Paris Agreement were the result of a political consensus and not scientific reality and were therefore insufficient to protect human rights. The Court should rather focus on the method of Earth's energy imbalance as the scientific metric for determining whether actions to combat climate change were working. In this connection, scientific consensus indicated that to restore the stability of the Earth's climate so as to protect human life and health, States should take the necessary measures to reduce atmospheric concentrations of CO_2 to an equitable and environmentally sustainable level of 350 parts per million (ppm; in 2021 this had been approximately 416 ppm and in 2022 it was expected to be even higher after the measurements were completed). While States had already overshot safe and stable levels of atmospheric CO_2, there remained a narrow window of opportunity to bring the dangerous levels of warming back down to levels that protected human life, health and well-being by the end of the century. However, immediate and ambitious action was required in order to achieve that.

400. In this connection, the interveners submitted that the Court should also act decisively and without delay. In their view, there was a solid evidentiary basis allowing the Court to reach, *inter alia*, the following critical conclusions:

(a) The rights to life and respect for private life, family life and the home under Articles 2 and 8 encompassed the right to a stable climate system that protected human life, health, and well-being;

(b) States' actions to address human-caused climate change should be based on the best available scientific evidence and therefore aligned to restore the Earth's energy balance which called on States to pursue a pathway to reduce atmospheric concentrations from current levels to 350 ppm as rapidly as possible;

(c) States whose laws, policies and commitments were not aligned with achieving the 350 ppm standard should take specific, immediate and adequate measures to phase out emissions of CO_2 and other GHG pollution and remove as much CO_2 from the atmosphere to stabilise the climate system and protect resources upon which human life, health and well-being depended. While the State had a margin of appreciation in designing the means to reach the 350 ppm standard, it had no discretion in revisiting that standard which was based on scientific evidence;

(d) Exceptional circumstances existed which would justify the Court indicating specific measures under Article 46 to guide States as to the relevant actions and pathway timetables in sufficiently specific terms.

401. The interveners also submitted that in its assessment the Court should take into account the fact that there was universal scientific consensus and research which demonstrated that climate change presented a clearly identifiable and present danger to individual life and human health. Moreover, the State authorities had been well aware of the effects of climate change. The interveners considered that it would be particularly important if the Court were to recognise under Article 2 of the Convention the right to a stable climate system which protected human life, health and well-being.

13. Group of academics from the University of Bern (Professors Claus Beisbart, Thomas Frölicher, Martin Grosjean, Karin Ingold, Fortunat Joos, Jörg Künzli, C. Christoph Raible, Thomas Stocker, Ralph Winkler and Judith Wyttenbach, and Doctors Ana M. Vicedo-Cabrera and Charlotte Blattner)

402. The interveners submitted that the Court should reaffirm the existence of the State's positive obligations to secure human rights in the environmental context. The issue of immediate and real risk from adverse climate effects should be viewed against the scientific evidence about the existing risks to older women in Switzerland from human-induced and, specifically, heat-related climate change. The scope of the State's positive obligations depended on the extent to which the risk was susceptible to

mitigation. When determining this extent, due regard should be paid to the legal landscape tasked with regulating such risks, namely the international climate-law regime. The relevant question to assess was whether the State's measures were aimed at and effectively contributed to its fair share of preventing dangerous levels of climate change.

403. As regards Switzerland's compliance with its climate commitments, the interveners argued that the relevant promises had not been met and, in particular, the commitments under the Paris Agreement had still not been incorporated into law. Switzerland's policies stood in stark contrast to scientific assessments of downscaled pathways compatible with the 1.5°C limit, even with a narrow view of ambition and progression. Switzerland had previously had no plan that would effectively contribute to mitigating global warming, and it still had no such plan. The chances that it would meet its ambitions were diminishing because the window of opportunity was closing, at the expense of the protection of especially vulnerable groups. Since the Paris Agreement had been adopted, Switzerland had made no progress on its climate targets and set no binding climate targets. In other words, Switzerland's climate policy had continuously been off track to achieve its already low mitigation targets. These were the considerations that the Court needed to take into account when assessing Switzerland's margin of appreciation and its compliance with the positive obligations under the Convention. In this context, the Court should also be mindful of the importance of access to justice and effective legislative initiative by the authorities.

14. Center for International Environmental Law and Dr Margaretha Wewerinke-Singh

404. The interveners submitted that, in the light of the principle of harmonious interpretation of the Convention, the Court should have regard to the relevant international developments, notably the recognition of the right to a clean, healthy and sustainable environment under UN General Assembly Resolution 76/300, as well as the consensus on the States' duties to avert the threat of climate change under the UNFCCC, the Paris Agreement, and best available science, in particular the IPCC reports. This best available science recognised that current levels of warming were already causing harm and infringing on human rights. Warming of 1.5°C or higher was not safe for most countries and communities. Exceeding 1.5°C even temporarily could unleash further irreversible harm such as excess deaths. The science therefore demonstrated that protecting human rights from further foreseeable climate harm required keeping warming below 1.5°C. The IPCC had shown that the most effective mitigation measures for reducing GHG emissions by 2030 – the period most important for avoiding overshoot of 1.5°C – were replacing fossil fuels with renewable energy and energy efficiency.

405. Citing scientific reports on the subject, including the IPCC Special Report, the interveners submitted that carbon dioxide removal and offset credits derived from extraterritorial activities did not deliver those reductions. The interveners considered that the precautionary principle and the principle of prevention precluded the States from forgoing available and proven measures to immediately and steeply reduce GHG emissions in reliance on speculative technologies such as engineered carbon dioxide removal that increased the likelihood of overshooting 1.5°C. To the extent that the State's climate mitigation plans relied on the purchase of carbon offset credits from conduct outside its territory or CDR technologies, they failed to satisfy the State's duties to respect and ensure the rights to life and private and family life.

15. The Sabin Center for Climate Change Law at Columbia Law School

406. The intervener submitted that the existing case-law from international and national fora demonstrated that the Court's assessment of the existence of victim status might properly be understood as a question of merit. The intervener suggested that where such a question existed courts tended to give applicants the opportunity to prove that an alleged omission by a State in mitigating climate change caused them particularised individual harms. In the intervener's view, the science was clear that climate change had widespread and dramatic negative impacts on the lives and livelihoods of individuals and communities worldwide, and it was absolutely necessary that the international community, and individual nations, drastically and in short order reduced GHG emissions. However, in Europe as elsewhere, there was a gap between what a global carbon budget demanded, the time frames and extent of countries' climate commitments, and countries' implementation of the commitments they had.

407. As regards the States' margin of appreciation, the intervener pointed out that in the comparative context courts had addressed in three different ways the issue of separation of powers relating to climate-change obligations. First, courts had found that governments were given limited deference and that courts should provide judicial review where government action or inaction threatened human rights. Secondly, courts had found that they were authorised to provide judicial review of the legality of government action or inaction, but that governments held a great deal of discretion in establishing ultimate climate targets. Thirdly, courts had found that they could not dictate particular standards or remedies on the issues of the appropriateness of a State's mitigation action (or lack thereof), even where the court might grant certain forms of declaratory relief.

16. Germanwatch, Greenpeace Germany and Scientists for Future

408. The interveners submitted that there might be four different ways to construe an interference by the State with individual rights in the context of climate change: (a) interference by GHG emissions from public services; (b) interference by omission in relation to GHG emissions from private sources; (c) the anticipatory prevention of future interference, which was a concept developed by the German Constitutional Court in its climate change case-law; and (d) interference through allocation of emission rights, which arose where the State allocated GHG emission rights to emitters and thus it should take responsibility for these emissions. The interveners further submitted that there were seven dimensions of causality in the present context: (a) certainty, which arose in relation to the IPCC reports establishing that climate change and its effects were uncontested with highest confidence; (b) individualisation of the effects on the applicant; (c) intensity, which related to the severity of the interference and which should be determined concerning effects on human health and the environment as collective goods; (d) the time element, requiring the interference to be present or imminent or immediate; (e) interdependence with the environment "as such", which, irrespective of whether the Court were to recognise the existence of a right to a healthy environment, related to the fact that its case-law had recognised a link between the Convention rights and the environment as such; (f) attribution to a State, relating to three types of emissions – emissions from the territory of a State impacting on the same territory, emissions from the territory of a State impacting abroad, and external emissions originating in/resulting from human activities in the relevant State; and (g) "drop in the ocean" or shared contributions, whereby any extent of contribution should be considered as being relevant.

409. The interveners considered that there were three criteria which could be applied to determine the level of GHG emission reduction necessary to abide by fundamental rights: (a) fair shares in the global emissions budget, which was to be established by first determining the global budget, and then determining the allocation of budgets to States that could be done either through the model used by the CAT or on the basis of the equal per capita model; (b) modelled emission pathways (which were to be derived from the measures that were consistent with the upper temperature limits) and the model of differing budgets and insufficiency of mere financial compensation in this context; or (c) exploration of the technical, economic and social capabilities, which would correspond to an obligation of the respondent State to do whatever was technically, economically and socially feasible to reduce GHG emissions. The interveners were also of the view that the principles concerning attribution and jurisdiction should be developed and refined to cover emissions caused abroad.

C. The Court's assessment

1. Preliminary points

410. At the outset, the Court notes that climate change is one of the most pressing issues of our times. While the primary cause of climate change arises from the accumulation of GHG in the Earth's atmosphere, the resulting consequences for the environment, and its adverse effects on the living conditions of various human communities and individuals, are complex and multiple. The Court is also aware that the damaging effects of climate change raise an issue of intergenerational burden-sharing (see paragraph 420 below) and impact most heavily on various vulnerable groups in society, who need special care and protection from the authorities

411. The Court, however, can deal with the issues arising from climate change only within the limits of the exercise of its competence under Article 19 of the Convention, which is to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention and the Protocols thereto. In this regard, the Court is, and must remain, mindful of the fact that to a large extent measures designed to combat climate change and its adverse effects require legislative action both in terms of the policy framework and in various sectoral fields. In a democracy, which is a fundamental feature of the European public order expressed in the Preamble to the Convention together with the principles of subsidiarity and shared responsibility (see, *inter alia*, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, *Reports* 1998-I, and *Grzęda v. Poland* [GC], no. 43572/18, § 324, 15 March 2022), such action thus necessarily depends on democratic decision-making.

412. Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government. However, democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements. The legal basis for the Court's intervention is always limited to the Convention, which empowers the Court to also determine the proportionality of general measures adopted by the domestic legislature (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts)). The relevant legal framework determining the scope of judicial review by domestic courts may be considerably wider and will depend on the nature and legal basis of the claims introduced by litigants.

413. At the same time, the Court must also be mindful of the fact that the widely acknowledged inadequacy of past State action to combat climate change globally entails an aggravation of the risks of its adverse

consequences, and the ensuing threats arising therefrom, for the enjoyment of human rights – threats already recognised by governments worldwide. The current situation therefore involves compelling present-day conditions, confirmed by scientific knowledge, which the Court cannot ignore in its role as a judicial body tasked with the enforcement of human rights. Given the necessarily primary responsibility of the legislative and executive branches and the inherently collective nature of both the consequences and the challenges arising from the adverse effects of climate change, however, the question of who can seek recourse to judicial protection under the Convention in this context is not just a question of who can seek to address this common problem through the courts, first domestically and subsequently by engaging the Court, but raises wider issues of the separation of powers.

414. The present case, and the two other cases heard by the same composition of the Grand Chamber (see paragraph 5 above), raise unprecedented issues before the Court. The particular nature of the problems arising from climate change in terms of the Convention issues raised has not so far been addressed in the Court's case-law. While the Court's environmental case-law to date (see, in particular, paragraph 538 below) can offer guidance up to a point, there are important differences between the legal questions raised by climate change and those addressed until now.

415. The Court's existing case-law in environmental matters concerns situations involving specific sources from which environmental harm emanates. Accordingly, those exposed to that particular harm can be localised and identified with a reasonable degree of certainty, and the existence of a causal link between an identifiable source of harm and the actual harmful effects on groups of individuals is generally determinable. Furthermore, the measures taken, or omitted, with a view to reducing the impugned harm emanating from a given source, whether at the regulatory level or in terms of implementation, can also be specifically identified. In short, there is a nexus between a source of harm and those affected by the harm, and the requisite mitigation measures may be identifiable and available to be applied at the source of the harm.

416. In the context of climate change, the key characteristics and circumstances are significantly different. First, there is no single or specific source of harm. GHG emissions arise from a multitude of sources. The harm derives from aggregate levels of such emissions[184]. Secondly, CO_2 – the primary GHG – is not toxic *per se* at ordinary concentrations[185]. The emissions produce harmful consequences as a result of a complex chain of effects. These emissions have no regard for national borders.

417. Thirdly, that chain of effects is both complex and more unpredictable in terms of time and place than in the case of other emissions of specific toxic

[184] See, for instance, AR6 WGIII, Summary for policymakers, p. 8.
[185] See IPCC, "Carbon Dioxide Capture and Storage" (2005), Annex I, pp. 385-95.

pollutants. Aggregate levels of CO_2 give rise to global warming and climate change, which in turn cause incidents or periods of extreme weather; these in turn cause various harmful phenomena such as excessive heatwaves, droughts, excessive rainfall, strong winds and storms, which in turn give rise to disasters such as wildfires, floods, landslides and avalanches. The immediate danger to humans arises from those kinds of consequences in the given climate conditions. In the longer term, some of the consequences risk destroying the basis for human livelihoods and survival in the worst affected areas. Whole populations are, or will be, affected, albeit in varying ways, to varying degrees and with varying severity and imminence of consequences.

418. Fourthly, the sources of GHG emissions are not limited to specific activities that could be labelled as dangerous. In many places, the major sources of GHG emissions are in fields such as industry, energy, transport, housing, construction and agriculture, and thus arise in the context of basic activities in human societies. Consequently, mitigation measures cannot generally be localised or limited to specific installations from which harmful effects emanate. The mitigation measures are necessarily a matter of comprehensive regulatory policies in various sectors of activity[186]. Adaptation measures may to a greater extent depend on local action[187]. However, without effective mitigation (which is at the centre of the applicants' arguments in the present case; see paragraphs 304, 306 and 335 above), adaptation measures cannot in themselves suffice to combat climate change (see paragraph 115 above).

419. Fifthly, combating climate change, and halting it, does not depend on the adoption of specific localised or single-sector measures. Climate change is a polycentric issue. Decarbonisation of the economies and ways of life can only be achieved through a comprehensive and profound transformation in various sectors. Such "green transitions" necessarily require a very complex and wide-ranging set of coordinated actions, policies and investments involving both the public and the private sectors. Individuals themselves will be called upon to assume a share of responsibilities and burdens as well. Therefore, policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations.

420. In this connection, the Court notes that, in the specific context of climate change, intergenerational burden-sharing assumes particular importance both in regard to the different generations of those currently living and in regard to future generations. While the legal obligations arising for States under the Convention extend to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party, it is

[186] See further AR6 WGIII.
[187] See further AR6 WGII.

clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change (see paragraph 119 above) and that, at the same time, they have no possibility of participating in the relevant current decision-making processes. By their commitment to the UNFCCC, the States Parties have undertaken the obligation to protect the climate system for the benefit of present and future generations of humankind (see paragraph 133 above; Article 3 of the UNFCCC). This obligation must be viewed in the light of the already existing harmful impacts of climate change, as well as the urgency of the situation and the risk of irreversible harm posed by climate change. In the present context, having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review.

421. Lastly, while the challenges of combating climate change are global, both the relative importance of various sources of emissions and the necessary policies and measures required for achieving adequate mitigation and adaptation may vary to some extent from one State to another depending on several factors such as the structure of the economy, geographical and demographic conditions and other societal circumstances. Even if in the longer term, climate change poses existential risks for humankind, this does not detract from the fact that in the short term the necessity of combating climate change involves various conflicts, the weighing-up of which falls, as stated previously, within the democratic decision-making processes, complemented by judicial oversight by the domestic courts and this Court.

422. Because of these fundamental differences, it would be neither adequate nor appropriate to follow an approach consisting in directly transposing the existing environmental case-law to the context of climate change. The Court considers it appropriate to adopt an approach which both acknowledges and takes into account the particularities of climate change and is tailored to addressing its specific characteristics. In the present case, therefore, while drawing some inspiration from the principles set out in the Court's existing case-law, the Court will seek to develop a more appropriate and tailored approach as regards the various Convention issues which may arise in the context of climate change.

2. General considerations relating to climate-change cases

423. Before proceeding with the assessment of the legal issues arising in the present case, the Court finds it necessary to address at the outset some of the general considerations relating to climate-change cases.

(a) Questions of causation

424. As indicated above, the specificity of climate-change disputes, in comparison with classic environmental cases, arises from the fact that they are not concerned with single-source local environmental issues but with a more complex global problem. In the context of human rights-based complaints against States, issues of causation arise in different respects which are distinct from each other and have a bearing on the assessment of victim status as well as the substantive aspects of the State's obligations and responsibility under the Convention.

425. The first dimension of the question of causation relates to the link between GHG emissions – and the resulting accumulation of GHG in the global atmosphere – and the various phenomena of climate change. This is a matter of scientific knowledge and assessment. The second relates to the link between the various adverse effects of the consequences of climate change, and the risks of such effects on the enjoyment of human rights at present and in the future. In general terms, this issue pertains to the legal question of how the scope of human rights protection is to be understood as regards the impacts arising for human beings from an existing degradation, or risk of degradation, in their living conditions. The third concerns the link, at the individual level, between a harm, or risk of harm, allegedly affecting specific persons or groups of persons, and the acts or omissions of State authorities against which a human rights-based complaint is directed. The fourth relates to the attributability of responsibility regarding the adverse effects arising from climate change claimed by individuals or groups against a particular State, given that multiple actors contribute to the aggregate amounts and effects of GHG emissions.

426. The Court will address these issues in turn in paragraphs 427 to 444 below.

(b) Issues of proof

427. One of the key features of climate-change cases is the necessity for the relevant court to engage with a body of complex scientific evidence. In the context of environmental cases, as regards general principles on the standard and burden of proof, the Court has held as follows (see *Fadeyeva v. Russia*, no. 55723/00, § 79, ECHR 2005-IV):

> "The Court reiterates at the outset that, in assessing evidence, the general principle has been to apply the standard of proof 'beyond reasonable doubt'. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. It should also be noted that it has been the Court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, only the respondent Government have access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* is impossible ..."

428. A mere allegation that the State failed to comply with certain domestic rules and environmental or technical standards is not in itself sufficient to ground the assertion that the applicant's rights have been affected in a manner giving rise to an issue under the Convention (compare, for instance, *Fägerskiöld v. Sweden* (dec.), no. 37664/04, 26 February 2008, and *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 75, 2 December 2010). Nevertheless, the Court attaches importance to the fact that the situation complained of breached the relevant domestic law (see, for instance, *Yevgeniy Dmitriyev v. Russia*, no. 17840/06, § 33, 1 December 2020). Moreover, in some cases, the Court may need to have regard to the relevant international standards concerning the effects of environmental pollution when ascertaining whether the rights of an individual have been affected (see, for instance, *Oluić v. Croatia*, no. 61260/08, § 60, 20 May 2010; *Hardy and Maile v. the United Kingdom*, no. 31965/07, § 191, 14 February 2012; and *Thibaut v. France* (dec.), nos. 41892/19 and 41893/19, § 42, 14 June 2022).

429. The Court also relies on studies and reports by relevant international bodies as regards the environmental impacts on individuals (see *Tătar*, cited above, § 95). As regards climate change, the Court points to the particular importance of the reports prepared by the IPCC, as the intergovernmental body of independent experts set up to review and assess the science related to climate change, which are based on comprehensive and rigorous methodology, including in relation to the choice of literature, the process of review and approval of its reports as well as the mechanisms for the investigation and, if necessary, correction of possible errors in the published reports. These reports provide scientific guidance on climate change regionally and globally, its impact and future risks, and options for adaptation and mitigation[188].

430. Lastly, the Court attaches particular importance to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case (see, for instance, *Taşkın and Others*, cited above, § 112). As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. However, it reiterates in this connection that, while sensitive to the subsidiary nature of its role and cautious about taking on the role of a first-instance tribunal of fact, the Court is nevertheless not bound by the findings of domestic courts and may depart from them where this is rendered unavoidable by the circumstances of a particular case. It is the Court's function to review the reasoning adduced by domestic judicial authorities from the point of view of the Convention and to determine whether the national authorities have struck a fair balance between the competing

[188] See, for further details, www.ipcc.ch/about; last accessed 14.02.2024.

interests at stake (see *Pavlov and Others*, cited above, § 76, with further references).

(c) Effects of climate change on the enjoyment of Convention rights

431. In recent times there has been an evolution of scientific knowledge, social and political attitudes and legal standards concerning the necessity of protecting the environment, including in the context of climate change. There has also been a recognition that environmental degradation has created, and is capable of creating, serious and potentially irreversible adverse effects on the enjoyment of human rights. This is reflected in the scientific findings, international instruments and domestic legislation and standards, and is being recognised in domestic and international case-law (see paragraphs 173, 176, 225 and 236-267 above).

432. The findings of the IPCC reports noted in paragraphs 107 to 120 above have not been challenged or called into doubt by the respondent or intervening States. It should also be noted that the clear indications as regards the adverse effects of climate change, both existing and those associated with an overshoot of 1.5°C global temperature rise, noted by the IPCC, have been shared by many environmental experts and scientists intervening as third parties in the present proceedings before the Court (see, for instance, paragraphs 392-393, 397, 399, 404-405 and 406 above).

433. Moreover, the IPCC findings correspond to the position taken, in principle, by the States in the context of their international commitments to tackle climate change. They also underpin the general policy aims in the respondent State in terms of the urgency of addressing climate change and its adverse effects on the lives, health and well-being of individuals (see paragraphs 84-102 above)[189]. This also includes the activities of the environmental bodies – such as the FOEN – which follow climate-change developments and regularly issue alerts as to the adverse effects which climate change creates for individuals. Moreover, the respondent Government in the present case, as well as the many third-party intervener Governments, have not contested that there is a climate emergency (see paragraphs 337, 367 and 373-375 above).

434. The Court cannot ignore the above-noted developments and considerations. On the contrary, it should be recalled that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 146, ECHR 2008). Indeed, an

[189] For a global database of climate laws see www.climate-laws.org; last accessed 14.02.2024).

appropriate and tailored approach as regards the various Convention issues which may arise in the context of climate change, required for the reasons set out in paragraph 422 above, needs to take into account the existing and constantly developing scientific evidence on the necessity of combating climate change and the urgency of addressing its adverse effects, including the grave risk of their inevitability and their irreversibility, as well as the scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights.

435. As the Court has already recognised, Article 8 is capable of being engaged because of adverse effects not only on individuals' health but on their well-being and quality of life (see paragraph 514 below) and not only because of actual adverse effects but also sufficiently severe risks of such effects on individuals (see paragraph 470 below). The Court has already established that Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly (see, for instance, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII). It has also held that the duty to regulate not only relates to actual harm arising from specific activities but extends to the inherent risks involved (see, for instance, *Di Sarno and Others v. Italy*, no. 30765/08, § 106, 10 January 2012). In other words, issues of causation must always be regarded in the light of the factual nature of the alleged violation and the nature and scope of the legal obligations at issue.

436. In sum, on the basis of the above findings, the Court will proceed with its assessment of the issues arising in the present case by taking it as a matter of fact that there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target.

(d) The question of causation and positive obligations in the climate-change context

437. In its case-law relating to adverse effects arising from environmental harm, the Court has often merged the assessment of the questions of victim status and the applicability of Article 8 (see, for instance, *Hardy and Maile v. the United Kingdom*, no. 31965/07, §§ 187-92, 14 February 2012). It has also not articulated the issue of causality in specific terms. This is linked with the following circumstances. First, the applicability of Article 8 – as indicated above – is triggered not only by actual damage to the health or well-being of an applicant but by the risk of such effects, where such risks present

a sufficiently close link with the applicant's enjoyment of his or her rights under Article 8. Secondly, the complaints in such cases have concerned alleged failures by the authorities to comply with positive obligations directed at the avoidance or reduction of harm. Thirdly, such obligations have been formulated in terms of a duty to take measures to ensure the effective protection of those who might be endangered by the risks inherent in the harmful activity (see paragraph 538 below).

438. The notion of measures to ensure effective protection as far as positive obligations are concerned may vary considerably from case to case, depending on the gravity of the impact on an applicant's Convention rights and the extent of any burden the obligation would impose on the State. Nonetheless, certain factors relevant for the assessment of the content of those positive obligations on States in the context of environmental harm have been identified by the Court (see paragraphs 538-539 below). In any event, for a State's positive obligations to be engaged there has to be evidence of a risk meeting a certain threshold. There must be a relationship of causation between the risk and the alleged failure to fulfil positive obligations.

439. In the context of climate change, the particularity of the issue of causation becomes more accentuated. The adverse effects on and risks for specific individuals or groups of individuals living in a given place arise from aggregate GHG emissions globally, and the emissions originating from a given jurisdiction make up only part of the causes of the harm. Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect compared to that in the context of local sources of harmful pollution. Furthermore, from the perspective of human rights, the essence of the relevant State duties in the context of climate change relates to the reduction of the risks of harm for individuals. Conversely, failures in the performance of those duties entail an aggravation of the risks involved, although the individual exposures to such risks will vary in terms of type, severity and imminence, depending on a range of circumstances. Accordingly, in this context, issues of individual victim status or the specific content of State obligations cannot be determined on the basis of a strict *conditio sine qua non* requirement.

440. It is therefore necessary to further adapt the approach to these matters, taking into account the special features of the problem of climate change in respect of which the State's positive obligations will be triggered, depending on a threshold of severity of the risk of adverse consequences on human lives, health and well-being. This will be developed in detail in the Court's assessment of victim status and the applicability of the relevant Convention provisions (see paragraphs 478-488 and 507-520 below) and in the determination of the content of the States' positive obligations in this context (see paragraphs 544-554 below).

(e) The issue of the proportion of State responsibility

441. The respondent Government raised an issue concerning the proportion of the respondent State's contributions to global GHG emissions and the capacity of individual States to take action and to bear responsibility for a global phenomenon that requires action by the community of States (see paragraph 346 above). Such arguments have been examined and rejected by the domestic courts in some national climate-change cases (see paragraphs 253 and 257 above).

442. For its part, the Court notes that while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (see *Duarte Agostinho and Others*, cited above, §§ 202-03). The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not.

443. This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question (see, albeit in other contexts, *M.S.S. v. Belgium and Greece*, cited above, §§ 264 and 367, and *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, nos. 75734/12 and 2 others, §§ 160-61 and 179-81, 19 November 2019). It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations (see ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8). Similarly, the alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party, subject to it having jurisdiction within the meaning of Article 1 of the Convention (see *Duarte Agostinho and Others*, cited above). Indeed, given that the Article 1 jurisdiction is principally territorial, each State has its own responsibilities within its own territorial jurisdiction in respect of climate change.

444. Lastly, as regards the "drop in the ocean" argument implicit in the Government's submissions – namely, the capacity of individual States to affect global climate change – it should be noted that in the context of a State's positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise. The relevant test does not require it to be shown that "but for" the failing or omission of the authorities the harm would not have occurred. Rather, what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm (see, among many other authorities, *O'Keeffe v. Ireland* [GC], no. 35810/09, § 149, ECHR 2014 (extracts), and *Baljak and Others v. Croatia*, no. 41295/19, § 124, 25 November 2021, with further references). In the context of climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.

(f) Scope of the Court's assessment

445. The Court has repeatedly stressed that no Article of the Convention is specifically designed to provide general protection of the environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI (extracts), and *Cordella and Others*, cited above, § 100). To that effect, other international instruments and domestic legislation are more adapted to dealing with such protection.

446. At the same time, the Court has often dealt with various environmental problems deemed to *affect* the Convention rights of individuals, particularly Article 8 (see *Hatton and Others*, cited above, § 96). It has, however, explained that in contrast with *actio popularis* type of complaints – which are not permitted in the Convention system (see paragraph 460 below) – the crucial element which must be present in determining whether, in the circumstances of a given case, an environmental harm has adversely affected one of the rights safeguarded by the Convention is the existence of a harmful effect on a person and not simply the general deterioration of the environment (see, for instance, *Di Sarno and Others*, cited above, §§ 80-81).

447. While the Court has on occasion referred to "the right of the people concerned ... to live in a safe and healthy environment" (see *Tătar*, cited above, § 112, and *Di Sarno and Others*, cited above, § 110), this language cannot be understood without regard to the distinction that must be made between, on the one hand, the rights protected under the Convention and, on the other hand, the weight of environmental concerns in the assessment of legitimate aims and the weighing-up of rights and interests in the context of

the application of the Convention. In this latter context, the Court has, for instance, in the context of Article 1 of Protocol No. 1 held as follows (see *Turgut and Others v. Turkey*, no. 1411/03, § 90, 8 July 2008):

> "[I]n today's society the protection of the environment is an increasingly important consideration ... The Court notes that it has on various occasions dealt with questions relating to environmental protection and stressed the importance of this issue ... The protection of nature and forests, and, more generally, the environment, is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations ..."

448. It is also from this dual perspective of the Court's engagement with environmental issues – namely, ensuring the protection of Convention rights and having due regard for environmental concerns in the assessment of legitimate aims and the weighing-up of rights and interests in the context of the application of the Convention – that the relevance of the recent international initiatives for the recognition of the human right to a clean, healthy and sustainable environment (see, in particular, UN General Assembly Resolution 76/300, and Committee of Ministers Recommendation CM/Rec(2022)20, both cited above) should be understood from the perspective of the Convention. It is therefore not for the Court to determine whether the general trends regarding the recognition of such a right give rise to a specific legal obligation (see paragraph 372 above concerning the arguments raised by the intervening Norwegian Government). Such a development forms part of the international-law context in which the Court assesses Convention issues before it (see *Demir and Baykara*, cited above, § 76), notably as regards the recognition by the Contracting Parties of a close link between the protection of the environment and human rights.

449. The Court is mindful of the fact that in a context such as the present one it may be difficult to clearly distinguish issues of law from questions of policy and political choices and, therefore, of the fundamentally subsidiary role of the Convention, particularly given the complexity of the issues involved with regard to environmental policy-making (see *Dubetska and Others v. Ukraine*, no. 30499/03, § 142, 10 February 2011). It has stressed that national authorities have direct democratic legitimation and are in principle better placed than an international court to evaluate the relevant needs and conditions. In matters of general policy, or political choices, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker is given special weight (see *Hatton and Others*, cited above, § 97).

450. However, this does not exclude the possibility that where complaints raised before the Court relate to State policy with respect to an issue affecting the Convention rights of an individual or group of individuals, this subject matter is no longer merely an issue of politics or policy but also a matter of

law having a bearing on the interpretation and application of the Convention. In such instances, the Court retains competence, albeit with substantial deference to the domestic policy-maker and the measures resulting from the democratic process concerned and/or the judicial review by the domestic courts. Accordingly, the margin of appreciation for the domestic authorities is not unlimited and goes hand in hand with a European supervision by the Court, which must be satisfied that the effects produced by the impugned national measures were compatible with the Convention.

451. It follows from the above considerations that the Court's competence in the context of climate-change litigation cannot, as a matter of principle, be excluded. Indeed, given the necessity of addressing the urgent threat posed by climate change, and bearing in mind the general acceptance that climate change is a common concern of humankind (see paragraphs 420 and 436 above), there is force in the argument put forward by the UN Special Rapporteurs that the question is no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights (see paragraph 379 above).

(g) Relevant principles regarding the interpretation of the Convention

452. The well-established case-law principles regarding the interpretation of the Convention as an international treaty have been summarised by the Court in *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, §§ 118-25, 8 November 2016, with further references) and *Slovenia v. Croatia* ((dec.) [GC], no. 54155/16, § 60, 18 November 2020).

453. The Court must address the concerns expressed by the respondent Government about the harmonious and evolutive interpretation of the Convention in the light of the developing rules and principles of international environmental law (see paragraphs 352 and 355 above). In the view of the respondent Government, supported by most of the intervening Governments, the principles of the harmonious and evolutive interpretation of the Convention should not be used to interpret the Convention as a mechanism of international judicial enforcement in the field of climate change and to transform the rights enshrined in the Convention into rights to combat climate change (see paragraphs 366, 368, 371-373 and 375 above).

454. The Court reiterates that it only has the authority to ensure that the Convention is complied with. This is the instrument which the Court is entrusted to interpret and apply. The Court does not have the authority to ensure compliance with international treaties or obligations other than the Convention. Thus, the Court has acknowledged that while other instruments can offer wider protection than the Convention, it is not bound by interpretations given to similar instruments by other bodies, having regard to possible differences in the content of the provisions of other international instruments and/or possible differences in the role of the Court and the other

bodies (see *Caamaño Valle v. Spain*, no. 43564/17, §§ 53-54, 11 May 2021, with further references).

455. Nevertheless, the interpretation and application of the rights provided for under the Convention can and must be influenced both by factual issues and developments affecting the enjoyment of the rights in question and also by relevant legal instruments designed to address such issues by the international community. The Court has consistently held that the Convention should be interpreted, as far as possible, in harmony with other rules of international law (ibid.). Moreover, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, § 167, 17 January 2023).

456. The Court cannot ignore the pressing scientific evidence and the growing international consensus regarding the critical effects of climate change on the enjoyment of human rights (see paragraph 436 above). This consideration relates, in particular, to the consensus flowing from the international-law mechanisms to which the member States voluntarily acceded and the related requirements and commitments which they undertook to respect (see *Demir and Baykara*, cited above, §§ 85-86; compare *Guberina v. Croatia*, no. 23682/13, § 92, 22 March 2016), such as those under the Paris Agreement. The Court must bear these considerations in mind when conducting its assessment under the Convention (see paragraphs 445-451 above).

457. At the same time, the Court must also bear in mind its subsidiary role and the necessity of affording the Contracting States a margin of appreciation in the implementation of policies and measures to combat climate change, as well as the need to observe appropriate respect for the prevailing constitutional principles, such as those relating to the separation of powers.

3. Admissibility

(a) Victim status/*locus standi* (representation)

458. There are, in general, three possible approaches in the Court's case-law to examining the existence of victim status under Article 34 of the Convention. It may be examined as a separate preliminary issue in the case (see, for instance, *S.A.S. v. France* [GC], no. 43835/11, §§ 53-58, ECHR 2014 (extracts)); it may be examined in the context of an assessment of the applicability of the relevant Convention provision (see, for instance, *Greenpeace e.V. and Others v. Germany* (dec.), no. 18215/06, 12 May 2009); or it may be considered to be "closely bound up with" the issues to be considered on the merits and thus joined to the examination of the complaint on the merits (see, for instance, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 111, ECHR 2012).

459. For the sake of methodological clarity, and having regard to the fact that the issue of victim status is one of the salient issues of the climate-change cases, the Court finds it necessary at this point to elaborate on the general principles concerning victim status separately. However, given the close link between victim status and the applicability of the relevant Convention provisions (see paragraphs 513 and 519 below), whether the applicants have victim status in the present case will be examined together with the Court's assessment of the applicability of Articles 2 and 8 of the Convention.

(i) General principles

460. The Convention does not provide for the institution of an *actio popularis*. The Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, for instance, *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, with further references). Accordingly, a person, non-governmental organisation or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention. The Convention does not permit individuals or groups of individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, §§ 50-51, ECHR 2012).

461. The Court has repeatedly stressed that the victim-status criterion is not to be applied in a rigid, mechanical and inflexible way (see *Albert and Others v. Hungary* [GC], no. 5294/14, § 121, 7 July 2020). Moreover, like the other provisions of the Convention, the term "victim" in Article 34 must also be interpreted in an evolutive manner in the light of conditions in contemporary society (see *Gorraiz Lizarraga and Others*, cited above, § 38, and *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), no. 37857/14, § 39, 7 December 2021). In this context, the Court has cautioned that any excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory (see *Gorraiz Lizarraga and Others*, cited above, § 38).

462. The Court interprets the concept of "victim" autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act, even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (see *Aksu*, cited above, § 52). Moreover, the existence of victim status does not necessarily imply the existence of prejudice (see *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII).

463. In general, the word "victim" under Article 34 denotes the following categories of persons (see *Centre for Legal Resources on behalf of Valentin*

Câmpeanu v. Romania [GC], no. 47848/08, §§ 96-101, ECHR 2014): those *directly* affected by the alleged violation of the Convention (the direct victims); those *indirectly* affected by the alleged violation of the Convention (the indirect victims); and those *potentially* affected by the alleged violation of the Convention (the potential victims). In *Mansur Yalçın and Others v. Turkey* (no. 21163/11, § 40 *in fine*, 16 September 2014) the Court noted that, in any event, whether the victim is direct, indirect or potential, there must be a link between the applicant and the harm which he or she claims to have sustained as a result of the alleged violation.

464. The Court reiterates that the issue of victim status should be distinguished from the issue of *locus standi*. The latter relates to the questions of representation of the (direct) victims' complaints before the Court. It may therefore also be referred to as "representation" (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 102-03).

(α) Victim status of individuals

465. In order to fall into the category of direct victims, the applicant must be able to show that he or she was "directly affected" by the measure complained of (see *Lambert and Others v. France* [GC], no. 46043/14, § 89, ECHR 2015 (extracts)). This implies that the applicant has been personally and actually affected by the alleged violation of the Convention, which is normally the result of a measure applying the relevant law or a decision allegedly in breach of the Convention or, in some instances, of the acts or omissions of State authorities or private parties allegedly infringing the applicant's Convention rights (see, for instance, *Aksu*, cited above, § 51; see also *Karner v. Austria*, no. 40016/98, §§ 24-25, ECHR 2003-IX, and *Berger-Krall and Others v. Slovenia*, no. 14717/04, § 258, 12 June 2014).

466. However, this does not necessarily mean that the applicant needed to be personally targeted by the act or omission complained of. What is important is that the impugned conduct personally and directly affected him or her (see, for instance, *Aksu*, cited above, §§ 51-54).

467. The issues relating to the category of indirect victims normally concern the question of the standing of the direct victim's next of kin to submit or pursue an application before the Court concerning issues affecting the direct victim (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 97-100, with further references).

468. The Court has consistently held that "Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end" (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 47, ECHR 2013 (extracts), and the cases cited therein). Thus, indirect victims must demonstrate a "ricochet effect" created by the alleged violation affecting one person (the direct victim) on the Convention rights of another person (the

indirect victim) in order for the latter to demonstrate harm or a valid personal interest in bringing the situation complained of to an end.

469. Two types of potential victim status may be found in the case-law (see, for instance, *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (dec.) [GC], no. 56672/00, ECHR 2004-IV). The first type concerns persons who claim to be presently affected by a particular general legislative measure. The Court has specified that it may accept the existence of victim status where applicants contend that a law violates their rights, in the absence of an individual measure of implementation, if they belong to a class of people who risk being directly affected by the legislation, or if they are required either to modify their conduct or risk being prosecuted (see *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010, and *Sejdić and Finci*, cited above, § 28).

470. The second type concerns persons who argue that they may be affected at some future point in time. The Court has made clear that the exercise of the right of individual petition cannot be used to prevent a potential violation of the Convention and that, in theory, the Court cannot examine a violation other than *a posteriori*, once that violation has occurred. It is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the Convention owing to the risk of a future violation (see *Berger-Krall and Others*, cited above, § 258, with further references). In general, the relevant test to examine the existence of such victim status is that the applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture being insufficient in this regard (see *Asselbourg and Others v. Luxembourg* (dec.), no. 29121/95, ECHR 1999-VI, and *Senator Lines GmbH*, cited above).

471. The term "potential" therefore refers, in some circumstances, to victims who claim that they are at present, or have been, affected by the general measure complained of, and, in other circumstances, to those who claim that they might be affected by such a measure in the future. In some instances, these two types of situations may coexist or may not be easily distinguishable (see, for instance, *Tănase*, cited above, § 108) and the relevant case-law principles may apply interchangeably (see, for instance, *Shortall and Others v. Ireland* (dec.), no. 50272/18, §§ 50-61, 19 October 2021).

472. In environmental cases, the Court has not considered it sufficient for an applicant to complain of general damage to the environment (see *Di Sarno and Others*, cited above, § 80). According to the Court's existing case-law in this context, in order to claim victim status, the applicant needs to show that he or she is impacted by the environmental damage or risk complained of. The criteria on which the Court has relied to establish victim status includes most notably issues such as the minimum level of severity of the harm in question, its duration and the existence of a sufficient link with the applicant

or applicants, including, in some instances, the geographical proximity between the applicant and the impugned environmental harm (see, for instance, *Tătar*, cited above, §§ 95-97; *Greenpeace e.V. and Others*, cited above; *Caron and Others v. France* (dec.), no. 48629/08, 29 June 2010; *Hardy and Maile*, cited above, §§ 190-92; *Cordella and Others*, cited above, §§ 104-08; and *Pavlov and Others*, cited above, §§ 64-70).

(β) *Locus standi* (representation) by associations

473. In accordance with the Court's case-law, an association is in principle not in a position to rely on health considerations to allege a violation of Article 8 (see *Greenpeace e.V. and Others*, cited above) and in general it cannot complain of nuisances or problems which can only be encountered by natural persons (see *Besseau and Others v. France* (dec.), no. 58432/00, 7 February 2006).

474. Most recently, in an environmental context, the Court reasoned as follows as regards the victim status of associations (see *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği*, cited above, § 41):

> "The first reason is the prohibition on the bringing of an *actio popularis* under the Convention system; this means that an applicant cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly. It follows that in order for an applicant to be able to argue that he is a victim, he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect ... The second reason concerns the nature of the Convention right at stake and the manner in which it has been invoked by the applicant association in question. Certain Convention rights, such as those under Article 2, 3 and 5, by their nature, are not susceptible of being exercised by an association, but only by its members ... In *Asselbourg and Others* (cited above), when declining to grant victim status to the applicant association, the Court noted that the applicant association could only act as a representative of its members or employees, in the same way as, for example, a lawyer represented his client, but could not itself claim to be the victim of a violation of Article 8."

475. However, although in the absence of a measure directly affecting them the Court does not normally grant victim status to associations, even if the interests of their members could be at stake, there may be "special considerations" where an association represents individuals, even in the absence of a measure directly affecting the association in question.

476. In *Centre for Legal Resources on behalf of Valentin Câmpeanu* (cited above, §§ 103 and 105), the Court found that there might be "special considerations" where it could be accepted that applications could be lodged by others on behalf of the victims without a specific authority to act. The Court stressed that its judgments "[served] not only to decide those cases brought before [it] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance

by the States of the engagements undertaken by them as Contracting Parties". At the same time, the Court was mindful of the need to ensure that the conditions of admissibility governing access to it were interpreted in a consistent manner.

477. On the basis of the case-law principles set out in *Centre for Legal Resources on behalf of Valentin Câmpeanu*, in several similar subsequent cases the Court accepted the *locus standi* of associations to lodge or pursue applications on behalf of direct victims, including where the victim had been able, while alive, to lodge complaints himself or herself (see *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania*, no. 2959/11, §§ 42-46, 24 March 2015).

*(ii) Victim status/*locus standi *in the climate-change context*

(α) Victim status of individuals

478. The Court notes that there is cogent scientific evidence demonstrating that climate change has already contributed to an increase in morbidity and mortality, especially among certain more vulnerable groups, that it actually creates such effects and that, in the absence of resolute action by States, it risks progressing to the point of being irreversible and disastrous (see paragraphs 104-120 above). At the same time, the States, being in control of the causes of anthropogenic climate change, have acknowledged the adverse effects of climate change and have committed themselves – in accordance with their common but differentiated responsibilities and their respective capabilities – to take the necessary mitigation measures (to reduce GHG emissions) and adaptation measures (to adapt to climate change and reduce its impacts). These considerations indicate that a legally relevant relationship of causation may exist between State actions or omissions (causing or failing to address climate change) and the harm affecting individuals, as noted in paragraph 436 above.

479. Given the nature of climate change and its various adverse effects and future risks, the number of persons affected, in different ways and to varying degrees, is indefinite. The resolution of the climate crisis requires, and depends on, a comprehensive and complex set of transformative policies involving legislative, regulatory, fiscal, financial and administrative measures as well as both public and private investment. The critical issues arise from failures to act, or inadequate action. In other words, they arise from omissions. In key respects, the deficiencies reside at the level of the relevant legislative or regulatory framework. The need, in this context, for a special approach to victim status, and its delimitation, therefore arises from the fact that complaints may concern acts or omissions in respect of various types of general measures, the consequences of which are not limited to certain identifiable individuals or groups but affect the population more widely. The outcome of legal proceedings in this context will inevitably have an effect

beyond the rights and interests of a particular individual or group of individuals, and will inevitably be forward-looking, in terms of what is required to ensure effective mitigation of the adverse effects of climate change or adaptation to its consequences.

480. That being said, the Court notes that the assessment of victim status in the present context of complaints concerning alleged omissions in general measures relating to the prevention of harm, or the reduction of the risk of harm, affecting indefinite numbers of persons is without prejudice to the determination of victim status in circumstances where complaints by individuals concern alleged violations arising from a specific individual loss or damage already suffered by them (see, for instance, *Kolyadenko and Others*, cited above, §§ 150-55).

481. The question for the Court in the present case is how and to what extent allegations of harm linked to State actions and/or omissions in the context of climate change, affecting individuals' Convention rights (such as the right to life under Article 2 and/or the right to respect for private and family life under Article 8), can be examined without undermining the exclusion of *actio popularis* from the Convention system and without ignoring the nature of the Court's judicial function, which is by definition reactive rather than proactive.

482. In this connection, the Court has already accepted, albeit in the context of the application of Article 6 in an environmental context, that the issue of victim status must be interpreted in an evolutive manner in the light of conditions in contemporary society and that any excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory (see *Gorraiz Lizarraga and Others*, cited above, § 38).

483. The Court's case-law on victim status is premised on the existence of a direct impact of the impugned action or omission on the applicant or a real risk thereof. However, in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change. Leaving aside the issue of jurisdiction, the fact remains that potentially a huge number of persons could claim victim status under the Convention on this basis. While it is true that in the context of general situations/measures, the class of persons who could claim victim status "may indeed be very broad" (see *Shortall and Others*, cited above, § 53), it would not sit well with the exclusion of *actio popularis* from the Convention mechanism and the effective functioning of the right of individual application to accept the existence of victim status in the climate-change context without sufficient and careful qualification.

484. If the circle of "victims" within the overall population of persons under the jurisdiction of the Contracting Parties actually or potentially adversely affected is drawn in a wide-ranging and generous manner, this

would risk disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change. If, on the other hand, this circle is drawn too tightly and restrictively, there is a risk that even obvious deficiencies or dysfunctions in government action or democratic processes could lead to the Convention rights of individuals and groups of individuals being affected without them having any judicial recourse before the Court. In addition, in view of the considerations of intergenerational burden-sharing related to the impacts and risks of climate change, the members of society who stand to be most affected by the impact of climate change can be considered to be at a distinct representational disadvantage (see paragraph 420 above). The need to ensure, on the one hand, effective protection of the Convention rights, and, on the other hand, that the criteria for victim status do not slip into *de facto* admission of *actio popularis* is particularly acute in the present context.

485. In this regard, although the lack of State action, or insufficient action, to combat climate change does entail a situation with general effect, the Court does not consider that the case-law concerning "potential" victims under which victim status could be claimed by a "class of people" who have "a legitimate personal interest" in seeing the impugned situation being brought to an end (see paragraphs 471 above), could be applied here. In the context of climate change, this could cover virtually anybody and would therefore not work as a limiting criterion. Everyone is concerned by the actual and future risks, in varying ways and to varying degrees, and may claim to have a legitimate personal interest in seeing those risks disappear.

486. Therefore, having regard to the special features of climate change, when determining the criteria for victim status – which is premised on the existence of a real risk of a "direct impact" on the applicant (see paragraphs 465-466 and 483 above) – the Court will rely on distinguishing criteria such as a particular level and severity of the risk of adverse consequences of climate change affecting the individual(s) in question (see paragraph 440 above), taking into account the pressing nature of their need for individual protection.

487. In sum, the Court finds that in order to claim victim status under Article 34 of the Convention in the context of complaints concerning harm or risk of harm resulting from alleged failures by the State to combat climate change, an applicant needs to show that he or she was personally and directly affected by the impugned failures. This would require the Court to establish, having regard to the principles concerning issues of proof set out in paragraphs 427 to 430 above, the following circumstances concerning the applicant's situation:

(a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk

of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and

(b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.

488. The threshold for fulfilling these criteria is especially high. In view of the exclusion of *actio popularis* under the Convention, as discussed in paragraphs 483 to 484 above, whether an applicant meets that threshold will depend on a careful assessment of the concrete circumstances of the case. In this connection, the Court will have due regard to circumstances such as the prevailing local conditions and individual specificities and vulnerabilities. The Court's assessment will also include, but will not necessarily be limited to, considerations relating to: the nature and scope of the applicant's Convention complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general), and the nature of the applicant's vulnerability.

(β) Standing of associations

489. As the Court already noted in *Gorraiz Lizarraga and Others* (cited above, § 38), in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. This is especially true in the context of climate change, which is a global and complex phenomenon. It has multiple causes and its adverse effects are not the concern of any one particular individual, or group of individuals, but are rather "a common concern of humankind" (see the Preamble to the UNFCCC). Moreover, in this context where intergenerational burden-sharing assumes particular importance (see paragraph 420 above), collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes.

490. These general observations concerning the importance of recourse to collective entities such as associations to defend the rights and interests of affected or concerned individuals, as far as issues of the environment are concerned, are reflected in international instruments such as the Aarhus Convention. That Convention recognises that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations" (see paragraph 141 above).

491. The Aarhus Convention also emphasises the importance of the role which non-governmental organisations play in the context of environmental protection. It envisages the need to ensure that non-governmental organisations have wide access to justice in matters concerning environmental protection (see, in particular, the Preamble and Article 9 of the Aarhus Convention). Article 2 § 5 of the Aarhus Convention explicitly incorporates within the category of "the interested public" non-governmental organisations whose statutory goals include the promotion of environmental protection, provided that they also meet "any requirements under national law". According to the Implementation Guide[190], whether a non-governmental organisation promotes environmental protection or not can be ascertained in a variety of ways, such as through its charter, by-laws or activities. In this context, "environmental protection" may concern any purpose consistent with the implied definition of environment found in Article 2 § 3. Moreover, it is specified that the reference to "meeting any requirements under national law" should not be read as leaving absolute discretion to States in defining these requirements, but rather in the context of the important role the Aarhus Convention assigns to non-governmental organisations.

492. The Court further notes that the EU has developed a set of legal instruments concerning the implementation of the Aarhus Convention (see paragraphs 212-214 above). The CJEU has found that Article 9 § 3 of the Aarhus Convention must be read in conjunction with Article 47 of the Charter of Fundamental Rights in ensuring that "a duly constituted environmental organisation operating in accordance with the requirements of national law" is able to contest a measure affecting the environment[191].

493. In this connection, it should also be noted that a comparative study from 2019 found that broad legal standing was granted by law and in practice in a number of EU member States (thirteen out of twenty-eight at the time). In addition, while access had broadened over the years in some countries, either through jurisprudence (Austria, Belgium) or by law (Greece, Ireland, Slovakia, Slovenia, Sweden), in some others, recent jurisprudence (Slovenia) or legal reforms planned (the United Kingdom) or enacted (the Netherlands) aimed to restrict access to courts[192]. An earlier comparative study from 2013 had found that the EU member States' legislation required one or more of the following conditions to be met for the legal standing of associations before the courts to be recognised: the condition that the statutes of the organisation

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[190] Cited above, pp. 57-58 and 194-95; see also Maastricht Recommendations, cited above, p. 12.

[191] Judgment of 20 December 2017 in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, C-664/15, EU:C:2017:987, paragraph 58. See also, more recently, judgment of 8 November 2022 in *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland*, C-873/19, EU:C:2022:857, paragraph 81.

[192] Implementation Study, cited above, pp. 102-06.

should cover environmental protection or whatever was relevant for the challenged decision; a requirement of activity in the area in question; geographical proximity; a certain number of years of registration and activity; a certain number of members; representation of a significant percentage of the population or the existence of support from the public; openness and democratic structure; and non-profit activity[193].

494. The findings of the above studies were confirmed by a broader comparative survey conducted by the Court for the purposes of the present proceedings (see paragraphs 232-234 above). This survey found that there was a nearly universal ratification of the Aarhus Convention by Council of Europe member States and that associations – meeting certain criteria noted in paragraph 233 above – were generally granted standing to bring court cases in the interests of the protection of the environment and/or in the interests of private individuals who may be affected by specific environmental hazards or industrial projects. While the standing of associations in the context of climate-change litigation – which is not covered by the Aarhus Convention – was still a developing issue, it would appear that in most member States there may at least be a theoretical possibility for environmental associations to bring a climate-change case, and in some States the criteria for such standing have already been established either in domestic legislation or in the domestic courts' case-law (see paragraph 234 above).

495. In the light of the above considerations, in order to devise an approach to the matter in the present case, in which the applicant association also claims victim status, the Court notes some key principles which must guide its decision in that respect.

496. First, it is necessary to make, and to maintain, the distinction between the victim status of individuals and the legal standing of representatives who are acting on behalf of persons whose Convention rights are alleged to be violated (see paragraphs 465-477 above). In regard to the former, there seems to be no reason to call into question the principle in the case-law that an association cannot rely on health considerations or nuisances and problems associated with climate change which can only be encountered by natural persons (see paragraph 474 above). This, by the nature of things, places a constraint on the possibility of granting victim status to an association with regard to any substantive issue under Articles 2 and/or 8 of the Convention.

497. Secondly, there has been an evolution in contemporary society as regards recognition of the importance of associations to litigate issues of climate change on behalf of affected persons. Indeed, climate-change litigation often involves complex issues of law and fact, requiring significant financial and logistical resources and coordination, and the outcome of a dispute will inevitably affect the position of many individuals (see

[193] "Effective Justice?", Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union (2013), pp. 14-15.

paragraph 410 above). As is apparent from the circumstances of domestic climate-change litigation (see, for instance, paragraphs 258, 260 and 262 above; see also *Carême*, cited above), associations regularly appear as one of the applicants, or sometimes the sole applicant, or as a key intervener in the case.

498. The specific considerations relating to climate change weigh in favour of recognising the possibility for associations, subject to certain conditions, to have standing before the Court as representatives of the individuals whose rights are or will allegedly be affected. Indeed, as the Court noted previously in *Asselbourg and Others* and *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği* (cited above, §§ 41 and 43), it may be possible for an association to have standing before the Court despite the fact that it cannot itself claim to be the victim of a violation of the Convention.

499. Moreover, the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context (see paragraph 489 above), speak in favour of recognising the standing of associations before the Court in climate-change cases. In view of the urgency of combating the adverse effects of climate change and the severity of its consequences, including the grave risk of their irreversibility, States should take adequate action notably through suitable general measures to secure not only the Convention rights of individuals who are currently affected by climate change, but also those individuals within their jurisdiction whose enjoyment of Convention rights may be severely and irreversibly affected in the future in the absence of timely action. The Court therefore considers it appropriate in this specific context to acknowledge the importance of making allowance for recourse to legal action by associations for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change, instead of exclusively relying on proceedings brought by each individual on his or her own behalf.

500. However, similarly to what was observed above concerning the victim status of natural persons in this context (see paragraph 483 *in fine* above), the exclusion of *actio popularis* under the Convention requires that the possibility for associations to lodge applications before the Court be subject to certain conditions. It is clear that the Convention mechanism cannot accept an abstract complaint about a general deterioration of the living conditions of people without considering its impact on a particular person or group of persons.

501. In this connection, when devising the test for the standing of associations in climate-change litigation under the Convention, the Court finds it pertinent to have regard to the Aarhus Convention, the importance of which has already been noted in its case-law (see *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et*

Mox v. France (dec.), no. 75218/01, 28 March 2006). The Court must, however, be mindful of the difference between the basic nature and purpose of the Aarhus Convention, which is designed to enhance public participation in environmental matters, and that of the Convention, which is designed to protect individuals' human rights. It must also bear in mind the specific features of climate-change litigation (see paragraphs 410-422 above) and the difference between climate change and the more linear and localised (traditional) environmental issues which the Aarhus Convention is designed to address. Moreover, in so far as the Aarhus Convention provides for a very broad standing of associations where the existence of an effect on the "public concerned" is assumed to exist (provided that the association is duly established under domestic law), the Court must be mindful of the fact that its own approach cannot result in an acceptance of *actio popularis* which, as a matter of principle and established case-law, is not provided for in the Convention system.

502. Thus, taking into account the above-noted considerations, the following factors will determine the standing of associations before the Court in the present context.

In order to be recognised as having *locus standi* to lodge an application under Article 34 of the Convention on account of the alleged failure of a Contracting State to take adequate measures to protect individuals against the adverse effects of climate change on human lives and health, the association in question must be: (a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and (c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.

In this connection, the Court will have regard to such factors as the purpose for which the association was established, that it is of non-profit character, the nature and extent of its activities within the relevant jurisdiction, its membership and representativeness, its principles and transparency of governance and whether on the whole, in the particular circumstances of a case, the grant of such standing is in the interests of the proper administration of justice.

In accordance with the specific features of recourse to legal action by associations in this context (see paragraphs 497-499 above), the standing of an association to act on behalf of the members or other affected individuals within the jurisdiction concerned will not be subject to a separate requirement

of showing that those on whose behalf the case has been brought would themselves have met the victim-status requirements for individuals in the climate-change context as established in paragraphs 487 to 488 above.

503. In the event of existing limitations regarding the standing before the domestic courts of associations meeting the above Convention requirements, the Court may also, in the interests of the proper administration of justice, take into account whether, and to what extent, its individual members or other affected individuals may have enjoyed access to a court in the same or related domestic proceedings.

(iii) Application of these principles to the present case

504. The respondent Government challenged the standing/victim status of all the applicants as regards the substantive Convention provisions relied on, namely Articles 2 and 8 (see paragraphs 341 and 345 above).

505. Having regard to the approach outlined in paragraph 459 above, the Court will examine the issues of the victim status of applicants nos. 2-5 and the standing of the applicant association in the context of its assessment of the applicability of Articles 2 and 8 of the Convention.

(b) Applicability of the relevant Convention provisions

506. Similarly to what was observed above concerning victim status (see paragraph 458 above), the issue of applicability of the relevant Convention provisions may be examined separately as an issue of admissibility or in the context of the examination of the complaint on the merits (compare, for instance, *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, § 146, ECHR 2008 (extracts), and *M. Özel and Others v. Turkey*, nos. 14350/05 and 2 others, § 171 *in fine*, 17 November 2015). For the sake of methodological clarity, the Court will elaborate on the general principles concerning applicability separately (see the approach adopted in paragraph 459 above).

(i) General principles

(α) Article 2

507. In *Nicolae Virgiliu Tănase v. Romania* ([GC], no. 41720/13, §§ 140-41, 25 June 2019), the Court elaborated on the general principles for the applicability of Article 2 in instances where the right to life was at stake and where the person concerned did not die. In so far as may be relevant for the present case, the Court reasoned as follows:

> "140. It further emerges from the Court's case-law that, where the victim was not killed but survived and where he or she does not allege any intent to kill, the criteria for a complaint to be examined under this aspect of Article 2 are, firstly, whether the person was the victim of an activity, whether public or private, which by its very nature put his or her life at real and imminent risk and, secondly, whether he or she has suffered injuries that appear life-threatening as they occur. Other factors ... may also come into

play. The Court's assessment depends on the circumstances. While there is no general rule, it appears that if the activity involved by its very nature is dangerous and puts a person's life at real and imminent risk ... the level of injuries sustained may not be decisive and, in the absence of injuries, a complaint in such cases may still fall to be examined under Article 2 (see ... *Kolyadenko and Others*, cited above, § 155, in the context of natural disasters).

141. The Court has found this positive procedural obligation to arise under Article 2 in regard to a number of different kinds of activities, such as, for example, ... in respect of the management of dangerous activities resulting in industrial or environmental disasters (see *Öneryıldız* [*v. Turkey* [GC], no. 48939/99, ECHR 2004 XII], and *Budayeva and Others*, cited above) ... [This] list is not exhaustive ..."

508. The common thread in the relevant principles under Article 2 in the existing case-law concerning environmental degradation is that in order for a positive obligation to arise for the State, a threat to the right to life must be at stake. This flows from the case-law cited in *Nicolae Virgiliu Tănase* (see, for instance, *Öneryıldız*, cited above, § 71, and *Budayeva and Others*, cited above, § 130). This may then apply, for instance, to the case of industrial activities, which by their very nature are dangerous (see *Kolyadenko and Others*, cited above, § 158) or to instances where the right to life is threatened by a natural disaster (see *M. Özel and Others*, cited above, § 170).

509. It follows from the above-noted general principles that complaints concerning the alleged failures of the State to combat climate change most appropriately fall into the category of cases concerning an activity which is, by its very nature, capable of putting an individual's life at risk. Indeed, the applicants referred the Court to compelling scientific evidence showing a link between climate change and an increased risk of mortality, particularly in vulnerable groups (see paragraphs 65-68 above). At present, there is nothing in the arguments provided by the respondent Government or the intervening Governments to call into question the relevance and reliability of this evidence.

510. Thus, the IPCC has found (with *medium confidence*) that anthropogenic climate change, particularly through increased frequency and severity of extreme events, increases heat-related human mortality[194]. Other scientific studies have also found that heatwaves have caused tens of thousands of premature deaths in Europe since 2000[195]. In this context, the IPCC has also found (with *high confidence*) that populations at "highest risk" of temperature-related morbidity and mortality include older adults, children, women, those with chronic diseases, and people taking certain medications[196].

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[194] AR6 WGII, Summary for policymakers, p. 9.

[195] European Environment Agency, "Extreme temperatures and health" (2021). See also the study published in the *Lancet Countdown* (Vol 400, 2022, p. 1619) which found that, globally, heat-related deaths increased by 68% between 2000-04 and 2017-21, a death toll that was significantly exacerbated by the confluence of the COVID-19 pandemic.

[196] IPCC 2018 Special report, pp. 240-41.

511. The applicability of Article 2, however, cannot operate *in abstracto* in order to protect the population from any possible kind of environmental harm arising from climate change. In accordance with the case-law cited in paragraph 507 above, in order for Article 2 to apply in the context of an activity which is, by its very nature, capable of putting an individual's life at risk, there has to be a "real and imminent" risk to life. This may accordingly extend to complaints of State action and/or inaction in the context of climate change, notably in circumstances such as those in the present case, considering that the IPCC has found with high confidence that older adults are at "highest risk" of temperature-related morbidity and mortality.

512. It may be impossible to devise a general rule on what constitutes a "real and imminent" risk to life, as that will depend on the Court's assessment of the particular circumstances of a case. However, the Court's case-law indicates that the term "real" risk corresponds to the requirement of the existence of a serious, genuine and sufficiently ascertainable threat to life (see, for instance, *Fadeyeva v. Russia* (dec.), no. 55723/00, 16 October 2003, and *Brincat and Others*, cited above, §§ 82-84). The "imminence" of such a risk entails an element of physical proximity of the threat (see, for instance, *Kolyadenko and Others*, cited above, §§ 150-55) and its temporal proximity (see *Brincat and Others*, cited above, § 84).

513. In sum, in order for Article 2 to apply to complaints of State action and/or inaction in the context of climate change, it needs to be determined that there is a "real and imminent" risk to life. However, such risk to life in the climate-change context must be understood in the light of the fact that there is a grave risk of inevitability and irreversibility of the adverse effects of climate change, the occurrences of which are most likely to increase in frequency and gravity. Thus, the "real and imminent" test may be understood as referring to a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of by the applicant. This would also imply that where the victim status of an individual applicant has been established in accordance with the criteria set out in paragraphs 487 to 488 above, it would be possible to assume that a serious risk of a significant decline in a person's life expectancy owing to climate change ought also to trigger the applicability of Article 2.

(β) Article 8

514. According to the existing case-law, in order to fall within the scope of Article 8 of the Convention, complaints relating to environmental nuisances have to show, first, that there was an "actual interference" with the applicant's enjoyment of his or her private or family life or home, and, secondly, that a certain level of severity was attained. In other words, they have to show that the alleged environmental nuisance was serious enough to affect adversely, to a sufficient extent, the applicants' enjoyment of their right

to respect for their private and family life and their home (see *Pavlov and Others*, cited above, § 59, with further references; see also *Çiçek and Others v. Turkey* (dec.), no. 44837/07, § 22, 4 February 2020, with further references).

515. The question of "actual interference" in practice relates to the existence of a direct and immediate link between the alleged environmental harm and the applicant's private or family life or home (see *Ivan Atanasov*, cited above, § 66, and *Hardy and Maile*, cited above, § 187). In this context, the general deterioration of the environment is not sufficient. There must be a negative effect on an individual's private or family sphere (see *Kyrtatos*, cited above, § 52), which is essentially a matter to be decided on the basis of the criteria set out in paragraphs 487 to 488 above concerning the existence of victim status.

516. As regards the question of the seriousness of the interference, the Court has held that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (see, for instance, *Yevgeniy Dmitriyev*, cited above, § 32). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental impact on the applicant's health or quality of life (see *Çiçek and Others*, cited above, § 22). Moreover, breaches of the right to respect for one's home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious interference may result in the breach of a person's right to respect for his or her home if it prevents him or her from enjoying the amenities of his or her home (see *Udovičić v. Croatia*, no. 27310/09, § 136, 24 April 2014).

517. The Court has made clear that there will be no arguable claim under Article 8 if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. Conversely, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes, in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *Jugheli and Others v. Georgia*, no. 38342/05, § 62, 13 July 2017, with further references). Moreover, the Court has explained that it is often impossible to quantify the effects of the environmental nuisance at issue in each individual case and to distinguish them from the influence of other relevant factors such as age, profession or personal lifestyle. The same applies to the possible worsening of quality of life, which is a subjective characteristic that hardly lends itself to a precise definition (ibid., § 63).

518. It should further be noted that, in some instances, the exposure of a person to a serious environmental risk may be sufficient to trigger the applicability of Article 8. For instance, in *Hardy and Maile* (cited above,

§§ 189-92), the Court found that Article 8 applied where the dangerous effects of an activity to which the individuals concerned could potentially be exposed established a sufficiently close link with private and family life for the purposes of that provision. In *Jugheli and Others* (cited above, § 71), the Court found that even assuming that the air pollution complained of had not caused any quantifiable harm to the applicants' health, "it [could] have made them more vulnerable to various illnesses". In *Dzemyuk v. Ukraine* (no. 42488/02, §§ 82-84, 4 September 2014), the Court found that the available evidence confirmed the existence of potential risks to the environment caused by the location of a cemetery close to the applicant's house with the consequent impact on the environment and the applicant's "quality of life" under Article 8 of the Convention.

519. Drawing on the above considerations, and having regard to the causal relationship between State actions and/or omissions relating to climate change and the harm, or risk of harm, affecting individuals (see paragraphs 435, 436 and 478 above), Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life.

520. However, in this context, the question of "actual interference" or the existence of a relevant and sufficiently serious risk entailing the applicability of Article 8 essentially depends on the assessment of similar criteria to those set out in paragraphs 487 to 488 above concerning the victim status of individuals, or in paragraph 502 above concerning the standing of associations. These criteria are therefore determinative for establishing whether Article 8 rights are at stake and whether this provision applies. In each case, these are matters that remain to be examined on the facts of a particular case and on the basis of the available evidence.

(ii) Application of these principles to the present case

(α) Article 8 of the Convention

– *The applicant association*

521. Having regard to the criteria set out in paragraph 502 above, the Court notes that the applicant association, according to its Statute, is a non-profit association established under Swiss law to promote and implement effective climate protection on behalf of its members. It has more than 2,000 female members who live in Switzerland and whose average age is 73. Close to 650 members are 75 or older. The applicant association's Statute further provides that it is committed to engaging in various activities aimed at reducing GHG emissions in Switzerland and addressing their effects on global warming. It acts not only in the interest of its members, but also in the interest of the general public and future generations, with the aim of ensuring effective climate protection. The applicant association pursues its aims

through various actions, including by taking legal action to address the effects of climate change in the interests of its members (see paragraph 10 above).

522. The FSC and the FAC limited their assessment of standing to the individual applicants, considering it unnecessary to examine that of the applicant association. As a result, the Court does not have the benefit of the assessment of the legal status of the applicant association under domestic law or of the nature and extent of its activities within the respondent State.

523. The Court further notes that in its submissions before the Court, the applicant association explained that it acted to ensure that its members were able to exercise their rights regarding the effects of climate change on them (see paragraph 307 above). Given the membership basis and representativeness of the applicant association, as well as the purpose of its establishment, the Court accepts that it represents a vehicle of collective recourse aimed at defending the rights and interests of individuals against the threats of climate change in the respondent State (see paragraph 497 above). The Court, furthermore, notes that the individual applicants did not have access to a court in the respondent State. Thus, viewed overall, the grant of standing to the applicant association before the Court is in the interests of the proper administration of justice.

524. Having regard to the above considerations, the Court finds that the applicant association is lawfully established, it has demonstrated that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members and other affected individuals against the threats arising from climate change in the respondent State and that it is genuinely qualified and representative to act on behalf of those individuals who may arguably claim to be subject to specific threats or adverse effects of climate change on their life, health, well-being and quality of life as protected under the Convention (see paragraph 519 above).

525. In these circumstances, the Court finds that the complaints pursued by the applicant association on behalf of its members fall within the scope of Article 8.

526. Accordingly, it follows that the applicant association has the necessary *locus standi* in the present proceedings and that Article 8 is applicable to its complaint. The Government's objections must therefore be dismissed.

– *Applicants nos. 2-5*

527. Two key criteria have been set out for recognising the victim status of natural persons in the climate-change context: (a) high intensity of exposure of the applicant to the adverse effects of climate change; and (b) a pressing need to ensure the applicant's individual protection (see paragraphs 487-488 above). The threshold for fulfilling these criteria is especially high (see paragraph 488 above).

528. The applicants' complaint before the Court in the present case concerns the adverse effects of climate change which they, as older women, suffer as a result of the respondent State's allegedly inadequate action concerning climate change. The factual circumstances underlying their complaint may be seen as being localised and focused on the specific circumstances – namely, the past, present and future adverse effects of climate change and, in particular, heatwaves – prevailing at their places of residence in Switzerland.

529. In this connection, the applicants provided information and evidence showing how climate change affects older women in Switzerland, in particular in relation to the increasing occurrence and intensity of heatwaves. The data provided by the applicants, emanating from domestic and international expert bodies – the relevance and probative value of which has not been called into question – shows that several summers in recent years have been among the warmest summers ever recorded in Switzerland and that heatwaves are associated with increased mortality and morbidity, particularly in older women (see paragraphs 65-67 above).

530. Older people have been found by the IPCC to belong to some of the most vulnerable groups in relation to the harmful effects of climate change on physical and mental health[197]. Similar findings were made by the Swiss FOEN, which noted, more specifically, that heatwaves placed strain on the human body and that they could cause dehydration and the impairment of heart and lung function, leading to an increase in emergency hospital admissions. In this context, older people were found to be particularly at risk[198]. Moreover, the adverse effects of climate change on older women, and the need to protect them from the adverse effects of climate change, have been stressed in many international documents[199].

531. While the above findings undoubtedly suggest that the applicants belong to a group which is particularly susceptible to the effects of climate change, that would not, in itself, be sufficient to grant them victim status within the meaning of the criteria set out in paragraphs 487 to 488 above. It is necessary to establish, in each applicant's individual case, that the requirement of a particular level and severity of the adverse consequences affecting the applicant concerned is satisfied, including the applicants'

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[197] See AR6 WGII, Technical summary, p. 50.

[198] FOEN "Climate change in Switzerland", Management Summary (2020), p. 9.

[199] See, for instance, Reports of the Office of the United Nations High Commissioner for Human Rights: "Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women", A/HRC/41/26, 1 May 2019, and "Analytical study on the promotion and protection of the rights of older persons in the context of climate change", A/HRC/47/46, 30 April 2021; Note by the Secretary General "Human rights of older women: the intersection between ageing and gender", A/76/157, 16 July 2021, paragraph 61; and Report of the Secretary General "The impacts of climate change on the human rights of people in vulnerable situations", A/HRC/50/57, 6 May 2022, paragraph 4.

individual vulnerabilities which may give rise to a pressing need to ensure their individual protection.

532. In this connection, as regards applicants nos. 2-4, it should be noted that in their written declarations and their medical records they provided accounts of the various difficulties they encountered during heatwaves, including the effects on their medical conditions. They also submitted that they needed to take various personal adaptation measures during heatwaves.

533. However, while it may be accepted that heatwaves affected the applicants' quality of life, it is not apparent from the available materials that they were exposed to the adverse effects of climate change, or were at risk of being exposed at any relevant point in the future, with a degree of intensity giving rise to a pressing need to ensure their individual protection, not least given the high threshold which necessarily applies to the fulfilment of the criteria set out in paragraphs 487 to 488 above. It cannot be said that the applicants suffered from any critical medical condition whose possible aggravation linked to heatwaves could not be alleviated by the adaptation measures available in Switzerland or by means of reasonable measures of personal adaptation given the extent of heatwaves affecting that country (see paragraphs 88-90 above). It should also be reiterated that victim status in relation to future risk is only exceptionally admitted by the Court and the individual applicants have failed to demonstrate that such exceptional circumstances exist in their regard (see paragraph 470 above).

534. Finally, the fifth applicant provided a very general declaration not indicating any particular morbidity or other serious adverse effects created by heatwaves that would go beyond the usual effects which any person belonging to the group of older women might experience. Moreover, while she provided a medical certificate attesting that she suffered from asthma, in her declaration she stated that she had never seen a doctor concerning heatwaves (see paragraphs 20-21 above). It is therefore not possible to establish a correlation between the applicant's medical condition and her complaints before the Court.

535. It follows from the above considerations that applicants nos. 2-5 do not fulfil the victim-status criteria under Article 34 of the Convention. This suffices for the Court to conclude that their complaints should be declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3.

(β) Article 2 of the Convention

536. While Article 8 undoubtedly applies in the circumstances of the present case as regards the complaints of the applicant association concerning the effects of the alleged shortcomings on the part of the respondent State in its measures to combat the adverse effects and threats of climate change on human health, whether those alleged shortcomings also had such life-threatening consequences as could trigger the applicability of Article 2 is

more questionable. However, for the reasons stated in paragraphs 537 and 538 below, the Court finds it unnecessary to analyse further the issues pertinent to the threshold of applicability of Article 2. The Court also finds that, having regard to the reasons set out in paragraphs 527 to 535 above, the complaints of applicants nos. 2-5 under Article 2 should be declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3.

(γ) Conclusion

537. The Court finds it appropriate to examine the applicant association's complaint from the angle of Article 8 alone. That said, in its case-law analysis below it will have regard to the principles developed also under Article 2, which to a very large extent are similar to those under Article 8 (see paragraph 292 above) and which, when seen together, provide a useful basis for defining the overall approach to be applied in the climate-change context under both provisions.

4. Merits

(a) General principles

538. To a great extent the Court has applied the same principles as those set out in respect of Article 2 when examining cases involving environmental issues under Article 8, notably by affirming that:

(a) The States have a positive obligation to put in place the relevant legislative and administrative framework designed to provide effective protection of human health and life. In particular, States have an obligation to put in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks (see, for instance, *Jugheli and Others*, cited above, § 75; *Di Sarno and Others*, cited above, § 106; and *Tătar*, cited above, § 88).

(b) The States also have an obligation to apply that framework effectively in practice; indeed, regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the Convention is intended to protect effective rights, not illusory ones. The relevant measures must be applied in a timely and effective manner (see *Cuenca Zarzoso v. Spain*, no. 23383/12, § 51, 16 January 2018).

(c) In assessing whether the respondent State complied with its positive obligations, the Court must consider whether, in the manner of devising and/or implementing the relevant measures, the State remained within its margin of appreciation. In cases involving environmental issues, the State

must be allowed a wide margin of appreciation (see *Hardy and Maile*, cited above, § 218, with further references), in particular with regard to the substantive aspect (see *Hatton and Others*, cited above, § 100).

(d) The choice of means is in principle a matter that falls within the State's margin of appreciation; even if the State has failed to apply one particular measure provided for by domestic law, it may still fulfil its positive duty by other means. An impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources (see *Kolyadenko and Others*, cited above, § 160, and *Kotov and Others v. Russia*, nos. 6142/18 and 13 others, § 134, 11 October 2022).

(e) While it is not in the Court's remit to determine what exactly should have been done, it can assess whether the authorities approached the matter with due diligence and gave consideration to all competing interests (see *Mileva and Others v. Bulgaria*, nos. 43449/02 and 21475/04, § 98, 25 November 2010).

(f) The State has a positive obligation to provide access to essential information enabling individuals to assess risks to their health and lives (see *Guerra and Others v. Italy*, 19 February 1998, §§ 57-60, *Reports* 1998-I, developing *López Ostra v. Spain*, 9 December 1994, § 55, Series A no. 303-C; see, further, *McGinley and Egan v. the United Kingdom*, 9 June 1998, §§ 98-104, *Reports* 1998-III, and *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 157-69, ECHR 2005-X).

(g) In assessing whether the respondent State complied with its positive obligations, the Court must consider the particular circumstances of the case. The scope of the positive obligations imputable to the State in the particular circumstances will depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation (see *Kolyadenko and Others*, cited above, § 161, and *Brincat and Others*, cited above, §§ 101-02).

539. In environmental cases examined under Article 8 of the Convention, the Court has frequently reviewed the domestic decision-making process, taking into account that the procedural safeguards available to the individual will be especially material in determining whether the respondent State has remained within its margin of appreciation (see, for instance, *Flamenbaum and Others v. France*, nos. 3675/04 and 23264/04, § 137, 13 December 2012). In this context, the Court has had particular regard to the following principles and considerations:

(a) The complexity of the issues involved with regard to environmental policy-making renders the Court's role primarily a subsidiary one. The Court must therefore first examine whether the decision-making process was adequate (see *Taşkın and Others*, cited above, §§ 117-18);

(b) The Court is required to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making

procedure, and the procedural safeguards available (see *Hatton and Others*, cited above, § 104).

(c) In particular, a governmental decision-making process concerning complex issues such as those in respect of environmental and economic policy must necessarily involve appropriate investigations and studies in order to allow the authorities to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided (ibid., § 128). What is important is that the effects of activities that might harm the environment and thus infringe the rights of individuals under the Convention may be predicted and evaluated in advance (see *Hardy and Maile*, cited above, § 220, with further references).

(d) The public must have access to the conclusions of the relevant studies, allowing them to assess the risk to which they are exposed (see *Tătar*, cited above, § 113, with further references). Moreover, in some instances, relying on the Aarhus Convention, the Court has noted the obligation that in the event of any imminent threat to human health or the environment, whether caused by human activities or owing to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and which is held by a public authority be disseminated immediately and without delay to members of the public who may be affected (see *Di Sarno and Others*, cited above, § 107).

(e) The individuals concerned must have an opportunity to protect their interests in the environmental decision-making process, which implies that they must be able to participate effectively in relevant proceedings and to have their relevant arguments examined, although the actual design of the process is a matter falling within the State's margin of appreciation (see, for instance, *Flamenbaum and Others*, cited above, § 159).

540. It is with these principles in mind that the Court will proceed by identifying the content of the State's positive obligations under Articles 2 and 8 of the Convention in the context of climate change (see paragraphs 292 and 537 above) However, given the special nature of the phenomenon as compared with the isolated sources of environmental harm previously addressed in the Court's case-law, the general parameters of the positive obligations must be adapted to the specific context of climate change.

(b) The States' positive obligations in the context of climate change

(i) The States' margin of appreciation

541. In accordance with the principle of subsidiarity, the national authorities have the primary responsibility to secure the rights and freedoms defined in the Convention, and in doing so they enjoy a margin of appreciation, subject to the Court's supervisory jurisdiction (see, among

many other authorities, *Garib v. the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017; see also see the Preamble to the Convention, introduced on the basis of Article 1 of Protocol No. 15).

542. Having regard, in particular, to the scientific evidence as regards the manner in which climate change affects Convention rights, and taking into account the scientific evidence regarding the urgency of combating the adverse effects of climate change, the severity of its consequences, including the grave risk of their reaching the point of irreversibility, and the scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights (see paragraph 436 above), the Court finds it justified to consider that climate protection should carry considerable weight in the weighing-up of any competing considerations. Other factors militating in the same direction include the global nature of the effects of GHG emissions, as opposed to environmental harm that occurs solely within a State's own borders, and the States' generally inadequate track record in taking action to address the risks of climate change that have become apparent in the past several decades, as evidenced by the IPCC's finding of "a rapidly closing window of opportunity to secure a liveable and sustainable future for all" (see paragraph 118 above), circumstances which highlight the gravity of the risks arising from non-compliance with the overall global objective (see also paragraph 139 above).

543. Taking as a starting-point the principle that States must enjoy a certain margin of appreciation in this area, the above considerations entail a distinction between the scope of the margin as regards, on the one hand, the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect, and, on the other hand, the choice of means designed to achieve those objectives. As regards the former aspect, the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States. As regards the latter aspect, namely their choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources, the States should be accorded a wide margin of appreciation.

(ii) Content of the States' positive obligations

544. As stated above, the Court already held long ago that the scope of protection under Article 8 of the Convention extends to adverse effects on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm. Similarly, the Court derives from Article 8 a right for individuals to enjoy effective protection by the State

authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change (see paragraph 519 above).

545. Accordingly, the State's obligation under Article 8 is to do its part to ensure such protection. In this context, the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights, as noted in paragraphs 435 and 519 above, and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory (see, for instance, *H.F. and Others v. France*, cited above, § 208 *in fine*; see also paragraph 440 above).

546. In line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC (see paragraphs 104-120 above), the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the Convention.

547. Bearing in mind that the positive obligations relating to the setting-up of a regulatory framework must be geared to the specific features of the subject matter and the risks involved (see paragraphs 107-120 and 440 above) and that the global aims as to the need to limit the rise in global temperature, as set out in the Paris Agreement, must inform the formulation of domestic policies, it is obvious that the said aims cannot of themselves suffice as a criterion for any assessment of Convention compliance of individual Contracting Parties to the Convention in this area. This is because each individual State is called upon to define its own adequate pathway for reaching carbon neutrality, depending on the sources and levels of emissions and all other relevant factors within its jurisdiction.

548. It follows from the above considerations that effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. In this context, in order for the measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see, *mutatis mutandis*, *Georgel and Georgeta Stoicescu v. Romania*, no. 9718/03, § 59, 26 July 2011).

549. Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures. Accordingly, and reiterating the position taken above, namely that the margin of appreciation to be afforded to States is reduced as regards the setting of the requisite aims and objectives, whereas in respect of the choice of means to pursue those aims and objectives it remains wide, the Court finds it appropriate to outline the States' positive obligations (see paragraph 440 above) in this domain as follows.

550. When assessing whether a State has remained within its margin of appreciation (see paragraph 543 above), the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:

(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;

(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;

(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);

(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and

(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

551. The Court's assessment of whether the above requirements have been met will, in principle, be of an overall nature, meaning that a shortcoming in one particular respect alone will not necessarily entail that the State would be considered to have overstepped its relevant margin of appreciation (see paragraph 543 above).

552. Furthermore, effective protection of the rights of individuals from serious adverse effects on their life, health, well-being and quality of life requires that the above-noted mitigation measures be supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection. Such adaptation measures must be put in place and

effectively applied in accordance with the best available evidence (see paragraphs 115 and 119 above) and consistent with the general structure of the State's positive obligations in this context (see paragraph 538 (a) above).

553. Lastly, it has already been noted in the Court's case-law that the procedural safeguards available to those concerned will be especially material in determining whether the respondent State has remained within its margin of appreciation (see paragraph 539 above). This is also true in matters of general policy, which include the approach to the choice of means to combat climate change through mitigation and adaptation.

554. In this context, drawing on the approach taken in environmental cases (see paragraph 539 above), and noting the specific features and complexities of the issues concerning climate change, the following types of procedural safeguards are to be taken into account as regards the State's decision-making process in the context of climate change:

(a) The information held by public authorities of importance for setting out and implementing the relevant regulations and measures to tackle climate change must be made available to the public, and in particular to those persons who may be affected by the regulations and measures in question or the absence thereof. In this connection, procedural safeguards must be available to ensure that the public can have access to the conclusions of the relevant studies, allowing them to assess the risk to which they are exposed.

(b) Procedures must be available through which the views of the public, and in particular the interests of those affected or at risk of being affected by the relevant regulations and measures or the absence thereof, can be taken into account in the decision-making process.

(c) Application of the above principles to the present case

(i) Preliminary remarks

555. In the present case, and having regard to the nature of the complaint of the applicant association, acting on behalf of its members (see paragraph 296 above), the Court will assess the respondent State's compliance with its duty to put in place, and effectively apply in practice, the relevant mitigation measures. Failure by the State to comply with this aspect of its positive obligations would suffice for the Court to conclude that the State failed to comply with its positive obligations under Article 8 of the Convention without it being necessary to examine whether the ancillary adaptation measures were put in place (see paragraph 552 above).

556. Moreover, having regard to the nature of the applicant association's complaint relating to the existing and future adverse effects of climate change on the rights of the individuals on whose behalf it acts, and contrary to the arguments of the respondent Government (see paragraph 338 *in fine* above), the Court's assessment may take into account the overall situation in the respondent State, including any relevant information that has come to light as

regards the situation since the completion of the domestic proceedings. However, noting the currently ongoing domestic legislative process (see paragraph 97 above), the Court's assessment is limited to examining the domestic legislation as it stands on the date of adoption of the present judgment, namely 14 February 2024, and on which the parties have provided their submissions.

557. The Court also takes note of the applicant association's reference to several studies suggesting deficiencies in Switzerland's measures to tackle climate change (see paragraph 325 above), which the Government challenged, considering them to be based in essence on subjective hypotheses. For its part, and having regard to its findings in paragraph 573 below, the Court does not find it necessary for its determination of the present case to resolve the disagreements between the parties concerning the findings made in those studies.

(ii) The respondent State's compliance with its positive obligations

558. At the outset, the Court notes that the currently existing 2011 CO_2 Act (in force since 2013) required that by 2020 GHG emissions should be reduced overall by 20% compared with 1990 levels (see paragraph 84 above). However, as pointed out by the applicants, in an assessment dating back to August 2009, the Swiss Federal Council[200] found that at that time the existing scientific evidence[201] relating to the limitation of global warming to 2 to 2.4°C above pre-industrial levels (thus above the currently required 1.5°C limit) required a reduction in global emissions of at least 50-85% by 2050 compared with 1990 levels. This meant that the industrialised countries (such as the respondent State) had to reduce their emissions by 25-40% by 2020 compared to 1990 levels. The study in question also found that in order for the UNFCCC commitments (which were higher than the 1.5°C limit) to be met, GHG emissions would have to decline continuously in order not to exceed 1 to 1.5 tonnes of CO_2eq per capita at the end of the century. However, the pathway which targeted a reduction of 20% by 2020 was considered to be insufficient to achieve that objective in the long term, which required an additional effort for the period after 2020.

559. Moreover, as the Government acknowledged, the relevant domestic assessments found that even the GHG reduction target for 2020 had been missed. Indeed, on average over the period between 2013 and 2020, Switzerland reduced its GHG emissions by around 11% compared with 1990 levels (see paragraph 87 above), which indicates the insufficiency of the

[200] FF 2009 6723 "Message relatif à la politique climatique suisse après 2012 (Révision de la loi sur le CO2 et initiative populaire fédérale « pour un climat sain »)" (2009), pp. 6737-38 and 6757.
[201] See AR4 "Climate Change 2007: Impacts, Adaptation, and Vulnerability".

authorities' past action to take the necessary measures to address climate change.

560. In December 2017, for the period from 2020 to 2030, the Federal Council tabled a revision of the 2011 CO_2 Act, proposing an overall reduction of 50% of GHG emissions, which included a domestic reduction of 30% by 2030 compared with 1990 levels, while the rest was to be achieved by measures to be taken abroad ("external emissions").

561. However, this proposed revision of the 2011 CO_2 Act was rejected in a popular referendum in June 2021. According to the Government, this did not suggest that citizens rejected the necessity of combating global warming or reducing national GHG emissions but rather the proposed means to do so (see paragraph 357 above). In this connection, the Court reiterates that with respect to the choice of means to tackle climate change, the States are accorded a wide margin of appreciation (see paragraph 543 above). In any event, and irrespective of the way in which the legislative process is organised from the domestic constitutional point of view (see *G.S.B. v Switzerland*, no. 28601/11, §§ 72-73, 22 December 2015; see also *Humpert and Others v. Germany* [GC], nos. 59433/18 and 3 others, §§ 71-72, 14 December 2023), the fact is that after the referendum a legislative lacuna existed for the period after 2020. The State sought to address this lacuna by enacting, on 17 December 2021, a partial revision of the existing 2011 CO_2 Act, according to which the reduction target for the years 2021 to 2024 was set at 1.5% per year compared with 1990 levels, on the understanding that from 2022 onwards, a maximum of 25% of this reduction could be achieved by measures implemented abroad (see paragraph 95 above). This also left the period after 2024 unregulated and thus incompatible with the requirement of the existence of general measures specifying the respondent State's mitigation measures in line with a net neutrality timeline (see paragraph 550 (a) above).

562. These lacunae point to a failure on the part of the respondent State to fulfil its positive obligation derived from Article 8 to devise a regulatory framework setting the requisite objectives and goals (see paragraph 550 (a)-(b) above). In this context, it should be noted that in its latest AR6 Synthesis Report (Climate Change 2023) the IPCC stressed that the choices and actions implemented in this decade would have impacts now and for thousands of years (see paragraphs 118-119 above).

563. There have, however, been other developments and regulatory initiatives at the domestic level in relation to climate change. In December 2021 Switzerland submitted an updated NDC undertaking to comply with the targets set out in the Paris Agreement.[202] Switzerland therefore aligned its climate policy with the international commitments set

[202] See UNFCCC, Nationally Determined Contributions Registry, available at www.unfccc.int/NDCREG; last accessed 14.02.2024.

out in that agreement. In particular, the commitments under this updated NDC were summarised in a subsequent communication[203] as follows:

> "Switzerland is committed to following the recommendations of science in order to limit warming to 1.5 degrees Celsius. In view of its climate neutrality target by 2050, Switzerland's NDC is to reduce its [GHG] emissions by at least 50 percent by 2030 compared with 1990 levels, corresponding to an average reduction of [GHG] emissions by at least 35 percent over the period 2021-2030. By 2025, a reduction of [GHG] by at least 35 percent compared with 1990 levels is anticipated. Internationally transferred mitigation outcomes (ITMOs) from cooperation under Article 6 of the Paris Agreement will partly be used."

564. On 30 September 2022, reflecting the commitments in the updated NDC, the Climate Act[204] was enacted (see paragraph 93 above). This Act – which was confirmed in a referendum only on 18 June 2023 but has not yet come into force – envisages the principle of a net-zero emissions target by 2050 by providing that the GHG emissions should be reduced "as far as possible". It also provides for an intermediate target for 2040 (75% reduction compared with 1990 levels) and for the years 2031 to 2040 (average of at least 64%) and 2041 to 2050 (average of at least 89% compared with 1990 levels). It also set indicative values for the reduction of emissions in the building, transport and industrial sectors for the years 2040 and 2050.

565. In this connection, the Court notes that the Climate Act sets out the general objectives and targets but that the concrete measures to achieve those objectives are not set out in the Act but rather remain to be determined by the Federal Council and proposed to Parliament "in good time" (section 11(1) of the Climate Act). Moreover, the adoption of the concrete measures is to be provided under the 2011 CO_2 Act (section 11(2) of the Climate Act), which, as already noted in paragraphs 558 to 559 above, in its current form cannot be considered as providing for a sufficient regulatory framework.

566. It should also be noted that the new regulation under the Climate Act concerns intermediate targets only for the period after 2031. Given the fact that the 2011 CO_2 Act provides for legal regulation of the intermediate targets only up until 2024 (see paragraph 561 above), this means that the period between 2025 and 2030 still remains unregulated pending the enactment of new legislation.

567. In these circumstances, given the pressing urgency of climate change and the current absence of a satisfactory regulatory framework, the Court has difficulty accepting that the mere legislative commitment to adopt the concrete measures "in good time", as envisaged in the Climate Act, satisfies the State's duty to provide, and effectively apply in practice, effective

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[203] See the Report "Switzerland's information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 of its updated and enhanced nationally determined contribution (NDC) under the Paris Agreement (2021 – 2030)".

[204] FF 2022 2403 Loi fédérale sur les objectifs en matière de protection du climat, sur l'innovation et sur le renforcement de la sécurité énergétique.

protection of individuals within its jurisdiction from the adverse effects of climate change on their life and health (see paragraph 555 above).

568. While acknowledging the significant progress to be expected from the recently enacted Climate Act, once it has entered into force, the Court must conclude that the introduction of that new legislation is not sufficient to remedy the shortcomings identified in the legal framework applicable so far.

569. The Court further observes that the applicant association has provided an estimate of the remaining Swiss carbon budget under the current situation, also taking into account the targets and pathways introduced by the Climate Act (see paragraph 323 above). Referring to the relevant IPCC assessment of the global carbon budget, and the data of the Swiss greenhouse gas inventory[205], the applicant association provided an estimate according to which, assuming the same per capita burden-sharing for emissions from 2020 onwards, Switzerland would have a remaining carbon budget of 0.44 $GtCO_2$ for a 67% chance of meeting the 1.5°C limit (or 0.33 $GtCO_2$ for an 83% chance). In a scenario with a 34% reduction in CO_2 emissions by 2030 and 75% by 2040, Switzerland would have used the remaining budget by around 2034 (or 2030 for an 83% change). Thus, under its current climate strategy, Switzerland allowed for more GHG emissions than even an "equal per capita emissions" quantification approach would entitle it to use.

570. The Court observes that the Government relied on the 2012 Policy Brief to justify the absence of any specific carbon budget for Switzerland. Citing the latter, the Government suggested that there was no established methodology to determine a country's carbon budget and acknowledged that Switzerland had not determined one. They argued that Swiss national climate policy could be considered as being similar in approach to establishing a carbon budget and that it was based on relevant internal assessments prepared in 2020 and expressed in its NDCs (see paragraph 360 above). However, the Court is not convinced that an effective regulatory framework concerning climate change could be put in place without quantifying, through a carbon budget or otherwise, national GHG emissions limitations (see paragraph 550 (a) above).

571. In this regard the Court cannot but note that the IPCC has stressed the importance of carbon budgets and policies for net-zero emissions (see paragraph 116 above), which can hardly be compensated for by reliance on the State's NDCs under the Paris Agreement, as the Government seemed to suggest. The Court also finds convincing the reasoning of the GFCC, which rejected the argument that it was impossible to determine the national carbon budget, pointing to, *inter alia*, the principle of common but differentiated responsibilities under the UNFCCC and the Paris Agreement (see *Neubauer and Others*, cited in paragraph 254 above, paragraphs 215-29). This principle

[205] See FOEN, Switzerland's greenhouse gas inventory, available at www.bafu.admin.ch; last accessed 14.02.2024.

requires the States to act on the basis of equity and in accordance with their own respective capabilities. Thus, for instance, it is instructive for comparative purposes that the European Climate Law provides for the establishment of indicative GHG budgets (see paragraph 211 above).

572. In these circumstances, while acknowledging that the measures and methods determining the details of the State's climate policy fall within its wide margin of appreciation, in the absence of any domestic measure attempting to quantify the respondent State's remaining carbon budget, the Court has difficulty accepting that the State could be regarded as complying effectively with its regulatory obligation under Article 8 of the Convention (see paragraph 550 above).

(iii) Conclusion

573. In conclusion, there were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets (see paragraphs 558 to 559 above). By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.

574. The above findings suffice for the Court to find that there has been a violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

575. The applicants complained that they had not had access to a court, for the purposes of Article 6 § 1 of the Convention, concerning the State's failure to take the necessary action to address the adverse effects of climate change.

576. The relevant part of Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

1. The applicants

577. The applicants stressed that access to a court was crucial in climate cases. In their view, given their participation in the domestic proceedings, there was no doubt that they had victim status for the purposes of their

complaint under Article 6 § 1 of the Convention. They also considered that the civil limb of Article 6 was applicable in the present case. In particular, the protection of physical integrity was a "civil right" within the meaning of Article 6. The dispute concerned the right to life under Article 10 § 1 of the Swiss Constitution as well as the rights under Articles 2 and 8 of the Convention (all of which had a legal basis in domestic law) in relation to the inadequate enforcement of the CO_2 Act and the inadequacy of the climate targets. The dispute at issue was about the scope of the above-mentioned rights.

578. The dispute in question was genuine and serious, and the outcome of the proceedings was directly decisive for the rights in question. There was a clear connection, and thus more than a tenuous connection or remote consequences, between the rights invoked, on the one hand, and the reduction of GHG (outcome of the proceedings), on the other. In the domestic proceedings, the applicants had sought an order which would force the respondent State to take the necessary action to tackle dangerous climate change. This would have gone hand in hand with a reduction of GHG emissions and the heatwaves linked to them, a matter which had a clear connection to the protection of their rights. In the domestic proceedings they had not merely complained about hypothetical consequences for the environment and human health but had pointed to concrete health risks from excessive GHG emissions which they faced as members of a particularly vulnerable group and which had also materialised for some of the applicants. Thus, the outcome of the domestic proceedings had affected the very substance of their rights to life and private life.

579. The applicants contended that they had not had an effective judicial remedy at their disposal by which to assert their civil rights. The domestic authorities had declared their claims inadmissible on the grounds that they lacked standing under section 25a of the APA, and the domestic courts had upheld that decision. The domestic courts had not assessed the applicants' claim or, alternatively, had only done so arbitrarily. Specifically, none of the courts had effectively analysed the merits of the critical questions, such as those relating to the applicants' vulnerability to extreme heatwaves, the harm from heat-related afflictions suffered by applicants nos. 2-5, and the legislative and administrative framework necessary to protect the applicants' rights to life and their family and private life.

580. In the applicants' view, the domestic courts had applied the standing requirements arbitrarily and in a manifestly unreasonable way, impairing the very essence of their right of access to a court. The assessment of the FAC that the applicants were not "particularly" affected by the impacts of climate change had been in clear contrast to the best available scientific evidence and the medical certificates submitted by the applicants. Moreover, the FSC's conclusion that there was still some time available to combat dangerous climate change had been arbitrary and contrary to any scientific evidence. It

had been the result of the judges' own fact-finding exercise without the involvement of (climate) scientists and despite the fact that the FSC's appellate function was normally limited to the examination of breaches of the law. In any event, that finding had been based on a false premise and was manifestly unreasonable.

581. The applicants also submitted that the domestic courts had applied the standing requirements disproportionately, given their duty to consider the nature of the rights at stake, and the fact that on the basis of their interpretation of the standing requirements, acts and failures by the State in fighting climate change would remain entirely outside the scope of human rights law. This would be an unacceptable consequence in the light of the magnitude of the threat posed by climate change and the practice in comparable environmental-law cases. Moreover, the domestic courts' arbitrary application of the standing requirements was inconsistent with the respondent State's commitments under the Aarhus Convention.

2. The Government

582. For the reasons set out in paragraphs 340 to 341 above concerning the applicant association's victim status under the substantive provisions (Articles 2 and 8), the Government argued that the applicant association could also not be considered to have victim status under Article 6 § 1 of the Convention. On the other hand, the Government did not contest that applicants nos. 2-5 could claim victim status under that provision.

583. Relying on the findings of the domestic courts, the Government submitted that the applicants had not been affected with the required intensity in the enjoyment of their rights arising from Article 10 § 1 of the Constitution and Articles 2 and 8 of the Convention to claim victim status for the purposes of Article 34 of the Convention. Their request had been of an *actio popularis* nature and they could not arguably claim that there had been a dispute over a right recognised in domestic law. The Government also stressed that neither the Swiss Constitution nor any other domestic legislation recognised the right to a clean, healthy and sustainable environment.

584. The Government further stressed that the applicants had not established the existence of a sufficient link between the alleged omissions and the rights invoked. Moreover, they had not demonstrated that there had been a serious and imminent threat to the rights invoked, and the requested actions had not been likely to immediately contribute to the reduction of CO_2 emissions in Switzerland. Consequently, neither the threat nor the actions requested presented a degree of probability making the outcome of the dispute directly decisive for the rights invoked by the applicants. The link between the alleged omissions and the rights invoked by the applicants was therefore too tenuous and remote.

585. In the present case, in reality, the applicants had sought to obtain the replacement of the CO_2 Act by a law providing for stricter measures. It was

therefore the general interest in protection of the climate that had constituted the object of the proceedings and the issue at stake, and not a dispute over a civil right of the applicants. The Government therefore argued that Article 6 § 1 was not applicable.

586. Furthermore, the Government pointed out that the applicants had had access to two levels of domestic jurisdiction. Both the FAC and the FSC had carefully examined the applicants' case and had provided duly reasoned decisions. Moreover, in the Government's view, the domestic administrative procedure was not particularly complex and was based on the inquisitory principle whereby the domestic authorities sought to establish the facts of their own motion. However, in order to bring an action under section 25a of the APA certain conditions needed to be fulfilled so as to avoid *actio popularis* claims.

587. In the Government's view, the conditions laid down by the procedural law to allow an authority to examine a particular matter served the proper administration of justice. The requirement for the person making the claim to be affected to some extent in his or her personal legal sphere resulted from the fact that section 25a of the APA was a means of individual legal protection. This allowed for a delimitation in relation to *actio popularis* claims. This requirement also contributed to respect for the separation of powers. It could not therefore be said to restrict access to a court in such a way that the individual's right to a court would be impaired in its very essence. Moreover, there was a reasonable relationship of proportionality between this requirement and the aims pursued.

588. The careful examination of the case carried out by the FSC with regard to the formal criterion of an interest worthy of protection, as well as the characteristics of the political system specific to Switzerland, demonstrated that the courts could not play a determining role in the sphere of climate change, and could certainly not themselves define the measures to be taken. In the view of the Government, the FSC had therefore rightly considered that the applicants' complaints should not be answered by judicial means, but rather by political means. Their appeal had not served the purpose of individual legal protection but rather had aimed to examine in an abstract manner the current climate protection measures, and those planned up to 2030. This element in particular had led the FSC to find that the applicants' appeal was of an *actio popularis* nature, which was incompatible with the means of individual legal protection. These findings were neither arbitrary nor manifestly unreasonable and the Court should not therefore call them into question.

589. In sum, in the Government's view, there had been no disproportionate restriction on the applicants' right of access to the domestic courts in a manner impairing the very essence of that right. The applicants' Article 6 § 1 complaint was therefore manifestly ill-founded.

B. The Court's assessment

1. Admissibility

(a) Victim status

590. In order to claim to be a "victim" in the context of an alleged violation of Article 6 of the Convention, and to complain of alleged procedural shortcomings under that provision, it is normally sufficient that the applicant was affected as a party to the proceedings brought by him or her before the domestic courts. This is true for individuals (see, for instance, *Balmer-Schafroth and Others v. Switzerland*, 26 August 1997, § 26, *Reports* 1997-IV, and *Çöçelli and Others v. Türkiye*, no. 81415/12, §§ 39-40, 11 October 2022) and for associations (see, for instance, *Gorraiz Lizarraga and Others*, cited above, § 36, and *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği*, cited above, § 40, with further references).

591. Where the *locus standi* of an applicant has been denied at the domestic level (see, for instance, *Bursa Barosu Başkanlığı and Others v. Turkey*, no. 25680/05, §§ 114-16, 19 June 2018), including in instances where the applicant was not recognised as possessing an interest in bringing an action, and where the applicant complains of a lack of access to a court or of another procedural deficiency in that respect, the matter of victim status may more appropriately be examined in the context of the assessment of the applicability of Article 6 to the dispute in question (see, for instance, *Asselbourg and Others*, cited above; *Folkman and Others v. the Czech Republic* (dec.), no. 23673/03, 10 July 2006; *Sarl du Parc d'Activités de Blotzheim v. France*, no. 72377/01, §§ 18-20, 11 July 2006; and *Association Burestop 55 and Others*, cited above, §§ 52-60).

592. In the present case, the Government challenged the standing/victim status of all the applicants as regards the substantive Convention provisions (Articles 2 and 8), whereas they did not challenge the victim status of applicants nos. 2-5 under the procedural provisions (Articles 6 and 13) (see paragraphs 341 and 345 above).

593. Having regard to the fact that the issue of victim status under Article 34 is, in any event, a matter that goes to the Court's jurisdiction and which the Court examines of its own motion (see *Fedotova and Others*, cited above, § 88), the issue of the victim status of the applicants under Article 6 § 1 of the Convention will be examined by joining it to the assessment of the applicability of that provision.

(b) Applicability of Article 6 § 1 of the Convention

(i) General principles

594. Article 6 of the Convention does not guarantee a right of access to a court with power to invalidate or override a law enacted by the legislature

(see, for example, *Ruiz-Mateos v. Spain*, no. 14324/88, Commission decision of 19 April 1991, Decisions and Reports 69, p. 22; *Posti and Rahko v. Finland*, no. 27824/95, § 52, ECHR 2002 VII; and *Project-Trade d.o.o. v. Croatia*, no. 1920/14, § 68, 19 November 2020).

595. For Article 6 § 1 in its civil limb to be applicable, there must be a "dispute" ("*contestation*" in French) over a right which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The provision does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play. Lastly, the right must be a "civil" right (see, most recently, *Grzęda*, cited above, § 257, with further references; see also, in the environmental context, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV, and *Association Burestop 55 and Others*, cited above, § 52).

596. As indicated previously, the Convention does not recognise a right to bring an *actio popularis*, this prohibition being intended to avoid cases being brought before the Court by individuals complaining of the mere existence of a law applicable to any citizen of a country, or of a judicial decision to which they are not party (see *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, § 29, ECHR 2009 (extracts)). Thus, an environmental association relying on Article 6 must show that the dispute or claim raised by it has a sufficient link with a specific civil right on which the association itself can rely (see *Association Burestop 55 and Others*, cited above, § 55).

(α) The existence of a "right" and its "civil" nature

597. The notion of "civil" rights is an autonomous one. The Court has held that the character of the legislation which governs how the matter is to be determined or that of the authority invested with jurisdiction in the matter are of little consequence (see *Ivan Atanasov*, cited above, § 90). Thus, the classification of the legislation (civil, commercial, administrative or other), or of the competent tribunal (ordinary, administrative court or other) are not as such decisive. What matters is that the right is exercisable by the person in question and can be characterised as a "civil" right.

598. Article 6 § 1 does not guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned. In order to decide whether the right in question has a basis in domestic law, the starting-point must be the provisions of the relevant law and their interpretation by the

domestic courts. It is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Grzęda*, cited above, §§ 258-59).

599. When carrying out its assessment, the Court needs to establish whether the applicant's claim was frivolous or vexatious or otherwise lacking in foundation (see, for instance, *Miller v. Sweden*, no. 55853/00, § 28, 8 February 2005). Moreover, it is necessary for the Court to look beyond the appearances and the language used and to concentrate on the realities of the situation (see *Boulois v. Luxembourg* [GC], no. 37575/04, § 92, ECHR 2012, with further references).

600. In the environmental context, the Court has recognised the existence of a civil right where the domestic law recognises an individual right to environmental protection where the rights to life, to physical integrity and of property are at stake (see, for instance, *Zander v. Sweden*, 25 November 1993, § 24, Series A no. 279-B; *Balmer-Schafroth and Others*, cited above, §§ 33-34; *Athanassoglou and Others*, cited above, § 44; and *Taşkın and Others*, cited above, §§ 132-33).

601. As regards associations, in *Gorraiz Lizarraga and Others* (cited above, §§ 45-47), Article 6 was found to apply with respect to proceedings intended to defend certain specific interests of the association's members, namely their lifestyle and properties. The Court noted that the applicant association had complained of a direct and specific threat hanging over its members' personal assets and lifestyles, which, without a doubt, had an economic and civil dimension. While the relevant domestic proceedings had "ostensibly [borne] the hallmark of public-law proceedings", the final outcome of the proceedings had nonetheless been decisive for the applicants' complaints of interference with their property and lifestyles. Thus, the Court found that the proceedings as a whole could be considered to concern the civil rights of the members of the association (see also, for similar considerations, *L'Erablière A.S.B.L.*, cited above, §§ 29-30).

602. It is also clear that associations can rely on Article 6 in disputes concerning their own "civil" rights (see *Association Burestop 55 and Others*, cited above, § 55). In the context of environmental litigation, the Court has remarked that on a strict reading, Article 6 would not be applicable to proceedings aimed at environmental protection as a public-interest value as there would not be a dispute over a civil right which the association itself could claim. However, relying on the case-law in *Gorraiz Lizarraga and Others* (cited above), the Court considered that such an approach would be at variance with the realities of today's civil society, where associations play an important role, *inter alia* by defending specific causes before the domestic authorities or courts, particularly in the environmental-protection sphere (see *Collectif national d'information et d'opposition à l'usine Melox – Collectif*

Stop Melox et Mox, cited above). In this connection, the Court has also relied on the principles flowing from the Aarhus Convention (see *Association Burestop 55 and Others*, cited above, § 54; see also paragraph 491 above).

(β) The existence of a genuine and serious dispute

603. In order for Article 6 to apply there has to be a dispute, which must be genuine and serious and which may relate not only to the actual existence of a right but also to its scope and the manner of its exercise (see paragraph 596 above). The existence of a dispute ("*contestation*" in French) implies the existence of a disagreement. However, conformity with the spirit of the Convention requires that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 45, Series A no. 43, and *Cipolletta v. Italy*, no. 38259/09, §§ 31-32, 11 January 2018, with further references).

604. In the environmental context, the Court has been prepared to accept that disputes concerning environmental matters were genuine and serious. It has drawn that conclusion from, in particular, the fact that the relevant appeal had been declared admissible at the domestic level (see, for instance, *Balmer-Schafroth and Others*, cited above, § 38, and *Athanassoglou and Others*, cited above, § 45), from the substance of the applicant's pleadings before the domestic courts (see *Association Burestop 55 and Others*, cited above, § 59), or from the arguments used by the domestic courts to dismiss a given action (see *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox*, cited above).

(γ) Whether the outcome of the proceedings is "directly decisive" for the applicant's right

605. Whether the result of the proceedings can be considered directly decisive for the right in question depends on the nature of the right relied on as well as on the object of the proceedings in question.

606. In the environmental context, the Court considered in *Balmer-Schafroth and Others* (cited above, § 40) that the applicants had failed to demonstrate that the operation of the power station had exposed them personally to a danger that was not only serious but also specific and, above all, imminent. The Court reached a similar conclusion in *Athanassoglou and Others* (cited above, §§ 53-54), in which it held that the applicants had in reality sought to contest the very principle of the use of nuclear energy, which was a policy decision for each Contracting State to take according to its democratic processes and not an issue to be examined under Article 6 § 1. The Court followed the same approach in several other cases where the applicants essentially complained of a hypothetical environmental impact rather than a specific infringement of, or an adverse impact on, their rights (see, for instance, *Folkman and Others*, cited above; *Zapletal v. the Czech*

Republic (dec.), no. 12720/06, 30 November 2010; and *Ivan Atanasov*, cited above, § 92).

607. By contrast, where the adverse environmental effects on an applicant's rights were immediate and certain, the Court considered that the dispute concerning the matter fell under Article 6 § 1 (see, for instance, *L'Erablière A.S.B.L.*, cited above, §§ 28-29; *Zander*, cited above, § 26; *Taşkın and Others*, cited above, § 133; and *Association Burestop 55 and Others*, cited above, § 59).

(ii) Applicability of Article 6 § 1 in the climate-change context

608. The above-noted general principles concerning the applicability of Article 6 § 1 also prevail in the present climate-change context, it being understood that their application may need to take into account the specificities of climate-change litigation. In other words, while characteristics of the subject matter do not at present prompt the Court to revise its firmly established case-law on Article 6, they will nonetheless inevitably have implications for the application of that case-law, both in regard to the conditions for its applicability and to the assessment of compliance with the requirements flowing from that provision.

609. As pointed out above, Article 6 does not guarantee a right of access to a court with power to invalidate or override laws enacted by Parliament (see paragraphs 594 and 600 above). This accordingly means that Article 6 cannot be relied upon to institute an action before a court for the purpose of compelling Parliament to enact legislation. However, where domestic law does provide for individual access to proceedings before a Constitutional Court or another similar superior court which does have the power to examine an appeal lodged directly against a law, Article 6 may be applicable (see *Xero Flor w Polsce sp. Z o.o. v. Poland*, no. 4907/18, § 190, 7 May 2021, with further references).

610. As already addressed above, a legally relevant relationship of causation may exist between State actions and/or omissions and the harm, or risk of harm, affecting individuals (see paragraphs 431 and 519 above). Where such rights are recognised under domestic law, a "civil" right within the meaning of Article 6 may be at issue. Moreover, it is important to note that in so far as participation of the public and access to information in matters concerning the environment (as widely acknowledged in international environmental law) constitute rights recognised in domestic law, this may lead to a conclusion that there is a "civil" right within the meaning of Article 6. Thus, in so far as such rights can be found in domestic law, this may also lead to a conclusion that a "civil" right within the meaning of Article 6 § 1 is at issue.

611. As to the further question – whether there is a genuine and serious dispute or disagreement over the manner of ensuring respect for such a right

– this is a matter to be determined on the facts of each particular case (see paragraphs 603 to 604 above).

612. As regards, lastly, the requirement that the outcome of the proceedings in question must be "directly decisive" for the applicant's right, the Court notes that there is a certain link between the requirement under Article 6 that the outcome of the proceedings must be directly decisive for the applicants' rights relied on under domestic law, and the considerations it has found relevant with a view to setting out criteria for victim status as well as those relating to the applicability of Article 8 (see, for instance, the approach in *Athanassoglou and Others*, cited above, § 59, and *Ivan Atanasov*, cited above, §§ 78 and 93).

613. Furthermore, the object of the proceedings also has a bearing on whether the outcome can be considered decisive for the right relied on. In this connection, in most of the environmental cases examined by the Court so far, the proceedings have concerned issues relating to the operating permits for specific facilities, or the conditions for their operation. In such circumstances, where the harmful operation or its continuation depends on the outcome of the proceedings, it may often be clear that the outcome of the proceedings would be directly decisive for the rights relied on by the affected individuals who have victim status (see, for instance, *Zander*, cited above, § 24 *in fine*; see also, by contrast, *Balmer-Schafroth and Others*, cited above, § 40, and *Athanassoglou and Others*, cited above, §§ 54-55). In the context of climate litigation, however, the object of the proceedings may well be broader, which is why the question whether their object can be considered directly decisive for the rights relied on becomes more critical and distinct.

614. At the same time, the various elements of the analysis under this limb of the test, and in particular the notion of imminent harm or danger, cannot be applied without properly taking into account the specific nature of climate change-related risks, including their potential for irreversible consequences and corollary severity of harm. Where future harms are not merely speculative but real and highly probable (or virtually certain) in the absence of adequate corrective action, the fact that the harm is not strictly imminent should not, on its own, lead to the conclusion that the outcome of the proceedings would not be decisive for its alleviation or reduction. Such an approach would unduly limit access to a court for many of the most serious risks associated with climate change. This is particularly true for legal actions instituted by associations. In the climate-change context, their legal actions must be seen in the light of their role as a means through which the Convention rights of those affected by climate change, including those at a distinct representational disadvantage, can be defended and through which they can seek to obtain an adequate corrective action for the alleged failures and omissions on the part of the authorities in the field of climate change.

(iii) Application of the above principles and considerations to the present case

615. The Court notes that the applicants' action instituted at the domestic level largely concerned requests for legislative and regulatory action falling outside the scope of Article 6 § 1 (see points 1-3 and some items under point 4 of their claims in paragraph 22 above). In part, however, the action concerned the implementation of measures within the competence of the respective authorities, required to achieve the current reduction target of 20%, and thus for ending the unlawful omissions (see the opening part of point 4 in paragraph 22 above). They also requested a declaratory ruling of unlawfulness of the alleged governmental omissions in the field of climate change (see point 5 of the request). The applicants have acknowledged this dual nature of the complaint they raised in their legal action before the FAC (see paragraph 33 above).

616. While the complaint concerning policy decisions that are subject to the relevant democratic processes is not a matter falling within the scope of Article 6 (see paragraph 594 above), the applicants' complaint concerning effective implementation of the mitigation measures under existing law is a matter capable of falling within the scope of that provision, provided that the other conditions for the applicability of Article 6 § 1 are satisfied.

617. As to the "civil" nature of the right, the applicants relied, *inter alia*, on the right to life under Article 10 of the Swiss Constitution (see paragraph 121 above), which the Court has previously found to be a right from which not only the right to life but also the right to the protection of physical integrity can be derived (see *Balmer-Schafroth and Others*, cited above, §§ 33-34). In accordance with the Court's well-established case-law these are rights which are civil in nature for the purpose of the first limb of the test for the applicability of Article 6 (see paragraph 600 above).

618. In this regard the Court notes that the FSC did not reject the legal action of applicants nos. 2-5 for lack of a right on which they could rely, but rather because it considered their action to be of an *actio popularis* nature and that the individual applicants were not affected with sufficient intensity (see paragraph 59 above). In sum, it cannot be said that the individual applicants' claim was frivolous or vexatious or otherwise lacking in foundation in terms of the relevant domestic law (see paragraph 599 above). The Court is unable to agree with the finding of the FSC that the individual applicants' claim could not be considered arguable for the purposes of Article 6 § 1 of the Convention (see paragraph 61 above). Moreover, as regards the applicant association, while the FSC left open whether it had legal standing before it, the Court notes that the association's action was based on the threat arising from the adverse effects of climate change as they affected its members' health and well-being (see *Gorraiz Lizarraga and Others*, cited above, § 46). The Court is satisfied that the interests defended by the association are such that the "dispute" raised by it had a direct and sufficient link to its members'

rights in question, bearing in mind the specific role of associations in the climate-change context (see paragraph 614 above).

619. The above considerations are also important for informing the second criterion for the applicability of Article 6, namely the existence of a genuine and serious dispute or disagreement over respect for the relevant right (see paragraph 611 above), which undoubtedly existed in the present case.

620. Lastly, as regards the third criterion – whether the outcome of the proceedings was "directly decisive" for the applicants' rights – the Court notes the following.

621. As regards the dispute brought by the applicant association, and in so far as that dispute arose out of a relevant part of its claim at the domestic level – namely, the complaint concerning the failure to effectively implement mitigation measures under the existing law (see paragraph 615 above) – the applicant association has demonstrated that it had an actual and sufficiently close connection to the matter complained of and to the individuals seeking protection against the adverse effects of climate change on their lives, health and quality of life. In other words, the applicant association sought to defend the specific civil rights of its members in relation to the adverse effects of climate change (see also paragraphs 521-526 above). It acted as a means through which the rights of those affected by climate change could be defended and through which they could seek to obtain an adequate corrective action for the State's failure to effectively implement mitigation measures under the existing law (see paragraph 614 above).

622. In this connection, the Court refers to its above findings regarding the applicant association's standing for the purposes of the complaint under Article 8 of the Convention (see paragraphs 521-526 above). It reiterates the important role of associations in defending specific causes in the sphere of environmental protection, as already found in its case-law (see paragraph 601 above), as well as the particular relevance of collective action in the context of climate change, the consequences of which are not specifically limited to certain individuals. Similarly, in so far as a dispute reflects this collective dimension, the requirement of a "directly decisive" outcome must be taken in the broader sense of seeking to obtain a form of correction of the authorities' actions and omissions affecting the civil rights of its members under national law.

623. Article 6 § 1 therefore applies to the complaint of the applicant association and it can be considered to have victim status under that provision regarding its complaint of lack of access to a court (see paragraph 593 above). The Government's preliminary objection in that regard is therefore dismissed.

624. With respect to applicants nos. 2-5, it cannot be considered that the dispute they had brought concerning the failure to effectively implement mitigation measures under the existing law was or could have been directly decisive for their specific rights. For similar reasons as those stated above

with respect to Article 8 of the Convention (see paragraphs 527-535 above), it cannot be held that applicants nos. 2-5 have made out a case demonstrating that the requested action by the authorities – namely, effectively implementing mitigation measures under the existing national law – alone would have created sufficiently imminent and certain effects on their individual rights in the context of climate change. It therefore follows that their dispute had a mere tenuous connection with, or remote consequences for, their rights relied upon under national law (compare *Balmer-Schafroth and Others*, cited above). Thus, the outcome of the dispute was not directly decisive for their civil rights (see paragraph 612 above).

625. Against this background the Court finds that the complaint of applicants nos. 2-5 is inadmissible as being incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. Merits

(a) General principles

626. In the present case, an issue under Article 6 § 1 arises in relation to the requirement of access to a court. The relevant general principles concerning this matter are as follows (see *Zubac v. Croatia* [GC], no. 40160/12, §§ 76-79, 5 April 2018):

> "76. The right of access to a court was established as an aspect of the right to a tribunal under Article 6 § 1 of the Convention in *Golder v. the United Kingdom* (21 February 1975, §§ 28-36, Series A. no. 18). In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court (see *Roche v. the United Kingdom* [GC], no. 32555/96, § 116, ECHR 2005-X; see also *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 91, ECHR 2001-V; *Cudak v. Lithuania* [GC], no. 15869/02, § 54, ECHR 2010; and *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 84, ECHR 2016 (extracts)).
>
> 77. The right of access to a court must be 'practical and effective', not 'theoretical or illusory' (see, to that effect, *Bellet v. France*, 4 December 1995, § 36, Series A no. 333-B). This observation is particularly true in respect of the guarantees provided for by Article 6, in view of the prominent place held in a democratic society by the right to a fair trial (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII, and *Lupeni Greek Catholic Parish and Others*, cited above, § 86).
>
> 78. However, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, which regulation may vary in time and in place according to the needs and resources of the community and of individuals (see *Stanev v Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court,

it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Lupeni Greek Catholic Parish and Others*, cited above, § 89, with further references).

79. The Court would also stress that it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *inter alia*, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; and *Perez v. France* [GC], no. 47287/99, § 82, ECHR 2004-I). Normally, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments in issue before them for consideration are not for the Court to review. The Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015)."

627. It should also be reiterated that Article 6 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the grounds of being incompatible with the Convention or to equivalent domestic legal norms (see *Berger-Krall and Others*, cited above, § 322, with further references, and paragraph 600 above). Furthermore, the Court has also accepted, albeit in another context, that maintaining the separation of powers between the legislature and the judiciary is a legitimate aim as regards limitations on the right of access to a court (see *A. v. the United Kingdom*, no. 35373/97, § 77, ECHR 2002-X).

628. The relevant principles concerning limitations on the right of access to a court reflect the process, inherent in the Court's task under the Convention, of striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Fayed*, cited above, § 65 *in fine*). It thus remains to be determined, on the facts of the particular case, whether there has been a disproportionate limitation on the right of access to a court (see *Association Burestop 55 and Others*, cited above, §§ 71-72).

(b) Application of the above principles to the present case

629. At the outset, the Court reiterates that the right of access to a court includes not only the right to institute proceedings but also the right to obtain a determination of the dispute by a court. This flows from the fact that the right of access to a court must be "practical and effective", not theoretical or illusory (see, for instance, *Lupeni Greek Catholic Parish and Others*, cited above, § 86).

630. In the present case, the applicant association's legal action was rejected, first by an administrative authority, the DETEC, and then by the domestic courts at two levels of jurisdiction, without the merits of its

complaints being assessed (see paragraphs 28-31, 34-42 and 52-63 above). There was therefore a limitation on the right of access to a court and the Court must assess whether the manner in which the limitation at issue operated in the present case restricted the applicant association's access to a court in such a way or to such an extent that the very essence of the right was impaired (see paragraphs 626 to 628 above).

631. As regards the legitimate aim pursued by the limitation at issue, in so far as the decisions of the domestic courts sought to distinguish the issue of individual protection from the relevant democratic processes and general challenges to legislation, thereby preventing *actio popularis* complaints, it should be reiterated that the Court has previously accepted that maintaining the separation of powers between the legislature and the judiciary is a legitimate aim as regards limitations on the right of access to a court (see paragraph 627 above). Moreover, as already discussed in paragraphs 596 and 627 to 628 above, Article 6 § 1 does not require the provision of access to a court as regards challenges to the state of domestic legislation, or for *actio popularis* complaints.

632. However, and as the last step of the relevant test, it remains to be seen whether the limitation on the applicant association's right of access to a court, to the extent that the proceedings did not fall outside the scope of Article 6, was proportionate, namely whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (see paragraph 626 above).

633. In this connection, it should be reiterated that the action which the applicant association instituted at the domestic level could be seen as being hybrid in nature. In its main part, it clearly concerned issues pertaining to the democratic legislative process and falling outside the scope of Article 6 § 1, but it also concerned issues pertaining specifically to alleged failures in the enforcement of the existing domestic law affecting the protection of the rights defended by the applicant association. Some of the claims thus raised issues going to the lawfulness of the impugned governmental actions or omissions, alleging adverse effects on the right to life and the protection of physical integrity, which are enshrined in the domestic law, notably in Article 10 of the Constitution (see paragraphs 615-617 above).

634. To the extent that it was seeking to vindicate these rights in the face of the threats posed by the allegedly inadequate and insufficient action by the authorities to implement the relevant measures for the mitigation of climate change already required under the existing national law, this kind of action cannot automatically be seen as an *actio popularis* or as involving a political issue which the courts should not engage with. This position is consistent with the reasoning set out in paragraph 436 above as regards the manner in which climate change may affect human rights and the pressing need to address the threats posed by climate change.

635. The Court is not persuaded by the domestic courts' findings that there was still some time to prevent global warming from reaching the critical limit (see paragraphs 56-59 above). This was not based on sufficient examination of the scientific evidence concerning climate change, which was already available at the relevant time, as well as the general acceptance that there is urgency as regards the existing and inevitable future impacts of climate change on various aspects of human rights (see paragraph 436 above; see also paragraph 337 above as regards the respondent Government's acceptance that there was a climate emergency). Indeed, the existing evidence and the scientific findings on the urgency of addressing the adverse effects of climate change, including the grave risk of their inevitability and their irreversibility, suggest that there was a pressing need to ensure the legal protection of human rights as regards the authorities' allegedly inadequate action to tackle climate change.

636. The Court further notes that the domestic courts did not address the issue of the standing of the applicant association, an issue which warranted a separate assessment irrespective of the domestic courts' position as regards the individual applicants' complaints. The domestic courts did not engage seriously or at all with the action brought by the applicant association.

637. What is more, before resorting to the courts the applicant association, and its members, had raised their complaints before various expert and specialised administrative bodies and agencies, but none of them dealt with the substance of their complaints (see paragraph 22 above). Despite the fact that such an examination by the administrative authorities alone could not satisfy the requirements of access to a court under Article 6, the Court notes that, judging by the DETEC's decision, the rejection of the applicants' complaint by the administrative authorities would seem to have been based on inadequate and insufficient considerations similar to those relied upon by the domestic courts (see paragraphs 28-31 above). The Court notes, furthermore, that individual applicants/members of the association were not given access to a court, and nor was there any other avenue under domestic law through which they could bring their complaints to a court. There were therefore no other relevant safeguards to be taken into account in its assessment of the proportionality of the limitation on the applicant association's right of access to a court (see paragraph 628 above).

638. The foregoing considerations are sufficient to enable the Court to conclude that, to the extent that the applicant association's claims fell within the scope of Article 6 § 1, its right of access to a court was restricted in such a way and to such an extent that the very essence of the right was impaired.

639. In this connection, the Court considers it essential to emphasise the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case-law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field. Furthermore, given the principles of shared responsibility and

subsidiarity, it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed.

640. In the present case, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

641. The applicants complained that they had not had an effective remedy at their disposal, within the meaning of Article 13 of the Convention, concerning their complaints about the authorities' omission to address the adverse effects of climate change.

642. Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

643. The Government contested the applicants' complaint.

644. The Court notes that the role of Article 6 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by the more stringent requirements of Article 6 (see, for instance, *Baka v. Hungary* [GC], no. 20261/12, § 181, 23 June 2016). Given the Court's findings under Article 6 § 1 of the Convention concerning the applicant association (see paragraph 640 above), the present complaint does not give rise to any separate issue in its regard. Consequently, the Court holds that it is not necessary to examine the complaint under Article 13 of the Convention separately.

645. As regards applicants nos. 2-5, having regard to its findings in paragraphs 527 to 535 and 625 above, the Court finds that they have no arguable claim under Article 13 and that their complaint is incompatible *ratione materiae* with the provisions of the Convention (see, for instance, *Athanassoglou and Others*, cited above, §§ 59-60) and must be rejected in accordance with Article 35 § 4 of the Convention.

VI. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

A. Article 41 of the Convention

646. Article 41 of the Convention provides as follows:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

647. The applicant association did not submit a claim for damages. The Court therefore makes no award under this head.

2. Costs and expenses

648. In the Chamber proceedings the applicant association claimed a total amount of 324,249.25 Swiss Francs (CHF) in respect of cost and expenses. The sum comprised, first, lawyers' fees (CHF 315,249.25), and, secondly, the costs imposed by the Swiss courts at the domestic level (totalling CHF 9,000). In the proceedings before the Grand Chamber, the applicant association submitted a claim for newly incurred costs and expenses in the amount of CHF 187,988.45. It also provided invoices and supporting documents in relation to the payments made by the applicant association. Subsequently, the applicant association submitted additional fee notes and invoices for services provided by the legal representatives to the applicant association totalling CHF 79,181.50, 63,057.92 euros (EUR) and 27,504.50 British pounds (GBP).

649. The Government contested the applicant association's claim as being unsubstantiated and excessive. They considered that the claim should be rejected or, in the alternative, that a maximum amount of CHF 13,000 should be awarded.

650. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, for instance, *Halet v. Luxembourg* [GC], no. 21884/18, § 214, 14 February 2023). Having regard to the above criteria, the Court is not convinced that all the costs and expenses incurred in the proceedings before it were necessarily incurred and considers it reasonable to award EUR 80,000 covering all costs and expenses under this head. The remainder of the applicant association's claim for costs and expenses is rejected.

3. Default interest

651. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

B. Article 46 of the Convention

652. The relevant parts of Article 46 of the Convention provide as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

1. The parties' submissions

653. The applicants submitted that in the event of a finding of a violation by the Court, Article 46 of the Convention should also be applied. However,

given that the choice of means to implement the Court's judgment was primarily for the respondent State, the Court should not specify the measures to be taken. It should rather indicate that the State would need to take all suitable measures to allow it to achieve a level of annual emissions compatible with its target of attaining a minimum reduction of 40% in GHG emissions by 2030, and carbon neutrality by 2050.

654. The Government pointed out that the applicants had not requested before the domestic courts or before the Court that any specific general measures be indicated to the State. They had in fact accepted that there were several measures available to the respondent State to ensure compliance with the relevant carbon budget. The Government further noted that various mitigation measures had been developed at the international level, notably by the IPCC. In the Government's view, it was also important to bear in mind the wide margin of appreciation accorded to the State in a complex and technical area such as climate change, Moreover, indicating any specific measures under Article 46 would run counter to the principle of subsidiarity and the necessary separation of powers. In any event, there was no systemic issue at the domestic level that would warrant the application of Article 46. The Government therefore submitted that the Court should not indicate any general measures under that provision.

2. The Court's assessment

655. The Court reiterates that under Article 46 of the Convention the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see, among other authorities, *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, § 293, 14 September 2022).

656. The Court further points out that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions and spirit of the Court's judgment. However, in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measure – individual and/or general – that might be taken to put an end to the situation which has given rise to the finding of a violation (ibid., § 294).

657. In the present case, having regard to the complexity and the nature of the issues involved, the Court is unable to be detailed or prescriptive as regards any measures to be implemented in order to effectively comply with the present judgment. Given the differentiated margin of appreciation accorded to the State in this area (see paragraph 543 above), the Court considers that the respondent State, with the assistance of the Committee of Ministers, is better placed than the Court to assess the specific measures to be taken. It should thus be left to the Committee of Ministers to supervise, on the basis of the information provided by the respondent State, the adoption of measures aimed at ensuring that the domestic authorities comply with Convention requirements, as clarified in the present judgment.

FOR THESE REASONS, THE COURT,

1. *Holds*, unanimously, that the second applicant's son and heir has standing to continue the present proceedings in the applicant's stead;

2. *Dismisses*, unanimously, the Government's preliminary objections concerning the scope of the complaint, jurisdiction, and compliance with the six-month time-limit;

3. *Joins*, by sixteen votes to one, the issue of the victim status/*locus standi* of the applicants under Articles 2 and 8 of the Convention to the assessment of the applicability of those provisions;

4. *Holds*, by sixteen votes to one, that the applicant association has *locus standi* in the present proceedings and that its complaint should be examined under Article 8 of the Convention alone, and *dismisses* the Government's objection in that regard;

5. *Upholds*, unanimously, the Government's objection as regards the victim status of applicants nos. 2-5 under Articles 2 and 8 of the Convention, and *declares* their complaints inadmissible;

6. *Holds*, unanimously, that it is not necessary to examine the applicability of Article 2 of the Convention;

7. *Holds*, by sixteen votes to one, that there has been a violation of Article 8 of the Convention;

8. *Joins*, by sixteen votes to one, the issue of the victim status of the applicants under Article 6 § 1 of the Convention to the assessment of the applicability of that provision;

9. *Holds*, by sixteen votes to one, that Article 6 § 1 of the Convention applies to the complaint of the applicant association and that it can be considered to have victim status under that provision, and *dismisses* the Government's objection in that regard;

10. *Holds*, by sixteen votes to one, that Article 6 § 1 of the Convention is not applicable to the complaint of applicants nos. 2-5, and *declares* their complaint inadmissible;

11. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

12. *Holds*, unanimously, that there is no need to examine separately the applicant association's complaint under Article 13 of the Convention, and *declares* the complaints of applicants nos. 2-5 inadmissible;

13. *Holds*, unanimously,
    (a) that the respondent State is to pay the applicant association, within three months, EUR 80,000 (eighty thousand euros), plus any tax that may be chargeable, in respect of costs and expenses;
    (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

14. *Dismisses*, unanimously, the remainder of the applicant association's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Prebensen	Síofra O'Leary
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Eicke is annexed to this judgment.

S.O.L.
S.P.R.

PARTLY CONCURRING PARTLY DISSENTING OPINION OF JUDGE EICKE

INTRODUCTION

1. To my regret, I am unable to agree with the majority either in relation to the methodology they have adopted or on the conclusions which they have come to both in relation to the admissibility (and, in particular, the question of "victim" status) as well as on the merits. In so far as I have voted for a violation of Article 6, the right of access to court, as I will explain in a little more detail below, my conclusion was reached on the basis of a very different (and, arguably, a more orthodox) approach to the Convention and the case-law thereunder.

2. Despite a careful and detailed engagement with the arguments advanced both by the parties and interveners in this case (and those in the two linked cases of *Carême v. France*, app. no. 7189/21, and *Duarte Agostinho and Others v. Portugal and 32 Others*, app. no. 39371/20) as well as by my colleagues in the course of the deliberations, I find myself in a position where my disagreement goes well beyond a mere difference in the assessment of the evidence or a minor difference as to the law. The disagreement is of a more fundamental nature and, at least in part, goes to the very heart of the role of the Court within the Convention system and, more generally, the role of a court in the context of the unique and unprecedented challenges posed to humanity (including in but also across our societies) by anthropogenic climate change.

3. It is, of course, perfectly understood and accepted that, under Article 32 of the Convention, the Court's jurisdiction extends to "all matters concerning the interpretation and application of the Convention" (Article 32 § 1) and that "[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide" (Article 32 § 2). However, it is equally clear that this ultimate interpretative authority comes with immense responsibility; a responsibility which, in my view, is reflected in the Court's normally careful, cautious and gradual approach to the evolutive interpretation of the Convention under what is frequently described as the "living instrument" doctrine. Unfortunately, for the reasons set out in a little more detail below, I have come to the conclusion that the majority in this case has gone well beyond what I consider to be, as a matter of international law, the permissible limits of evolutive interpretation.

4. In doing so, it has, in particular, unnecessarily expanded the concept of "victim" status/standing under Article 34 of the Convention and has created a new right (under Article 8 and, possibly, Article 2) to "effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change" (§§ 519 and 544 of the Judgment) and/or imposed

a new "primary duty" on Contracting Parties "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" (§ 545, emphasis added), covering both emissions emanating from within their territorial jurisdiction as well as "embedded emissions" (i.e. those generated through the import of goods and their consumption); none of which have any basis in Article 8 or any other provision of or Protocol to the Convention.

BACKGROUND

5. It is worth repeating that, my disagreement with the majority does not relate in any way to the nature or magnitude of the risks and the challenges posed by anthropogenic climate change. I completely share their understanding of the urgent need to address this issue, both on its own and, perhaps as importantly, as (a major) aspect of what the Reykjavík Declaration "United around our values", adopted at the end of the 4th Summit of Heads of State and Government of the Council of Europe (Reykjavík, 16-17 May 2023), refers to as the "triple planetary crisis of pollution, climate change and loss of biodiversity" (see § 200 of the judgment)[1] currently confronting humanity. In fact, it seems clear to me that this is not just a question of ultimately achieving the target of limiting the temperature increase to 1.5°C above pre-industrial levels identified in the Paris Agreement (important though that is). After all, every tenth of a degree increase has an immediate impact and leads to an increase in the damage and danger created by climate change and, in fact, we all need to take immediate and effective steps to avoid any further increase. My principal disagreement with the majority therefore solely relates to the role this Court can play at this point in time in identifying and taking the steps necessary – and frequently already overdue – to ensure the survival of our planet.

6. In fact, the assessment set out by the European Environment Agency's ("EEA") "European climate risk assessment", published shortly after this judgment was adopted,[2] serves to confirm our shared understanding. In its Executive Summary, the EEA identified its "key takeaways" as follows:

> "-Human-induced climate change is affecting the planet; globally, 2023 was the warmest year on record, and the average global temperature in the 12-month period between February 2023 and January 2024 exceeded pre-industrial levels by 1.5°C.
>
> -Europe is the fastest-warming continent in the world. Extreme heat, once relatively rare, is becoming more frequent while precipitation patterns are changing. Downpours and other precipitation extremes are increasing in severity, and recent years have seen catastrophic floods in various regions. At the same time, southern Europe can expect considerable declines in overall rainfall and more severe droughts.

[1] https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1

[2] EEA Report No 1/2024, published on 11 March 2024

-These events, combined with environmental and social risk drivers, pose major challenges throughout Europe. Specifically, they compromise food and water security, energy security and financial stability, and the health of the general population and of outdoor workers; in turn, this affects social cohesion and stability. In tandem, climate change is impacting terrestrial, freshwater and marine ecosystems.

-Climate change is a risk multiplier that can exacerbate existing risks and crises. Climate risks can cascade from one system or region to another, including from the outside world to Europe. Cascading climate risks can lead to system-wide challenges affecting whole societies, with vulnerable social groups particularly affected. Examples include mega-droughts leading to water and food insecurity, disruptions of critical infrastructure, and threats to financial markets and stability.

-When applying the scales of severity used in the European climate risk assessment, several climate risks have already reached critical levels. If decisive action is not taken now, most climate risks identified could reach critical or catastrophic levels by the end of this century. Hundreds of thousands of people would die from heatwaves, and economic losses from coastal floods alone could exceed EUR 1 trillion per year.

-Climate risks to ecosystems, people and the economy depend on non-climatic risk drivers as much as on the climate-related hazards themselves. Effective policies and action at European and national levels can therefore help reduce these risks to a very significant degree. The extent to which we can avoid damages will largely depend on how quickly we can reduce global greenhouse gas emissions, and how fast and effectively we can prepare our societies and adapt to the unavoidable impacts of climate change.

-The EU and its Member States have made considerable progress in understanding the climate risks they are facing and preparing for them. National climate risk assessments are increasingly used to inform adaptation policy development. However, societal preparedness is still low, as policy implementation is lagging substantially behind quickly-increasing risk levels. Most of the climate risks are co-owned by the EU and its Member States; therefore, coordinated and urgent additional action is required at all governance levels.

-Most policies and actions to strengthen Europe's resilience to climate change are made for the long term, and some actions have long lead times. Urgent action is needed now to prevent rigid choices that are not fit for the future in a changing climate, such as in land-use planning and long-lived infrastructure. We must prevent locking ourselves into maladaptive pathways and avoid potentially catastrophic risks.

-Adaptation policies can both support and conflict with other environmental, social and economic policy objectives. Thus, an integrated policy approach considering multiple policy objectives is essential for ensuring efficient adaptation."

7. The two major aspects of this challenge one can derive from all the evidence, however, are (a) the absolute need for urgent action and (b) the sheer complexity of the challenges climate change (and the other aspects of the "triple planetary crisis") pose (geo-)politically, practically, logistically as well as legal.

8. In relation to the latter, Sir David Attenborough, the British biologist, natural historian, broadcaster and author, in his address to the UN Security

Council on 23 February 2021,[3] expressed the challenge in these stark (but realistic) terms:

> "Perhaps the most significant lesson brought by these last 12 months has been that we are no longer separate nations, each best served by looking after its own needs and security. We are a single truly global species whose greatest threats are shared and whose security must ultimately come from acting together in the interests of us all.
>
> Climate change is a threat to global security that can only be dealt with by unparalleled levels of global co-operation. It will compel us to: question our economic models and where we place value; invent entirely new industries; recognise the moral responsibility that wealthy nations have to the rest of the world; and put a value on nature that goes far beyond money."

9. It is also this spirit of global (rather than merely regional or bilateral) cooperation which has underpinned the increasingly detailed treaty regime addressing climate change as well as other, frequently interlinked or overlapping, aspects of the "triple planetary crisis". These, of course, include the UN Framework Convention on Climate Change ("UNFCCC") and the subsequent Protocols and other agreements concluded by or under the auspices of its annual Conference of the Parties ("COP"), including the Paris Agreement adopted at COP21. As the German Constitutional Court (*Bundesverfassungsgericht*) rightly stated, in § 204 of its judgment of 24 March 2021 (referred to in the judgment as *Neubauer and Others v. Federal Republic of Germany*):

> "The Paris Agreement very much relies on mutual trust as a precondition for effectiveness. In Art. 2(1)(a) PA, the Parties agreed on a climate target (well below 2°C and preferably 1.5°C) without committing themselves to any specific reduction measures. In this respect, the Paris Agreement establishes a voluntary mechanism by which the Parties determine their own measures for reaching the agreed temperature target. These measures must, however, be made transparent. The purpose of the transparency provisions is to ensure that all states are able to trust that other states will act in conformity with the target ([...]). Creating and fostering trust in the willingness of the Parties to achieve the target is therefore seen as a key to the effectiveness of the Paris Agreement. Indeed, the Agreement is highly reliant on the individual states making their own contributions."

10. It is in this context and in light of the need, in order to address the issue effectively, for mutual trust and cooperation amongst all the nations of the World or at least the now 198 Contracting Parties to the UNFCCC (including other major GHG emitters such as the United States, China and India) that it seems to me that this Court should act with extreme caution and prudence. This is even more so where:

(a) as it has repeatedly acknowledged, the Convention is not "specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more

[3] https://www.gov.uk/government/speeches/pm-boris-johnsons-address-to-the-un-security-council-on-climate-and-security-23-february-2021

pertinent in dealing with this particular aspect" (*Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI (extracts)); and

(b) none of the proposals of the Parliamentary Assembly of the Council of Europe ("PACE")[4] to provide the Court with an express competence in relation to a clean and healthy environment through the adoption of a protocol or otherwise have so far[5] found the approval of the Contracting Parties to the Convention.

11. Furthermore, it seems to me that the potentially enormous evidential and scientific complexities which, by definition, have to inform any effective – cross-sectoral and cross-border – engagement with the issue of anthropogenic climate change also pose a very real question as to whether (and, if so, how) this Court (and, on the majority's approach, the Committee of Ministers in the context of the execution of judgments under Article 46 of the Convention), can adequately or at all contribute to (rather than hinder) the fight against climate change in the absence of any clear or agreed measures or guidelines. After all, the necessary (and detailed) engagement with scientific evidence in the context of what the Court in *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 44, Series A no. 172 described (in the context of the arguably simpler issue of aircraft noise) as "this difficult social and technical sphere" is not currently part of the Court's working practices.

12. Just by way of example, in the week between 29 January and 2 February 2024, i.e. shortly before this judgment was adopted, an expert review team of the Subsidiary Body for Implementation ("SBI"),[6] set up to assist the governing bodies of the UNFCCC,[7] the Kyoto Protocol[8] and the Paris Agreement,[9] was due to review Switzerland's Eighth National

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[4] Parliamentary Assembly of the Council of Europe, *Future Action to be Taken by the Council of Europe in the Field of Environment Protection* (4 November 1999) Recommendation 1431 (1999); Parliamentary Assembly of the Council of Europe, *Environment and Human Rights* (27 June 2003) Recommendation 1614 (2003); Parliamentary Assembly of the Council of Europe, *Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment* (30 September 2009) Recommendation 1885 (2009).

[5] That said, the need for and feasibility of a further instrument or instruments on human rights and the environment has, of course, been under active consideration by CDDH-ENV at least since September 2022 which, at its last meeting on 19-21 March 2024, adopted its draft report with a view to it being transmitted to the CDDH for adoption at the latter's meeting in June 2024 (https://rm.coe.int/steering-committee-for-human-rights-comite-directeur-pour-les-droits-h/1680aefdb5).

[6] Status of submission and review of national communications and biennial reports - Note by the secretariat (FCCC/SBI/2023/INF.8 of 22 September 2023)

[7] Conference of the Parties ("COP")

[8] Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol ("CMP")

[9] Conference of the Parties serving as the meeting of the Parties to the Paris Agreement ("CMA")

Communication and Fifth Biennial Report under the UNFCCC/Fifth National Communication under the Kyoto Protocol to the UNFCCC, of 16 September 2022.[10] This report, which runs to 297 densely typed pages, covers *inter alia* detailed evidence in relation to Switzerland's compliance with the clearly quantified emissions limitations and reduction commitments incumbent upon it as an Annex I Party to the Kyoto Protocol. The expert review team which considered and reported on Switzerland's previous (2022) Submissions consisted of 21 experts from different Contracting Parties covering six specialist review areas ("Generalist", "Energy", "IPPU" (industrial processes and product use), "Agriculture", "LULUCF and KP-LULUCF" (land use, land-use change and forestry; and activities under Article 3, paragraphs 3–4, of the Kyoto Protocol) and "Waste") with two lead reviewers.[11]

13. It seems to me to be clear that the Court (or the Committee of Ministers) does not, in fact, have the capacity to engage in anything approaching such a review process to ensure, as the majority seems to envisage, that Contracting Parties have "adopt[ed], and ... effectively appl[ied] in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change".

14. As an aside, it is also noteworthy – and serves to reinforce the point made by the *Bundesverfassungsgericht* (above) – that the move, in the context of the Paris Agreement, away from binding and specific reduction measures (binding only on some Contracting Parties, i.e. the Annex I Parties to the Kyoto Protocol) to the voluntary mechanism by which the (all) Contracting Parties determine their own Nationally Determined Contributions (NDC)appears to have been a deliberate shift in approach. This shift was intended to ensure that this "common concern of mankind" is addressed by all States on the basis of "the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (Article 2(2) Paris Agreement); a principle or concept which seems to be difficult to reconcile (if not wholly inconsistent) with the Court's primary role of ensuring observance of a common minimum standard of protection applicable equally to all Contracting Parties (see § 20(b) below).

15. In relation to the clear need for "urgent" action, it also seems to me that, even more so in light of the political complexities arising in the context of identifying and implementing the necessary measures to counter climate change effectively and swiftly, there must be significant doubt that proceedings before this Court can make a meaningful contribution. In fact, there must be a real risk that

(a) as is frequently the case when the Court is concerned with an "abstract" review of a legislative or regulatory regime, the

[10] https://unfccc.int/documents/614139

[11] Report on the individual review of the annual submission of Switzerland submitted in 2022 (FCCC/ARR/2022/CHE of 24 February 2023)

legislation/regulatory regime before the Court (as considered, where applicable, by the national courts in the process of exhausting domestic remedies, as required under Article 35 § 1 of the Convention) has long been replaced or changed substantially (see by way of recent example *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, §§ 269-270, 25 May 2021); and/or

(b) in any event, proceedings before this Court are much more likely to distract the Contracting Parties and slow down the necessary processes and, even if a judgment is obtained, any delay and/or failure in the implementation of any judgment is only likely to undermine the need for urgent action and, potentially, the rule of law.

THE COURT'S ROLE AND EVOLUTIVE INTERPRETATION

16. As the Court has consistently made clear, its principal role is "to ensure the observance of the engagements undertaken by the Contracting States (Article 19 of the Convention). In accordance with Article 32 of the Convention, the Court provides the final authoritative interpretation of the rights and freedoms defined in Section I of the Convention" (see most recently *Humpert and Others v. Germany* [GC], nos. 59433/18 and 3 others, § 69, 14 December 2023).

17. The applicable principles of interpretation applied by the Court in this context were recently summarised in *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, § 60, 18 November 2020 (based on the judgment in *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §§ 118-22 and 125, 8 November 2016; with further references):

> "(a) As an international treaty, the Convention must be interpreted in the light of the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969 (...). In accordance with those provisions, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn.
>
> (b) Regard must also be had to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.
>
> (c) The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, as an instrument for the protection of human rights, the Convention comprises more than mere reciprocal engagements between Contracting States.
>
> (d) When interpreting the Convention, recourse may also be had to supplementary means of interpretation, including the travaux préparatoires of the treaty, either to confirm a meaning determined in accordance with other methods, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable."

18. However, the Court has also always explained that there are clear limits as to what can legitimately be achieved by means of interpretation; limits which flow from the fact that its role is limited to interpreting the provisions of the Convention (and its Protocols):

(a) while it must take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 235, 29 January 2019 and authorities cited there; and Article 31 § 3 (c) of the Vienna Convention of 23 May 1969 on the Law of Treaties), the Court only "has authority to ensure that the text of the European Convention on Human Rights is respected (...). It is the Convention which the Court can interpret and apply; it does not have authority to ensure respect for international treaties or obligations other than the Convention (...)" (*Caamaño Valle v. Spain*, no. 43564/17, § 53, 11 May 2021); and

(b) "the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate" (see *Johnston and Others v. Ireland*, 18 December 1986, § 53, Series A no. 112; *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 53, ECHR 2012; and *Ferrazzini v. Italy* [GC], no. 44759/98, § 30, ECHR 2001-VII).

19. As is clear from the historic refusal of the Contracting Parties to the Convention to respond positively to the repeated calls by the Parliamentary Assembly of the Council of Europe for the adoption of an additional protocol to the Convention which would provide for (and give the Court jurisdiction to ensure the observance of) a right to a clean and healthy environment (see above) and was, again, clear from the submissions of those Contracting Parties who were third party interveners in this case[12] and/or defendants in *Duarte Agostinho and Others* (cited above),[13] even if this issue was not, perhaps, considered at the time of the drafting of the original Convention, the omission from the Convention as it stands today of such a right was not coincidental.

20. In the context of the present case it is further important to have regard to the following:

(a) the Court has consistently recognised the fundamental (foundational) importance within the Convention system of the concept of "effective political democracy" governed by the rule of law as reflected in the Court's approach to subsidiarity and the (usually wide) margin of appreciation:

[12] Austria, Ireland, Italy, Latvia, Norway, Portugal, Romania and Slovakia

> "... the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (...). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one")" (*Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII with further authorities, see also *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 54, ECHR 2000-IV);

(b) while "nothing prevents the Contracting States from adopting a broader interpretation entailing a stronger protection of the rights and freedoms in question within their respective domestic legal systems (Article 53 of the Convention)" (see e.g. *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, § 93, 22 December 2020) or through other international treaties or European Union law (*Krombach v. France* (Dec), no. 67521/14, § 39, 20 February 2018), the role of the Convention (and within it the Court) is clearly to lay down (and to ensure observance of) minimum standards of human rights protection; and

(c) as the principles of subsidiarity and the margin of appreciation (both now, following the entry into force of Protocol No 15, provided for in the Preamble of the Convention and reflected, even if not exactly, in domestic law by the principle of the separation of powers between the legislature and the judiciary (see *A. v. the United Kingdom*, no. 35373/97, § 77, ECHR 2002-X)) make clear that, in relation to questions of social and economic policy requiring the careful weighing up of competing rights and interests (frequently, if not invariably in this context, including the rights and interests of parties not before the court), in a functioning democracy as envisaged by the Convention, this Court (and the courts more generally) take a subsidiary role to the democratically legitimated legislature and executive (or, in the context of an international treaty, the authorities of the Contracting Parties).

21. This latter point is, of course, of particular relevance in the present case where the most recent 2020 (Third) CO_2 Act, though adopted by Parliament, was expressly rejected by a popular vote in the course of a referendum in June 2021 (see e.g. §§ 92 and 94 of the judgment). It seems to me that great care is required in such a context not to be perceived to be relying (at least in part) on this very expression of the democratic will of the people of Switzerland as a basis for finding a violation of Article 8.

"VICTIM" STATUS/STANDING

22. When considering the question of "victim" status in this case, it is important to note at the outset that there was, in fact, no dispute and no uncertainty about the "victim" status of the individual applicants in relation

to the Article 6 § 1 complaint in this case; and therefore no need to join that question to the merits. The only real issue on this question arose in relation to the complaints brought under Article 2 and/or 8 of the Convention.

23. This is, of course, not surprising. After all, as the majority note in § 590 of the judgment, relying *inter alia* on the judgment in *Balmer-Schafroth and Others v. Switzerland*, 26 August 1997, § 26, *Reports of Judgments and Decisions* 1997-IV, "[i]n order to claim to be a 'victim' in the context of an alleged violation of Article 6 of the Convention, and to complain of alleged procedural shortcomings under that provision, it is normally sufficient that the applicant was affected as a party to the proceedings brought by him or her before the domestic courts". In *Balmer-Schafroth and Others* the Court was concerned with an objection to the extension of an operating licence for a nuclear power station. Rejecting the Government's objection that the applicants in that case were not victims, the Court expressly confirmed that:

> "Under the Court's case-law, for the purposes of Article [34] the word "victim" means the person directly affected by the act or omission in issue....
>
> In the instant case, the fact that the Federal Council declared admissible the objections the applicants wish to raise before a tribunal (...) justifies regarding them as victims. The first preliminary objection must therefore be dismissed."

24. This rationale, of course, applies with equal force in the present case where the Federal Administrative Court, at first instance, expressly recognised that the individual applicants had "an 'interest worthy of protection' in the revocation or amendment of the impugned DETEC decision, which made the appeal admissible from that perspective" (§ 35).

25. Furthermore and in any event,

(a) the Swiss Government (perhaps as a result of the judgment in *Balmer-Schafroth and Others*) did not, in fact, challenge the "victim" status of the individual applicants (§ 592); and

(b) in § 618, the majority expressly asserts that "the interests defended by the association are such that the 'dispute' raised by it had a direct and sufficient link to its members' rights in question", sufficient to confirm the latter as the real "victims" (see also § 621).

26. In light of this clear and uncontested position as to the "victim" status of the individual applicants under Article 6 § 1 it would, in my view, have been more obvious and more appropriate to address the complaint about the denial of access to court first; before then, if necessary, moving on to consider the complaint(s) under Articles 2 and 8 of the Convention.

27. Nevertheless, the majority decided to approach the latter issue(s) first and, as a result, once they came to consider Article 6, were inevitably compelled to join the question of "victim" status under Article 6 § 1 to the question of the admissibility of that provision (§ 593) and to conclude, ultimately, that only the association has "victim" status (§ 623).

28. This approach and conclusion was, in my view, the inevitable consequence of the novel approach the majority decided to take to the

question of "victim" status under Article(s 2 and) 8 and the resulting need to find a way to reconcile this approach with both the existing case-law on "victim" status and the uncontested "victim" status of the individual applicants under Article 6.

29. In relation to the approach to "victim" status more generally, the judgment rightly notes (§ 460) that:

> "The Convention does not provide for the institution of an *actio popularis*. The Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, for instance, *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, with further references). Accordingly, a person, non-governmental organisation or group of individuals must be able to claim to be a victim of a violation of the rights set forth in the Convention. The Convention does not permit individuals or groups of individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, §§ 50-51, ECHR 2012)."

30. As the Court confirmed this position again in *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), no. 37857/14, § 41, 7 December 2021, this time in relation to associations:

> "... there are two principal reasons why an association may not be considered to be a direct victim of an alleged violation of the Convention. The first reason is the prohibition on the bringing of an *actio popularis* under the Convention system; this means that an applicant cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly. It follows that in order for an applicant to be able to argue that he is a victim, he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect (...). ..."

31. In *Asselbourg and Others v. Luxembourg (dec.),* no. 29121/95, ECHR 1999-VI, in the specific context of environmental protection, the Court further explained that:

> "From the terms "victim" and "violation" in Article 34 of the Convention, like the underlying philosophy of the obligation to exhaust all domestic remedies imposed by Article 35, it can be deduced that, in the system for the protection of human rights as envisaged by the framers of the Convention, exercise of the right of individual petition cannot have the aim of preventing a violation of the Convention. It is only in wholly exceptional circumstances that the risk of a future violation may nevertheless confer the status of "victim" on an individual applicant, and **only then if he or she produces reasonable and convincing evidence of the probability of the occurrence of a violation concerning him or her personally: mere suspicions or conjectures are not enough in that respect**.
>
> In the instant case, the Court considers that the mere mention of the pollution risks inherent in the production of steel from scrap iron is not enough to justify the applicants' assertion that they are the victims of a violation of the Convention. **They must be able to assert, arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage is such that it can be considered to constitute a violation, on condition that the**

consequences of the act complained of are not too remote (see, mutatis mutandis, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 33, § 85 (emphasis added))."

32. This approach was developed further, in relation to non-governmental organisations, in *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.), § 41, cited above:

"... there are two principal reasons why an association may not be considered to be a direct victim of an alleged violation of the Convention. .... The second reason concerns the nature of the Convention right at stake and the manner in which it has been invoked by the applicant association in question. Certain Convention rights, such as those under Article 2, 3 and 5, by their nature, are not susceptible of being exercised by an association, but only by its members (...). In Asselbourg and Others (cited above), when declining to grant victim status to the applicant association, the Court noted that the applicant association could only act as a representative of its members or employees, in the same way as, for example, a lawyer represented his client, but could not itself claim to be the victim of a violation of Article 8."

33. In fact the Court, in *Asselbourg and Others*, cited above, explained its conclusion on the basis that:

"With regard to the association Greenpeace-Luxembourg, the Court considers that a non-governmental organisation cannot claim to be the victim of an infringement of the right to respect for its "home", within the meaning of Article 8 of the Convention, merely because it has its registered office close to the steelworks that it is criticising, where the infringement of the right to respect for the home results, as alleged in this case, from nuisances or problems which can be encountered only by natural persons. In so far as Greenpeace-Luxembourg sought to rely on the difficulties suffered by its members or employees working or spending time at its registered office in Esch-sur-Alzette, the Court considers that the association may only act as a representative of its members or employees, in the same way as, for example, a lawyer represents his client, but it cannot itself claim to be the victim of a violation of Article 8 (...)."

34. As a result it is only in "highly exceptional circumstances" that a person can either (a) seek a review of the relevant law and practice *in abstracto* or (b) claim to be a "victim" in relation to the risk of a "future violation". As the Court summarised the position in relation to the latter in *Berger-Krall and Others v. Slovenia*, no. 14717/04), § 258, 12 June 2014:

"... the exercise of the right of individual petition [under Article 34] cannot be used to prevent a potential violation of the Convention: in theory, the Court cannot examine a violation other than a posteriori, once that violation has occurred."

There is, therefore, other than in "highly exceptional circumstances" no basis on which the applicants in this case can be the victim of a "future risk" under Articles 2 and/or 8 or seek an *in abstracto* review of the relevant law and practice.

35. The principal examples of such "highly exceptional circumstances" recognised to date are

(a) in relation to "future" risk,

(i) complaints concerning a *prima facie* risk of inhuman and degrading treatment faced by the individual applicant in the receiving country in case of expulsion or extradition (starting with *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161); and

(ii) where, in the context of a negative obligation arising under the Convention, "a person [...] contend[s] that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted (...) or if he is a member of a class of people who risk being directly affected by the legislation" (*Burden v. the United Kingdom* [GC], no. 13378/05, § 34, ECHR 2008; see also *Norris v. Ireland*, 26 October 1988, § 32, Series A no. 142); and

(b) in relation to an alleged present or past risk, in cases of secret surveillance (also primarily a question of the negative obligation of the state not to interfere with the applicant's right to respect for private life) where "an exception to the rule denying individuals the right to challenge a law *in abstracto* is justified ... only if [the individual] is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures" (see e.g. *Roman Zakharov v. Russia* [GC], no. 47143/06, § 171, ECHR 2015).

36. By contrast, the Commission decision in *Noël Narvii Tauira and 18 Others v. France* (application no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports (DR) 83-B, p. 112), expressly relied on by the Court in *Berger-Krall and Others*, did not fall within this category of "highly exceptional circumstances". In that case, the Commission declared inadmissible for lack of "victim" status complaints concerning the decision of the French President to resume nuclear testing in Tahiti. It explained that in order for applicants to be able to claim to be victims of a violation of the Convention, they must have "an arguable and detailed claim that, owing to the authorities' failure to take adequate precautions, the degree of probability that damage will occur is such that it may be deemed to be a violation, on condition that the consequences of the act complained of are not too remote". Despite having been provided with a whole series of scientific reports and evidence of the experience of past Nuclear tests, it concluded that the applicants had failed to satisfy this test and that the application was therefore inadmissible for lack of "victim status".

37. The one crucial factor which is common to these very few recognised and legitimate cases of "highly exceptional circumstances" permitting apparent derogation from the mandatory requirement for the alleged victim to have been "directly affected" (in the past) by the measure in question, or, in so far as applicable in cases of positive obligations, by the respondent government's failure to act, seems to be that identified by Mr. Justice Clarke, the then Chief Justice of Ireland, in his judgment in *Friends of the Irish Environment v The Government of Ireland & Ors* [2020] IESC 49 (31 July 2020) at § 7.21:

> "... there are circumstances in which an overly strict approach to standing could lead to important rights not being vindicated. However, that does not take away from the importance of standing rules in our constitutional order. The underlying position was reiterated in the recent decision of this Court in Mohan, which re-emphasised the need, ordinarily, for a plaintiff to be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of the measure which they seek to challenge on the basis that it breaches rights. That remains the fundamental proposition. The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted."

38. This is, of course, also the underlying rationale for granting standing for associations who are not (or cannot be) direct victims such as in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, §§ 111 - 113, ECHR 2014, where "the Court [was] satisfied that in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the Convention".

39. As a consequence, I fully accept that it might, in principle, be permissible, exceptionally and subject to clear conditions including the availability and effectiveness of the available domestic remedies, for the Court to recognise an exception to the established rules on "victim" status and standing under Article 34 of the Convention. This is, of course, little more than an expression of the principle of effectiveness, seeking "to render [the Convention] safeguards practical and effective, not theoretical and illusory" (see *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, § 122, 15 October 2020 with further authorities).

40. However, it is also absolutely clear from the Court's case-law that this could only be the case (again following the approach identified) where it is accepted – as I think it has to be in the context of climate change – that, in fact, no individual applicant complaining about a State's failure to take adequate mitigation measures is likely ever to be able to establish that "for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage is such that it can be considered to constitute a violation, on condition that the consequences of the act complained of are not too remote" (*Asselbourg and Others,* cited above and *Noël Narvii Tauira and 18 Others*).

41. Unfortunately, rather than go down this path, the majority has chosen what, in my view, is the worst of both worlds. After all, the majority has (at least implicitly) accepted that the application of the established "victim" test would not, in fact, lead to a situation where there would be a real risk that important rights of the individual applicants "would not be vindicated" at all as:

(a) the reasons given for the conclusion that the individual applicants in the present case did not satisfy the "victim" test neither rely on nor establish any such impossibility. In fact, the only reason given is that these individual applicants had failed to produce sufficient evidence to establish the necessary "direct impact" (§§ 532 -533 "... as regards applicants nos. 2-4 ... it is not apparent from the available materials that they were exposed to the adverse effects of climate change, or were at risk of being exposed at any relevant point in the future, with a degree of intensity giving rise to a pressing need to ensure their individual protection" and § 534 "... the fifth applicant provided a very general declaration not indicating any particular morbidity or other serious adverse effects created by heatwaves that would go beyond the usual effects which any person belonging to the group of older women might experience. ... It is therefore not possible to establish a correlation between the applicant's medical condition and her complaints before the Court"); and

(b) the test laid down in §§ 486 – 488 for the assessment of "a real risk of a 'direct impact' on the applicant", while described in § 488 as "especially high", does not, in fact, seem to me to differ significantly (if at all) from the test summarised in *Asselbourg and Others,* cited above.

42. Of course, I also, in principle, perfectly understand (and share) the majority's desire to ensure inter-generational justice and to "avoid a disproportionate burden on future generations" (§ 549). However, not having sought (or having been unable) to establish the necessary "highly exceptional circumstances" to justify the need for an exception to the traditional "victim"/standing test and absent an express provision in the Convention akin to Article 20a of the German Basic Law (*Grundgesetz*) (as considered by the *Bundesverfassungsgericht* in *Neubauer*) or Articles 2 and 3 of the proposed text for an additional protocol to the European Convention on Human Rights set out in the Appendix to PACE Recommendation 2211 (2021) *Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe*, the inevitable conclusion is that there is no basis for drawing any enforceable obligation from the current text of the Convention to combat "future risk" in respect of the applicants before the Court and even less to combat a "future risk" in respect of "future generations", i.e. by or on behalf of individuals who are, by definition, not even before the Court.

43. That being the case, the conclusions reached in §§ 532 – 534 of the judgment should have led the Court to declare this part of the application (under Articles 2 and/or 8) inadmissible; leaving the issues raised in relation to the alleged failure to take the necessary and/or appropriate mitigation measures in relation to the risks created by climate change for an appropriate future case in which the applicants could show, by reference either to the traditional test or the test identified in the judgment, that they were "directly affected" (or, of course, in the context of a request for an advisory opinion under Protocol No 16).

44. A further result of the approach adopted by the majority in relation to the individual applicants was that there was no need and no justification for the innovation of granting "victim" status/standing to the applicant association whether "as representatives of the individuals whose rights are or will allegedly be affected" (§ 498) or at all:

(a) such a development has no basis in the language of Article 34 of the Convention, which expressly makes the standing of a "non-governmental organisation or group of individuals" subject to them "claiming to be victims of a violation" themselves;

(b) for the reasons set out above, there is no justification in terms of the need to ensure effective access to the Court for creating such a right to bring proceedings before the Court, effectively by means of law making rather than interpretation; and

(c) the fact that "climate-change litigation often involves complex issues of law and fact, requiring significant financial and logistical resources and coordination, and the outcome of a dispute will inevitably affect the position of many individuals", while perhaps justifying allowing associations to act as legal representatives of individual "victims" (which they, of course, can and do already), cannot justify giving them standing in their own right (and, even less so, giving them standing independently of whether their members are "victims" or not).

45. Nevertheless, that is exactly what the majority did and, in my view, in doing so, they created exactly what the judgment repeatedly asserts it wishes to avoid, namely a basis for *actio popularis* type complaints (see e.g. §§ 446, 481, 484, 488, 500 and 596). After all:

(a) the majority recognise that

(i) "[g]iven the nature of climate change and its various adverse effects and future risks, the number of persons affected, in different ways and to varying degrees, is indefinite" (§ 479);

(ii) "the fact that complaints may concern acts or omissions in respect of various types of general measures, the consequences of which are not limited to certain identifiable individuals or groups but affect the population more widely. The outcome of legal proceedings in this context will inevitably have an effect beyond the rights and interests of a particular individual or group of individuals, and will inevitably be forward-looking, in terms of what is required to ensure effective mitigation of the adverse effects of climate change or adaptation to its consequences" (§ 479); and

(iii) "in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change. Leaving aside the issue of jurisdiction, the fact remains that potentially a huge number of persons could claim victim status under the Convention on this basis" (§ 483); and

(b) while purporting to maintain the principle in the case-law that an association cannot, itself, rely on health considerations or nuisances and

problems associated with climate change which can only be encountered by natural persons (§ 496), associations are nevertheless now granted the broadest standing "for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change" (§ 499), without, however, even being limited to protecting the rights of/representing their members. After all, the test for such standing laid down in § 502 expressly

(i) extends the remit of their standing to representing "members or other affected individuals within the jurisdiction"; and

(ii) does not require that those "members or other affected individuals within the jurisdiction", on whose behalf the case has been brought, have to meet the "victim" status requirements for individuals. This aspect is further underlined by the fact that, in relation to the applicant association in the present case, the majority considered it enough to be satisfied that the association "represents a vehicle of collective recourse aimed at defending the rights and interests of individuals against the threats of climate change in the respondent State" (§ 523, emphasis added).

46. This, of course, has to be read in light of the stated overall rationale (§ 499) that "[i]n view of the urgency of combating the adverse effects of climate change and the severity of its consequences, including the grave risk of their irreversibility, States should take adequate action notably through suitable general measures to secure not only the Convention rights of individuals who are currently affected by climate change, but also those individuals within their jurisdiction whose enjoyment of Convention rights may be severely and irreversibly affected in the future in the absence of timely action."

47. There is one further aspect of the issue of "victim" status/standing of associations, alluded to in § 503, which is worth noting. The majority there recognises that there exist in numerous Contracting Parties "existing limitations regarding the standing before the domestic courts of associations". This, of course, potentially raises difficulties in relation to the requirement (under Article 35 § 1 of the Convention) that "the Court may only deal with the matter after all domestic remedies have been exhausted", an essential component of the principle of subsidiarity. How is the Court to deal with an application brought before it by an association against a Contracting Party whose domestic procedural law does not provide for standing to be accorded to associations (generally or, at least, outside the very clear and narrow confines of the Aarhus Convention)?

48. The traditional answer would, of course, be that, unless there are domestic remedies which are available in theory and in practice at the relevant time and which the applicant (association) can directly institute themselves, an application can be made directly to the Court which would then, effectively, act as a first instance court. However, the majority seeks to answer this question by stating that "the Court may also, in the interests of

the proper administration of justice, take into account whether, and to what extent, its individual members or other affected individuals may have enjoyed access to a court in the same or related domestic proceedings" (§ 503, emphasis added). The weakness of this "may" is clearly demonstrated by the facts of this case. After all, not only is the applicant association granted standing despite the fact that neither it nor its "individual members or other affected individuals" had effective access to court before applying to the Court; in fact, the very absence of access to court for the individual applicants in this case is used as the final justification for granting it standing "in the interests of the proper administration of justice" (§ 523).

49. Furthermore, even if this criterion were to be taken "into account" in future cases it will remain to be seen whether (and, if so, how) the Court is going to determine whether the exhaustion requirement has been fulfilled by reference to possible domestic litigation brought by "other affected individuals" over which litigation, by definition, the association will not have had any control or influence (for an example of the inverse situation in this context see *Kósa v. Hungary (Dec.)*, no. 53461/15, §§ 59-63, 21 November 2017). After all, the Grand Chamber has only recently had cause to reaffirm that "[i]n order to be able to lodge an application in accordance with Article 34 of the Convention, an individual must be able to show that he or she was directly affected by the measure complained of; this is indispensable for putting the protection mechanism of the Convention into motion (...). Likewise, the Court can base its decision only on the facts complained of (...). Therefore, it is not sufficient that a violation of the Convention is 'evident' from the facts of the case or the applicant's submissions. Rather, the applicant must complain that a certain act or omission entailed a violation of the rights set forth in the Convention or the Protocols thereto (...), in a manner which should not leave the Court to second-guess whether a certain complaint was raised or not (...)" (*Grosam v. the Czech Republic* [GC], no. 19750/13, § 90, 1 June 2023).

50. As a consequence, it seems to me that a very real question that arises is whether the approach adopted by the majority means that:

(a) Contracting Parties will ultimately feel the need, or even be required, to introduce rules to permit such standing under domestic law, whether as a matter of strict legal obligation (under Articles 2, 8 and/or 13) or "just" in order to ensure that their national courts can consider the Convention complaint before it is brought before and considered by the Court (in application of the principle of subsidiarity); or

(b) where no such standing for an association is provided for in national law, the Court will, in fact, find itself having to consider these applications as a court of first instance and without the benefit of any prior consideration by the national courts. While this is clearly a role which this Court is not designed and is generally ill equipped to fulfil, this would be even more challenging when confronted with the inevitably detailed and complex

evidence seeking to establish whether or not the respondent State has "adopted, and effectively applied in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change", as envisaged by the majority.

51. This dilemma, of course, assumes a yet further relevance – especially in relation to the question of "adoption" of regulations and measures - for those 27 Contracting Parties to the Convention who are also member states of the European Union ("EU") and, in case of the planned accession by the EU to the Convention, the EU itself. After all,

(a) as the EU Commission stated in their intervention in the case of *Duarte Agostinho and Others*, "the EU sets Union-wide binding targets for climate and energy that all Member States have to comply with and achieve through national implementation", under the umbrella of, *inter alia*, Regulation (EU) 2018/1999 *on the Governance of the Energy Union and Climate Action* and/or Regulation (EU) 2021/1119 *establishing the framework for achieving climate neutrality* ("European Climate Law") as well as a broad range of individual (general and sectoral) legislative acts;[14] and

(b) as the judgment records in §§ 215–220, as the law stands it appears that individuals and associations only have very limited standing before the Court of Justice of the European Union ("CJEU") under Article 263 TFEU.

ARTICLE 6 – ACCESS TO COURT

52. In relation to the substantive complaint under Article 6 concerning the alleged denial of access to court, it is perhaps helpful that the leading authorities on this question are, in fact, two Grand Chamber cases against Switzerland (and in the context of environment law): *Balmer-Schafroth and Others*, and *Athanassoglou and Others v. Switzerland* [GC], both cited above.

53. Before considering (briefly) the individual components required to be satisfied in relation to the applicability and a finding of a violation of Article 6 § 1, I want to make it clear that I agree with the majority (see e.g. §§ 594, 609, 616 and 627) that Article 6 § 1 does not guarantee a right of access to a court with power to invalidate or override laws enacted by parliament and/or to compel the adoption of laws. In fact, the Grand Chamber in *Athanassoglou and Others*, § 54, cited above expressly underlined that the question "how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes". As a result, I also agree that only the "applicants' complaint concerning effective implementation of the mitigation measures under existing law is a matter

[14] the EU Commission identified, in form of a non-exhaustive list, legislative acts such as "the Emission Trading System ("ETS"), Effort Sharing Regulation ("ESR"), Land Use, Land Change and Forestry Regulation ("LULUCF") and Regulation setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles"

capable of falling within the scope of that provision" (§ 616) while those seeking "legislative and regulatory action" fall outside the scope of Article 6 § 1 (§ 615, referring to e.g. points 1-3 and some items under point 4 of the applicants' claims identified in § 22 of the judgment).

54. The majority of the questions concerning the applicability of (the civil limb of) Article 6 § 1 are readily answered by reference to the Court's judgments in the two previous cases against Switzerland, mentioned above, which apply with equal force in the present case:

(a) in relation to the necessary "existence of one or more 'rights' recognised under domestic law", the judgment in *Balmer-Schafroth and Others*, cited above, § 34, held that "the right to have their physical integrity adequately protected", in that case from the risks entailed by the use of nuclear energy, "is recognised in Swiss law, as is apparent in particular from section 5 (1) of the Nuclear Energy Act – to which both the applicants and the Federal Council expressly referred – and from the constitutional right to life, on which the Federal Council commented in its decision". This was, again, confirmed in *Athanassoglou and Others*, § 44, cited above, where the Court noted that these rights "are, as the Government have always conceded, ones accorded to individuals under Swiss law, notably in the Constitution and in the provisions of the Civil Code governing neighbours' rights". Just as in *Balmer-Schafroth and Others* and *Athanassoglou and Others* there would seem to me to be no reason why the "civil right" in this case could not also be defined not only as enshrined in Article 10 of the Federal Constitution (the right to life and to personal freedom) but also by reference to the CO_2 legislation (i.e. the CO_2 Act and the CO_2 Ordinance) as invoked by the applicants before the domestic authorities and courts and as summarised in §§ 123 – 126 of the judgment; and

(b) in relation to the existence of a "genuine and serious" dispute ("*contestation*") of a justiciable nature over those "rights", the Court, in *Balmer-Schafroth and Others*, §§ 37 – 38, cited above, confirmed that "[i]nasmuch as it sought to review whether the statutory requirements had been complied with, the Federal Council's decision was therefore more akin to a judicial act than to a general policy decision ... Moreover, in the light of the above considerations and the fact that the Federal Council declared the applicants' objection admissible, there can be no doubt that the dispute was genuine and serious". In *Athanassoglou and Others*, § 45, cited above, the Court recorded that "[i]t was not contested by the Government in the light of the Court's *Balmer-Schafroth and Others* judgment that there was a 'genuine and serious' dispute of a justiciable nature between the applicants and the decision-making authorities ...". Applying these *dicta* to the present case, it is clear from the facts that "the FAC held that applicants nos. 2-5 had an 'interest worthy of protection' in the revocation or amendment of the impugned DETEC decision, which made the appeal admissible from that perspective" (§ 35). A similar approach was taken by the Federal Supreme

Court: "The FSC considered that applicants nos. 2-5 had standing to lodge an appeal against the FAC's judgment. The FSC, however, left it open whether the applicant association also had standing to lodge the appeal and considered it more appropriate to limit its considerations to applicants nos. 2-5." (§ 53).

55. The only question which remains open, in light of the fact that the Court in both *Balmer-Schafroth and Others* and *Athanassoglou and Others* answered this question in the negative, is whether the outcome of the "dispute"/procedure was directly decisive for those domestic-law rights.

56. In *Balmer-Schafroth and Others* § 40, cited above, the Court based its conclusion on the fact that the applicants "did not for all that establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical". In *Athanassoglou and Others*, § 48, cited above, the Court identified the "remoteness" test to be applied as being "whether the applicants' arguments were sufficiently tenable; it does not have to decide whether they were well-founded in terms of the applicable Swiss legislation". After a detailed consideration of the assessment and inspection reports concerning the relevant power plant as well as the back-fitting to address the major on-going developments in nuclear power plant safety technology, the Court, nevertheless and contrary to the conclusion reached by the Commission (reported as *Greenpeace Schweiz and others v Switzerland* (Dec), no. 27644/95, 7 April 1997), concluded (at § 51) that "the facts of the present case provide an insufficient basis for distinguishing it from the *Balmer-Schaffroth and Others* case". By contrast, the Commission, relying on the Court's judgment in *Zander v. Sweden*, 25 November 1993, § 25, Series A no. 279-B, had concluded that "the Federal Council's discretion was not unfettered and there was serious disagreement between the authorities and the applicants. Finally, the outcome of the dispute was directly decisive for the applicants' entitlement to protection against the effects of the nuclear power plant".

57. In the context of the present case, it seems to me that the conclusion of the majority set out in § 618 would – *mutatis mutandis* – equally justify concluding that the outcome of the proceedings brought by the individual applicants was directly decisive for those domestic-law "civil" rights. The majority there held that "the association's action was based on the threat arising from the adverse effects of climate change as they affected its members' health and well-being (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 46, ECHR 2004-III). The Court is satisfied that the interests defended by the association are such that the "dispute" raised by it had a direct

and sufficient link to its members' [i.e. including the individual applicants'] rights in question". This is further underlined by the fact that it would ultimately only have been through these proceedings before the national courts that the applicants could have sought a remedy e.g. in relation to the acknowledged failure by the Swiss authorities to meet even the GHG reduction target for 2020 (referred to in § 559).

58. Having established that Article 6 § 1, the right of access to court, was, in principle, applicable to the individual applicants it seems to me that, applying the reasoning of the majority in §§ 629 – 637 *mutatis mutandis*, to the extent that the applicants claims fell within the scope of Article 6 § 1, their "right of access to a court was restricted in such a way and to such an extent that the very essence of the right was impaired" (§ 638).

ARTICLES 2 AND 8 – THE CREATION OF A NEW RIGHT

59. Turning to the substantive complaints under Articles 2 and/or 8, it is telling of the majority's whole approach, in the context of Article 2, that the reasoning moves from a quote taken from *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019 (in § 507) requiring evidence of an individual having been "the victim of an activity, whether public or private, which by its very nature put his or her life at real and imminent risk" (§ 140, emphasis added) to the (first, but in my view, questionable) conclusion (at § 509) that "the alleged failures of the State to combat climate change most appropriately fall into the category of cases concerning an activity which is, by its very nature, capable of putting an individual's life at risk". In so far as there is a causal connection at all, for the reasons set out above (when considering the question of "victim" status/standing) this is plainly too remote to be capable of engaging Article 2.

60. Having, therefore, at this early stage significantly underplayed (if not ignored) the need for any such risk to life to be "real and imminent" in order to fall within the competence of the Court, this question is then later addressed in §§ 512 – 513 of the judgment but not by reference to the further clarification provided in *Nicolae Virgiliu Tănase* at § 142. Recapitulating and rationalising the then (2019) existing case-law of the Court, the Grand Chamber in that case had made clear that "[w]here the real and imminent risk of death stemming from the nature of an activity is not evident, the level of the injuries sustained by the applicant takes on greater prominence. In such cases a complaint falls only to be examined under Article 2 where the level of the injuries was such that the victim's life was put in serious danger". Again, this is clearly not the scenario presented by these applicants. In legal terms, this difficulty is also not overcome by reference (in § 512) to the decisions in *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, 28 February 2012 (determining "imminence" of risk by reference to whether applicants were present or absent when their homes were flooded on

7 August 2001) or *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, 24 July 2014 (where a complaint about exposure to asbestos was rejected on the basis that "[i]t can neither be said that their conditions constitute an inevitable precursor to the diagnosis of that disease, nor that their current conditions are of a life-threatening nature"). If anything, these decision confirm that any risk created by the alleged failure to act in this case cannot satisfy the "real and imminent" test.

61. Furthermore, even subject to this higher threshold, the test quoted – by its position in the reasoning in the *Nicolae Virgiliu Tănase* judgment - clearly only relates to "this procedural obligation" (§ 141), namely the "procedural obligation" identified in § 137 of that judgment: "Thirdly, the Court reiterates that the State's duty to safeguard the right to life must be considered to involve not only these substantive positive obligations, but also, in the event of death, the procedural positive obligation to have in place an effective independent judicial system". It does not and cannot relate to the separate "substantive positive obligation" entailing "a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life", identified much earlier (in § 135) of *Nicolae Virgiliu Tănase* but which forms the blueprint for the positive obligation ultimately imposed by the majority under Article 8.

62. Arguably, therefore, (always assuming admissibility) the "procedural obligation" referred to in § 507 of the judgment (by reference to §§ 140 – 141 of *Nicolae Virgiliu Tănase*) might have been capable of being considered together with the complaint under Article 6 of the Convention and, if they had wanted to, enabled the majority to find a procedural violation of Article 2 and/or 8. However, the substantive violation of Article 8 which the majority seeks to construct from this starting premise has no basis either in the text of the Convention nor in any of the Court's case-law.

63. As the judgment rightly notes (§ 445), the Court has repeatedly stressed that no Article of the Convention is specifically designed to provide general protection of the environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI (extracts), and *Cordella and Others*, cited above, § 100) and that, to that effect, other international instruments and domestic legislation are more adapted to dealing with such protection. In *Jugheli and Others v. Georgia*, no. 38342/05, § 62, 13 July 2017 the Court further clarified that:

> "The Court reiterates at the outset that Article 8 is not violated every time an environmental pollution occurs. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (...). Furthermore, the adverse effects of the environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (...). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or psychological effects. There would be no

> arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city (...)."

64. It is, of course, one of the characteristics of climate change that, in fact, its effects have become – at least by reference to any comparators within the respondent State – "environmental hazards inherent to life in every modern city" and, as such, no applicability of Article 8 is capable of being derived from such a comparison which, in the Court's case-law, tended to be tied to or triggered by an identified source of (potential) pollution within the geographical vicinity.

65. Nevertheless, the majority went on, by reference to some of that very case-law, to

(a) create a new "right for individuals to effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change" (§§ 519 and 544 of the judgment); and

(b) impose a new "primary duty" on High Contracting Parties "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" (§ 545, emphasis added), an obligation which the majority translates into a requirement "that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades" (§ 548); neither of which have any basis in Article 8 or any other provision of or Protocol to the Convention.

66. Not only that, but the majority, in what seems to me to be a clear break with the Court's traditional approach in relation to "difficult social and technical spheres" developed in the context of, arguably, (much) less complex spheres than the fight against anthropogenic climate change (see e.g. *Powell and Rayner v. the United Kingdom*, § 44, cited above and *Hatton and Others*, cited above, § 100), also considered that, in relation to this new obligation imposed on Contracting States, at least as far as "the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect" is concerned Contracting States will only be accorded a "reduced margin of appreciation" (§ 543). Only when concerned with the "choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources" does the majority allow for a "wide margin of appreciation".

67. Compliance with either margin of appreciation will now be supervised by the Court (by means of an overall assessment relating both to mitigation as well as adaptation measures) and, it is to be assumed (in light of the requirement for exhaustion of domestic remedies under Article 35 § 1 of the Convention (see the discussion at §§ 47 *et seq* above) and the principle of subsidiarity) national courts and tribunals. This assessment is due to be

carried out by reference to a detailed catalogue of criteria set out in § 550, including by reference to "the need to ... keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence" (§ 550 (d)), an assessment which, in my respectful view, the Court is ill-equipped and ill-suited to perform. The nature of this part of the test alone, of course, underlines why "the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality" (§ 543) is wholly inadequate to explain or justify the adoption of such a fundamentally different approach to the margin of appreciation than the one Court has hitherto adopted.

CONCLUSION

68. In light of the above, and plainly recognising the nature or magnitude of the risks and the challenges posed by anthropogenic climate change and the urgent need to address them, the Court would already have achieved much if it had focussed on a violation of Article 6 of the Convention and, at a push, a procedural violation of Article 8 relating in particular to (again) the right of access to court and of access to information necessary to enable effective public participation in the process of devising the necessary policies and regulations and to ensure proper compliance with and enforcement of those policies and regulations as well as those already undertaken under domestic law. However, in my view, the majority clearly "tried to run before it could walk" and, thereby, went beyond what was legitimate for this Court, as the court charged with ensuring "the observance of the engagements by the High Contracting Parties in the Convention" (Article 19) by means of "interpretation and application of the Convention" (Article 32), to do.

69. I also do worry that, in having taken the approach and come to the conclusion they have, the majority are, in effect, giving (false) hope that litigation and the courts can provide "the answer" without there being, in effect, any prospect of litigation (especially before this Court) accelerating the taking of the necessary measures towards the fight against anthropogenic climate change. In fact, there is a significant risk that the new right/obligation created by the majority (alone or in combination with the much enlarged standing rules for associations) will prove an unwelcome and unnecessary distraction for the national and international authorities, both executive and legislative, in that it detracts attention from the on-going legislative and negotiating efforts being undertaken as we speak[15] to address the – generally

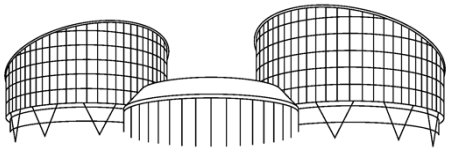
[15] Including (but not exclusively) under the auspices of the Council of Europe. In this context it is worth noting again that the CDDH-ENV has, in fact, been engaged in actively considering the need for and feasibility of a further instrument or instruments on human rights and the environment since at least September 2022: see footnote 5 above

accepted – need for urgent action. Not only will those authorities now have to assess and, if considered necessary, design and adopt (or have adopted) new "regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" but there is also a significant risk that they will now be tied up in litigation about whatever regulations and measures they have adopted (whether as a result or independently) or how those regulations and measures have been applied in practice and, where an applicant was successful, lengthy and uncertain execution processes in relation to any judgments. After all, under Article 46 § 2 of the Convention supervision of the execution of any judgment of the Court lies with the Committee of Ministers, i.e. representatives of the very states who have now, contrary to their "intention" as reflected in the terms of the Convention, had significant new obligations imposed on them by the Court. In this context, I would note that the Committee of Ministers is also not likely to be helped in any way by the generality of the majority's conclusion under Article 46 (§ 657).

70. Consequently, while I understand and share the very real sense of and need for urgency in relation to the fight against anthropogenic climate change, I fear that in this judgment the majority has gone beyond what it is legitimate and permissible for this Court to do and, unfortunately, in doing so, may well have achieved exactly the opposite effect to what was intended.

Annex 622

Case of Carême v France [2024] ECHR 88



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF CARÊME v. FRANCE

(Application no. 7189/21)

DECISION

STRASBOURG

9 April 2024

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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The European Court of Human Rights (Grand Chamber), sitting as a Grand Chamber composed of:

Síofra O'Leary,
Georges Ravarani,
Marko Bošnjak,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Arnfinn Bårdsen,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Darian Pavli,
Raffaele Sabato,
Lorraine Schembri Orland,
Anja Seibert-Fohr,
Peeter Roosma,
Ana Maria Guerra Martins,
Mattias Guyomar,
Andreas Zünd*, judges*,

and Søren Prebensen, *Deputy Grand Chamber Registrar*,

Having regard to the above application lodged on 28 January 2021,

Having deliberated in private on 31 March 2023 and 11 January 2024, decides as follows:

PROCEDURE

1. The case originated in an application (no. 7189/21) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Damien Carême ("the applicant"), on 28 January 2021.

2. The applicant was represented by Ms C. Lepage, a lawyer practising in Paris. The French Government ("the Government") were represented by their Agent, Mr D. Colas, Director of Legal Affairs at the Ministry of European and Foreign Affairs.

3. The applicant alleged, in particular, that France had taken insufficient steps to prevent climate change and that this failure entailed a violation of his right to life and his right to respect for his private and family life and his home. The applicant relied on Articles 2 and 8 of the Convention.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 31 May 2022 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. The President of the Court decided that in the interests of the proper administration of justice, the case should be assigned to the same composition of the Grand Chamber as the cases of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20) and *Duarte Agostinho and Others v. Portugal and 32 Others* (application no. 39371/20) (Rule 24, Rule 42 § 2 and Rule 71), which were relinquished by Chambers of the Third and Fourth Sections, respectively.

6. The applicant and the Government each filed memorials on the admissibility and merits of the case. In addition, having been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3), third-party comments were received from the European Network of National Human Rights Institutions (ENNHRI), Our Children's Trust ("OCT"), Oxfam France and Oxfam International and its affiliates (Oxfam).

7. On 11 January 2023 the Grand Chamber decided that in the interest of the proper administration of justice, after the completion of the written stage of the proceedings in the above-mentioned cases, the oral stage would be staggered so that a hearing in the present case and in the *Verein KlimaSeniorinnen Schweiz and Others* case would be held on 29 March 2023, and a hearing in the *Duarte Agostinho and Others* case would be held before the same composition of the Grand Chamber at a later stage (the hearing was held on 27 September 2023).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 29 March 2023 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	M. COLAS,	*Agent*,
Ms	P. REPARAZ,	
Ms	M. BLANCHARD,	
Ms	C. BLONDEL,	
Ms	A. AUBERT,	
Mr	J. SEVESTRE-GIRAUD,	
Mr	A. AMADORI,	
MS	D. BARRERE,	*Advisers*;

(b) for the applicant

Ms	C. LEPAGE,	*Counsel*,
Mr	C. HUGLO,	
Mr	T. BEGEL,	*Advisers*,
Mr	D. CARÊME,	*Applicant*.

The Court heard addresses by Mr Colas and Ms Lepage, and their answers to questions put by the Court.

THE FACTS

I. THE APPLICANT'S SITUATION

9. The applicant was born in 1960. He is a politician who served as mayor of Grande-Synthe from 23 March 2001 to 3 July 2019. Since 26 May 2019 he has been a member of the European Parliament. After being elected to the European Parliament, the applicant moved from Grande-Synthe to Brussels (see paragraph 68 below).

10. Grande-Synthe is a municipality of some 23,000 inhabitants located in the Dunkirk area on the coast of the English Channel. As found by the *Conseil d'État*, Grande-Synthe is particularly exposed to risks linked to climate change, including the risk of flooding (see paragraph 28 below).

II. PROCEEDINGS INSTITUTED BY THE APPLICANT

A. The applicant's requests to the authorities

11. On 19 November 2018 the applicant, acting on his own behalf and in his capacity as mayor of the municipality of Grande-Synthe, and in the name and on behalf of the latter municipality, asked the President of the Republic, the Prime Minister and the Minister for Ecological Transition and Solidarity: (a) to take all necessary measures to curb greenhouse gas ("GHG") emissions produced on the national territory in order to comply with the relevant commitments made by France in that respect; (b) to take all necessary legislative and regulatory initiatives to "make it obligatory to give priority to climate matters" and to prohibit all measures likely to increase GHG emissions; and (c) to implement immediate climate-change adaptation measures in France.

12. The above-mentioned authorities did not reply to the requests made by the applicant and the municipality of Grande-Synthe.

B. Proceedings in the Conseil d'État

1. The applicant's legal action

13. In the absence of a response from the authorities, on 23 January 2019 the applicant, acting on his own behalf and in his capacity as mayor of Grande-Synthe, and in the name and on behalf of the latter municipality, applied to the *Conseil d'État* for judicial review (*recours pour excès de pouvoir*) of the implicit rejection decisions constituted by the authorities' failure to reply to their requests.

14. The claimants pointed to the adverse effects of climate change, which were already impacting the environment, health and economy of various States around the world. Moreover, relying on the 2018 Special report "1.5°C global warming" of the Intergovernmental Panel on Climate Change ("IPCC"), they pointed to the future risks linked to climate change and, in that respect, to the necessity of taking urgent and ambitious measures in order to progressively limit GHG emissions with a view to achieving the goal of limiting global warming to 1.5°C above pre-industrial levels. In this context, the claimants pointed to the fact that France was one of the countries in the world most affected by climate change, which had adverse consequences for the health of its citizens and the environment, most notably through the erosion of the coastline and the risk of flooding by 2030. They noted, however, that instead of keeping GHG emissions below the limit set out in Decree no. 2015-1491 of 18 November 2015, France had in fact increased its carbon budget by 6.7% in 2017 and would be unable to meet the targets set for the period 2015-18.

15. As regards the situation of the municipality of Grande-Synthe, the claimants argued that its geographical location left it particularly exposed to the risks of climate change, namely more frequent heavy rain and rising sea levels, which increased the risk of coastal and inland flooding. Moreover, heatwaves depleted the soil and aggravated pollution in the area. There was also a risk that any resulting environmental disasters would lead to significant socio-economic costs. For instance, the consequences of climate change already observed on the territory of the municipality had given rise to costs of between 100,000 and 500,000 euros (EUR) for the period between 1995 and 2010. In the claimants' view, while the municipality of Grande-Synthe was doing its utmost to address the effects of climate change, this would not be sufficient in the absence of effective action taken at national level. Against this background, the claimants argued that the municipality of Grande-Synthe had an interest in bringing proceedings in the *Conseil d'État* against any decision relating to the risks resulting from climate change on its territory.

16. As regards the applicant's situation, the claimants submitted that, having regard to his powers and responsibilities as the mayor of Grande-Synthe, as provided by Article L. 2212-2 of the General Code on Territorial Authorities (see paragraph 50 below), and the delegation given to him by the Municipal Council to pursue legal actions on behalf of the municipality, his legal action in relation to the impact of climate change on Grande-Synthe was admissible. Moreover, they argued that the legal action brought by the applicant on his own behalf as a citizen was justified under Articles 2 and 8 of the Convention.

17. As regards the merits of their legal action, relying on domestic and EU law, as well as the Paris Agreement[1], the municipality of Grande-Synthe and Mr Carême argued that the government had a positive duty to take effective measures to address climate change, including the necessary adaptation measures, which, in their view, it had failed to take. Moreover, relying on the Court's case-law in *L.C.B. v. the United Kingdom* (9 June 1998, *Reports of Judgments and Decisions* 1998-III), *Öneryıldız v. Turkey* ([GC], no. 48939/99, ECHR 2004-XII), *López Ostra v. Spain* (9 December 1994, Series A no. 303-C) and *Tătar v. Romania* (no. 67021/01, 27 January 2009), they argued that Articles 2 and 8 of the Convention imposed a positive obligation on States Parties to adopt adequate measures to ensure effective protection of the environment and human health, in particular through the establishment of an appropriate and effective legal framework. In this respect, they invited the *Conseil d'État* to follow the conclusions of the Netherlands Supreme Court in the *Urgenda* case[2].

18. Finally, the claimants asked the *Conseil d'État* to make the following order:

> "SET ASIDE the implicit rejection decisions constituted by the failure to reply of the President of the Republic, the Prime Minister and the Minister for Ecological Transition and Solidarity concerning [the claimants'] requests, first, that all necessary measures be taken to curb greenhouse gas emissions produced on the national territory, in order to comply, at minimum, with the relevant commitments made by France [in that respect]; secondly, that immediate climate-change adaptation measures be taken in France; and finally, that all necessary legislative and regulatory initiatives be taken to make it obligatory to give priority to climate matters and to prohibit all measures likely to increase greenhouse gas emissions;
>
> ORDER the Prime Minister and the Minister for Ecological Transition and Solidarity to take all necessary measures to curb greenhouse gas emissions produced on the national territory, in order to comply, at minimum, with the relevant national and international commitments made by France [in that respect], within a period of six months;
>
> ORDER the [the Prime Minister and the Minister for Ecological Transition and Solidarity] to take immediate climate-change adaptation measures in France, within a period of six months maximum;
>
> ORDER [the Prime Minister and the Minister for Ecological Transition and Solidarity] to take all necessary legislative and regulatory initiatives to make it obligatory to give priority to climate matters and to prohibit all measures likely to increase greenhouse gas emissions, within a period of six months maximum;
>
> ..."

[1] Paris Agreement, 12 December 2015, United Nations, Treaty Series, vol. 3156.
[2] The State of the Netherlands v. Stichting Urgenda, 20 December 2019, NL:HR:2019:2007.

2. The parties' submissions to the Conseil d'État

19. In its reply to the legal action before the *Conseil d'État*, the Ministry for Ecological Transition and Solidarity ("the Ministry") argued that the claimants' request to order the authorities to take the necessary legislative initiatives concerning climate change was outside the judicial competence of the *Conseil d'État*. The Ministry further argued that the municipality of Grande-Synthe and its mayor had no legal interest in bringing a legal action in the *Conseil d'État* as the issues relating to the legislation on climate change did not specifically affect the municipality. In the Ministry's view, although the municipality of Grande-Synthe was situated within the perimeter of the territory subject to a heightened risk of flooding (*Territoire à risque important d'inondation* "TRI"), it did not have direct access to the sea and the relevant TRI simulations of coastal flooding in relation to climate change did not suggest that it would affect the municipality of Grande-Synthe. Moreover, the Ministry pointed out that the scientific community did not attribute the current erosion of France's coastline to climate change and that, in any event, the municipality of Grande-Synthe would have to demonstrate a direct link between climate change and the changes that had taken place on its territory. However, even assuming that the municipality of Grande-Synthe could demonstrate with certainty that it was suffering the impacts of climate change, in the Ministry's view, it had failed to identify the exact decisions which it was challenging and its standing to bring the legal action at issue could not be established on the basis of Article L. 2212-2 of the General Code on Territorial Authorities (see paragraph 50 below).

20. As to whether the appeal lodged by the applicant on his own behalf was admissible, the Ministry was of the view that the sole fact that he was a person who had rights under the Convention did not suffice to confer on him an interest in bringing proceedings in the *Conseil d'État* concerning the issues of climate change.

21. With respect to the merits of the case, the Ministry argued that the claimants could not rely on the Paris Agreement as it was not intended to confer any rights on individuals and that, in any event, the commitments by France under the Agreement had to be viewed in the context of the collective commitments of EU member States. In this connection, the Ministry was of the view that France was compliant with the requirements and goals set out at EU level. Similarly, citing *Guerra and Others v. Italy* (19 February 1998, *Reports of Judgments and Decisions* 1998-I), the Ministry contended that by providing a comprehensive legislative and regulatory framework, France was compliant with its obligations flowing from the Convention. Lastly, the Ministry argued that the claimants had not demonstrated any relevant breach of the domestic law concerning climate change. In these circumstances, the Ministry contended that the claimants' action, as a whole, should be rejected.

22. In their reply to the Ministry's submission, the claimants argued that the municipality of Grande-Synthe was in fact directly affected by the risk of flooding. They contended that the TRI on which the Ministry had relied was outdated and not in line with the relevant IPCC and domestic predictions and studies, which showed that the municipality was at risk of coastal flooding by 2040. In this connection, the claimants submitted that the existing infrastructure to protect against such flooding had not been designed for the contemporary effects of climate change. Similarly, the claimants strongly objected to the Ministry's submission that the current erosion of France's coastline was not attributable to climate change. According to them, both the IPCC and certain domestic studies had clearly established such a link and the risk of erosion was real for the municipality of Grande-Synthe, which was a coastal territory that was extremely flat, situated in part below sea level, criss-crossed by a network of water drainage channels (*watringues*) and composed of clay soils. The claimants also argued that the possible direct and indirect adverse consequences of climate change on the interests which the municipality was obliged to protect conferred on it an interest in bringing an action in the *Conseil d'État*.

23. As regards whether the appeal lodged by Mr Carême on his own behalf was admissible, the claimants pointed to the fact that his house was located less than four kilometres from the coastline and that according to some predictions (*Coastal Risk Screening Tool*[3]) his house would be flooded by 2040 as a result of the effects of climate change. The applicant had not therefore lodged the legal action as an ordinary citizen but as someone with a concrete legal interest, since in a foreseeable future his house was at real risk of flooding linked to climate change, which would therefore affect his property and his day-to-day environment. Moreover, when discussing the applicant's interest in bringing an action in the *Conseil d'État*, it was necessary to take into account the nature of climate litigation, which was intended to protect not only current interests but also the interests of future generations.

24. As regards the merits of their legal action, the claimants reiterated their earlier arguments and disagreed with the Ministry's views concerning France's compliance with its obligations under the Paris Agreement and EU and national law in respect of the necessary measures to be taken to address the adverse effects of climate change. As regards, in particular, the arguments made under Articles 2 and 8 of the Convention, the claimants pointed out that according to the Court's case-law, in addition to the obligation to put in place a regulatory framework, the States had a duty to take preventive measures to protect the right to life (citing *Öneryıldız*, cited above, §§ 101 and 109, and *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, 24 July 2014). In the claimants' view, by failing to comply with its

[3] Available at www.coastal.climatecentral.org (last accessed 11.01.2024).

duty to reduce GHG emissions, the State had failed to comply with its protective obligation under the Convention. Moreover, the claimants argued that although in its 2017 Climate Plan France had made an ambitious commitment to achieve carbon neutrality by 2050, the existing legislative and regulatory framework was insufficient to achieve that objective (citing the findings of the 2019 Report of the High Council on Climate[4]). In this connection, they also pointed out that in 2018 GHG emissions in France had remained above the set objectives (citing a report of the Climate & Energy Observatory). The insufficiency of the relevant framework was, in the claimants' view, in breach of the State's obligations to guarantee the enjoyment of the right to life (Article 2) and the right to private and family life (Article 8) under the Convention.

25. The following entities intervened in the proceedings in the *Conseil d'État*: the cities of Paris and Grenoble, the non-governmental organisations Oxfam France, Greenpeace France and Notre Affaire à Tous, and the Fondation pour la Nature et l'Homme.

3. The Conseil d'État*'s decision*

26. On 19 November 2020 the *Conseil d'État* found that the claimants' request to order the authorities to take the necessary legislative initiatives to tackle climate change related to the issue of the separation of powers in the context of a legislative process, and was not amenable to judicial review. In particular, it reasoned as follows:

> "... [T]he fact that the executive refrains from submitting a legislative proposal to Parliament concerns the relations between the constitutional public authorities and therefore falls outside the jurisdiction of the administrative courts. Consequently, the arguments set out in the legal action, in so far as they are directed against the implicit refusal of the claimants' requests for the adoption of legislative provisions, must be rejected."

27. On the other hand, the *Conseil d'État* considered that the requests to set aside the implicit rejection decisions concerning the taking of necessary measures to curb GHG emissions produced on the national territory, regulatory measures to make it obligatory to give priority to climate matters, and climate-change adaptation measures, were amenable to judicial review.

28. As regards the claimants' interest in pursuing the requests, the *Conseil d'État*, distinguishing between the municipality and the applicant, found:

> "It follows from the case file, and in particular from the information published by the National Observatory on the effects of global warming, that the Dunkirk area has been assessed as being at a very high level of exposure to climate risk. In this respect, the municipality of Grande-Synthe argues, without being seriously challenged on this point, that owing to its immediate proximity to the coast and the physical

[4] Available at www.hautconseilclimat.fr (last accessed 11.01.2024).

> characteristics of its territory, it is exposed in the medium term to high and increased risks of flooding, and an increase in episodes of severe drought, with the effect not only of a reduction and degradation of water resources, but also significant damage to built-up areas, given the geological characteristics of the soil. While these concrete consequences of climate change are likely to have full effect on the territory of the municipality only by 2030 or 2040, their inevitability, in the absence of effective measures taken quickly to prevent the causes and in view of the time frame for public policy action in this area, is such as to justify the need to act without delay. Consequently, the municipality of Grande-Synthe, in view of its level of exposure to the risks arising from the phenomenon of climate change and the direct and certain impact [of climate change] on its situation and the interests for which it is responsible, has an interest conferring on it standing to seek the setting-aside of the contested implicit [rejection] decisions. The circumstance, invoked by the Minister in support of her objection, that the effects of climate change are likely to affect the interests of a significant number of municipalities is not such as to call into question that interest.
>
> On the other hand, Mr Carême, who merely argues, in his capacity as a citizen, that his current residence is located in an area likely to be subject to flooding by 2040, has no such interest."

29. In this connection, in his conclusions on this case, the public rapporteur (*le rapporteur public*) had made the following comments on the question of the applicant's lack of interest to bring proceedings:

> "[His status as mayor] is not sufficient to confer on him an interest in bringing proceedings, nor is the fact that his current residence is located in an area likely to be flooded annually in 2040: there is no indication as to where his residence will be in the years to come, let alone in twenty years or more, so that his [personal] interest appears to be affected in too uncertain a manner on this point. We propose to dismiss the application in so far as it emanates from him for lack of interest to bring proceedings."

30. Furthermore, the *Conseil d'État* declared admissible the interventions of the cities of Paris and Grenoble noting in particular that their interest in intervening was based on the fact that those urban areas had been identified by the National Observatory on the effects of global warming as being at a very high level of exposure to climate risks. Moreover, having regard to their action to combat the adverse anthropogenic effects of climate change, the *Conseil d'État* declared admissible the above-noted non-governmental associations' interventions (see paragraph 25 above). The third-party interventions were accepted in so far as they concerned the admissible part of the action brought by the municipality of Grande-Synthe.

31. Furthermore, relying on the United Nations Framework Convention on Climate Change ("UNFCCC")[5], the Paris Agreement and EU law (2020 Climate and Energy Package)[6], the *Conseil d'État* pointed out that States

[5] United Nations Framework Convention on Climate Change, 9 May 1992, United Nations, Treaty Series, vol. 1771, p. 107.

[6] See further 2020 climate & energy package, available at www.europa.eu (last accessed 11.01.2024).

had a shared but differentiated responsibility to take the necessary measures to address climate change by reducing GHG emissions. Moreover, the *Conseil d'État* noted that although the UNFCCC and the Paris Agreement did not have a direct effect on individuals and required further measures of implementation in order to produce such effects, they had to be taken into consideration when interpreting the domestic law, in particular in relation to the environmental objectives fixed by States. In this connection, the *Conseil d'État* noted that when fixing France's objective to reduce GHG emissions by 40% by 2030, Article L. 100-4 of the Energy Code (see paragraph 40 below) referred to the UNFCCC and the Paris Agreement. Moreover, Article L. 222-1 A of the Environment Code (see paragraph 42 below) provided that the maximum level of national GHG emissions was to be fixed for the period 2015-18 and then for consecutive periods of five years thereafter. Within this framework, the Decree of 18 November 2015 fixed the carbon budget for the first period at a maximum limit of 442 Mt CO_2e per year.

32. However, from the information available in the file, the *Conseil d'État* found that for the period 2015-18 France had surpassed its first carbon budget target by 62 Mt CO_2e per year and thus reduced GHG emissions by only 1%, instead of the planned 2.2% per year. In this connection, the *Conseil d'État* noted that the 2019 and 2020 reports of the High Council on Climate had found that the policies put in place to achieve the fixed objectives concerning the reduction of GHG emissions had been insufficient.

33. The *Conseil d'État* further noted that the Decree of 21 April 2020 had significantly modified the second carbon budget (period 2019-23) initially set in the Decree of 18 November 2015, by increasing the maximum limit of GHG emissions from 399 to 422 Mt CO_2e per year. As regards the third carbon budget (period 2024-28), the Decree of 21 April 2020 had only slightly modified the maximum limit initially set in the Decree of 18 November 2015 by increasing it from 358 to 359 Mt CO_2e per year. Finally, it noted that the Decree of 21 April 2020 had fixed the fourth carbon budget (period 2029-30) at 300 Mt CO_2e per year. In the view of the *Conseil d'État*, this fourth carbon budget would allow France to achieve its final objective of reducing GHG emissions by 40% compared to 1990 levels by 2030, as required by Article L. 100-4 of the Energy Code, and by 37% compared to 2005 levels, as required by Regulation (EU) 2018/842.[7] However, globally, the modifications introduced by the Decree of 21 April 2020 had led to most of the efforts required being postponed until after 2020, in accordance with a road map which had never yet been

[7] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) 525/2013 (OJ L 156, 19.6.2018, p. 26–42).

attained. At the same time, the most recent scientific evidence, including the reports published by the IPCC, showed that climate risks would increase if the temperature continued to rise, and therefore the European Commission was considering proposing to increase the EU's 2030 GHG emissions reduction target to -55% compared to the 1990 emissions level.

34. In view of these considerations, the *Conseil d'État* concluded that further investigations were needed as regards the part of the municipality of Grande-Synthe's submissions relating to the implicit rejection of the request to take all necessary measures to curb GHG emissions produced on the national territory. As regards the part of the legal action relating to regulatory measures to make it obligatory to give priority to climate matters, the *Conseil d'État* considered that it was insufficiently substantiated. Lastly, with regard to the need to take climate-change adaptation measures, the argument could not validly be raised.

35. Following further investigations concerning the measures taken by the authorities to curb GHG emissions, on 1 July 2021 the *Conseil d'État* set aside the authorities' implicit rejection of the municipality of Grande-Synthe's request in that respect. The *Conseil d'État* found, in particular, that the reduction in GHG emissions in 2019 had been small and that the reduction in 2020 had not been sufficient, having regard to the reduced economic activity owing to the public-health crisis. It also found that compliance with the pathway set to achieve emission reduction targets of reducing GHG emissions by 40% compared to 1990 levels by 2030, as required by Article L. 100-4 of the Energy Code, and by 37% compared to 2005 levels, as required by Regulation (EU) 2018/842 – which required a 12% reduction in emissions in the period 2024-28 pursuant to the Decree of 21 April 2020 – did not appear to be feasible if new measures were not rapidly adopted.

36. In the light of these findings, the *Conseil d'État* ordered the authorities to take additional measures by 31 March 2022 to meet the GHG emissions reduction targets set out in Article L. 100-4 of the Energy Code and Annex I of Regulation (EU) 2018/842.

C. Subsequent proceedings in the *Conseil d'État*

37. On 1 April 2022 the municipality of Grande-Synthe lodged a legal action in the *Conseil d'État* requesting that it impose a financial penalty on the State for non-execution of the *Conseil d'État*'s judgment of 1 July 2021.

38. On 10 May 2023 the *Conseil d'État* found that while the government had taken additional measures to tackle climate change and thereby demonstrated its determination to implement the *Conseil d'État*'s decision, there was still no sufficiently credible guarantee that the GHG emissions reduction pathway would actually be attained. The *Conseil d'État* therefore ordered the government to take additional measures by 30 June 2024, and to

submit, by 31 December 2023, a progress report detailing these measures and their effectiveness.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL FRAMEWORK

A. Charter for the Environment

39. The 2004 Charter for the Environment provides as follows:

"Article 1. Everyone has the right to live in a balanced and healthy environment.

Article 2. Everyone is under a duty to participate in preserving and improving the environment.

Article 3. Everyone must, under the conditions provided for by law, avoid causing damage to the environment or, failing that, limit the consequences of such damage.

Article 4. Everyone is required, under the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment.

Article 5. Where the occurrence of any damage, albeit uncertain in the light of current scientific knowledge, could seriously and irreversibly harm the environment, public authorities shall, in application of the precautionary principle and in the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of provisional measures commensurate with the risk involved in order to prevent the occurrence of such damage.

Article 6. Public policies must promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress.

Article 7. Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in any public decision-making process likely to affect the environment.

Article 8. Education and training on the environment shall contribute to the exercise of the rights and duties set out in this Charter.

Article 9. Research and innovation must contribute to the preservation and development of the environment.

Article 10. This Charter shall inspire France's actions at both European and international levels."

B. Energy Code

40. Article L. 100-4 of the Energy Code, as amended by Law no. 2019-1147 of 8 November 2019, reiterates the French target of a 40% reduction in greenhouse gas emissions between 1990 and 2030, in accordance with Annex I to Regulation (EU) 2018/842 of the European

Parliament and of the Council, and provides as follows: “in response to the ecological and climate emergency, the national energy policy” aims to “1. [r]educe greenhouse gas emissions by 40% between 1990 and 2030 and achieve carbon neutrality by 2050 ...”. The provision in question adds that “the pathway is set out in detail in the carbon budgets referred to in Article L. 222-1 A of the Environment Code”.

41. That Article states that “... carbon neutrality is to be understood as a balance, across the national territory, between anthropogenic emissions by sources and anthropogenic removals using greenhouse gas sinks, as referred to in Article 4 of the Paris Agreement ratified on 5 October 2016”, and that “[t]he calculation of such emissions and removals will be carried out in accordance with the same procedures as those applicable to the national greenhouse gas inventories notified to the European Commission and in the context of the United Nations Framework Convention on Climate Change, without taking into account international carbon offsets”.

C. Environment Code

42. Article L. 222-1 A of the Environment Code provides that “for the period 2015-18, and for each consecutive five-year period, a national greenhouse gas emissions ceiling known as the ‘carbon budget’ will be set by decree”.

43. Article L. 222-1 B of the same Code adds that “the decree establishing the low-carbon strategy will allocate the carbon budget for each of the periods mentioned in Article L. 222-1 A by major sectors .... It will also allocate carbon budgets in indicative annual emissions bands”.

D. Two decrees defining the national low-carbon strategy

44. A first decree of 18 November 2015 set “the carbon budgets for the periods 2015-18, 2019-23 and 2024-28 ... respectively at 442, 399 and 358 Mt CO_2e per year ...” (Article 2 of Decree no. 2015-1491 of 18 November 2015 on national carbon budgets and the national low-carbon strategy).

45. For the period 2015-18, as the original targets were exceeded by 62 Mt CO_2e per year, a second decree of 21 April 2020 (Decree no. 2020-457 on national carbon budgets and the national low-carbon strategy) was adopted providing for the raising of these ceilings.

46. For the period 2019-23 (second carbon budget), the new ceiling was set at 422 instead of 399 Mt CO_2e per year, an increase of 23 Mt CO_2e and, for the period 2024-28 (third carbon budget), at 359 instead of 358 Mt CO_2e per year. Finally, the ceiling was set at 300 Mt CO_2e for the period 2029-33 (fourth carbon budget).

47. The effect of raising these ceilings is that the average annual reduction of approximately 40 Mt CO_2e has been increased to an average annual reduction of about 60 Mt CO_2e.

E. Law no. 2021-1104 of 22 August 2021 on combating climate change and strengthening resilience to its effects

48. Law no. 2021-1104 sets out, by sector of activity, and in particular the sectors with the highest GHG emissions, the obligations imposed on the various stakeholders by Article L. 100-4 of the Energy Code in order to achieve the reduction target initially set at 40% by 2030 compared with 1990 levels. It is structured around the five themes which the Citizens' Climate Convention discussed and on which it presented proposals.

49. Section 1 of the Law reiterates France's commitment to meeting the new targets resulting from the revision of the European "effort sharing" Regulation of 30 May 2018 which sets GHG emissions reduction targets for each member State consistent with the new European target of reducing GHG emissions by at least 55% by 2030.

F. General Code of Territorial Authorities

50. Article L. 2212-2 of the General Code of Territorial Authorities (*Code general des collectivités territoriales*), taken together with Article L. 2122-24, defines the policing powers of mayors which they exercise on behalf of the municipality. It does not concern the issue of interest in bringing proceedings or the question of standing to act before the courts, which is governed by Article L. 2122-22 § 16, providing that the mayor can bring legal actions on behalf of the municipality or defend the municipality in actions brought against it.

G. Case-law concerning interest in bringing an action

51. The applicant's interest in bringing an action is one of the conditions for admissibility of an application for judicial review (*recours pour excès de pouvoir*). It follows from the domestic case-law that the administrative courts take a flexible approach to this particular condition, while consistently refusing to accept an *actio popularis*. The applicant must establish the existence of a personal interest in seeking the setting-aside of the act he or she is challenging. To this end, the interest invoked must be sufficiently direct. However, the administrative courts do not require it to be specific to the applicant. In other words, it is not necessary for the interest invoked to be specific and particular to the individual applicant, but it must be part of a circle in which case-law has accepted ever larger groups of interested parties, without however enlarging it to the dimensions of the

national community (Chenot conclusions on the *Conseil d'État* decision in *Sieur Gicquel*, 10 February 1950, no. 1743).

52. According to the domestic case-law, the mere fact of being a citizen is not sufficient to confer an interest giving standing to act in disputes concerning the setting-aside of decisions (see, for example, *Conseil d'État*, 11 December 1987, no. 76469; *Conseil d'État*, 12 March 1999, no. 192014; and *Conseil d'État*, 17 May 2002, no. 231290). For the existence of an interest to bring proceedings to be recognised, it must be linked to a particular status relied on by the applicant.

53. Similarly, the *Conseil d'État* does not accept the interest of every citizen to bring proceedings against an administrative decision likely to harm the environment (*Conseil d'État*, 2 October 1986, nos. 50893 and 50894). It has also considered that "Article 2 of the Charter for the Environment, according to which '[e]veryone is under a duty to participate in preserving and improving the environment', cannot, in itself, confer on every person who invokes it an interest in bringing an application for judicial review of any administrative decision that he or she intends to contest" (*Conseil d'État*, 3 August 2011, Mme B. no. 330566).

54. In addition, the interest invoked must not be excessively uncertain, which implies that the contested decision must be regarded as capable of prejudicing, at least in a sufficiently probable manner, the person bringing the action. For instance, an applicant's action contesting a decree banning camping in a municipality which he had not yet visited was deemed admissible (*Conseil d'État*, 14 February 1958, *Abisset*, *Recueil Lebon* p. 98). On the other hand, an applicant's interest in requesting the setting-aside of a decree creating a national park was denied on the grounds that he merely claimed to be a hiker who lived in the *département*, while he lived 200 km from the park's boundaries (*Conseil d'État*, 3 June 2009, no. 305131).

II. RELEVANT INTERNATIONAL MATERIALS

55. The relevant international materials are set out in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, §§ 133-231, 9 April 2024.

COMPLAINT

56. The applicant alleged that France had failed to take sufficient steps to prevent climate change and that this failure entailed a violation of his right to life and the right to respect for his private and family life and his home, relating, in particular, to the risk of climate-change-induced flooding to which the municipality of Grande-Synthe would be exposed in the period 2030-40. The applicant relied on Articles 2 and 8 of the Convention.

THE LAW

57. The relevant part of Article 2 of the Convention provides as follows:

"1. Everyone's right to life shall be protected by law ..."

58. The relevant part of Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home ..."

I. THE PARTIES' SUBMISSIONS

A. The Government

59. The Government pointed out that the scientific findings were clear as regards the existence of a triple crisis: climate change, pollution and the degradation of biodiversity. The IPCC reports had established the anthropogenic origin of climate change and had shown that GHG emissions reduction measures and adaptation measures were necessary to limit the negative impact of climate change on humans and the environment. France was aware of the climate emergency and was actively engaged in addressing it through legislative initiatives and programmes,

60. At the domestic level, the issues of climate change were subject to review by the administrative courts, as seen in the *Grande-Synthe* and the "*Affaire du siècle*" cases (see also *Verein KlimaSeniorinnen Schweiz and Others*, cited above, § 240). At the same time, the issues linked to the reduction of GHG emissions were not subject to regulation under the Convention or to the jurisdiction of the Court. Neither Article 2 nor Article 8, or any other provision of the Convention, guaranteed the right to a healthy environment as such. The issues under the Convention were limited to individual cases and the specific environmental problems affecting an applicant.

61. However, the applicant in the present case was in reality seeking to obtain a review by the Court of the measures taken by France to limit GHG emissions. It was clear that the applicant's complaint was not intended to protect his individual rights but rather the general interest. This was an *actio popularis* complaint, the nature of which was demonstrated by the fact that the applicant had not complained of specific environmental problems whose cause, localisation and effects could clearly be established. He had rather complained about the effects of climate change which emanated from a whole system and entailed global risks, the materialisation of which, as regards particular individuals, was neither certain nor determinable in terms of localisation. The Government stressed that the Convention did not allow for the possibility of an abstract review of the domestic legislation or measures, including in the environmental context (citing, *inter alia*, *Caron and Others v. France* (dec.), no. 48629/08, 29 June 2010). Moreover, the

right of individual application could not be used simply in order to prevent the possible occurrence of a violation in the future (citing *Aly Bernard and Others v. Luxembourg* (dec.), no. 29197/95, 29 June 1999). In the applicant's case, in the absence of an individualised complaint, it was questionable whether he had properly exhausted the domestic remedies.

62. In any event, the Government considered that the applicant had not demonstrated that he had been, or that he would be, personally affected by the impugned effects and risks associated with climate change. While it was probable that climate change would affect different persons differently, depending on their place of residence, conditions of life and health, the applicant had not demonstrated the existence of a serious and specific risk for his health and his property. In this connection, it was not sufficient that he had relied on the risks threatening the municipality of Grande-Synthe given, in particular, that it could not be established that the applicant would still reside in this municipality or what his personal situation would be in a few years, let alone by 2040. Moreover, in so far as the applicant had argued that he suffered from asthma, that was not an issue mentioned in his initial application to the Court and nor had it been raised before the *Conseil d'État*. It was therefore beyond the scope of the present case.

63. As to the subsidiary question of a loss of victim status, the Government were of the view that the *Conseil d'État*'s judgment of 1 July 2021 had divested the applicant of any victim status he might have claimed. That judgment had effectively responded to the complaint made by the applicant before the domestic authorities and before the Court by accepting as admissible and partially granting on the merits the claim brought by the municipality. It had introduced the possibility of a "pathway review" by the administrative courts, which were now competent to examine the State's compliance with the climate objectives set out by the EU and in the national legislation.

64. Furthermore, the Government stressed that in order for Article 2 to apply there had to be a serious risk to life. This also applied in the environmental context where the danger to life had to be serious, real and imminent, and clearly identifiable (citing, *inter alia*, *Brincat and Others*, cited above, §§ 82-85, and *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, § 137, ECHR 2008 (extracts)). In the Government's view, the applicant had not in any way demonstrated that he personally faced any such serious, real and imminent risk to his life in relation to climate change.

65. As regards more specifically Article 8, the Government pointed out that in order for this provision to apply the measure complained of had to affect the applicant's Article 8 rights (private and family life and home) directly and sufficiently seriously (citing, *inter alia*, *Fadeyeva v. Russia*, no. 55723/00, §§ 68-69, ECHR 2005-IV). In the present case, the Government considered that, by merely relying on the fact that his house was located in the municipality of Grande-Synthe, which was subject to the

adverse effects of climate change, as had been recognised by the *Conseil d'État*, the applicant had not demonstrated the existence of such a direct and sufficiently serious effect on his Article 8 rights. The applicant had not shown that there was a direct link between the State's omissions in the context of GHG emissions reduction and his personal life. Moreover, he had not shown that he had already been restricted in the enjoyment of his home or that he would be personally affected by the risks of future (in ten or twenty years) climate change.

66. In any event, the Government considered that no violation of Articles 2 and 8 could be found against France. In their view, it could not be said that France had failed to meet its positive obligations under the Convention as regards the measures taken to address the effects of climate change. In particular, the Government stressed that: (a) there was a legislative and administrative framework in place which allowed for the assessment of the risks associated with climate change and achieving the objectives of GHG emissions reduction fixed by France; (b) the domestic law guaranteed the participation of, and the provision of information to, the public with regard to climate-change risks and the determination of the national mitigation policies; and (c) there were effective remedies in place allowing for a possibility of reviewing the mitigation commitments undertaken by France.

B. The applicant

67. The applicant submitted that there was a climate emergency which required ambitious reductions in GHG emissions. He contended that as a resident of Grande-Synthe he was directly and personally exposed to the major risks of coastal erosion, floods and coastal flooding. In particular, there was no doubt that the municipality would be flooded as of 2030. At the same time, the authorities of the respondent State were not taking sufficient action to address those risks. In this connection, the applicant pointed out that Article 2 of the Convention came into play to the extent that such climate-change effects could be fatal. The insufficiency of State action to address these effects prevented the applicant from serenely envisaging himself in his home in the future, which directly affected his private and family life protected by Article 8 of the Convention. In his submissions to the Grand Chamber of 17 November 2022 the applicant also submitted that since the beginning of 2020 he had developed allergic asthma, which made him particularly sensitive to air pollution caused by climate change and the effects of allergens exacerbated by it.

68. At the hearing, in reply to the Court's questions, the applicant clarified that, as a member of the European Parliament, he lived in Brussels and not in Grande-Synthe. He did not own or rent property in Grande-Synthe. He had family links with the municipality because his

brother lived there, and he would return there when his mandate in the European Parliament ended. However, he felt attached to the municipality where he had spent many years as mayor. He also explained that he had complained to the Court as the mayor of Grande-Synthe and as a citizen and resident of Grande-Synthe. He submitted that as an asthmatic he was also affected in Brussels by the effects of climate change.

69. As regards the issue of a possible loss of his victim status as a result of the judgment of the *Conseil d'État*, the applicant argued that there had been no acknowledgment of a violation of his rights at the domestic level and he had not received any redress in that respect. In particular, his legal action in the *Conseil d'État* had been dismissed and, in any event, the judgment of the *Conseil d'État* of 1 July 2021, in which the municipality had been partially successful, had still not been executed.

70. The applicant submitted that the link between human rights and climate change was well recognised in international and comparative law. Scientific studies clearly demonstrated that the right to life was at risk as a result of climate change. In the applicant's case, the right to life under Article 2 was engaged with respect to, on the one hand, his exposure to a risk of coastal flooding, and, on the other, a risk of deterioration of his health linked to his asthma.

71. With respect to Article 8, the applicant argued that the alleged inaction of the respondent State to tackle the effects of climate change exposed him to adverse consequences as regards his private life and his quality of life in his home. In particular, he could not serenely envisage the future in his home which was subject to an increasing risk of coastal flooding. At the same time, his health, already weakened by asthma, was getting worse as the effects of climate change got worse.

72. The applicant argued that France's existing legislative and administrative framework was insufficient to meet the national objectives for the reduction of GHG emissions. Against this background, having regard also to the non-execution of the *Conseil d'État*'s judgment, the applicant considered that the State had not put in place the necessary legislative and administrative framework, in breach of its positive obligations under Articles 2 and 8 of the Convention.

C. The third-party interveners

1. ENNHRI

73. Referring to its submission in the *Verein KlimaSeniorinnen Schweiz and Others* case (cited above, §§ 382-385), the intervener further submitted that the global sea-level rise, heatwaves and river floods caused by human-induced climate change increased the risk of injury and death. The increased mortality and morbidity rates in France reflected the immediate and direct impact of climate change. With regard to victim status, the

intervener submitted that a foreseeable risk of sea-level rise could seriously endanger an individual's health and quality of life at home, in violation of Article 8 of the Convention. Furthermore, increased heat-related mortality rates, particularly in France, constituted a real and immediate risk of harm caused by climate change, engaging the applicability of Article 2 of the Convention. As part of their positive obligations, States had to take appropriate mitigation measures. Implementing climate-change adaptation measures alone would not suffice to comply with the positive obligations under Articles 2 and 8.

2. OCT and Oxfam

74. The interveners made a joint submission for the *Verein KlimaSeniorinnen Schweiz and Others* case, cited above, §§ 399-401, and the present case.

II. THE COURT'S ASSESSMENT

75. The Court does not need to address all of the Government's arguments, as in any event the applicant's complaint is inadmissible for the following reason.

76. The Court refers to the general principles on the victim status of physical persons under Article 34 in the context of complaints under Articles 2 and 8 of the Convention concerning climate change set out in *Verein KlimaSeniorinnen Schweiz and Others*, cited above, §§ 487-488.

77. In the present case, it should first be noted that in the proceedings which the applicant instituted in January 2019 in the *Conseil d'État*, acting on his own behalf and in his capacity as mayor of Grande-Synthe, in the name and on behalf of that municipality, he based his complaints on the local circumstances prevailing in the area in which the municipality of Grande-Synthe is located (see paragraphs 13-18 above). The applicant pointed, in particular, to the risks of flooding which the municipality faced as a result of the inadequacy of the mitigation action taken by the government and also as a result of the insufficiency of the existing local infrastructure to protect against the contemporary effects of climate change. Moreover, he pointed out that the house in which he resided was located less than four kilometres from the coastline and that according to some predictions it would be flooded by 2040, taking into account the effects of climate change. He therefore argued that he had not lodged the legal action as an ordinary citizen but as someone with a concrete legal interest, since in a foreseeable future his house was at real risk of flooding linked to climate change, which would therefore affect his property and his day-to-day environment (see paragraphs 23-24 above).

78. The *Conseil d'État* found that the relevant area where the municipality was located had been assessed as being at "a very high level of

exposure" to climate risks and that, owing to its immediate proximity to the coast and the physical characteristics of its territory, the municipality was exposed in the medium term to high and increased risks of flooding and an increase in episodes of severe drought, with the effect not only of a reduction and degradation of water resources, but also significant damage to built-up areas, given the geological characteristics of the soil. Furthermore, the *Conseil d'État* noted that while these concrete consequences of climate change were likely to have their full effect on the territory of the municipality only by 2030 or 2040, "their inevitability", in the absence of effective measures taken quickly to prevent the causes and in view of the time frame for public policy action in this area, was such as to justify the need to "act without delay" (see paragraph 28 above).

79. At the same time, while recognising the standing of the Grande-Synthe municipality, as regards the applicant's particular situation, the *Conseil d'État* found that he did not have an interest in bringing proceedings on the basis of the mere fact that his current residence was located in an area likely to be subject to flooding by 2040. This finding was premised on the conclusions of the public rapporteur according to which there was no indication as to where the applicant's residence would be in the years to come, let alone in twenty years or more, so that his interest appeared to be affected in too uncertain a manner (see paragraph 29 above).

80. For its part, having regard to the key factors for victim status set out in *Verein KlimaSeniorinnen Schweiz and Others* (cited above, §§ 487-488), the Court finds no reason to question the hypothetical nature of the risk relating to climate change affecting the applicant, as stated by the *Conseil d'État*.

81. Furthermore, it is critical to note that, by the applicant's own admission at the hearing in reply to the Court's questions, after becoming a member of the European Parliament in May 2019, he had moved to Brussels (see paragraphs 9 and 68 above). He does not own, and no longer rents, any property in Grande-Synthe and currently his only concrete link with the municipality is the fact that his brother lives there. In this connection, the Court reiterates that according to its' well-established case-law, unless they can demonstrate additional elements of dependence – which is not the situation in the present case – adult siblings cannot rely on the family-life aspect of Article 8 (see, for instance, *Mamasakhlisi and Others v. Georgia and Russia*, nos. 29999/04 and 41424/04, § 282, 7 March 2023, with further references).

82. Moreover, the Court notes that in his initial application lodged on 28 January 2021 (see paragraph 1 above) the applicant indicated an address in Grande-Synthe, although at that time he no longer resided in that municipality but in Brussels (see paragraphs 9 and 68 above). Similarly, the applicant's belated admission concerning his actual place of residence stands in contrast to the arguments raised in his application before the Court

in which he submitted that his residence in Grande-Synthe was at a future risk of flooding and that the current situation prevented him from envisaging himself serenely in his home (see paragraph 67 above).

83. In these circumstances, having regard to the fact that the applicant has no relevant links with Grande-Synthe and that, moreover, he currently does not live in France, the Court does not consider that for the purposes of any potentially relevant aspect of Article 8 – private life, family life or home – he can claim to have victim status under Article 34 of the Convention as regards the alleged risks linked to climate change threatening that municipality. This is true irrespective of the status he invoked, namely that of a citizen or former resident of that municipality. The same considerations apply as regards the applicant's complaint under Article 2 of the Convention.

84. Holding otherwise, and given the fact that almost anyone could have a legitimate reason to feel some form of anxiety linked to the risks of the adverse effects of climate change in the future, would make it difficult to delineate the *actio popularis* protection – not permitted in the Convention system – from situations where there is a pressing need to ensure an applicant's individual protection from the harm which the effects of climate change may have on the enjoyment of their human rights.

85. As regards the applicant's argument that he complained to the Court as the former mayor of Grande-Synthe, the Court refers to its well-established case-law according to which decentralised authorities that exercise public functions, regardless of their autonomy *vis-à-vis* the central organs – which applies to regional and local authorities, including municipalities – are considered to be "governmental organisations" that have no standing to make an application to the Court under Article 34 of the Convention (see *Assanidze v. Georgia* [GC], no. 71503/01, § 148, ECHR 2004-II, and *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, § 61, 18 November 2020, with further references). Accordingly, leaving aside the fact that he is no longer the mayor of Grande-Synthe, the Court finds that the applicant had no right to apply to the Court or to lodge a complaint with it on behalf of the municipality of Grande-Synthe.

86. That said, and notwithstanding its findings under the Convention as set out above, the Court has taken note of the fact that the interests of the residents of Grande-Synthe have, in any event, been defended by their municipality before the *Conseil d'État* in accordance with national law.

87. Lastly, as regards the issue of his asthma (see paragraphs 62 and 67 above), it should be noted that this did not form part of the applicant's initial application to the Court but was raised for the first time in his submissions to the Grand Chamber of 17 November 2022. This issue constitutes a new and distinct complaint and thus cannot be regarded as an elaboration of the applicant's original complaint. In the absence of any information to show that the applicant complied with the admissibility requirements in Article 35

§ 1 of the Convention (Rule 47 §§ 3.1 (b) and 5.1 of the Rules of Court), the Grand Chamber has confined its examination to "the case" that was relinquished to it pursuant to Article 30 of the Convention.

88. In conclusion, it follows from the above considerations that the applicant's complaint, in so far as falling within the scope of the present case (see paragraph 87 above), should be declared inadmissible as being incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 April 2024.

Søren Prebensen	Síofra O'Leary
Deputy to the Registrar	President

Annex 623

Case of La Oroya Population v Peru. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 27, 2023. Series C No. 511 (Spanish original and English translation of paragraphs 53 and 129)

Translated Extract of '*La Oroya Population v Peru*, *Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 27, 2023. Series C No. 511'

[. . .]

53. In light of the above, the fact that there has been a judgment by the Constitutional Court recognising the protection of the rights to health and the environment in favour of the alleged victims does not prevent this Court from analysing allegations that have been presented with respect to the international responsibility of the State for violation of said rights. In any case, according to the jurisprudence of this Court, in application of the principle of subsidiarity, the State could allege that the violations of the rights to a healthy environment and to health have ceased and have been repaired by virtue of said judgment, and that, therefore, they were remedied, a situation that could be the object of an analysis of the merits. This argument, however, was not expressly formulated by the State in the present case, and even if it had been formulated, this would not affect the competence of this Court to hear the violations of rights alleged by the Commission and the representatives, but in any case would make it possible to determine that the State ceased and repaired said violations and, therefore, that it is not internationally responsible for them.

[. . .]

129. States have recognised the right to a healthy environment, which entails an obligation of protection that concerns the international community[1]. It is difficult to imagine international obligations of greater significance than those that protect the environment against unlawful or arbitrary conduct that causes serious, extensive, lasting, and irreversible damage to the environment in a scenario of climate crisis that threatens the survival of species. In view of the above, the international protection of the environment requires the progressive recognition of the prohibition of these type of conduct as a peremptory norm (*jus cogens*) that earns the recognition of the International Community as a norm that does not admit derogation[2]. This Court has

[1] UN GA A/Res/76/300. The Human Right to a Clean, Healthy and Sustainable Environment, 28 July 2022; Stockholm Declaration, 16 June 1972, principle 2; World Charter for Nature, 28 October 1982, General Principles; Rio Declaration on Environment and Development, principle 7; Johannesburg Declaration, 4 September 2002, para. 13. See also: ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, supra, para. 29.

[2] The international community has already defined a series of conducts prohibited by jus cogens that include the prohibition of the use of force in international relations, genocide, slavery, apartheid, crimes against humanity, forced disappearance of persons, among others. ICJ Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 5 February 1970, para. 33; Rome Statute of the International Criminal Court, in force since

noted the importance of the legal expressions of the International Community whose superior universal value is indispensable to guarantee essential or fundamental values[3]. In this sense, guaranteeing the interest of both present and future generations and the preservation of the environment against its radical degradation is fundamental for the survival of humanity[4].

[. . .]

1 July 2002, Articles 5-8; Draft conclusion on the identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, International Law Commission, 2022, Conclusion 23.

[3] The denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and its effects on State obligations in the area of human rights (Interpretation and scope of Articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States). Advisory Opinion OC-26/20 of November 9, 2020. Series A No. 26, para. 102.

[4] Advisory Opinion OC-23/17 paragraph 59.

CORTE INTERAMERICANA DE DERECHOS HUMANOS

CASO HABITANTES DE LA OROYA VS. PERÚ

SENTENCIA DE 27 DE NOVIEMBRE DE 2023
(Excepciones Preliminares, Fondo, Reparaciones y Costas)

En el *caso Habitantes de La Oroya Vs. Perú,*

la Corte Interamericana de Derechos Humanos (en adelante "la Corte Interamericana", "la Corte" o "el Tribunal"), integrada por los siguientes Jueces y Juezas:

Ricardo C. Pérez Manrique, Presidente;
Eduardo Ferrer Mac-Gregor Poisot, Vicepresidente;
Humberto Antonio Sierra Porto, Juez;
Nancy Hernández López, Jueza;
Verónica Gómez, Jueza;
Patricia Pérez Goldberg, Jueza, y
Rodrigo Mudrovitsch, Juez,

presentes, además,

Pablo Saavedra Alessandri, Secretario, y
Romina I. Sijniensky, Secretaria Adjunta,

de conformidad con los artículos 62.3 y 63.1 de la Convención Americana sobre Derechos Humanos (en adelante "la Convención Americana" o "la Convención") y con los artículos 31, 32, 42, 65 y 67 del Reglamento de la Corte (en adelante "el Reglamento"), dicta la presente Sentencia, que se estructura en el siguiente orden:

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I
INTRODUCCIÓN A LA CAUSA Y OBJETO DE LA CONTROVERSIA

1. *El caso sometido a la Corte.* – El 30 de septiembre de 2021, la Comisión Interamericana de Derechos Humanos (en adelante "la Comisión Interamericana" o "la Comisión") sometió a la jurisdicción de la Corte el caso "Comunidad de La Oroya respecto de la República del Perú" (en adelante "el Estado" o "Perú"). De acuerdo con lo indicado por la Comisión, el caso se relaciona con una serie de alegadas violaciones a los derechos humanos en perjuicio de un grupo de pobladores de La Oroya[1], como consecuencia de supuestos actos de contaminación ocurridos en el Complejo Metalúrgico de La Oroya (en adelante también "el CMLO"). La Comisión observó que el Estado peruano habría incumplido con su deber de actuar con debida diligencia en la regulación, fiscalización y control de las actividades del CMLO respecto de los derechos al medio ambiente sano, la salud, la vida y la integridad personal. En el mismo sentido, alegó que el Estado habría incumplido con su obligación de lograr progresivamente la realización de los derechos a la salud y el medio ambiente sano como resultado de la modificación de los estándares de calidad del aire aprobados por el Estado, los cuales habrían sido regresivos. Asimismo, sostuvo que Perú es responsable por la violación de los derechos de la niñez, pues las medidas adoptadas por el Estado para la protección de niños y niñas habrían sido insuficientes y no habrían enfrentado la principal fuente de riesgo para garantizar su salud. Además, observó que el Estado no habría garantizado la participación pública de las presuntas víctimas, las cuales tampoco habrían recibido información relevante sobre medidas que afectaron sus derechos. Adicionalmente, señaló que el Estado habría violado el derecho a la protección judicial, pues transcurridos más de 14 años desde una decisión del Tribunal Constitucional (en adelante también "TC"), donde se ordenaron medidas de protección para la comunidad, el Estado no habría adoptado medidas efectivas para implementar integralmente todos los puntos referidos en la sentencia, y tampoco habría promovido acciones para impulsar su cumplimiento. Finalmente, la Comisión indicó que el Estado también es responsable por presuntamente no haber realizado investigaciones de manera seria y efectiva respecto de los alegados actos de hostigamientos, amenazas y represalias que fueron denunciados por algunas presuntas víctimas.

2. *Trámite ante la Comisión*. – El trámite ante la Comisión fue el siguiente:

a) *Medidas cautelares ante la Comisión.* – El 21 de noviembre de 2005, los peticionarios presentaron una solicitud de medidas cautelares destinada a proteger los derechos a la vida, integridad personal y salud de 66 personas. El 31 de agosto de 2007 la Comisión otorgó las medidas a favor de 65 personas. El 3 de mayo de 2016 la Comisión decidió ampliar la medida a favor de 14 personas adicionales.

b) *Petición.* – El 27 de diciembre de 2006, la Asociación Interamericana para la Defensa del Ambiente (AIDA), el Centro de Derechos Humanos y Ambiente

[1] En su petición ante la Comisión Interamericana los representantes solicitaron que se guardara estricta confidencialidad de la identidad de las [presuntas] víctimas en razón de las presiones sufridas por quienes están implementando trabajos de protección ambiental y de salud humana. Atendiendo a dicha solicitud, la Comisión mantuvo en reserva los nombres de las presuntas víctimas, sustituyéndolos por los seudónimos "María" y "Juan", cada uno con un número respectivo. El Estado tiene conocimiento de los nombres reales que corresponden a cada uno de los seudónimos utilizados. Las presuntas víctimas identificadas por la Comisión, de conformidad con los seudónimos se encuentran señaladas en el Anexo 1 de la presente Sentencia.

(CEDHA), EarthJustice, y la Asociación Pro Derechos Humanos (APRODEH), presentaron la petición inicial ante la Comisión.

c) *Informe de Admisibilidad.* – El 5 de agosto de 2009 la Comisión aprobó el Informe de Admisibilidad Nº 76/09, en el que concluyó que la petición era admisible[2].

d) *Informe de Fondo.* – El 19 de noviembre de 2020 la Comisión aprobó el Informe de Fondo Nº 330/20 (en adelante "el Informe de Fondo"), en el cual llegó a una serie de conclusiones y formuló varias recomendaciones al Estado.

e) *Notificación al Estado*. – La Comisión notificó al Estado el Informe de Fondo mediante una comunicación de 30 de diciembre de 2020, otorgando un plazo de dos meses para informar sobre el cumplimiento de las recomendaciones. Tras el otorgamiento de dos prórrogas, el Estado solicitó una prórroga adicional, la cual fue rechazada por la Comisión.

3. *Sometimiento a la Corte*. – El 30 de septiembre de 2021, la Comisión sometió a la Corte la totalidad de los hechos y violaciones a derechos humanos del caso[3]. Lo hizo, según indicó, por la necesidad de obtención de justicia y reparación para la víctima. El Tribunal nota, con preocupación que, entre la presentación de la petición inicial ante la Comisión, y el sometimiento del caso ante la Corte, han transcurrido cerca de 15 años.

4. *Solicitudes de la Comisión.* – La Comisión solicitó a la Corte que concluyera y declarara la responsabilidad internacional de Perú por las violaciones a los derechos contenidos en los artículos 4.1, 5.1, 8.1, 13.1, 19, 23.1.a, 25.1, 25.2.c. y 26 de la Convención Americana, en relación con los artículos 1.1 y 2 del mismo instrumento, y que ordenara al Estado, como medidas de reparación, las recomendaciones incluidas en dicho Informe.

II
PROCEDIMIENTO ANTE LA CORTE

5. *Notificación al Estado y a los representantes.* – El sometimiento del caso fue notificado a los representantes[4] y al Estado el 2 de diciembre de 2021[5].

6. *Escrito de solicitudes, argumentos y pruebas.* – El 3 de febrero de 2022, los representantes presentaron su escrito de solicitudes, argumentos y pruebas (en adelante el "escrito de solicitudes y argumentos"), conforme a los artículos 25 y 40 del Reglamento. Los representantes coincidieron sustancialmente con los alegatos de la Comisión y complementaron su línea argumentativa. Adicionalmente, propusieron medidas de reparación específicas.

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[2] El 14 de agosto de 2009 la Comisión notificó el Informe de Admisibilidad a las partes.

[3] La Comisión designó como sus delegados ante la Corte al entonces Comisionado Edgar Stuardo Ralón Orellana y a la Secretaria Ejecutiva Tania Reneaum Panszi. Asimismo, designó a la entonces Secretaria Ejecutiva Adjunta, Marisol Blanchard Vera, y a Jorge Humberto Meza Flores, Christian González Chacón y Daniela Saavedra Murillo, como asesores y asesora legales.

[4] La representación de las presuntas víctimas fue ejercida por la Asociación Interamericana para la Defensa del Ambiente (AIDA) y la Asociación Pro Derechos Humanos (APRODEH).

[5] El Estado designó como agentes en el caso a los señores Carlos Miguel Reaño Balerezo, Procurador Público Especializado Supranacional; Carlos Llaja Villena, Procurador Público Adjunto Especializado Supranacional, y Christian Adolfo Samillan Ley Cuen, abogado de la Procuraduría Pública Especializada Supranacional.

7. *Escrito de excepciones preliminares y contestación.* – El 20 de julio de 2022 el Estado presentó su escrito de excepciones preliminares y contestación al sometimiento del caso e Informe de Fondo y al escrito de solicitudes y argumentos (en adelante "escrito de contestación"), en los términos del artículo 41 del Reglamento del Tribunal. En dicho escrito, el Estado presentó tres excepciones preliminares y se opuso a las violaciones alegadas y a las solicitudes de reparación de la Comisión y los representantes.

8. *Observaciones a las excepciones preliminares.* – El 2 y 5 de septiembre de 2022 los representantes y la Comisión presentaron, respectivamente, sus observaciones a las excepciones preliminares del Estado.

9. *Audiencia pública.* – El 12 de septiembre de 2022[6] el Presidente de la Corte dictó una Resolución mediante la cual convocó a las partes y a la Comisión a una audiencia pública sobre las excepciones preliminares y eventuales fondo, reparaciones y costas, para escuchar los alegatos y observaciones finales orales de las partes y de la Comisión, respectivamente, así como para recibir las declaraciones de tres presuntas víctimas y dos peritos ofrecidos por los representantes[7], y un testigo y una perita ofrecidos por el Estado[8]. La audiencia pública se celebró los días 12 y 13 de octubre de 2022, durante el 153º Período Ordinario de Sesiones, el cual se llevó a cabo en Montevideo, Uruguay[9].

10. *Amici curiae.* – El Tribunal recibió diecisiete escritos de *amici curiae* presentados por: 1) la Clínica Legal del Instituto de Empresa (*IE Law School*)[10]; 2) la Mesa Técnica de Salud Ambiental y Humana y la Plataforma de la sociedad civil sobre Empresas y Derechos Humanos[11]; 3) la Relatoría Especial de las Naciones Unidas sobre Derechos

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[6] *Cfr. Caso Comunidad de La Oroya Vs. Perú.* Convocatoria a audiencia. Resolución del Presidente de la Corte Interamericana de Derechos Humanos de 12 de septiembre de 2022. Disponible en: www.corteidh.or.cr/docs/asuntos/comunidad_la_oroya_12_09_22.pdf

[7] El 19 de septiembre de 2022 los representantes informaron que la declarante María 9 se encontraba físicamente imposibilitada de asistir a dicha audiencia por lo que solicitaron que María 9 rindiera su declaración por affidavit y que, en su lugar, se permitiera a María 1, quien habría sido llamada a declarar por affidavit, a declarar durante la audiencia pública. El 26 de septiembre de 2022 el Estado y la Comisión presentaron sus observaciones a la solicitud de sustitución de los representantes. Mediante la nota de Secretaría de 29 de septiembre de 2022 se decidió recibir la declaración de María 1 en audiencia pública, y la de María 9 ante fedatario público.

[8] El 19 de septiembre de 2022 el Estado solicitó dos aclaraciones en relación con la Resolución del Presidente de la Corte de 12 de septiembre de 2022. En concreto, pidió aclaraciones respecto de lo siguiente: a) la modalidad en que María 15 realizaría su declaración, y b) la omisión respecto de la declaración de C.M. en sustitución de Juan 12. Mediante la nota de Secretaría de 16 de septiembre de 2022 se subsanaron los errores materiales presentes en la Resolución del Presidente.

[9] A esta audiencia comparecieron: a) por la Comisión Interamericana; Jorge Meza Flores, Secretario Ejecutivo Adjunto y Daniela Saavedra, Asesora de la Comisión; b) por los representantes de las presuntas víctimas: Anna Cederstav, Liliana Ávila García, Marcella Ribeiro, Daniela Garcia, Jacob Kopas, Gloria Cano y Christian Huaylinos; c) por el Estado de Perú: Carlos Miguel Reaño Balarezo, Procurador Público Especializado Supranacional, Judith Cateriny Córdova Alva, Abogada de la Procuraduría Pública Especializada Supranacional, José Carlos Vargas Soncco, y Manuel Jesús Gallo Esteves, Abogados de la Procuraduría Pública Especializada Supranacional.

[10] El escrito fue firmado por Celia Cabré Sánchez, Lucía Camarero Garau, Santiago Celis y Alexandra Martínez y realiza consideraciones respecto al desarrollo de los derechos a un medio ambiente sano, la salud, la vida, la integridad personal y las garantías judiciales en el derecho internacional de los derechos humanos.

[11] El Estado señaló que la Mesa Técnica de Salud Ambiental y Humana está integrada por diversas organizaciones, entre ellas, dos de las organizaciones que representan a las presuntas víctimas. APRODEH. En concreto, el Estado suministró un enlace a una página web de fecha 16 de diciembre de 2020 donde se indicaba

Humanos y Ambiente[12]; 4) Susana Ramírez Hita[13]; 5) Carla Luzuriaga-Salinas[14]; 6); Laura Sofía Garzón Quijano, Verónica Hernández López, Julián Murcia Rodríguez, Valentina Sierra Camacho y Andrés Felipe López[15]; 7) el Centro Mexicano de Derecho Ambiental A.C. (CEMDA)[16]; 8) la ONG Defensoría Ambiental[17]; 9) el Centro por la Justicia y el Derecho Internacional (CEJIL)[18]; 10) la Clínica de Derechos Humanos del Centro de Investigación y Enseñanza en Derechos Humanos de la Universidad de Ottawa y la Clínica de Derechos Humanos del Programa de Postgrado en Derecho de la Pontificia Universidad Católica de Paraná[19]; 11) Ezio Costa Cordella y Macarena Martinic

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que la Mesa Técnica de Salud Ambiental y Humana (en adelante también, "la Mesa Técnica") estaba integrada por diversas organizaciones, tales como AIDA Y APRODEH. En vista de lo anterior, argumentó que los escritos de *amicus curiae* deben ser presentados por personas o institucionales ajenas al litigio y proceso, por lo que solicitó que el escrito fuera inadmitido. Al respecto, la Corte advierte que AIDA Y APRODEH no figuran como firmantes del escrito de *amicus curiae*. Sin embargo, en consideración a lo señalado por el Estado, y al hecho que los representantes señalaron en su escrito de solicitudes, argumentos y pruebas que pertenecen a dicha Mesa Técnica, y con fundamento en el artículo 2.3 del Reglamento, el escrito presentado la Mesa Técnica no resulta admisible. En vista de lo anterior, dicho escrito no será considerado por este Tribunal.

[12] El escrito fue firmado por David R. Boyd y se relaciona con lo siguiente: (i) consideraciones fácticas del caso; (ii) el derecho a un medio ambiente limpio, sano y sostenible; (iii) el aire limpio; (iv) ambientes no tóxicos; (v) principios clave que guían la interpretación del derecho a un medio ambiente limpio, sano y sostenible; (vi) el impacto especial del daño ambiental en los derechos de la niñez; (vii) el derecho a un medio ambiente sano y el acceso a la justicia con recursos efectivos; (viii) compensaciones; (ix) restitución no pecuniaria, y (x) conclusiones.

[13] El escrito fue firmado por Susana Ramírez Hita y realiza consideraciones respecto a las posibles medidas de reparación que podrían ser implementadas en el caso concreto. Para la propuesta de medidas de reparación se contemplan casos tales como: (i) el derrame de petróleo en la quebrada de Ynayo, y (ii) el derrame de petróleo por falta de mantenimiento de Petroperú en el río Marañón.

[14] El escrito fue firmado por Carla Luzuriaga-Salinas, y realiza consideraciones respecto al caso concreto en relación con la vulneración del derecho a un medio ambiente sano, así como posibles formas de reparación integral.

[15] El escrito fue firmado por Julián Ricardo Murcia Rodríguez, María Verónica Hernández, Laura Sofía Garzón Quijano, Valentina Sierra Camacho, estudiantes de derecho de la Universidad de La Sabana, y Andrés Felipe López Latorre, miembro del Grupo de Investigación en Derecho Internacional y profesor de la Facultad de Derecho y Ciencias Políticas de la Universidad de La Sabana. Dicho escrito realiza consideraciones sobre: (i) el riesgo de ausencia de análisis de atribución a los Estados por actos cometidos por terceros en la jurisprudencia interamericana, y (ii) la justiciabilidad de los DESCA.

[16] El escrito fue firmado por Gustavo Adolfo Alanís Ortega, y realiza consideraciones sobre: (i) la relación entre calidad del aire, medio ambiente sano y salud; (ii) las obligaciones y estándares internacionales de la calidad del aire, y (iii) conclusiones y solicitudes.

[17] El escrito fue firmado por Alejandra Donoso y realiza consideraciones sobre: (i) los casos de contaminación en La Oroya en Perú y en Quintero y Pachuncaví en Chile, como ejemplos de "zonas de sacrificio" y de injusticia ambiental en Latinoamericana, y (ii) la importancia del pronunciamiento de la Honorable Corte Interamericana de Derechos Humanos para la justicia ambiental en Latinoamérica.

[18] El escrito fue firmado por Viviana Krsticevic, Gisela de León, Florencia Reggiardo, y Francisco Quintana, y realiza consideraciones sobre: (i) las obligaciones estatales de garantizar el derecho a la vida y la integridad personal relacionadas con el derecho al aire puro; (ii) las obligaciones estatales de garantizar el derecho al medio ambiente sano relacionadas con el derecho al aire puro; (iii) las obligaciones estatales de garantizar el derecho al medio ambiente sano relacionadas con el derecho al aire puro; (iv) estándares internacionales que podrían desarrollarse sobre el derecho a la aire puro frente a la mala calidad de aire y la emergencia climática, y (v) conclusiones.

[19] El escrito fue firmado por Danielle Anne Pamplona, Juliana Bertholdi y Salvador Herencia Carrasco, y realiza consideraciones sobre: (i) la afectación de los Derechos Humanos de la comunidad de La Oroya por la explotación minera; (ii) las repercusiones de las actividades económicas en los derechos humanos y la responsabilidad del Estado de protegerlos, incluso en el caso de violaciones por parte de las empresas; (iii) obligaciones del Estado de asegurar un ambiente sano y saludable a comunidades afectadas por actividades empresariales, y (iv) conclusiones y petitorio.

Cristensen[20]; 12) Las organizaciones Earthjustice y Justicia para la Naturaleza[21]; 13) el Grupo de Trabajo de las Naciones Unidas sobre el tema de los derechos humanos y empresas transnacionales y otras empresas comerciales y la Relatora Especial sobre la situación de los defensores de derechos humanos [22]; 14) la ALTSEAN-Burma (Alternative ASEAN Network on Burma); el Centro de Estudios de Derecho, Justicia y Sociedad – Dejusticia; el Centro de Estudios Legales y Sociales (CELS); la Comisión Colombiana de Juristas (CCJ); la Egyptian Initiative for Personal Rights (EIPR); la Fundación para el Debido Proceso (DPLF, por sus siglas en inglés) ; la Clínica de Derechos Humanos de la Universidad de Virginia; Justiça Global; Minority Rights Group (MRG); y el Proyecto sobre Organización, Desarrollo, Educación e Investigación (PODER), como miembros del grupo de trabajo sobre litigio estratégico de la Red-DESC[23]; 15) la University Network for Human Rights[24]; 16) Juan Méndez, John Knox, James Anaya, Tracy Robinson, James Cavallaro, Paulo de Tarso Vannuchi, Flávia Piovesan, Paulo Abrão y la Red Universitaria

[20] El escrito fue firmado por Ezio Simone Costa Cordella y Macarena Martinic Cristensen, y se relaciona con: (i) el cumplimiento de las garantías establecidas en la Convención y la necesidad de una mirada precautoria; (ii) contenido y aplicación del principio precautorio; (iii) consecuencias de la aplicación del principio precautorio; (iv) aplicación del principio precautorio en el caso, y (v) reflexiones finales.

[21] El escrito fue firmado por Mae Manupipatpong, Jacob Kopas, Martin Wagner y Rafael González Ballar, y contiene alegatos relacionados con: (i) los impactos de la contaminación del complejo metalúrgico en la salud; (ii) la contaminación de La Oroya causó riesgos materiales y previsibles para la salud humana, y los daños que ya se manifestaron en muchas víctimas son consecuencias razonablemente previsibles de tales riesgos.

[22] El escrito fue firmado por Fernanda Hopenhaym, Presidenta del Grupo de Trabajo sobre el tema de los derechos humanos y empresas transnacionales y otras empresas comerciales, y Mary Lawlor, Relatora Especial sobre la situación de los defensores de los derechos humanos, y se relaciona con: (i) los desarrollos relevantes en materia de estándares internacionales en relación con las empresas y derechos humanos y su aplicación a la hora de determinar la responsabilidad internacional de los Estados a la luz de su deber de proteger contra abusos de derechos humanos cometidos por empresas; (ii) el deber del Estado de respetar y proteger los derechos humanos en el contexto de la actividad empresarial; (iii) la responsabilidad de empresas de respetar los derechos humanos; (iv) el acceso a reparación y (v) observaciones finales.

[23] El escrito fue firmado por Debbi Stothard, Vivian Newman Pont, Diego Morales, Moises David Meza, Sebastían Saavedra Eslava, Nelson Camilo Sánchez, Ahmed Elseidi, Daniel Cerqueira, Eduardo Baker, Stefanía Carrer, Jennifer Castello, Victoria de los Ángeles Beltrán Camacho, Fernando Ribeiro Delgado y María Eugenia Meléndez Margarida, y se relaciona con: (i) las obligaciones del Estado de garantizar el derecho a un ambiente sano y los derechos relacionados a través de la regulación efectiva de las actividades empresariales frente a la contaminación industrial; (ii) los efectos desproporcionados de la injusticia ambiental sobre los derechos humanos de poblaciones específicas y la correspondiente obligación del Estado de asegurar la igualdad sustantiva y prevenir y reparar la discriminación interseccional; (iii) las obligaciones de derechos humanos de los Estados respecto de la protección de las personas defensoras ambientalistas; (iv) la primacía de los derechos humanos respecto de las empresas y los instrumentos y las decisiones de inversión, y (v) la importancia regional y global de los estándares implicados en el presente caso.

[24] El escrito fue firmado por Thomas B. Becker Jr., María Luisa Aguilar Rodríguez, Juliana Bravo, Eliana Rojas, Margarita Flórez, Guillermo Pérez, Marlene Alleyne, Sofía Chávez, Gédéon Jean, Rosa María Mateus, Dakota Fenn, Alejandra Donoso Cáceres, Ruhan Nagra, Danny Noonan, Alberto Mexia, Freddy Ordóñez, Maricler Acosta, Angie Tórrez, Perry Gottesfeld, Martha Inés Romero, Gabriella Alves de Paula, Laura Chacón, Priyanka Radhakrishnan y Mayeli Sánchez Martínez, y se relaciona con: (i) las obligaciones positivas del Estado en virtud el derecho a un medio ambiente sano; (ii) antecedentes; (iii) violaciones similares de los derechos medioambientales en Perú, Chile, Colombia, México y Brasil, y (iv) conclusiones.

para los Derechos Humanos[25], y 17) la Clínica Jurídica de Medio Ambiente y Salud Pública – MASP – de la Universidad de los Andes[26].

11. *Alegatos y observaciones finales escritos.* – El 29 de noviembre de 2022 las partes y la Comisión presentaron sus alegatos y observaciones finales escritas, respectivamente. El Estado y los representantes remitieron anexos a sus alegatos finales escritos.

12. *Observaciones a los anexos a los alegatos finales.* - El 12 de enero de 2023 los representantes y el Estado remitieron sus observaciones a los anexos remitidos junto a los alegatos finales escritos de las partes, respectivamente, y los representantes remitieron anexos junto con dichas observaciones. En la misma fecha, la Comisión informó que no tenía observaciones que formular respecto de los anexos remitidos por el Estado junto con sus alegatos finales escritos.

13. *Observaciones a los anexos presentados por los representantes en su escrito de 12 de enero de 2023.*- El 30 de enero de 2023 el Estado remitió sus observaciones a los anexos presentados por los representantes en su escrito de 12 de enero de 2023. En la misma fecha, la Comisión informó que no tenía observaciones que formular respecto de dichos anexos.

14. *Erogaciones en aplicación del Fondo de Asistencia.*- El 1 de agosto de 2023 la Secretaría, siguiendo instrucciones del Presidente de la Corte, remitió información al Estado sobre las erogaciones del Fondo de Asistencia Legal de Víctimas (en adelante también "el FALV") en el presente caso. Asimismo, conforme al artículo 5 del Reglamento de la Corte sobre el Funcionamiento del referido Fondo le otorgó un plazo para presentar las observaciones que estimara pertinentes. El 10 de agosto de 2023 el Estado presentó sus observaciones.

15. *Otros escritos.*- El 20 de octubre de 2023 se recibió un escrito de los representantes relacionado con la alegada reactivación de las actividades en el Complejo Metalúrgico de La Oroya y sobre presuntos nuevos hechos de estigmatización y hostigamiento en contra de las presuntas víctimas. El 27 de octubre de 2023 el Estado y la Comisión remitieron sus observaciones al escrito de los representantes, y el Estado presentó anexos. Asimismo, mediante nota de la Secretaría se otorgó plazo a los representantes y a la Comisión para presentar las observaciones que estimaren pertinentes a dichos anexos. El 10 de noviembre de 2023 los representantes y la Comisión remitieron sus observaciones a los anexos del escrito del Estado.

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[25] El escrito fue firmado por Juan Méndez, John Knox, James Anaya, Tracy Robinson, James Cavallaro, Paulo de Tarso Vannuchi, Flávia Piovesan, Paulo Abrão, Aua Balde, Bernard Duhaime, Dominique Hervé, Sergio Puig, César Rodríguez Garavito, Armando Rocha, Adriana Sanín, Jânia Saldanha y Tomaso Ferrando, y contiene alegatos relacionados con: (i) el hecho de que el derecho a un medio ambiente sano ha sido reconocido a nivel internacional y es aplicable al caso de Perú respecto del control de la contaminación industrial privada; (ii) el derecho a un medio ambiente sano impone a los Estados obligaciones sustantivas que se aplican a casos de contaminación ambiental por parte de agentes y entes privados; (iii) el derecho a un medio ambiente sano impone a los Estados obligaciones de procedimiento que se aplican a casos de contaminación ambiental por agentes y entes privados, y (iv) el Estado de Perú es responsable y debe remediar la contaminación del medio ambiente en La Oroya.

[26] El escrito fue firmado por Mauricio Felipe Madrigal Pérez, Silvia Catalina Quintero, Leonardo Fernández Jiménez, y Juan Sebastián Avendaño Castañeda, y contiene alegatos relacionados con la responsabilidad internacional del Estado peruano por los hechos del presente caso. Asimismo, se relaciona con las disposiciones de derecho indicativo o *soft law* aplicables al caso concreto.

16. *Deliberación del presente caso*. - La Corte deliberó la presente Sentencia, de forma virtual, los días 19 y 20 de octubre de 2023 y, de forma presencial, los días 13, 14, 20 y 27 de noviembre de 2023.

III
COMPETENCIA

17. La Corte es competente para conocer el presente caso, en los términos del artículo 62.3 de la Convención Americana, en razón de que Perú es Estado Parte de dicho instrumento desde el 28 de julio de 1978 y reconoció la competencia contenciosa de la Corte el 21 de enero de 1981.

IV
EXCEPCIONES PRELIMINARES

18. El Estado presentó tres excepciones preliminares, las cuales serán analizadas en el siguiente orden: a) excepción preliminar en razón de la materia y en razón del tiempo, y b) excepción preliminar por falta de agotamiento de recursos internos.

A. Excepción preliminar en razón de la materia y en razón del tiempo

A.1. Alegatos del Estado y observaciones de la Comisión y de los representantes

19. El ***Estado*** alegó que, según el numeral 6 del artículo 19 del Protocolo de San Salvador, solo pueden ser objeto de análisis, por medio del mecanismo de peticiones ante el Sistema Interamericano de Protección de Derechos Humanos (ya sea directa o indirectamente), la protección del derecho a la libertad sindical o a la educación, pero no se permite tal posibilidad respecto del derecho a un medio ambiente sano, ni del derecho a la salud. Por lo tanto, el Estado consideró que, ante la indebida inclusión por parte de los representantes de los artículos 10 y 11 del Protocolo de San Salvador, procede la interposición de una excepción preliminar en razón de la materia . Asimismo sostuvo que no es posible derivar la justiciabilidad directa del artículo 26 de la Convención, por lo que interpuso una excepción preliminar en razón de la materia por "la indebida inclusión" de dicho artículo.

20. Por otra parte, el Estado presentó una excepción preliminar en razón del tiempo, al considerar que el litigio se encuentra delimitado por un periodo temporal que los representantes exceden con sus argumentos. En particular, el Estado alegó que la pretensión de los representantes de que se analicen violaciones al artículo 10 y 11 del Protocolo de San Salvador por hechos ocurridos al menos desde 1974 excede la competencia temporal de la Corte. Esto es así, toda vez que el Estado peruano suscribió el Protocolo de San Salvador en 1988 y lo ratificó en 1995, entrando en vigor en 1999. En tal sentido, consideró que, si fuera procedente analizar hechos bajo los derechos contenidos en el Protocolo de San Salvador, esto solo sería posible respecto de aquellos ocurridos con posterioridad a noviembre de 1999.

21. Los ***representantes*** señalaron que es claro que los hechos del presente caso ponen en evidencia una violación al medio ambiente sano, lo que a su vez generó la vulneración de otros derechos como la vida y la integridad personal, respecto de los cuales se derivaron obligaciones inmediatas para el Estado, las cuales no fueron cumplidas. En tal sentido, sostuvieron que "es evidente que la Corte puede pronunciarse sobre las violaciones al derecho a un medio ambiente sano y la salud, evidenciadas en

el presente caso". Por otro lado, alegaron que la Corte ha reiterado en numerosas ocasiones su competencia para conocer de violaciones al artículo 26 de la Convención Americana. Con respecto de los artículos 10 y 11 del Protocolo de San Salvador, señalaron que la utilización de dichos artículos sirve para identificar e interpretar derechos amparados por la Convención. En consecuencia, solicitaron que desestimara la excepción preliminar en razón de la materia planteada por el Estado.

22. En relación con la excepción preliminar en razón del tiempo, los representantes alegaron que los derechos al medio ambiente sano y a la salud se encuentran protegidos por el artículo 26 de la Convención. En ese sentido, hicieron notar que la Carta de la OEA fue ratificada por Perú el 12 de febrero de 1954, por lo que el reconocimiento de dichos derechos data con anterioridad a la entrada en vigor del Protocolo de San Salvador. Asimismo, señalaron que dichos derechos se encuentran reconocidos en la Constitución peruana desde el año 1979 y que igualmente se encuentra reconocida en otros instrumentos internacionales de protección de derechos. Adicionalmente, los representantes alegaron que la Corte tiene competencia para conocer violaciones de naturaleza permanente y continuada que empezaron antes de la entrada en vigor del Protocolo de San Salvador.

23. La ***Comisión*** observó que, de acuerdo con el artículo 62 de la Convención Americana, la Corte es plenamente competente para pronunciarse respecto del cumplimiento del artículo 26 de la Convención al haber el Estado peruano reconocido la jurisdicción contenciosa de dicho Tribunal para la interpretación y aplicación de las disposiciones de tal tratado. En este sentido, manifestó que la Corte tiene competencia en razón de la materia para determinar si el Estado ha cumplido con las obligaciones que dimanan de dicho artículo, por lo cual la excepción formulada por el Estado es improcedente. Asimismo, la Comisión señaló que Perú ratificó el Protocolo de San Salvador, el cual reconoce el derecho a un medio ambiente sano en su artículo 11, pero no se pronunció respecto de la competencia de la Corte para declarar violaciones autónomas a dicho artículo.

A.2. Consideraciones de la Corte

24. La Corte recuerda que, como todo órgano jurisdiccional, tiene el poder inherente a sus atribuciones para determinar el alcance de su propia competencia (*compétence de la compétence*). Para hacer dicha determinación, la Corte debe tener en cuenta que los instrumentos de reconocimiento de la cláusula facultativa de la jurisdicción obligatoria (artículo 62.1 de la Convención) presuponen la admisión, por los Estados que la presentan, del derecho de la Corte a resolver cualquier controversia relativa a su jurisdicción[27]. Además, el Tribunal ha afirmado su competencia para conocer y resolver controversias relativas al artículo 26 de la Convención Americana, como parte integrante de los derechos enumerados en la misma, respecto de los cuales el artículo 1.1 establece obligaciones de respeto y garantía a los Estados[28].

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[27] *Cfr*. *Caso Ivcher Bronstein Vs. Perú. Competencia.* Sentencia de 24 de septiembre de 1999. Serie C No. 54, párrs. 32 y 34, y *Caso San Miguel Sosa y otras Vs. Venezuela. Fondo, Reparaciones y Costas.* Sentencia de 8 de febrero de 2018. Serie C No. 348, párr. 220.

[28] *Cfr. Caso Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") Vs. Perú. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 1 de julio de 2009. Serie C No. 198, párrs. 97 – 103; *Caso Lagos del Campo Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 31 de agosto de 2017. Serie C No. 340, párrs. 142 y 154; *Caso Trabajadores Cesados de Petroperú y otros Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 23 de noviembre de 2017. Serie C No. 344, párr. 192; *Caso San Miguel Sosa y otras Vs. Venezuela. Fondo, Reparaciones y Costas*. Sentencia de 8

25. En particular, este Tribunal ha señalado que una interpretación literal, sistemática, teleológica y evolutiva respecto al alcance de su competencia permite concluir que el artículo 26 de la Convención Americana protege aquellos derechos que derivan de las normas económicas, sociales y de educación, ciencia y cultura contenidas en la Carta de la OEA. Los alcances de estos derechos deben ser entendidos en relación con el resto de las demás cláusulas de la Convención Americana, por lo que están sujetos a las obligaciones generales contenidas en los artículos 1.1 y 2 de la Convención y pueden ser sujetos de supervisión por parte de este Tribunal en términos de los artículos 62 y 63 del mismo instrumento. Esta conclusión se fundamenta no sólo en cuestiones formales, sino que resulta de la interdependencia e indivisibilidad de los derechos civiles y políticos y los derechos económicos, sociales, culturales y ambientales, así como de su compatibilidad con el objeto y fin de la Convención, que es la protección de los derechos fundamentales de los seres humanos. Corresponderá, en cada caso concreto que requiera un análisis de Derechos Económicos, Sociales, Culturales y Ambientales, determinar si de la Carta de la OEA se deriva explícita o implícitamente un derecho humano protegido por el artículo 26 de la Convención Americana, así como los alcances de dicha protección[29].

26. Asimismo, el Tribunal ha concluido que los derechos a la salud y al medio ambiente sano se encuentran protegidos por el artículo 26 de la Convención Americana, en tanto el

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de febrero de 2018. Serie C No. 348, párr. 220; *Caso Poblete Vilches y otros Vs. Chile. Fondo, Reparaciones y Costas*. Sentencia de 8 de marzo de 2018. Serie C No. 349, párr. 100; *Caso Cuscul Pivaral y otros Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 23 de agosto de 2018. Serie C No. 359, párrs. 75 a 97; *Caso Muelle Flores Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 6 de marzo de 2019. Serie C No. 375, párrs. 34 a 37; *Caso Asociación Nacional de Cesantes y Jubilados de la Superintendencia Nacional de Administración Tributaria (ANCEJUB-SUNAT) Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 21 de noviembre de 2019. Serie C No. 394, párrs. 33 a 34; *Caso Hernández Vs. Argentina. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 22 de noviembre de 2019. Serie C No. 395, párr. 62; *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina. Fondo, Reparaciones y Costas*. Sentencia de 6 de febrero de 2020. Serie C No. 400, párr. 195, *Caso Spoltore Vs. Argentina. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 9 de junio de 2020. Serie C No. 404, párr. 85; *Caso de los Empleados de la Fábrica de Fuegos de Santo Antônio de Jesus y sus familiares Vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 15 de julio de 2020. Serie C No. 407, párr. 23; *Caso Casa Nina Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 24 de noviembre de 2020. Serie C No. 419, párrs. 26 y 27*; Caso Guachalá Chimbo y otros Vs. Ecuador. Fondo, Reparaciones y Costas.* Sentencia de 26 de marzo de 2021. Serie C No. 423, párr. 97*; Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras.* Sentencia de 31 de agosto de 2021. Serie C No. 432, párrs. 62 – 66*; Caso Vera Rojas y otros Vs. Chile. Excepciones preliminares, Fondo, Reparaciones y Costas*. Sentencia de 1 de octubre de 2021. Serie C No. 439, párrs. 32 – 35*; Caso Pueblos Indígenas Maya Kaqchikel de Sumpango y otros Vs. Guatemala. Fondo, Reparaciones y Costas.* Sentencia de 6 de octubre de 2021. Serie C No. 440, párr. 118*; Caso Manuela y otros Vs. El Salvador. Excepciones preliminares, Fondo, Reparaciones y Costas.* Sentencia de 2 de noviembre de 2021. Serie C No. 441, párr. 182*; Caso Extrabajadores del Organismo Judicial Vs. Guatemala. Excepciones Preliminares, Fondo y Reparaciones.* Sentencia de 17 de noviembre de 2021. Serie C No. 445, párrs. 100 – 104*; Caso Palacio Urrutia y otros Vs. Ecuador. Fondo, Reparaciones y Costas.* Sentencia de 24 de noviembre de 2021. Serie C No. 446, párr. 153*; Caso Federación Nacional de Trabajadores Marítimos y Portuarios (FEMAPOR) Vs. Perú. Excepciones Preliminares, Fondo y Reparaciones.* Sentencia de 1 de febrero de 2022. Serie C No. 448, párrs. 107-112; *Caso Pavez Pavez Vs. Chile. Fondo, Reparaciones y Costas.* Sentencia de 4 de febrero de 2022. Serie C No. 449, párr. 87*; Caso Guevara Díaz Vs. Costa Rica. Fondo, Reparaciones y Costas.* Sentencia de 22 de junio de 2022. Serie C No. 453, párrs. 55 – 63, y *Caso Mina Cuero Vs. Ecuador. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 7 de septiembre de 2022. Serie C No. 464, párr. 127; *Caso Brítez Arce y otros Vs. Argentina. Fondo, Reparaciones y Costas.* Sentencia de 16 de noviembre de 2022. Serie C No. 474, párr. 58; *Caso Nissen Pessolani Vs. Paraguay*. *Fondo, Reparaciones y Costas.* Sentencia de 21 de noviembre de 2022. Serie C No. 477, párrs. 99 a 104, y *Caso Aguinaga Aillón Vs. Ecuador. Fondo, Reparaciones y Costas*. Sentencia de 30 de enero de 2023. Serie C No. 483, párrs. 91 a 101, y *Caso Rodríguez Pacheco y otra Vs. Venezuela. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 1 de septiembre de 2023. Serie C No. 504. párr. 114

[29] *Cfr*. *Caso Cuscul Pivaral y otros Vs. Guatemala supra,* párrs. 75 a 97, y *Caso Benites Cabrera y otros Vs. Perú, supra,* párr. 110.

primero se deriva de los artículos 34.i), 34.l) y 45.h) de la Carta de la OEA[30], y el segundo de los artículos 30, 31, 33 y 34 del mismo instrumento[31]. Adicionalmente, ha señalado que las obligaciones contenidas en los artículos 1.1 y 2 de la Convención Americana constituyen, en definitiva, la base para la determinación de responsabilidad internacional a un Estado por violaciones a los derechos reconocidos en la Convención en el marco de un procedimiento contencioso, incluidos aquellos reconocidos en virtud del artículo 26[32]. Sin embargo, el Tribunal ha establecido que la misma Convención hace expresa referencia a las normas del derecho internacional para su interpretación y aplicación, específicamente a través del artículo 29, el cual, como fue mencionado, prevé el principio *pro personae*[33]. De esta manera, como ha sido la práctica constante de este Tribunal, la Corte puede interpretar las obligaciones y derechos en ellos contenidos a la luz de otros tratados y normas pertinentes[34].

27. En razón de lo anteriormente expuesto, y dado que Perú es Parte de la Convención Americana, por lo que está obligado a cumplir con sus obligaciones derivadas del artículo 26 de la Convención, sobre el cual la Corte tiene competencia material para conocer sobre violaciones a los derechos protegidos por dicho dispositivo, el Tribunal desestima la excepción preliminar presentada por el Estado. En consecuencia, se pronunciará sobre el fondo del asunto en el apartado correspondiente.

28. Por otra parte, los representantes señalaron que la referencia realizada en su escrito de solicitudes y argumentos a los artículos 10 y 11 del Protocolo de San Salvador cumple el propósito de "caracterizar el contenido y avance de la identificación y la interpretación de los derechos a la vida e integridad, el ambiente sano y a la salud entre los derechos amparados en la Convención Americana en general y el art. 26 en particular"[35]. Tal como lo aseveraron los representantes, no se reclamó la violación directa del Protocolo de San Salvador, y, en consecuencia, no resulta necesario proceder al estudio de fondo de la competencia de este Tribunal para pronunciarse sobre violaciones directas a derechos reconocidos en dicho instrumento. Por esta razón, la Corte desestima las excepciones preliminares en razón de la materia y en razón del tiempo presentadas por el Estado respecto de la competencia de la Corte para conocer sobre violaciones al Protocolo de San Salvador.

B. Excepción preliminar por falta de agotamiento de los recursos internos

B.1. Alegatos del Estado y observaciones de la Comisión y de los representantes

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30 *Cfr. Caso Poblete Vilches y otros Vs. Chile, supra*, párr. 106, y *Caso Vera Rojas y otros Vs. Chile, supra*, párr. 34.

31 *Cfr. Medio ambiente y derechos humanos (obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal - interpretación y alcance de los artículos 4.1 y 5.1, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos).* Opinión Consultiva OC-23/17, de 15 de noviembre de 2017. Serie A No. 23, párr. 57, y *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, *supra*, párr. 186, nota a pie 173.

32 *Cfr. Caso Hernández Vs. Argentina, supra*, párr. 65, y *Caso Vera Rojas y otros Vs. Chile, supra,* párr. 34..

33 *Cfr. Caso familia Pacheco Tineo Vs. Bolivia. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 25 de noviembre de 2013. Serie C No. 272, párr. 143, y *Caso Vera Rojas y otros Vs. Chile, supra,* párr. 34.

34 *Cfr. Caso Muelle Flores Vs. Perú, supra*, párr. 176, y *Caso Federación Nacional de Trabajadores Marítimos y Portuarios (FEMAPOR) Vs. Perú, supra*, párr. 107.

35 Escrito de Solicitudes, Argumentos y Pruebas (Expediente de fondo, folio 948).

29. El ***Estado*** resaltó que, a la fecha de presentación de la petición inicial, el 27 de diciembre de 2006, los representantes no habrían cumplido con el requisito de agotar los recursos internos que prevé la legislación interna. En específico, el Estado señaló que en dicha fecha aún estaba en curso la etapa de ejecución de sentencia, en el proceso sobre acción de cumplimiento conocido por el Tribunal Constitucional. Asimismo, alegó que en el ordenamiento jurídico peruano existían distintos recursos para cuestionar: a) la falta de investigación respecto de los alegados actos de hostigamiento y amenazas contra las presuntas víctimas; b) la tutela del medio ambiente, el derecho a la salud y el derecho a la integridad personal, y c) el acceso a la información pública. En particular, el Estado señaló que el proceso de amparo, el recurso de habeas data, la posibilidad de interponer denuncias penales, y de solicitar una indemnización civil, eran mecanismos idóneos para la protección de los derechos alegados por las presuntas víctimas, los cuales no fueron agotados. En razón de ello, alegó que existió un incumplimiento del requisito relativo a la interposición y al agotamiento de los recursos internos de conformidad con el artículo 46.1.a) de la Convención. Por otro lado, el Estado solicitó que la Corte realice un control de legalidad respecto de las actuaciones de la Comisión al momento de calificar la petición de conformidad con los requisitos detallados en el artículo 46 de la Convención, y, en particular, respecto de la forma en que se acreditó el requisito de agotamiento de los recursos de la jurisdicción interna.

30. Los ***representantes*** alegaron que el Estado efectuó una renuncia tácita y parcial de la excepción por falta de agotamiento de los recursos internos, pues no formuló la excepción durante la admisibilidad del caso o en el proceso llevado frente a la Comisión, ni hizo referencia a la falta de agotamiento de acciones penales, acciones de derecho civil o *habeas data*. Asimismo, señalaron que la acción de cumplimiento era una acción idónea para acreditar el agotamiento de los recursos internos, ya que "por su diseño y enfoque en el caso concreto, buscaba la protección efectiva de los derechos humanos de las personas". Ahora bien, los representantes expresaron que la acción de cumplimiento no fue eficaz y que no había necesidad de esperar de manera indefinida su cumplimiento. Finalmente, alegaron que el requisito del agotamiento de los recursos internos no implica la interposición de todas las acciones posibles en la normatividad interna, ni la interposición de recursos internos por cada violación alegada. En el presente caso, indicaron el requisito se cumplió en el momento en que las víctimas agotaron la vía que se estimó más idónea para la protección de sus derechos, esto es, la acción de cumplimiento.

31. En relación con la alegada falta de agotamiento del proceso de ejecución de sentencia de la acción de cumplimiento, la ***Comisión*** recordó que dicho argumento fue debidamente atendido en el informe de admisibilidad N°76/09. De esta forma, recordó que, al momento de emitir su decisión de admisibilidad, habían transcurrido más de tres años desde la adopción de la sentencia del Tribunal Constitucional y el proceso de ejecución de sentencia permanecía abierto, sin que se hubiera verificado el cumplimiento del fallo. De esta forma, la Comisión estableció que en el caso se configuró la excepción de retardo injustificado, prevista en el artículo 46.2.c de la Convención Americana. Por otro lado, la Comisión recordó que no es práctica de los órganos del Sistema Interamericano exigir el agotamiento de los recursos internos de manera separada y autónoma frente a cada uno de los efectos derivados de una violación principal. En cualquier caso, señaló que, si el Estado considerara que frente a determinados hechos o alegaciones de los peticionarios existían recursos autónomos pendientes de agotar, tal cuestión debería haber sido presentada en el momento oportuno, esto es, en la etapa de admisibilidad, situación que no ocurrió en el caso. Asimismo, respecto del recurso de amparo, la Comisión alegó que, si bien podría haber sido un mecanismo idóneo, su interposición no era necesaria debido a

que ya se había llevado a cabo la acción de cumplimiento, la cual también podía considerarse un recurso idóneo.

B.2. Consideraciones de la Corte

32. El artículo 46.1.a) de la Convención Americana dispone que, para determinar la admisibilidad de una petición o comunicación presentada ante la Comisión Interamericana de conformidad con los artículos 44 o 45 del mismo instrumento, es necesario que se hayan interpuesto y agotado los recursos de la jurisdicción interna, según los principios del Derecho Internacional generalmente reconocidos[36]. La Corte recuerda que la regla del previo agotamiento de los recursos internos está concebida en interés del Estado, pues busca dispensarlo de responder ante un órgano internacional por actos que se le imputen, antes de haber tenido la ocasión de remediarlos con sus propios medios[37]. Lo anterior significa que no sólo deben existir formalmente esos recursos, sino que también deben ser adecuados y efectivos, como se desprende de las excepciones contempladas en el artículo 46.2 de la Convención[38].

33. En consideración a lo anterior, la Corte determinará, en primer lugar, si la excepción preliminar fue planteada por el Estado en el momento procesal oportuno. Al respecto, la Corte recuerda que una objeción al ejercicio de su jurisdicción basada en la supuesta falta de agotamiento de los recursos internos debe ser presentada en el momento procesal oportuno, esto es durante la admisibilidad del procedimiento ante la Comisión[39]. Por tanto, el Estado debe, en primer lugar, precisar claramente ante la Comisión, durante la etapa de admisibilidad del caso, los recursos que, en su criterio, aún no se habrían agotado. Por otra parte, los argumentos que dan contenido a la excepción preliminar interpuesta por el Estado ante la Comisión durante la etapa de admisibilidad deben corresponder con aquellos esgrimidos ante la Corte[40].

34. En el procedimiento ante la Comisión, el Estado presentó la excepción preliminar por falta de agotamiento de los recursos internos en el momento procesal oportuno en lo que respecta a la acción de cumplimiento, al señalar que las presuntas víctimas no habían solicitado que se aplicaran "los apercibimientos para el cumplimiento de la sentencia [del Tribunal Constitucional]". Asimismo, el Tribunal advierte que la argumentación del Estado se dirigió a señalar que el proceso de verificación del cumplimiento de la sentencia no se encontraba agotado; que existió una ausencia de imposición de mecanismos de apercibimiento previstos en el artículo 22 del Código Procesal Constitucional, y que no se interpuso un recurso de amparo ante dichos hechos[41].

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[36] *Cfr. Caso Velásquez Rodríguez Vs. Honduras. Excepciones Preliminares*. Sentencia de 26 de junio de 1987. Serie C No. 1, párrs. 85 y 86, y *Caso Rodríguez Pacheco y otra Vs. Venezuela, supra,*, párr. 26.

[37] *Cfr*. *Caso Velásquez Rodríguez Vs. Honduras. Fondo.* Sentencia de 29 de julio de 1988. Serie C No. 4, párr. 61, y *Caso Bendezú Tuncar Vs. Perú. Excepciones Preliminares y Fondo. Sentencia de 29 de agosto de 2023*. Serie C No. 497, párr. 20.

[38] *Cfr*. *Caso Velásquez Rodríguez Vs. Honduras*. *Fondo*, *supra*, párr. 63, y *Caso Bendezú Tuncar Vs. Perú, supra,* párr. 20.

[39] *Cfr. Caso Velásquez Rodríguez Vs. Honduras. Excepciones Preliminares*, *supra*, párrs. 84 y 85, y *Caso Rodríguez Pacheco y otra Vs. Venezuela, supra*, párr. 23.

[40] *Cfr. Caso Furlan y Familiares Vs. Argentina. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 31 de agosto de 2012. Serie C No. 246, párr. 29, y *Caso Bendezú Tuncar Vs. Perú, supra,* párr. 21.

[41] *Cfr.* Escrito del Estado respecto a aspectos de admisibilidad y fondo ante la Comisión Interamericana de Derechos Humanos de 25 de julio de 2007 (expediente de prueba, folio 416).

35. De lo anterior se desprende que el Estado identificó con claridad suficiente que no había sido agotada la acción de cumplimiento del Tribunal Constitucional conforme a la jurisdicción interna, lo que incluye la imposición de mecanismos de apercibimiento, y que no se habría interpuesto el recurso de amparo respecto de las alegadas violaciones a los derechos reclamados. Asimismo, la Corte advierte que, respecto de dichas acciones, los argumentos presentados por parte del Estado durante la etapa de admisibilidad corresponden a aquellos esgrimidos ante la Corte, y que en ese sentido el Estado señaló que la posición de los representantes "estuvo orientada a sustituir la jurisdicción interna a partir de la intervención directa del SIDH en un proceso". En ese sentido, la Corte considera que el Estado alegó que no se cumplió con el requisito previsto por el artículo 46 de la Convención en el momento procesal oportuno.

36. Dicho lo anterior, la Corte advierte que el Tribunal Constitucional emitió una sentencia el 12 de mayo de 2006 en la que resolvió declarar fundada la demanda presentada a favor de los habitantes de La Oroya para la protección de sus derechos a la vida y la integridad personal, y, de manera indirecta, respecto de los derechos a la salud y el medio ambiente, y ordenó al Ministerio de Salud adoptar una serie de medidas dirigidas a atender la salud de los habitantes de La Oroya, mejorar la calidad del aire, declarar un Estado de Alerta, y establecer programas de vigilancia epidemiológica y ambiental (*infra*, párr. 87). Esta sentencia fue resultado de una acción de cumplimiento presentada sobre la base del artículo 200 de la Constitución Política[42], y el artículo 66 del Código Procesal Constitucional[43]. En particular, la demanda ante el Tribunal Constitucional se presentó por el incumplimiento de diversas disposiciones legales con el objeto de prevenir daños a la salud y el medio ambiente por parte de diversas instancias gubernamentales. Tomando esta cuestión en consideración, la Corte procederá a analizar la idoneidad y efectividad del recurso intentado.

37. Respecto de la idoneidad de la acción de cumplimiento, el Tribunal advierte que el propio Tribunal Constitucional estableció en su sentencia de 12 de mayo de 2006 que la exigencia de los mandatos contenidos en diversas disposiciones reglamentarias y legales "no solo se relaciona con el control y la inacción administrativa sino, precisamente, conque (sic) tal inacción vulnera los derechos a la salud y a un medio ambiente equilibrado y adecuado […]"[44]. De lo anterior se desprende que la interposición de dicho recurso, y la resolución del Tribunal Constitucional, se dirigió a lograr la protección de los derechos a la salud y el medio ambiente sano de los habitantes de La Oroya, incluidas las presuntas víctimas. Adicionalmente, el Tribunal advierte que el Estado alegó, a lo largo del procedimiento ante la Comisión, y en su escrito de contestación ante la Corte, que precisamente se encontraba abierto el proceso de cumplimiento de la sentencia del Tribunal Constitucional, por lo que no se habrían agotado los recursos internos. En razón de lo anterior, esta Corte considera que la acción de cumplimiento era un recurso idóneo para la

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[42] El artículo 200 de la Constitución Política establece que la acción de cumplimiento, como una garantía constitucional, "procede contra cualquier autoridad o funcionario renuente a acatar una norma legal o un acto administrativo, sin perjuicio de las responsabilidades de ley". Al respecto, ver: Constitución Política de la República de Perú, promulgada el 29 de diciembre de 1993.

[43] El artículo 66 del Código Procesal Constitucional dispone que el objeto del proceso de cumplimiento es "ordenar que el funcionario o autoridad pública renuente: 1) Dé cumplimiento a una norma legal o ejecute un acto administrativo firme; o 2) Se pronuncie expresamente cuando las normas legales le ordenan emitir una resolución administrativa o dictar un reglamento". Al respecto ver: Código Procesal Constitucional, Ley No. 28237, de 2004.

[44] *Cfr*. Tribunal Constitucional de Perú, Caso Pablo Miguel Fabián Martínez y otros, Sentencia de 12 de mayo de 2005 (expediente de prueba, folio .820).

protección de los derechos que fueron alegados por las presuntas víctimas por medio de su interposición.

38. Ahora bien, respecto a la efectividad del recurso, el Tribunal recuerda que un recurso eficaz es aquel que es "capaz de producir el resultado para el que ha sido concebido"[45]. En el presente caso, la Corte recuerda que la acción de cumplimiento, intentada ante el Tribunal Constitucional, fue resuelta a favor de las presuntas víctimas. En ese sentido, el recurso determinó el incumplimiento de las autoridades de diversas disposiciones reglamentarias y legales y ordenó la adopción de una serie de medidas dirigidas a la protección de los derechos a la salud y el medio ambiente sano de los habitantes de La Oroya, incluidos los accionantes y el resto de presuntas víctimas. Sin embargo, la Corte constata que el Tribunal Constitucional emitió la sentencia el 12 de mayo de 2006, y que, para el 5 de agosto de 2009, fecha en que se resolvió el Informe de Admisibilidad por parte de la Comisión, dicha sentencia no habría sido cumplida de manera íntegra. Lo anterior permite concluir que, si bien el recurso intentado era idóneo para la protección de los derechos a la salud y el medio ambiente en favor de las presuntas víctimas[46], las órdenes del Tribunal Constitucional no habían sido cumplidas al momento que la Comisión Interamericana resolvió sobre la admisibilidad del caso, por lo que el recurso no fue efectivo.

39. Por otro lado, el Estado alegó, en su escrito de contestación, que la verificación del agotamiento de los recursos internos por parte de la Comisión se debió realizar al momento de la presentación de la petición inicial de los representantes, y no al momento en que se pronunció sobre la admisibilidad. Al respecto, la Corte advierte que el alegato del Estado podría tener un impacto en la consideración respecto de la aplicabilidad de la excepción prevista en el artículo 46.2.c) de la Convención, pues podría entenderse que al momento de la petición inicial no se habría producido aún un "retardo injustificado" en el cumplimiento de la decisión del Tribunal Constitucional. Sin embargo, la Corte ya ha señalado que el hecho de que el análisis del cumplimiento del requisito de agotamiento de recursos internos se realice de acuerdo con la situación al momento de decidir sobre la admisibilidad de la petición no afecta el beneficio del Estado que se deriva de la regla del agotamiento de los recursos internos, y de hecho le permite al Estado solucionar la situación alegada durante la etapa de admisibilidad[47]. Este Tribunal no encuentra razones para apartarse del mencionado criterio.

40. Asimismo, el Estado alegó que los representantes no habrían agotado la acción de amparo como un mecanismo eficaz para la protección de los derechos a la salud y el medio ambiente, y en cambio "sólo se activó como recurso" la denominada "acción de cumplimiento". Al respecto, la Corte considera que si bien el amparo podía ser un recurso idóneo y efectivo para la protección de los derechos sobre los que se pronunció el Tribunal Constitucional a través de la acción de cumplimiento, para efectos del cumplimiento del requisito del agotamiento de los recursos internos, de conformidad con el artículo 46.1 de la Convención, resulta suficiente que las presuntas víctimas agoten un recurso adecuado y efectivo para cumplir con las finalidades perseguidas, con independencia de que podrían

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[45] *Cfr. Caso Velásquez Rodríguez Vs. Honduras. Fondo*, *supra,* párrs. 66 y 67, y *Caso Aguinaga Aillón Vs. Ecuador, supra,* párr. 104.

[46] El Tribunal Constitucional señaló al respecto que la sentencia "no solo se relación con el control y la inacción administrativo sino, precisamente, conque tal inacción vulnera los derechos a la salud y a un medio ambiente sano".

[47] *Cfr. Caso Wong Ho Wing Vs. Perú. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 30 de junio de 2015. Serie C No. 297, párr. 28, y *Caso Barbosa de Souza y otros Vs. Brasil. Excepciones preliminares, Fondo, Reparaciones y Costas*. Sentencia de 7 de septiembre de 2021. Serie C No. 435, párr. 33.

haber existido otros recursos que resultaran igualmente idóneos y efectivos para alcanzar los mismos fines. En consecuencia, la Corte considera que no era necesario el agotamiento del recurso de amparo para el cumplimiento del requisito del agotamiento de los recursos internos en términos del artículo 46.1 de la Convención Americana.

41. Adicionalmente, la Corte recuerda que el Estado alegó que los representantes no agotaron otros recursos que habrían sido efectivos para la protección de los derechos no alegados mediante la acción de cumplimiento, a saber: el recurso de amparo respecto a los derechos a la participación política; el recurso de habeas data respecto al acceso a la información; la presentación de denuncias ante el Ministerio Público frente a actos de hostigamiento; y la indemnización por vía civil. Al respecto, la Corte comprobó que los alegatos relativos a la falta de agotamiento de los recursos internos respecto de los recursos antes señalados no fueron presentados durante la etapa de admisibilidad ante la Comisión, ni en alguna etapa posterior previo a la emisión del Informe de Fondo de la Comisión. Los referidos alegatos fueron formulados por vez primera, de forma clara, en el procedimiento contencioso ante la Corte a través del escrito de contestación. En consecuencia, los alegatos del Estado en cuanto a la falta de agotamiento de los recursos internos son extemporáneos.

42. En lo que respecta a la solicitud del Estado de que la Corte realice un control de legalidad, la Corte recuerda que la Comisión Interamericana posee independencia y autonomía en el ejercicio de sus funciones conforme a lo estipulado en la Convención Americana, en especial, en lo relativo al procedimiento de análisis de peticiones individuales dispuesto en los numerales 44 a 51 de la Convención. A pesar de esto, este Tribunal, en su jurisprudencia constante, ha establecido que puede efectuar un control de legalidad de las actuaciones de la Comisión en tanto alguna de las partes alegue la existencia de un grave error que genere indefensión[48]. En el presente caso, la Corte considera que el Estado no desplegó argumentos o elementos probatorios que permitieran establecer la existencia de un error grave que afectara el derecho a la defensa del Estado respecto a los actos de la Comisión, sino una discrepancia respecto al análisis jurídico de la admisibilidad del presente caso por parte de la Comisión.

43. En razón de lo anterior, la Corte concluye que la excepción preliminar del Estado por falta de agotamiento de los recursos internos es improcedente, y que tampoco se dan los supuestos en el caso para ejercer un control de legalidad de los actos de la Comisión.

V
CONSIDERACIONES PREVIAS

44. El Estado presentó consideraciones adicionales a sus excepciones preliminares sobre: a) la inclusión de hechos y derechos no mencionados en el Informe de Fondo, y b) las observaciones al número de presuntas víctimas. La Corte analizará ambas cuestiones como consideraciones previas.

A. Sobre la inclusión de hechos y derechos no mencionados en el Informe de Fondo

[48] *Cfr*. *Control de Legalidad en el Ejercicio de las Atribuciones de la Comisión Interamericana de Derechos Humanos (arts. 41 y 44 de la Convención Americana sobre Derechos Humanos).* Opinión Consultiva OC-19/05 de 28 de noviembre de 2005. Serie A No. 19, puntos resolutivos primero y tercero; *Caso del Pueblo Saramaka Vs. Suriname. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 32, y *Caso Rodríguez Pacheco y otra Vs. Venezuela, supra,* párr. 21.

A.1. Alegatos del Estado y observaciones de la Comisión y de los representantes

45. El ***Estado*** alegó que los representantes hicieron referencia a determinados hechos en el escrito de solicitudes y argumentos, sobre los cuales pretendieron sustentar vulneraciones de derechos en perjuicio de las presuntas víctimas, que no se encontraban comprendidos en la delimitación del marco fáctico del caso estudiado por la Comisión en su Informe de Fondo. En particular, el Estado interpretó que las determinaciones fácticas tomadas en cuenta por la Comisión se circunscriben al periodo posterior al pronunciamiento del Tribunal Constitucional de 2006, toda vez que, según el Informe de Fondo, no existía controversia sobre el menoscabo ocasionado a los pobladores de La Oroya. En tal sentido, indicó que los hechos del caso deberán circunscribirse a las obligaciones internacionales presuntamente incumplidas a partir de la emisión de la sentencia del Tribunal Constitucional de 2006. En esta línea, el Estado indicó que el análisis de las presuntas vulneraciones al derecho a la salud y al medio ambiente sano efectuadas por los representantes en su escrito de solicitudes y argumentos supondría abrir un debate sobre lo ya analizado en sede interna por el Tribunal Constitucional, tomando como base hechos ajenos al marco fáctico, en contra del principio de subsidiariedad. En virtud de lo anterior, concluyó que la Corte debería ceñir su análisis a las obligaciones presuntamente incumplidas a partir de la emisión de la sentencia del Tribunal Constitucional.

46. Los ***representantes*** alegaron que, conforme a las reglas procesales del litigio de casos contenciosos ante la Corte, el marco fáctico aplicable debe ser el establecido en el Informe de Fondo de la Comisión, el cual abarca la totalidad de la controversia alrededor de la contaminación ambiental proveniente del CMLO, y las afectaciones a los derechos humanos derivadas de dicha contaminación. De esta forma, sostuvieron que estos hechos, sobre los cuales se motivan los alegatos de violaciones a los derechos humanos, están descritos claramente en el Informe de Fondo, incluyendo aquellos relacionados con toda la operación del CMLO. En virtud de lo anterior, sostuvieron que la Corte debe admitir como probados todos los hechos anteriores a 2006, que fueron alegados en el escrito de solicitudes y argumentos, pues resultan complementarios a aquellos establecidos por la Comisión en su Informe de Fondo.

47. La ***Comisión*** resaltó que los aspectos indicados por los representantes de las presuntas víctimas (presentados por el Estado como "novedosos"), únicamente brindan información complementaria que detallan tanto el marco normativo como histórico en el que se desarrollaron las operaciones metalúrgicas en La Oroya, los cuales forman parte del marco fáctico y permitirían a la Corte contar con mayores elementos para determinar la responsabilidad estatal en el caso. En vista de lo anterior, solicitó a la Corte desestimar los argumentos interpuestos por el Estado.

A.2. Consideraciones de la Corte

48. La Comisión, en su Informe de Fondo, se refirió a los siguientes hechos: a) el Complejo Metalúrgico de La Oroya y el Programa de Adecuación y Manejo Ambiental (en adelante el "PAMA"); b) las modificaciones del PAMA y cierre de la empresa metalúrgica; c) las afectaciones a la salud y otros derechos por las operaciones de la empresa metalúrgica en La Oroya; d) la situación de salud de las presuntas víctimas; e) la acción de cumplimiento y la decisión del Tribunal Constitucional; f) las acciones tomadas por el Estado para remediar la contaminación y sus efectos en La Oroya en el marco de la decisión constitucional de 12 de mayo de 2006; y g) los supuestos actos de hostigamiento de ciertas presuntas víctimas . Los hechos descritos en los subacápites del Informe de Fondo antes señalados abarcaron

diversas cuestiones fácticas previas y posteriores a la sentencia del Tribunal Constitucional de 2006, las cuales también fueron objeto de un análisis de fondo por parte de la Comisión.

49. Al respecto, este Tribunal recuerda que el marco fáctico del proceso ante la Corte se encuentra constituido por los hechos contenidos en el Informe de Fondo sometido a su consideración. En consecuencia, no es admisible que las partes aleguen nuevos hechos distintos a los contenidos en dicho informe, sin perjuicio de exponer aquellos que permitan explicar, aclarar o desestimar los que hayan sido mencionados en el mismo y hayan sido sometidos a consideración de la Corte[49]. La excepción a este principio son los hechos que se califican como supervinientes, que podrán ser remitidos al Tribunal en cualquier estado del proceso antes de la emisión de la Sentencia[50]. Asimismo, las presuntas víctimas y sus representantes pueden invocar la violación de otros derechos distintos a los comprendidos en el Informe de Fondo, siempre y cuando se atengan a los hechos contenidos en dicho documento[51]. Corresponde a este Tribunal decidir en cada caso acerca de la procedencia de alegatos relativos al marco fáctico en resguardo del equilibrio procesal de las partes[52].

50. En tal sentido, la Corte advierte que, en el presente caso, los representantes pueden presentar hechos complementarios a aquellos señalados por la Comisión en su Informe de Fondo, y presentar nuevos argumentos de derecho respecto de dichos hechos, y que este Tribunal es competente para analizarlos. Adicionalmente, la Corte considera que el alegato del Estado respecto a que los hechos del caso se encuentran restringidos -por la propia Comisión, y por lo tanto para la Corte- a aquellos ocurridos con posterioridad a la sentencia del Tribunal Constitucional constituye una interpretación respecto a la forma en que el fondo del presente caso debería ser analizado, y no una objeción respecto de la inclusión de hechos nuevos por parte de los representantes o de alegatos que no pueden ser analizados por este Tribunal. Lo anterior resulta evidente por el hecho de que la propia Comisión incorporó hechos y analizó violaciones a los derechos de las presuntas víctimas sobre hechos previos al año 2006, y no circunscribió su análisis de fondo exclusivamente al cumplimiento de la sentencia del Tribunal Constitucional.

51. Asimismo, respecto de la alegada imposibilidad, basada en el principio de subsidiariedad, de que los representantes aleguen la violación al derecho al medio ambiente sano y a la salud en virtud de la sentencia del Tribunal Constitucional del año 2006, la Corte recuerda que el Sistema Interamericano comparte con los sistemas nacionales la competencia para garantizar los derechos y libertades previstos en la Convención, a investigar y en su caso juzgar y sancionar las infracciones que se cometieren; y, en segundo lugar, que si un caso concreto no es solucionado en la etapa interna o nacional, la Convención prevé un nivel internacional en el que los órganos principales son la Comisión y la Corte. En este sentido, la Corte ha indicado que cuando una cuestión ha sido resuelta en el orden interno, según las cláusulas de la Convención, no es necesario traerla ante el Tribunal Interamericano para la aprobación o confirmación de dicha resolución. Lo anterior se asienta en el principio de subsidiariedad o complementariedad, que informa

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49 *Cfr. Caso "Cinco Pensionistas" Vs. Perú. Fondo, Reparaciones y Costas.* Sentencia de 28 de febrero de 2003. Serie C 98, párr. 153, y *Caso Bendezú Tuncar Vs. Perú, supra,* párr. 49.

50 *Cfr. Caso Vera Vera y otra Vs. Ecuador. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 19 de mayo de 2011. Serie C No. 226, párr. 32, y *Caso Álvarez Vs. Argentina. Excepción Preliminar, Fondo y Reparaciones*. Sentencia de 24 de marzo de 2023. Serie C No. 487, párr. 45.

51 *Cfr. Caso Cinco Pensionistas Vs. Perú, Fondo, Reparaciones y Costas.* Sentencia de 28 de febrero de 2003. Serie C No. 98, párr. 155, y *Caso Baptiste y otros Vs. Haití. Fondo y Reparaciones.* Sentencia de 1 de septiembre de 2023. Serie C No. 503, párr. 60.

52 *Cfr*. *Caso de la Masacre de Mapiripán Vs. Colombia. Fondo, Reparaciones y Costas.* Sentencia de 15 de septiembre de 2005. Serie C No. 134, párr. 58 y *Caso Bendezú Tuncar Vs. Perú, supra,* párr. 49.

transversalmente el sistema interamericano de derechos humanos, el cual es, tal como lo expresa el Preámbulo de la Convención Americana, "coadyuvante o complementario de la [protección] que ofrece el derecho interno de los Estados americanos"[53].

52. El referido carácter subsidiario o complementario de la jurisdicción internacional significa que el sistema de protección instaurado por la Convención Americana no sustituye a las jurisdicciones nacionales, sino que las complementa[54]. De tal manera, el Estado es el principal garante de los derechos humanos de las personas, por lo que, si se produce un acto violatorio de dichos derechos, es él quien debe de resolver el asunto a nivel interno y, de ser el caso, reparar, antes de tener que responder ante instancias internacionales[55]. En este sentido, la jurisprudencia reciente ha reconocido que todas las autoridades de un Estado Parte en la Convención tienen la obligación de ejercer un control de convencionalidad, de forma tal que la interpretación y aplicación del derecho nacional sea congruente con las obligaciones internacionales del Estado en materia de derechos humanos[56]. Asimismo, la Corte ha señalado que la responsabilidad estatal bajo la Convención solo puede ser exigida a nivel internacional después de que el Estado haya tenido la oportunidad de reconocer, en su caso, una violación de un derecho, y de reparar por sus propios medios los daños ocasionados[57].

53. En razón de lo anterior, el hecho de que haya existido una sentencia por parte del Tribunal Constitucional en la que se reconociera la protección de los derechos a la salud y el medio ambiente en favor de las presuntas víctimas no impide a este Tribunal analizar alegatos que hayan sido presentados respecto a la responsabilidad internacional del Estado por violación a dichos derechos. En todo caso, conforme a la jurisprudencia de este Tribunal, en aplicación del principio de subsidiariedad, el Estado podría alegar que las violaciones a los derechos al medio ambiente sano y a la salud han cesado y han sido reparadas en virtud de dicha sentencia, y que, por lo tanto, que fueron subsanados, situación que podría ser objeto de un análisis de fondo. Este argumento, sin embargo, no fue formulado de forma expresa por el Estado en el presente caso, y aun cuando hubiera sido formulado, esto no afectaría la competencia de este Tribunal para conocer de violaciones a derechos alegados por la Comisión y los representantes, sino que en todo caso permitirían determinar que el Estado cesó y reparó dichas violaciones y, por lo tanto, que no es internacionalmente responsable por ellas.

54. En razón de todo lo anterior, este Tribunal desestima la solicitud del Estado, y determinará los hechos probados y sus consecuencias jurídicas en los acápites correspondientes en la presente Sentencia.

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[53] *Cfr. Caso Las Palmeras Vs. Colombia. Fondo.* Sentencia de 6 de diciembre de 2001. Serie C No. 90, párr. 33 y *Caso Comunidad Garífuna de San Juan y sus miembros Vs. Honduras. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 29 de agosto de 2023. Serie C No. 496, párr. 149.

[54] *Cfr. Caso Tarazona Arrieta y otros Vs. Perú. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 15 de octubre de 2014. Serie C No. 286*, párr. 137, y *Caso Benites Cabrera y otros Vs. Perú, supra*, párr. 133.

[55] *Cfr. Caso Acevedo Jaramillo y otros Vs. Perú. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 24 de noviembre de 2006. Serie C No. 157, párr. 66, y *Caso Benites Cabrera y otros Vs. Perú, supra*, párr. 133.

[56] *Cfr. Caso Almonacid Arellano y otros Vs. Chile.* Excepciones Preliminares, Fondo, Reparaciones y costas. sentencia de 26 de septiembre de 2006. Serie C No. 154, párr. 124, y *Caso Federación Nacional de Trabajadores Marítimos y Portuarios (FEMAPOR) Vs. Perú, supra*, párr. 99.

[57] *Cfr. Caso Masacre de Santo Domingo Vs. Colombia, supra,* párr. 143, y *Caso Tzompaxtle Tecpile y otros Vs. México. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 7 de noviembre de 2022. Serie C No. 470, párr. 194.

B. Sobre las observaciones respecto al número de presuntas víctimas

B.1. Alegatos del Estado y observaciones de la Comisión y de los representantes

55. El ***Estado*** sostuvo que las afirmaciones realizadas por los representantes respecto de alegadas violaciones a los derechos en perjuicio de la comunidad de La Oroya debían ser desestimadas, en tanto solo deben ser consideradas como presuntas víctimas aquellas comprendidas en el Informe de Fondo de la Comisión. Por otro lado, el Estado señaló que los representantes no han podido contactar a María 38, a la familia de Juan 40, Juan 29, María 35, Juan 20, Juan 27, Juan 28 y Juan 39; por lo que, en aras de identificar la legitimidad de la representación, se hace necesario validar el número final de presuntas víctimas, excluyendo cualquier número mayor a 80 presuntas víctimas, y circunscribiéndose únicamente a aquellas personas sobre las que exista prueba de su interés en el caso.

56. Los ***representantes*** sostuvieron que a lo largo del proceso ante la Comisión y la Corte han insistido en que el número de víctimas identificadas en el Informe de Fondo no corresponde a la totalidad de personas afectadas por los hechos de contaminación denunciados. En tal sentido, señalaron que la afectación que se evalúa en el caso rebasó la esfera individual, afectando de forma colectiva a la parte lesionada y a toda la comunidad. De esta forma, alegaron la necesidad de que la Corte valore los daños y afectaciones colectivas generadas con ocasión de los hechos denunciados y que, por lo tanto, se incluyan medidas de reparación colectivas que puedan beneficiar a la comunidad en general. Respecto a la alegada ausencia de poderes de representación, señalaron que han cumplido con su obligación de demostrar la legitimidad con que cuentan para representar los intereses de las víctimas debidamente identificadas. La ***Comisión*** no formuló alegatos sobre el particular.

B.2. Consideraciones de la Corte

57. La Corte recuerda que, de acuerdo con su jurisprudencia, y con fundamento en los artículos 50 de la Convención, y 35.1 del Reglamento de la Corte, corresponde a la Comisión y no a este Tribunal, identificar con precisión, y en la debida oportunidad procesal, a las presuntas víctimas en un caso presentado ante esta Corte[58]. La seguridad jurídica exige, como regla general, que todas las presuntas víctimas estén debidamente identificadas en el Informe de Fondo, no siendo posible añadir nuevas presuntas víctimas en etapas posteriores[59], sin que ello ocasione una afectación al derecho de defensa del Estado demandado. En el presente caso, la Comisión identificó en su Informe de Fondo a 80 personas como presuntas víctimas, las cuales fueron señaladas en un "anexo único".

58. En relación con lo anterior, la Corte advierte que los representantes no alegaron la inclusión de presuntas víctimas adicionales a aquellas señaladas por la Comisión en su Informe de Fondo, sino que solicitaron que se tomen en cuenta los impactos colectivos de las alegadas violaciones ocurridas en el presente caso. En efecto, la Corte considera

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[58] *Cfr. Caso Masacres de Río Negro Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 4 septiembre de 2012. Serie C No. 250, párr. 48, y *Caso Valencia Campos y otros Vs. Bolivia. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 18 de octubre de 2022. Serie C No. 469, párr. 34.

[59] *Cfr. Caso Masacres de Río Negro Vs. Guatemala, supra,* párr. 48, y *Valencia Campos y otros Vs. Bolivia, supra,* párr. 34.

que en el presente caso las alegadas violaciones al derecho al medio ambiente sano pudieron tener impactos que trascienden a las presuntas víctimas señaladas en el Informe de Fondo[60], pues la contaminación ambiental pudo afectar los derechos de otros sujetos en La Oroya durante los más de 100 años en que ha operado el CMLO. Le corresponderá a la Corte determinar, en el fondo de la controversia y, en su caso, en materia de reparaciones, las consecuencias jurídicas de los alcances colectivos de las alegadas violaciones en el presente caso. En razón de ello, la Corte considera que el alegato del Estado resulta improcedente.

59. Respecto al alegato sobre la ausencia de legitimidad de la representación de algunas presuntas víctimas, la Corte comprueba que en el acervo probatorio del caso se encuentran los poderes de representación de María 35, María 38, Juan 20, Juan 27, Juan 28 y Juan 39, y del padre de Juan 40[61]. En virtud de lo anterior, la Corte considera que no existe controversia sobre la legitimidad de la Asociación Interamericana para la Defensa del Ambiente (AIDA) y la Asociación Pro Derechos Humanos (APRODEH) para ejercer la representación de las señaladas presuntas víctimas. Por otro lado, este Tribunal observa que, respecto de Juan 3, 19 y 29, existió una continuidad en el ejercicio de las actuaciones por parte de los representantes desde el trámite del caso ante la Comisión, y no consta que, en todos los años que duró el trámite, los peticionarios indicaran su deseo de no continuar dicha representación[62]. En vista de ello, la Corte considera, como ha hecho en otros casos[63], que los poderes de representación aportados por los representantes en el trámite ante la Comisión se encuentran vigentes y resultan suficiente para acreditar a AIDA y APRODEH como representantes de Juan 3, 19 y 29 ante este Tribunal.

VI
PRUEBA

A. Admisibilidad de la prueba documental

[60] *Cfr*. Medio ambiente y derechos humanos (obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal - interpretación y alcance de los artículos 4.1 y 5.1, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-23/17 de 15 de noviembre de 2017. Serie A No. 23, párr. 59.

[61] Cfr. Poder de representación firmado por R.D.E.G. en favor de su hijo, Juan 40, de 15 de noviembre de 2021 (expediente de prueba, folio 17994); Poder de representación firmado por María 35, de 12 de noviembre de 2021 (expediente de prueba, folio 26718); Poder de representación firmado por María 38, de 12 de noviembre de 2021 (expediente de prueba, folio 26715); Poder de representación firmado por Juan 20, de 10 de junio de 2022 (expediente de prueba, folio 30202); Poder de representación firmado por Juan 27, de 10 de junio de 2022 (expediente de prueba, folio 30204); Poder de representación firmado por Juan 28, de 10 de junio de 2022 (expediente de prueba, folio 30206), y Poder de representación firmado por Juan 39, de 10 de junio de 2022 (expediente de prueba, folio 30208).

[62] *Cfr*. Poder de representación firmado por R.E.G y S.D.O. en favor de su hijo, Juan 3, de 25 de enero de 2007 (expediente de prueba, folio 30210); Poder de representación firmado por Juan 19, de 17 de mayo de 2005 (expediente de prueba, folio 30212); Poder de representación firmado por Juan 29, de 6 de diciembre de 2006 (expediente de prueba, folio 30214).

[63] *Cfr.* Entre otros*, Caso Pueblos Indígenas Maya Kaqchikel de Sumpango y otros Vs. Guatemala, supra,* párr. 25 *y Caso Habbal y otros Vs. Argentina. Excepciones Preliminares y Fondo.* Sentencia de 31 de agosto de 2022. Serie C No. 463, párr. 24.

60. El Tribunal recibió diversos documentos aportados como prueba por la Comisión[64], los representantes[65] y el Estado[66] (*supra* párrs. 6, 7, 11, 12 y 15), los cuales admite en el entendido que fueron presentados en la debida oportunidad procesal (artículo 57 del Reglamento)[67].

61. Ahora bien, los representantes remitieron anexos a sus alegatos finales escritos[68], a la comunicación de 12 de enero de 2023 mediante la cual formularon sus observaciones a los anexos remitidos por el Estado en sus alegatos finales escritos[69], y a su escrito de 20 de octubre de 2023[70]. En relación con los documentos anexos a los alegatos finales escritos, el Estado argumentó que estos habían sido presentados "de manera extemporánea", en tanto no fueron remitidos en el momento procesal oportuno, junto con el escrito de solicitudes, argumentos y pruebas. Al respecto, la Corte observa que los anexos 1 y 2 se refieren a documentos que fueron elaborados con base en elementos probatorios que constan en el expediente, los cuales fueron oportunamente trasladados al Estado, y respecto de los cuales pudo ejercer el derecho de defensa. En vista de lo anterior, esos anexos resultan admisibles en los términos del artículo 58.a del Reglamento, por tratarse de una sistematización de distintos elementos probatorios que ya habían sido oportunamente aportados. En relación con los anexos 3 y 4, la Corte advierte que se trata de documentos nuevos presentados con posterioridad al escrito de solicitudes, argumentos y pruebas, que se refieren a hechos supervinientes relacionados con el presente caso[71], por lo que resultan admisibles en los términos del artículo 57.1 del Reglamento. En lo que respecta a los anexos a los escritos de 12 de enero y 20 de octubre de 2023, este Tribunal advierte que fueron presentados respecto de hechos

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64 La Corte recibió 79 anexos remitidos por la Comisión Interamericana junto con su Informe de Fondo No. 330/20.

65 La Corte recibió 181 anexos remitidos por los representantes de las presuntas víctimas junto con su escrito de solicitudes, argumentos y pruebas.

66 La Corte recibió 94 anexos remitidos por el Estado junto al escrito de contestación.

67 La prueba documental puede ser presentada, en general y de conformidad con el artículo 57.2 del Reglamento, junto con los escritos de sometimiento del caso, de solicitudes y argumentos o de contestación, según corresponda, y no es admisible la prueba remitida fuera de esas oportunidades procesales, salvo en las excepciones establecidas en el referido artículo 57.2 del Reglamento (a saber, fuerza mayor, impedimento grave) o salvo si se tratara de un hecho superviniente, es decir, ocurrido con posterioridad a los citados momentos procesales. *Cfr*. *Caso Velásquez Rodríguez Vs. Honduras. Fondo, supra, párr. 140,* y *Caso Córdoba Vs. Paraguay. Fondo, Reparaciones y Costas.* Sentencia de 5 de septiembre de 2023. Serie C No. 505, párr. 20.

68 Anexo 1: Tabla resumen sobre las afectaciones a la salud derivadas de los affidávits de las presuntas víctimas y el peritaje de M. Yáñez; Anexo 2: Tabla resumen de las declaraciones de las presuntas víctimas rendidas ante fedatario público; Anexo 3: Comunicación de los representantes de 21 de junio de 2022 mediante la cual remitieron los poderes de María 34 y Juan 3, 19, 20, 27, 28, 29 y 39, y Anexo 4: Tabla de liquidación de daños materiales de Juan 12 en el periodo comprendido de junio 2020 a noviembre de 2022.

69 Anexo 1: Resolución No. 51 del Juzgado 20 Civil, de 1 de diciembre de 2022; Anexo 2: Resolución No. 52 del Juzgado 20 Civil, de 1 de diciembre de 2022; Anexo 3: Acta de defunción de María 38 de 5 de diciembre de 2022, y Anexo 4: Comunicación de AIDA y APRODEH dirigida al señor C.l.V. Procurador Público Adjunto Especializado Supranacional, de 12 de enero de 2023.

70 Anexo 1: Comunicado de prensa de Metalúrgica Business Perú S.A., de 3 de septiembre de 2023; Anexo 2: Programa de Radio Karisma del 26 de septiembre de 2023 y Anexo 3: Programa de Radio Karisma de 9 de octubre de 2023.

71 Por un lado, el Anexo 3 comprende hechos supervinientes relacionados con la entrega de los poderes de representación de las presuntas víctimas María 34 y Juan 3, 19, 20, 27, 28, 29 y 39, los cuales fueron obtenidos con posterioridad a la fecha de presentación del escrito de solicitudes, argumentos y pruebas. Por otro lado, el Anexo 4 refiere a estimaciones por concepto el daño material que presuntamente habría sufrido Juan 12, las cuales comprenden información referida a los meses de marzo a agosto del año 2022, fechas posteriores a la presentación del escrito de solicitudes, argumentos y pruebas.

ocurridos con posterioridad a la presentación del escrito de solicitudes, argumentos y pruebas, y, por lo tanto, constituyen prueba relativa a hechos alegados como supervinientes.

62. Por otro lado, el Estado presentó diversos anexos a sus alegatos finales escritos[72], y a su escrito de 27 de octubre de 2023[73]. Al respecto, la Corte admite los siguientes documentos: a) el Anexo 1 toda vez que ya fue remitido como Anexo 129 del escrito de argumentos y pruebas de los representantes; b) los Anexos 2, 3, 4 y 6, que son documentos presentados con posterioridad a la presentación del escrito de contestación y, por tanto, constituyen prueba relativa a hechos alegados como supervinientes; c) los Anexos 7, 8, y 9, que contienen documentos e información solicitada por los Jueces y Juezas en la audiencia pública. Por otra parte, no admite el anexo 5 porque la información presentada por el Estado en dicho anexo se refiere a hechos o situaciones anteriores a la presentación del escrito de contestación. En consecuencia, dicho documento no es admisible por extemporáneo en los términos del artículo 57.2 del Reglamento de la Corte. Respecto de los anexos al escrito de 27 de octubre de 2023, este Tribunal advierte que fueron presentados respecto de hechos ocurridos con posterioridad a la presentación del escrito de contestación, y, por lo tanto, constituyen prueba relativa a hechos alegados como supervinientes.

B. Admisibilidad de la prueba testimonial y pericial

63. Durante la audiencia pública se recibieron los testimonios de tres presuntas víctimas, un testigo y tres peritos[74]. Asimismo, se recibieron ante fedatario público (*affidávit*) las declaraciones de ocho peritos y veintidós testigos[75]. Al respecto, la Corte estima pertinente admitir las declaraciones rendidas en audiencia pública y ante

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[72] Anexo 1: Demanda de acción de cumplimiento de fecha 25 de octubre del año 2002; Anexo 2: Carta sin nombre de fecha 26 de octubre de 2022; Anexo 3: Oficio No. 45-2022-GRJ-DRSJ-DESP/ESRMP de fecha 22 de noviembre de 2022; Anexo 4: Resolución No. 50 de fecha 11 de junio de 2022; Anexo 5: Oficio No. 12-2021/CCO-INDECOPI de fecha 19 de enero de 2021; Anexo 6: Oficio No. 436-2022/CCO-INDECOPI de fecha 19 de septiembre de 2022; Anexo 7: Diagrama de flujo PTAI; Anexo 8: Planta de Tratamiento de aguas residuales domésticas Huaymanta, y Anexo 9: Base de datos de los muestreos de efluentes año 2007-2022.

[73] Anexo 1: Informe N° 0630-2022/MINEM-DGAAM-DGAM de fecha 15 de diciembre de 2022, emitido por la Dirección General de Asuntos Ambientales Mineros del Ministerio de Energía y Minas; Anexo 2: Informe N°1090-2023MINEM/OGAL de fecha 26 de octubre de 2023, emitido por la Oficina General de Asesoría Jurídica del Ministerio de Energía y Minas; Anexo 3: Resolución Administrativa N.° 0210-2023-ANA-AAA.MAN-ALA.MANTARO de fecha 11 de octubre de 2023, emitida por la Administración Local del Agua Mantaro de la Autoridad Nacional del Agua, y Anexo 4: Informe N° 009-2023-VOI/DGIN/SPROV de fecha 24 de octubre de 2023, emitido por la Subprefectura Provincial de Yauli – La Oroya.

[74] En audiencia pública la Corte recibió las declaraciones de las presuntas víctimas María 1, María 13 y María 15, del testigo John Maximiliano Astete Cornejo y de los peritos Marcos Orellana y Marisol Yáñez de la Cruz, propuestos por los representantes, y Patricia Mercedes Gallegos Quesquén, propuesta por el Estado. En respuesta al requerimiento de la Corte en la audiencia pública, el 10 de octubre de 2022 los peritos remitieron una versión escrita de sus declaraciones, las cuales ha sido incorporadas al expediente de prueba del caso.

[75] La Corte recibió ante fedatario público las declaraciones periciales de Christian Courtis y Juan P. Olmedo Bustos, ofrecidos por la Comisión, de Federico Chunga Fiestas, ofrecido por el Estado, y de Fernando Serrano, Caroline Weil, Howard Meilke, Diego Miguel Quirama Aguilar y Oscar Cabrera, ofrecidos por los representantes. También fueron recibidas las declaraciones testimoniales de Jazmín Monrroy Polanco y Katherine Andrea Melgar Támara, ofrecidas por el Estado, de Juan 1, Juan 2, Juan 6, Juan 8, el hijo de Juan 12, Juan 15, Juan 18, Juan 25, Juan 30, María 3, María 9, María 16, María 24, María 25, María 32, María 33, María 37, Pedro Barreto, Hugo Villa, Mercedes Lu, y Hunter Farrell, ofrecidas por los representantes (expediente de prueba, folios 28763 a 29577). También fueron recibidas las versiones escritas de los peritajes rendidos en la Audiencia Pública del presente caso por los peritos Marisol Yáñez y Marcos Orellana, ofrecidos por los representantes, así como por la perita Patricia Gallegos Quesquén, ofrecida por el Estado.

fedatario público, en cuanto se ajusten al objeto definido por la Presidencia en la Resolución que ordenó recibirlos[76].

64. Por otra parte, el Estado, en sus alegatos finales escritos, señaló que las declaraciones de Juan 18, María 25 y María 9 no fueron rendidas ante fedatario público, y por lo tanto debían ser rechazadas[77]. Los representantes señalaron que la declaración de Juan 18 no fue recabada ante fedatario público pues, de acuerdo con la legislación peruana, resultaba necesario un certificado médico expedido por una institución de salud del Estado para legalizar la firma del declarante, quien tiene 92 años. Respecto de María 25, indicaron que la presunta víctima es menor de edad, por lo que no podía legalizar su firma ante Notario Público de acuerdo con la normativa peruana. Finalmente, respecto de María 9, señalaron que, debido a circunstancias adversas de salud, ésta no pudo realizar la autentificación de su firma al momento de remitir la declaración**.**

65. Al respecto, se destaca que, en casos anteriores, y de forma excepcional, la Corte ha aceptado declaraciones de presuntas víctimas no rendidas ante fedatario público, considerando, a la luz del caso concreto, que existían justificaciones debidamente motivadas[78]. En el caso bajo análisis, la Corte advierte que las declaraciones de Juan 18, María 25 y María 9 se encuentran debidamente firmadas por las presuntas víctimas, pero no fueron autenticadas por un Notario Público[79]. No obstante lo anterior, la Corte, teniendo en cuenta la razonabilidad de las justificaciones expresadas por los representantes respeto a las limitaciones derivadas de las disposiciones de derecho interno, en los casos de Juan 18 y María 25, así como de las circunstancias particulares de salud de María 9, comprueba que, en efecto, existieron razones de fuerza mayor para no recabar las declaraciones antes señaladas ante fedatario público, por lo que resuelve, excepcionalmente, admitir las declaraciones de Juan 18, María 25 y María 9.

VII
HECHOS

66. Los siguientes son los hechos que se consideran como probados con fundamento en el marco fáctico presentado por la Comisión, otros hechos complementarios relatados por los representantes y el Estado, así como el acervo probatorio que ha sido admitido. Son presentados en el siguiente orden: a) el CMLO (Complejo Metalúrgico de La Oroya) y el PAMA (Programa de Adecuación y Manejo Ambiental); b) las modificaciones al PAMA, el otorgamiento de prórrogas para el cumplimiento del PAMA, y las actividades mineras desde el año 2009 al 2023; c) la contaminación ambiental en La Oroya y sus efectos en la población; d) la situación de salud de las presuntas víctimas; e) la acción de cumplimiento del Tribunal Constitucional, las medidas cautelares otorgadas por la Comisión Interamericana y las medidas adoptadas por el Estado en cumplimiento de dichas decisiones; y f) los alegados actos de hostigamiento en perjuicio de algunas presuntas víctimas.

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[76] *Cfr. Caso Comunidad de La Oroya Vs. Perú. Convocatoria a audiencia.* Resolución del Presidente de la Corte Interamericana de Derechos Humanos de 12 de septiembre de 2022.

[77] Al respecto, el Estado arguyó, *inter alia,* que los representantes "no legalizaron la firma de las presuntas víctimas ante Notario Público", de acuerdo con "el requerimiento efectuado por la Corte" y "lo establecido en el artículo 50.1 del Reglamento".

[78] *Cfr*. *Caso Valencia Campos y otros Vs. Bolivia, supra*, párr. 45.

[79] *Cfr*. Declaraciones juradas de Juan 18, María 9 y María 25 (expediente de prueba folios 29014 a 29021; 29049 a 29059, y 29077 a 29083).

A. Sobre el Complejo Metalúrgico de La Oroya (CMLO) y el Programa de Adecuación y Manejo Ambiental (PAMA)

67. El distrito de La Oroya se encuentra ubicado en la Sierra Central del Perú, en el Departamento de Junín. Tiene una población de más de 33,000 habitantes. En 1922 se instaló el CMLO, operado por la compañía estadounidense Cerro de Pasco Cooper Corporation. Desde sus inicios, el CMLO se dedicó a la fundición y refinamiento de concentrados polimetálicos con altos contenidos de plomo, cobre, zinc, con contenidos de metales como plata, oro, bismuto, selenio, telurio, cadmio, antimonio, indio y arsénico. En 1974 el complejo metalúrgico fue nacionalizado y pasó a ser propiedad de la empresa estatal Empresa Minera del Centro del Perú, S.A. (en adelante "Centromin"), la cual operó el CMLO hasta 1997. En ese año, el CMLO fue adquirido por la empresa privada Doe Run Perú S.R.L. (en adelante también "Doe Run" o "DRP"), filial de la empresa estadounidense "The Renco Group, Inc."[80].

68. Entre 1922 y 1993 Perú no contaba con una legislación específica respecto del control ambiental y prevención de contaminación del sector minero-metalúrgico, sino que existían normas generales en distintos instrumentos que regulaban las obligaciones ambientales[81]. En 1993 se promulgó el Reglamento para la Protección Ambiental en la Actividad Minero Metalúrgica (en adelante también "Reglamento Minero-Metalúrgico")[82]. Dicho Reglamento estableció que las actividades minero-metalúrgicas debían contar con un Estudio de Impacto Ambiental (EIA)[83] o con un Programa de Adecuación y Manejo Ambiental (PAMA)[84], como medios para controlar los impactos de esas actividades en el medio ambiente. El artículo 5 del Reglamento Minero-Metalúrgico establece que el titular de la actividad minero-metalúrgica es "responsable por las emisiones, vertimientos y disposición de desechos al medio ambiente que se produzcan como resultado de los

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80 *Cfr.* Plan de Acción para el Mejoramiento de la Calidad del Aire y la Salud de La Oroya, aprobado por el Gesta Zonal del Aire, 1 de marzo de 2006 (expediente de prueba, folio 0.13); Ministerio de Energía y Minas, Oficio No. 693-2007/JUS/CNDH-SE de junio de 2007. Anexo al escrito del Estado de 12 de julio de 2007 aportado en el trámite de las medidas cautelares (expediente de prueba, folio .73 y .91); Gobierno de Perú, Libro Blanco sobre la privatización de Metaloroya S.A., 1999 (expediente de prueba, folios 19729 a 19792); FIDH, Perú: donde la inversión se protege por encima de los derechos humanos, 2013 (expediente de prueba, folios 20566, 20567 y 20570), y RPP Noticias. Caso Doe Run: La Oroya sería liquidada tras subastas frustradas, 26 de julio de 2017 (expediente de prueba, folio 20414).

81 *Cfr.* Activos Mineros S.A.C., Informe No. 008-2011-GO de 17 de marzo de 2011 (expediente de prueba, folio .45).

82 *Cfr.* Decreto Supremo No. 016-93-EM. Reglamento para la Protección Ambiental en la Actividad Minero-Metalúrgica. Diario Oficial El Peruano, de 1 de mayo de 1993 (expediente de prueba, folio .59). El Decreto Supremo N°016-93-EM fue derogado por el Decreto Supremo No. 040-2014-EM de 12 de noviembre de 2014 (expediente de prueba, folios 28611 a 28641).

83 El Reglamento definió los EIA como: "Estudios que deben efectuarse en proyectos para la realización de actividades en concesiones mineras, de beneficio, de labor general y de transporte minero, que deben evaluar y describir los aspectos físico-naturales, biológicos, socio-económicos y culturales en el área de influencia del proyecto, con la finalidad de determinar las condiciones existentes y capacidades del medio, analizar la naturaleza, magnitud y prever los efectos y consecuencias de la realización del proyecto, indicando medidas de previsión y control a aplicar para lograr un desarrollo armónico entre las operaciones de la industria minera y el medio ambiente".

84 El Reglamento definió el PAMA como: "Programa que contiene las acciones e inversiones necesarias para incorporar a las operaciones minero-metalúrgicas los adelantos tecnológicos y/o medidas alternativas que tengan como propósito reducir o eliminar las emisiones y/o vertimientos para poder cumplir con los niveles máximos permisibles establecidos por la Autoridad Competente".

procesos efectuados en sus instalaciones". Por su parte, el artículo 48 regula las sanciones en caso de incumplimiento de las obligaciones establecidas en el PAMA[85].

69. Centromin fue la empresa encargada de elaborar el primer PAMA del CMLO en 1996. El PAMA fijó las acciones e inversiones necesarias para reducir o eliminar las emisiones y/o vertimientos de sustancias para poder cumplir con los niveles máximos permitidos por la autoridad competente. Dicho PAMA fue aprobado el 13 de enero de 1997 por el Ministerio de Energía y Minas ("MINEM"), fijando un plazo para su ejecución de 10 años. Además, fijó un compromiso de inversión en programas de adecuación de USD $129.125.000 (ciento veintinueve millones ciento veinticinco mil dólares de los Estados Unidos de América)[86]. Dicho plan contenía un conjunto de proyectos orientados a cumplir con las obligaciones ambientales de la empresa[87]. Posteriormente, tras la adquisición del CMLO, Doe Run asumió el compromiso de cumplir con la mayor parte de las obligaciones establecidas en el PAMA, salvo aquellas que quedaron a cargo de Centromin[88].

B. Sobre las modificaciones al PAMA, el otorgamiento de prórrogas, y las actividades mineras desde el 2009 al 2023

B.1. Las modificaciones al PAMA

70. El PAMA fue modificado en múltiples ocasiones con posterioridad a su adopción en 1997. Con motivo de estas modificaciones se incrementaron progresivamente los

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[85] El Reglamento estableció que en caso de inclumplimiento del PAMA sin causa justificada podrían aplicarse las siguientes sanciones: (a) detectada la infracción se notificará al titular de la actividad minera-metalúrgica para que en plazo de 90 días cumpla con las disposiciones contenidas en el PAMA; (b) si vencido dicho plazo subsistiera el incumplimiento, la Dirección General de Minería ordenará el cierre de operaciones por un periodo de treinta días calendario, además de una multa de 10 Unidades Impositivas Tributarias (UIT); (c) en caso de verificarse por segunda vez el incumplimiento, el cierre de las operaciones se efectuará por un periodo adicional de 60 días calendario y la multa se incrementará a 20 UIT; (d) si el infractor, incumple el programa por tercera vez, el cierre será por un periodo adicional de 90 días calendario y la multa será de 30 UIT, y (e) de persistir el incumplimiento, la autoridad competente dispondrá el cierre de la operación por periodos adicionales de 90 días y el pago de la última multa impuesta. Para "casos graves" se podía aplicar el cierre definitivo de la unidad metalúrgica. El alcance de este artículo fue modificado por el artículo 1 del Decreto Supremo N° 058-990-EM del 24 de noviembre de 1999 y sustituido por el artículo 1 del Decreto Supremo N° 022-2002-EM del 4 de julio de 2002, excluyendo las sanciones por caso fortuito o fuerza mayor, y modificando los plazos de cumplimiento y multas reguladas.

[86] *Cfr.* Ministerio de Energía y Minas, Oficio No. 693-2007/JUS/CNDH-SE de junio de 2007. Anexo al escrito del Estado de 12 de julio de 2007 aportado en el trámite de las medidas cautelares (expediente de prueba, folios .71 a .116).

[87] En particular, el PAMA aprobado para el CMLO comprendía los siguientes proyectos, con sus respectivos montos de inversión: sobre Gases de Procesos: a) Planta de Ácido-Fundición de Cu (USD$ 41.200.000); b) Planta de Ácido-Fundición de Pb/Zn (USD$ 48.800.000); sobre Líquidos de Procesos: c) Efluentes Líquidos Industriales (USD$ 3.075.000); sobre Sólidos de Procesos: d) Nuevo Sistema de Manejo de Escorias Cu/Pb (USD$ 6.500.000); Nuevo Depósito de Escorias de Cu y Pb (USD$ 2.500.000); Abandono de Depósito de Escorias (USD$ 5.250.000); Nuevo Depósito de Trióxido de As (USD$ 2.000.000); Abandono de Depósito de Tróxido de As (USD$ 8.700.000); Abandono de Depósito de Ferritas (USD$ 5.600.000); sobre Emisiones Calidad de Aire: Revegetación del Área Afectada por los Humos (USD$ 2.000.000); sobre Salud Pública: Desague/Basuras (USD$ 3.500.000). *Cfr.* "Programa de Adecuación y Manejo Ambiental (PAMA) de la Fundación de La Oroya", Exposición de Jaime Quijandria Salmón, Ministro de Energía y Minas, abril de 2004 (expediente de prueba, folio .121).

[88] *Cfr.* Gobierno de Perú, Libro Blanco sobre la privatización de Metaloroya S.A., 1999 (expediente de prueba, folio 19741).

montos de inversión[89]; se modificó el cronograma de acciones e inversiones[90]; y se amplió el alcance de ciertos proyectos[91]. Así, para el año 2004, el PAMA estaba compuesto por los siguientes proyectos y tenía los siguientes porcentajes de cumplimiento: a) Planta de Ácido Sulfúrico (con una inversión programada de USD$ 107.564.000, y un nivel de cumplimiento del 7.4%); b) Planta Tratamiento Agua Madre Refinería de Cobre (con una inversión programada de USD$ 5.548.000, y un nivel de cumplimiento del 44%); c) Planta Tratamiento Efluentes Líquidos (industriales) (con una inversión programada de USD$ 33.760.000, y un nivel de cumplimiento del 35%); d) Manipuleo de Escorias Cobre y Plomo (con una inversión programada de USD 9.618.000, y un nivel de cumplimiento del 101%); e) Adecuación Ambiental del Depósito de Escorias de Huanchán (Depósito de Escorias de Cobre y Plomo) (con una inversión programada de USD$ 841.000, y un nivel de cumplimiento del 138%); f) Depósito de Trióxido de Arsénico de Vado (con una inversión de USD$ 2.398.000, y un nivel de cumplimiento del 101%); g) Acondicionamiento del Depósito de Ferritas de Huanchán (Depósito de Ferritas de Zinc) (con una inversión programada de USD$ 1.825.000, y un nivel de cumplimiento del 94%); h) Aguas Servidas Eliminación de Basura (con una inversión programada de USD$ 11.727.000, y un nivel de cumplimiento del 20%), e i) Estación de Monitoreo y Aerografía (con una inversión programada de USD$ 672.000, y un nivel de cumplimiento del 93%)[92].

B.2. El otorgamiento de prórrogas para el cumplimiento del PAMA

71. El 20 de diciembre de 2005 Doe Run presentó una solicitud de prórroga excepcional para el cumplimiento de sus compromisos establecidos en el PAMA, con fundamento en el Decreto Supremo No. 046-2004-EM[93]. Doe Run manifestó su imposibilidad de cumplir con la ejecución del Proyecto "Plantas de Ácido Sulfúrico" —las cuales debían implementarse para la fundición de plomo y de cobre—[94], por razones técnico-económicas y financieras originadas por "las condiciones desfavorables del mercado de metales en los años 2002 - 2003". Señaló que se completaría la "puesta en servicio de tres plantas de ácido sulfúrico en forma progresiva en los años 2006, 2008 y

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89 Originalmente se designó una inversión de USD$ 129.125.000 el cual incrementado mediante las resoluciones No. 325-97-EM/DGM de 06 de octubre de 1997; No. 178-99-EM/DGM de 19 de octubre de 1999; No 133-2001-EM/DGAA, de 10 de abril de 2001 y No. 28-2002-EM/DGAA de 25 de enero de 2002. Esta última resolución estableció un monto de inversión de USD$ 173.953.000 , lo que significa que entre 1997 y 2002 se aprobó un aumento de la inversión de USD$ 44.828.000. *Cfr.* Modificaciones al PAMA del Complejo Metalúrgico de la Fundición de La Oroya (expediente de prueba, folios .160 a .165).

90 *Cfr.* Modificaciones al PAMA del Complejo Metalúrgico de la Fundición de La Oroya (expediente de prueba, folio .160), y Resolución Directoral No. 325-97-EM/DGM de fecha 6 de octubre de 1997 (expediente de prueba, folio 27565).

91 *Cfr.* Modificaciones al PAMA del Complejo Metalúrgico de la Fundición de La Oroya (expediente de prueba, folio .161); Resolución Directoral No. 082-2000-EM-DGAA de 17 de abril de 2000; Resolución Directoral No. 1333-2001-EM/DGAA de 10 de abril de 2000, y Resolución Directoral N°28-2002-EM/DGAA de 23 de enero del 2002 (expediente de prueba, folio 19939).

92 *Cfr.* Modificaciones al PAMA del Complejo Metalúrgico de la Fundición de La Oroya (expediente de prueba, folio .164), y "Programa de Adecuación y Manejo Ambiental (PAMA) de la Fundición de La Oroya" Exposición de Jaime Quijandria Salmón, entonces Ministro de Energía y Minas, abril de 2004 (expediente de prueba, folios .118 a .134)

93 *Cfr.* Ministerio de Energía y Minas, Decreto Supremo No. 046-2004-EM de 29 de diciembre de 2004 (expediente de prueba, folio 20037).

94 *Cfr*. *Doe Run Perú*, Solicitud de prórroga excepcional del plazo de cumplimiento para el proyecto plantas de ácido sulfúrico, de diciembre de 2005 (expediente de prueba, folio 19962).

2010"[95]. Así, el 29 de mayo de 2006 el MINEM aprobó en parte la solicitud de prórroga excepcional del PAMA, y estableció como plazo de culminación el mes de octubre de 2009. La Resolución señaló que la empresa debía cumplir con el proyecto "Plantas de Ácido Sulfúrico" y las medidas especiales y complementarias aprobadas[96].

72. En junio de 2009, meses antes de que venciera el plazo para el cumplimiento de las obligaciones asumidas en el PAMA por Doe Run, la empresa paralizó totalmente sus operaciones debido a problemas financieros, y se sometió a un proceso de reestructuración de pasivos[97]. En virtud de ello solicitó una nueva prórroga del PAMA para la realización del proyecto "Planta de Ácido Sulfúrico" y "Modificación del Circuito de Cobre" por un periodo de treinta meses adicionales[98]. Dicha paralización dio lugar a que diversos trabajadores solicitaran a la Defensoría del Pueblo que "intercediera" para lograr "mayor celeridad en flexibilización razonable del PAMA para [alcanzar una] solución integral y sostenible que garantice respeto a los derechos de los trabajadores de Doe Run […] y de la población oroína"[99]. También llevaron a cabo una huelga de noventa y tres días[100], bloqueando la carretera central, cuyo desalojo produjo cuatro heridos y diez trabajadores detenidos[101].

73. En ese contexto se otorgó la segunda prórroga del PAMA el 26 de septiembre de 2009, y se determinó la ampliación del plazo para el financiamiento y la culminación de los proyectos por medio de la Ley No. 29410[102]. Esa ley otorgó un plazo máximo improrrogable de diez meses para el financiamiento de los proyectos, y un plazo máximo improrrogable de veinte meses para su construcción y puesta en marcha. Asimismo, estableció que Doe Run se encontraba obligada a presentar las garantías que respaldaran el cumplimiento íntegro de sus obligaciones respecto del PAMA[103].

B.3. Actividades mineras en el CMLO desde el 2009 al 2023

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95 *Cfr. Doe Run Perú,* Solicitud de prórroga excepcional de plazo de cumplimiento para el proyecto de plantas de ácido sulfúrico, de diciembre de 2005 (expediente de prueba, folios 19956 y 20038).

96 *Cfr.* Ministerio de Energía y Minas, Resolución Ministerial No. 257-2006 de 29 de mayo de 2006 (expediente de prueba, folios .179 a .186).

97 *Cfr.* Diario El Comercio. "Doe Run Perú: cronología de la minera que paraliza al 100% sus operaciones tras 11 años en crisis", 20 de febrero de 2020 (expediente de prueba, folio 20095).

98 *Cfr.* Ministerio de Energía y Minas, Informe No. 771-2009-MEM-DGM/DNM de 17 de julio de 2009 (expediente de prueba, folio .190).

99 *Cfr.* Comité de la Defensa de la Oroya, Oficio N° 048-CDLO/2009 de 10 de agosto de 2009, dirigido al presidente del Congreso de la República (expediente de prueba, folio 20887).

100 *Cfr.* Organismo de Evaluación y Fiscalización Ambiental (OEFA), Ayuda Memoria "Periodo de paralizaciones del CMLO", 28 de enero de 2016 (expediente de prueba, folio .211).

101 *Cfr.* Diario El Comercio. "Doe Run Perú: cronología de la minera que paraliza al 100% sus operaciones tras 11 años en crisis", 20 de febrero de 2020 (expediente de prueba, folio 20095).

102 *Cfr*. Ley Nº 29410, "Ley que prorroga el plazo para el financiamiento y la culminación del proyecto planta de ácido sulfúrico y modificación del circuito de cobre del complejo metalúrgico de La Oroya" de 26 de septiembre de 2009 (expediente de prueba, folio 20090).

103 *Cfr*. Ley Nº 29410, "Ley que prorroga el plazo para el financiamiento y la culminación del proyecto planta de ácido sulfúrico y modificación del circuito de cobre del complejo metalúrgico de La Oroya" de 26 de septiembre de 2009 (expediente de prueba, folio 20090).

74. El PAMA llegó a su fecha de vencimiento en el año 2010[104], sin que se culminaran las adecuaciones de los proyectos de planta de ácido sulfúrico y modificación del circuito de cobre[105]. Las actividades de Doe Run se paralizaron parcialmente de junio de 2009 a junio de 2012[106]. En julio de 2012, el MINEM autorizó el reinicio de actividades de los circuitos de zinc y plomo[107]. Entre los años 2014 al 2015 la producción del CMLO fue parcial respecto al ácido sulfúrico y ferritas[108]. En el año 2020 la Dirección General de Minería paralizó las actividades en el CMLO debido a un incumplimiento en la constitución de garantías[109]. Doe Run presentó las garantías necesarias para acreditar el cumplimiento del Plan de Cierre del Complejo Metalúrgico de La Oroya, y el MINEM resolvió levantar la paralización de las actividades del CMLO[110].

75. El 15 de enero de 2022 la Junta de Acreedores de Doe Run acordó transferir el CMLO a sus trabajadores como dación en pago, los cuales constituyeron la empresa Metalúrgica Business Perú S.A.A.[111]. El 12 de diciembre de 2022 la empresa solicitó el cambio de titularidad de los certificados, permisos, licencias y/o autorizaciones de titularidad de Doe Run. En el año 2023 la Dirección General de Minería resolvió levantar la paralización de las actividades mineras en el CMLO[112], con lo cual, la empresa Metalurgia Business Perú S.A. habría iniciado operaciones a cargo de los extrabajadores de Doe Run en octubre de 2023[113].

C. La contaminación ambiental en La Oroya y sus efectos en la población

76. La industria metalúrgica ha sido considerada como una de las principales fuentes de contaminación atmosférica en el Perú[114]. En el caso específico de la actividad en el CMLO, en 1970 se realizaron estudios sobre los efectos causados por las actividades de fundición y refinamiento que determinaron que la producción de dióxido de azufre (SO_2)

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104 *Cfr*. Ley No. 29410 "Ley que prorroga el plazo para el financiamiento y la culminación del proyecto planta de ácido sulfúrico y modificación del circuito de cobre del complejo metalúrgico de La Oroya" de 26 de septiembre de 2009 (expediente de prueba, folio 20090), y Decreto Supremo No. 075-2009-EM que reglamenta la Ley No. 29410, de 28 de octubre de 2009 (expediente de prueba, folios 27801 a 27809).

105 *Cfr*. Ministerio de Energía y Minas, Resolución Directoral 055-2010-MEM-AAM mediante la cual se aprueba el Plan de Cierre del Complejo Metalúrgico de La Oroya, de 10 de febrero de 2010 (expediente de prueba, folio 20248).

106 *Cfr.* Organismo de Evaluación y Fiscalización Ambiental (OEFA), Ayuda Memoria "Periodo de paralizaciones del CMLO", 28 de enero de 2016 (expediente de prueba, folio .210).

107 *Cfr.* Escrito de solicitudes, argumentos y pruebas (expediente de fondo, folio 135, nota al pie 48), y Ministerio de Energía y Minas, Informe No. 1090-2023-MINME/OGAJ de 26 de octubre de 2023 (expediente de prueba, folios 30249 a 30258).

108 *Cfr.* Organismo de Evaluación y Fiscalización Ambiental (OEFA), Ayuda Memoria "Periodo de paralizaciones del CMLO", 28 de enero de 2016 (expediente de prueba, folio .211).

109 *Cfr.* Escrito de solicitudes, argumentos y pruebas (expediente de fondo, folio 138).

110 *Cfr.* Ministerio de Energía y Minas, Resolución Directoral No. 443-2020-MINEM de 8 de julio de 2020 (expediente de prueba, folios 20132 a 20141).

111 *Cfr.* Ministerio de Energía y Minas, Informe No. 1090-2023-MINME/OGAJ de 26 de octubre de 2023 (expediente de prueba, folio 30257).

112 *Cfr.* Ministerio de Energía y Minas, Informe No. 1090-2023-MINME/OGAJ de 26 de octubre de 2023 (expediente de prueba, folio 30255).

113 *Cfr.* Escrito de observaciones de la Comisión Interamericana de Derechos Humanos de 27 de octubre de 2023 (expediente de fondo, folio 1983).

114 *Cfr.* Oficina Nacional de Evaluación de Recursos Naturales (ONERN) y Agencia para el Desarrollo Internacional (AID), "El Perfil Ambiental del Perú", 1986 (expediente de prueba, folios 18228 a18231).

estaba afectando la vegetación en un área estimada de 30,200 hectáreas[115]. Los efectos ambientales de dicha actividad eran producidos por la emanación de gases y partículas en suspensión, cuya acumulación afectaba el suelo y el agua en La Oroya y las zonas adyacentes[116]. La contaminación atmosférica ha estado presente en La Oroya desde los inicios de la operación del CMLO en 1922, y en el año 2006 fue catalogada como una de las 10 ciudades más contaminadas del mundo[117]. Asimismo, se ha demostrado que el 99% de los contaminantes atmosféricos en La Oroya han sido producidos por las actividades en el CMLO[118].

77. Al menos desde 1999 se realizaron diversos estudios e informes que establecieron el alcance de la contaminación en La Oroya y los efectos en su población. En un estudio realizado entre el 23 y el 30 de noviembre de 1999, la Dirección General de Salud Ambiental del Ministerio de Salud (en adelante también, "DIGESA") señaló que las concentraciones contaminantes en el aire en La Oroya superaban "considerablemente" los respectivos lineamientos de la "Calidad del Aire" para dióxido de azufre, las Partículas Totales en Suspensión (PTS), las Partículas Menores a 10 Micrones (PM10), y que la concentración de plomo en el aire era 17.5 veces superior al estándar trimestral de plomo de la Agencia de Protección Ambiental de los Estados Unidos (en adelante también "EPA"). Además, afirmó que la concentración de plomo en el agua era hasta 70 veces el límite permitido según la Ley de Aguas, así como que los contaminantes del aire y del suelo se encontraban depositados en este último, y por lo tanto también en las plantas y los animales[119]. Asimismo, se ha demostrado que la contaminación ambiental produjo la presencia de plomo en la sangre de la población, la cual superaba tres veces el límite establecido por la Organización Mundial de la Salud (en adelante también "OMS")[120].

78. En el año 2003, el Diagnóstico de Línea Base de la Calidad del Aire de La Oroya elaborado por el gobierno local de la Provincia de Yalili, concluyó que la principal fuente de emisión de contaminantes en la ciudad de La Oroya era el CMLO operado por la empresa Doe Run[121]. También concluyó que existían niveles "considerables" de contaminantes tóxicos en la cuenca atmosférica, los cuales superaban los estándares nacionales de calidad ambiental de aire. El mismo estudio estableció que el deterioro

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115 *Cfr.* Oficina Nacional de Evaluación de Recursos Naturales (ONERN) y Agencia para el Desarrollo Internacional (AID), "El Perfil Ambiental del Perú", 1986 (expediente de prueba, folio 18230).

116 *Cfr.* Oficina Nacional de Evaluación de Recursos Naturales (ONERN) y Agencia para el Desarrollo Internacional (AID), "El Perfil Ambiental del Perú", 1986 (expediente de prueba, folio 18230).

117 *Cfr.* The Blacksmith Institute, New York, "The World's Worst Polluted Places-The top 10", septiembre de 2006 (expediente de prueba, folio .230).

118 *Cfr*. Consejo Nacional del Ambiente (CONAM), Decreto del Consejo Directivo No. 020-2006-CONAM/CD, "Plan de Acción para la Mejora de la Calidad del Aire en la Cuenca Atmosférica de La Oroya", de 23 de junio de 2006, publicado el 2 de agosto de 2006 (expediente de prueba, folio .401).

119 *Cfr.* Dirección General de Salud Ambiental del Ministerio de Salud, "Estudio de Plomo en Sangre en una Población Seleccionada de La Oroya" de noviembre de 1999 (expediente de prueba, folio .489), y The Blacksmith Institute, New York, "The World's Worst Polluted Places-The top 10", septiembre de 2006 (expediente de prueba, folio .245).

120 *Cfr.* Dirección General de Salud Ambiental del Ministerio de Salud, "Estudio de Plomo en Sangre en una Población Seleccionada de La Oroya", de noviembre de 1999 (expediente de prueba, folios .485 a .543); The Blacksmith Institute, New York, "The World's Worst Polluted Places-The top 10", septiembre de 2006 (expediente de prueba, folio .245); Consorcio Unión para el Desarrollo Sustentable (UNES), "Evaluación de Niveles de Plomo y Factores de Exposición en Gestantes y Niños Menores de tres años de la Ciudad de La Oroya", de marzo del 2000 (expediente de prueba, folio .411), y Doe Run Perú, "Estudio de niveles de plomo en la sangre de la población de La Oroya 2000-2001", de 2001 (expediente de prueba, folio .473).

121 *Cfr*. Consejo Nacional del Ambiente (CONAM), "Diagnóstico de línea de base de calidad de La Oroya", conducido por la Gesta Zonal del Aire de La Oroya, de 2004 (expediente de prueba, folio 0.397).

progresivo de la calidad del aire "tiene correlación con el incremento en las Infecciones Respiratorias Agudas", y que los principales afectados por estas infecciones son los niños y niñas que residen en la cuenca de La Oroya[122]. En ese mismo sentido, el Ministerio de Salud realizó un censo hemático en el primer trimestre de 2005, en el que analizó muestras de 788 niños y niñas menores de seis años que vivían en el sector de La Oroya Antigua y estableció que el 99.9% tenían niveles de plomo por encima del límite máximo recomendado por la OMS[123].

79. En junio de 2005 el Ministerio de Salud advirtió la prevalencia de enfermedades respiratorias en niños entre 3 y 14 años en La Oroya entre 2002 y 2003[124], resaltando que "[c]uando los niveles de contaminación del aire sobrepasan los límites permisibles pueden causar o agravar problemas respiratorios o cardiovasculares en la población más vulnerable". En tal sentido, destacó que las principales fuentes fijas de contaminación eran las instalaciones minero metalúrgicas que generan emisiones, es decir, la fundición de plomo que se encontraba en La Oroya Antigua y la refinería ubicada en La Oroya Nueva. Asimismo, señaló que en dicha región, "las afecciones respiratorias en los niños [y niñas eran] un problema de salud con una tendencia creciente en la morbilidad y mortalidad". También concluyó que el 90% de los escolares muestreados estudiaban y vivían en zonas de alta y mediana exposición a fuentes de contaminación del aire [125]. De acuerdo con el "Censo Hemático del Plomo y Evaluación Clínica-Epidemiológica en poblaciones seleccionadas de La Oroya", realizado por la DIGESA en el 2005, el 99% de los niños menores de 6 años habían presentado niveles de plomo por encima de los valores de referencia de la OMS[126].

80. En junio de 2007 la Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología del Congreso de la República emitió un informe parlamentario en el que concluyó que "[e]n La Oroya se vive una situación de contaminación permanente por la Fundición del [CMLO], que est[aba] afectando la vida de todos sus habitantes, especialmente de los grupos vulnerables como niños, niñas y mujeres en edad gestacional". Tomando en consideración estudios de DIGESA y Centro de Prevención y Control de Transmisión de Enfermedades de los Estados Unidos (en adelante también "CDC"), se estimó que el problema de salud pública en La Oroya representaba "un peligro inminente para la vida y salud de las personas". Por lo que consideró necesario que las autoridades competentes ejecutaran "medidas efectivas e integrales de protección de la vida"[127].

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122 *Cfr*. Consejo Nacional del Ambiente (CONAM), "Diagnóstico de línea de base de calidad de La Oroya", conducido por la Gesta Zonal del Aire de La Oroya, de 2004 (expediente de prueba, folio 0.397).

123 *Cfr*. Ministerio de Salud, Dirección General de Salud Ambiental, "Censo Hemático del Plomo y Evaluación Clínica-Epidemiológica en poblaciones seleccionadas de La Oroya Antigua", de 2005 (expediente de prueba, folios .479 a .481).

124 *Cfr*. Ministerio de Salud, "Prevalencia de las Enfermedades Respiratorias en Niños Escolares de 3-14 años y factores asociados a la calidad del aire, La Oroya, Junín, Perú. 2002-2003", de junio de 2005 (expediente de prueba, folios .552 a .568).

125 *Cfr*. Ministerio de Salud, "Prevalencia de las Enfermedades Respiratorias en Niños Escolares de 3-14 años y factores asociados a la calidad del aire, La Oroya, Junín, Perú. 2002-2003", de junio de 2005 (expediente de prueba, folios .552 a .568).

126 *Cfr*. Ministerio de Salud, Dirección General de Salud Ambiental, "Censo Hemático del Plomo y Evaluación Clínica-Epidemiológica en poblaciones seleccionadas de La Oroya Antigua", de 2005 (expediente de prueba, folio .480).

127 *Cfr*. Congreso de la República, Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología, "El problema de salud pública ambiental en La Oroya", de junio de 2007 (expediente de prueba, folio .666).

81. El 19 de julio de 2010 se presentó la "Evaluación de metales tóxicos en muestras biológicas antes y después del cierre del complejo Doe Run Perú". En dicha evaluación señaló que el cierre temporal de las operaciones del CMLO, ocurrido en el año 2009, disminuyó las emisiones contaminantes, y como consecuencia los niveles de metales tóxicos en los pobladores de La Oroya, salvo en el caso del cadmio[128]. El informe concluyó que "[l]a persistencia del plomo, cadmio y arsénico en el cuerpo humano y en el ambiente se debe muy probablemente a la acumulación histórica de estos metales tóxicos en La Oroya que incluye el periodo anterior a la adquisición del complejo por Doe Run Perú en 1997 y los 12 años en los que el complejo ha operado bajo responsabilidad del DRP (1997-2009)"[129].

82. En diciembre de 2011 y julio de 2013 la Dirección de Supervisión del Organismo de Evaluación y Fiscalización Ambiental (OEFA) realizó visitas de supervisión al CMLO, específicamente la ex unidad minera La Oroya, donde recolectó muestras de agua subterránea adyacente a los Depósitos de Tróxido de Arsénico de Malpaso y de Vado, ubicadas en las cercanías del río Mantaro, cuya remediación se encontraba a cargo de Activos Mineros S.A.C. De estas muestras concluyó que existían altas concentraciones de arsénico en dos puntos de control, y que esto evidenciaría que "el agua subterránea habría tenido contacto con el material encapsulado de los Depósitos de Trióxido de Arsénico, debido a una filtración por fallas actuales en el cierre de estos componentes". En razón de ello, concluyó que no se habría cumplido con las medidas de mitigación ambiental para que dichos componentes de acuerdo con lo establecido en el instrumento de gestión ambiental[130].

83. Entre el 1 y 28 de febrero de 2017 el Organismo de Evaluación y Fiscalización Ambiental (OEFA) realizó un monitoreo y vigilancia de la calidad del aire en la ciudad de La Oroya, aproximadamente a 700 metros del CMLO. Dicho monitoreo mostró el 2 de febrero de 2017 que la concentración promedio diaria superó el valor del Estándar de Calidad Ambiental para SO_2 igual a 365 $\mu g/m^3$ para 24 horas. El OEFA constató que los parámetros de SO_2 también habían excedido el ECA respectivo los días 10 y 11 de diciembre de 2016 y el 17 y 21 de enero de 2017[131].

84. Para el año 2017, un estudio concluyó que las emisiones de plomo, cadmio y arsénico ocasionados por las actividades del CMLO durante 87 años de vida productiva habían afectado alrededor de 2300 kilómetros cuadrados de suelo en la región central, de forma que la concentración de plomo se encontraba en el suelo en valores tan altos que pueden superar en 87% el límite máximo permitido. En lo que respecta al contenido de plomo en el agua del rio Mantaro, el estudio determinó que los niveles de presencia de este componente en la zona del depósito de escorias de Huanchan no permitía la vida acuática, tenía un impacto en el suelo, y no era apta para el riego o la bebida de

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128 *Cfr.* Fernando Serrano, "Evaluación de Metales Tóxicos en muestras biológicas antes y después del cierre del Complejo Doe Run Peru en la Oroya", de 19 de Julio de 2010 (expediente de prueba, folio .639).

129 *Cfr.* Fernando Serrano, "Evaluación de Metales Tóxicos en muestras biológicas antes y después del cierre del Complejo Doe Run Peru en la Oroya", de 19 de Julio de 2010 (expediente de prueba, folio .639).

130 *Cfr.* Ministerio de Ambiente, Organismo de Evaluación y Fiscalización Ambiental, Resolución Directoral No. 1706-2017-OEFA/DFSAI, de 22 de diciembre de 2017 (expediente de prueba, folios 23140, 23145, 23146).

131 *Cfr*. Ministerio de Ambiente, Organismo de Evaluación y Fiscalización Ambiental, Informe No. 15-2017-OEFA/DE-SDCA-CMVA, de 10 de abril de 2017 (expediente de prueba, folios 21862 a 21907).

animales[132].

D. La situación de salud de las presuntas víctimas

85. La Corte recuerda que el presente caso se refiere a 80 presuntas víctimas[133] que se agrupan en 17 familias, y 6 personas individuales, de los cuales 38 son mujeres y 42 hombres. Todas las presuntas víctimas han habitado en La Oroya en fechas posteriores a la instalación del CMLO en 1922, y seis de ellas han fallecido: María 14 y 38, y Juan 5, 12, 19 y 40. Debido a la importancia que tiene la evaluación de las circunstancias específicas de cada una de las presuntas víctimas, y como se ha hecho en otros casos[134], el Anexo 3 de la presente Sentencia contiene una relación de los hechos probados respecto al análisis de los padecimientos y el tratamiento médico otorgado a cada una de ellas, así como de las circunstancias particulares de quienes han fallecido.

E. Sobre la acción de cumplimiento del Tribunal Constitucional, las medidas cautelares otorgadas por la Comisión Interamericana, y las medidas adoptadas por el Estado en cumplimiento de dichas decisiones

E.1. Sobre la acción de cumplimiento y la decisión del Tribunal Constitucional

86. El 6 de diciembre de 2002 los señores Juan 7, María 11, y otras cuatro personas (en adelante, "los demandantes") presentaron una acción de cumplimiento contra el Ministerio de la Salud y la Dirección General de Salud Ambiental ante el Vigésimo Segundo Juzgado Civil de Lima. En su demanda solicitaron la protección del derecho a la salud y a un medio ambiente saludable de la población de La Oroya, mediante el diseño e implementación de una "estrategia de salud pública de emergencia" que permita mitigar y remediar el estado de salud de los pobladores; la declaración de "estados de alerta", y el establecimiento de "programas de vigilancia epidemiológica y ambiental"[135]. La demanda se sustentó en estudios relacionados con los impactos en la salud y el medio ambiente de la actividad del CMLO en La Oroya[136].

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132 *Cfr.* Siles Arce y Marilú Calderón, "Suelos contaminados con plomo en la Ciudad de La Oroya Junín y su impacto en las aguas del Río Mantaro", *Rev. Del Instituto de Investigación. FIGMM-UNMSM* vol. 20, No. 40, 2017 (expediente de prueba, folio 20815).

133 Las presuntas víctimas del presente caso han solicitado utilizar los pseudónimos "María" y "Juan": Juan 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, María 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, y 38.

134 *Cfr. Caso Cuscul Pivaral y otros Vs. Guatemala, supra*, párr. 55; *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, *supra*, nota al pie 29, y *Caso Integrantes y Militantes de la Unión Patriótica Vs. Colombia. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 27 de julio de 2022. Serie C No. 455, párr. 149.

135 *Cfr.* Demanda de Acción de Cumplimiento, interpuesta el 6 de diciembre de 2002 (expediente de prueba, folio .783).

136 Los referidos estudios aluden a: 1) el "Estudio de Plomo en Sangre en una Población Seleccionada de La Oroya" elaborado por DIGESA en 1999; 2) el "Estudio de Niveles de Plomo en Sangre de la Población en La Oroya 2000-2001" por Doe Run, y 3) la "Evaluación de Niveles de Plomo y Factores de Exposición en Gestantes y Niños Menores de tres años de la Ciudad de La Oroya" por el Consorcio Unión para el Desarrollo Sustentable. *Cfr.* Demanda de Acción de incumplimiento, interpuesta el 6 de diciembre de 2002 (expediente de prueba, folio .786).

87. El 1 de abril de 2005, el Vigésimo Segundo Juzgado Civil de Lima concedió la acción de cumplimiento[137]. No obstante, el 14 de abril de 2005 la Procuradora Pública apeló la sentencia[138]. El 11 de octubre de 2005 la Primera Sala Civil de la Corte Superior de Justicia de Lima resolvió revocar la decisión apelada y declaró improcedente la acción de cumplimiento, señalando *inter alia* que la controversia "requiere de un análisis probatorio complejo, que no es posible en la vía constitucional"[139]. Por tanto, los demandantes interpusieron un recurso de agravio constitucional contra de la referida sentencia. El 12 de mayo de 2006 el Tribunal Constitucional declaró parcialmente fundada la demanda de cumplimiento y ordenó la adopción de las siguientes medidas[140]:

1. Ordena que el Ministerio de Salud, en el plazo de treinta (30) días, implemente un sistema de emergencia para atender la salud de las personas contaminadas por plomo en la ciudad de La Oroya, debiendo priorizar la atención médica especializada de niños y mujeres gestantes, a efectos de su inmediata recuperación, conforme se expone en los fundamentos 59 a 61 de la presente sentencia, bajo apercibimiento de aplicarse a los responsables las medidas coercitivas establecidas en el Código Procesal Constitucional.
2. Ordena que el Ministerio de Salud, a través de la Dirección General de Salud Ambiental (Digesa), en el plazo de treinta (30) días, cumpla con realizar todas aquellas acciones tendentes a la expedición del diagnóstico de línea base, conforme lo prescribe el artículo 11° del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental del Aire, de modo tal que, cuanto antes, puedan implementarse los respectivos planes de acción para el mejoramiento de la calidad del aire en la ciudad de La Oroya.
3. Ordena que el Ministerio de Salud, en el plazo de treinta (30) días, cumpla con realizar todas las acciones tendientes a declarar el Estado de Alerta en la ciudad de La Oroya, conforme lo disponen los artículos 23 y 25 del Decreto Supremo 074-2001-PCM y el artículo 105 de la Ley 26842.
4. Ordena que la Dirección General de Salud Ambiental (Digesa), en el plazo de treinta (30) días, cumpla con realizar acciones tendientes a establecer programas de vigilancia epidemiológica y ambiental en la zona que comprende a la ciudad de La Oroya.
5. Ordena que el Ministerio de Salud, transcurridos los plazos mencionados en los puntos precedentes, informe al Tribunal Constitucional respecto de las acciones tomadas para el cumplimiento de lo dispuesto en la presente sentencia[141].

88. El TC señaló, como parte de sus fundamentos, que desde 1999 la Dirección General de Salud Ambiental había acreditado en La Oroya altos niveles de contaminación del aire y de plomo en la sangre de la población. El TC notó que en los 7 años que habían transcurrido desde el informe de la Dirección General de Salud Ambiental, el Ministerio de Salud no había implementado un sistema de emergencia para proteger y recuperar la salud de la población afectada. En ese sentido, destacó que la grave situación de salud de los niños y mujeres gestantes contaminados exigía una intervención concreta y

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137 *Cfr.* Vigésimo Segundo Juzgado Civil de Lima, Resolución No. 14, de 1 de abril de 2005 (expediente de prueba, folios .810 y .811).

138 *Cfr.* Vigésimo Segundo Juzgado Civil de Lima, Resolución No. 14, de 1 de abril de 2005 (expediente de prueba, folio .819).

139 *Cfr.* Primera Sala de la Corte Superior de Justicia, Sentencia de 11 de octubre de 2005 (expediente de prueba, folio .815).

140 *Cfr.* Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio .839).

141 Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio 0.839).

eficiente, y que el Ministerio de Salud era "el principal responsable de la recuperación inmediata de la salud de los pobladores afectados"[142].

E.2. Sobre las medidas cautelares otorgadas por la Comisión Interamericana

89. El 21 de noviembre de 2005 los representantes presentaron una solicitud de medidas cautelares para proteger el derecho a la vida, integridad personal y salud de 66 residentes de La Oroya, por efecto de la contaminación generada en el CMLO[143]. El 31 de agosto de 2007 la Comisión otorgó medidas cautelares a favor de 65 habitantes de La Oroya, entre ellos niños y niñas, ordenando al Estado peruano que:

> Adopt[ara] las medidas pertinentes para brindar un diagnóstico médico especializado para los beneficiarios identificados en la presente solicitud de medidas cautelares;
> Prove[yera] el tratamiento médico especializado y adecuado para aqu[e]llas personas cuyo diagnóstico demuestre que se encuentran en una situación de peligro de daño irreparable para su integridad personal o su vida[,] y
> Efect[uara] las coordinaciones pertinentes con los peticionarios y los beneficiarios para la implementación de las medidas cautelares[144].

90. El 1 de septiembre de 2010 los representantes solicitaron a la Comisión que ampliara la medida cautelar a favor de 14 personas quienes eran, en su mayoría, "parientes cercanos de los beneficiarios" y "residentes de La Oroya"[145]. El 3 de mayo de 2016 la Comisión otorgó una ampliación de las medidas cautelares a favor de las mencionadas 14 personas, solicitando al Estado peruano que:

> Adopt[ara] las medidas necesarias para preservar la vida y la integridad de María 29, María 30, María 31, María 32, María 33, María 34, María 35, María 36, María 37, María 38, Juan 39, Juan 40, Juan 41, y Juan 42, realizando las valoraciones médicas necesarias para determinar los niveles de plomo, cadmio y arsénico en la sangre, a fin de suministrar atención médica adecuada, de acuerdo a estándares internacionales aplicables a la materia;
> Con[certará] las medidas a adoptarse con los beneficiarios y sus representantes[,] e
> Infor[mará] sobre las acciones adoptadas a fin de investigar los hechos que dieron lugar a la ampliación de la presente medida cautelar y así evitar su repetición[146].

91. Las medidas cautelares otorgadas por la Comisión se encuentran vigentes.

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142 Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folios 0.831, 0.834, 0.836 a 0.838).

143 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folio 12).

144 *Cfr*. Comunicación de la Comisión Interamericana de 31 de agosto de 2007 (expediente de prueba, folios 11362 a 11364).

145 *Cfr*. Comisión Interamericana, MC 271-05. Comunidad La Oroya respecto a Perú. Resolución No. 29/2016 de 3 de mayo de 2016 (expediente de prueba, folio 16573).

146 *Cfr*. Comisión Interamericana, MC 271-05. Comunidad La Oroya respecto a Perú. Resolución No. 29/2016 de 3 de mayo de 2016 (expediente de prueba, folio 16578).

E.3. Sobre las acciones tomadas por el Estado para remediar la contaminación y sus efectos en la Oroya con posterioridad a las decisiones del TC y de la Comisión Interamericana

92. El Estado adoptó una serie de medidas con posterioridad a la decisión del Tribunal Constitucional del 12 de mayo de 2006 y de la Comisión Interamericana de 31 de agosto de 2007. Estas medidas se dirigieron a abordar los siguientes aspectos: a) la implementación de un sistema de emergencia para atender la salud; b) la adopción de medidas para el mejoramiento de la calidad del aire y el establecimiento de estados de alerta ambiental, y c) la implementación de procesos de remediación y fiscalización ambiental. La Corte se referirá a los aspectos centrales de dichas medidas adoptadas en el análisis de fondo de la presente Sentencia (*infra* Capítulo VIII-2)

F. De los alegados actos de hostigamiento en perjuicio de algunas presuntas víctimas

93. En el año 2002, habitantes de La Oroya conformaron el Movimiento por la Salud de La Oroya (en adelante "el MOSAO"). Las presuntas víctimas Juan 1, Juan 6, Juan 7, Juan 11, Juan 12, Juan 13, Juan 17, Juan 18, Juan 19, María 1, María 3, María 6, María 11, y María 13, fueron parte de las personas que integraron el MOSAO. El objetivo de la organización era procurar por la protección de la salud de la población. El MOSAO creó una Mesa Técnica, integrada por organizaciones de la sociedad civil y las iglesias católica y presbiteriana. Esta ha realizado protestas y ha denunciado la ocurrencia de actos de intimidación contra algunos de sus miembros[147].

94. El 17 de marzo de 2004 algunas de las presuntas víctimas que integran el MOSAO organizaron un plantón como medida de protesta contra la ampliación del PAMA. Dicho plantón fue dispersado por algunos trabajadores de la empresa quienes veían a la Doe Run Perú como "generadora de fuente de trabajo". En el marco del plantón, trabajadores del Complejo Metalúrgico y otros habitantes de La Oroya, quemaron las "bandoleras y panfletos" del MOSAO[148]. Por ello, el 28 de abril de 2004 los representantes del MOSAO denunciaron "el delito de coacción […] puesto que en forma diaria estamos siendo objeto de agresiones de diferentes indóle en perjuicio de la integridad física y psicológica de los integrantes del movimiento y de los integrantes de la Mesa Técnica que asesora al MOSAO". Dicha denuncia fue presentada ante el Sub Prefecto de la Provincia de Yalui[149], sin que recibiera respuesta alguna.

95. El 31 de agosto de 2006, el Secretario Ejecutivo Regional y miembros del Consejo Nacional del Ambiente (en adelante "el CONAM"), designado con la tarea de implementar un Plan de Contingencia para reducir los altos niveles de plomo del CMLO, denunció publicamente que habían sido amenazados por un grupo de personas que defendían las actividades de la empresa Doe Run Perú con "arrojarlos al río Mantaro", por lo que tuvo

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147 *Cfr.* Carta dirigida al Ministro del Interior, suscrita por Juan Aste Daffos, Coordinador de la Mesa Técnica del MOSAO, de 14 de mayo de 2004 (expediente de prueba, folio 25987); Nota dirigida a la Dirección General de Gobierno Interior, suscrita por María 1, de 24 de abril de 2012 (expediente de prueba, folio .1407); Sindicato Trabajadores Metalúrgicos en contra del Mosao, Comunicado No. 43-S.T.M.O. de 16 de abril de 2004 (expediente de prueba, folio 25990); Declaración de Juan 6 (expediente de prueba, folio 28972), y; Expedientes de salud de las victimas asociadas a la exposición de metales tóxicos (expediente de prueba, folios 24275 a 24928), y Escrito de Solicitudes, Argumentos y Pruebas (expediente de fondo, folio 268).

148 *Cfr*. Nota de prensa "En histórico día pueblo oroíno respaldó licencia social otorgada a Doe Run" de marzo de 2004 (expediente de prueba, folio .1373).

149 *Cfr*. Denuncia presentada por María 13 al Fiscal de la Provincia de Yauli, La Oroya, de 23 de agosto de 2007 (expediente de prueba, folios .1376 a .1379).

que ser cancelada la instalación del Comité Técnico de Calidad del Aire[150].

96. Asimismo, el 16 de noviembre de 2007, algunas de las presuntas víctimas denunciaron ante el Ministerio de Justicia que "la crítica situación de hostigamiento y amenazas que ya se vivía en esta población [había] empeorado". En concreto, señalaron que algunos de los beneficiarios de las medidas cautelares dictadas por la Comisión habían sido fotografiados por trabajadores de la empresa y que sus casas fueron marcadas, mientras los abogados que los asesoraban eran amedrentados en reuniones o espacios públicos[151]. Dicha solicitud no recibió respuesta alguna.

97. El 15 de agosto de 2007, Juan 2 denunció ante el Fiscal de la Provincia de Yauli–La Oroya, que ese día se habían percibido altos niveles de emisiones del complejo metalúrgico que "siguen contaminando […] a los niños de [la] ciudad". El 17 de agosto de 2007 Juan 2 fue separado de su trabajo en la Defensoría Municipal del Niño y Adolecente (en adelante "el DEMUNA"). Al respecto, alegó publicamente que dicha decisión fue una represalia por los reclamos que realizó contra la empresa minera. Juan 2 indicó que su separación de la DEMUNA dos días después de su denuncia, fue "provocada" por parte de "dos regidores que trabaja[ban] para Doe Run Perú"[152].

98. El 13 de abril de 2012, el Diario La República informó que, tras la decisión mayoritaria de la Junta de Acreedores de Doe Run de declarar a la empresa en "liquidación en marcha", los trabajadores del CMLO, "amenaz[aron] a las personas que emprendieron la iniciativa de denunciar abiertamente la contaminación en la zona"[153]. El 24 de abril de 2012 María 1, quien además era miembro del MOSAO, denunció ante la Dirección General de Gobierno interior del Ministerio del Interior que "tem[ía] por su vida [tras haber] sido agredida verbalmente". Asimismo, indicó que, "en varias oportunidades", detractores de su trabajo como activista habían ido a su vivienda "a golpear [la] puerta". También señaló que había tenido que "refugiarse" en Lima luego de que trabajadores de Doe Run "incita[ran] a la violencia" en su contra[154]. No obra en el expediente prueba de que la denuncia de María 1 haya sido contestada.

99. El 22 de julio de 2019, la Subprefectura de la Provincia de Yauli-La Oroya dictó garantías personales a favor de María 11 y su esposo Juan 7, luego de que esta denunciara que el locutor de un programa emitido por "Radio Karisma", había usado dicha plataforma para realizar "expresiones difamatorias y amenazas" contra María 11 y su esposo, "incit[ando] a la población en [su] contra" y poniéndoles "en grave peligro"[155]. No obra en el expediente que se realizaran acciones de investigación posteriores respecto de dichos hechos.

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150 *Cfr*. Diario La República, "Impiden Instalación de comité ambiental en La Oroya", 31 de agosto de 2006 (expediente de prueba, folio .1381).

151 *Cfr*. Comunicación de las presuntas víctimas con la Ministra de Justicia de 9 de noviembre de 2007 (expediente de prueba, folios .1383 y .1384).

152 *Cfr*. Coordinadora Nacional de Radio, "Acusan a Doe Run por retiro de representante de MOSAO de DEMUNA en La Oroya", 23 de agosto de 2007 (expediente de prueba, folios .1396 y .1397).

153 *Cfr.* Diario La República, "Doe Run: Denuncian que trabajadores tomarán represalias contra activistas de la zona", 13 de abril de 2012 (expediente de prueba, folio .1399)

154 *Cfr*. Nota dirigida a la Dirección General de Gobierno Interior, suscrita por María 1, de 24 de abril de 2012 (expediente de prueba, folios .1406 a .1408).

155 *Cfr*. Subprefectura de la provincia de Yauli-La Oroya, Resolución No. 60-2019-VOI/DGIN/SPROV de 22 de julio de 2019 (expediente de prueba, folios .1419 a .1420).

100. El 3 de septiembre de 2023, la empresa Metalúrgica Business Perú S.A. emitió un comunicado de prensa mediante el cual señaló, *inter alia*, que las "ONGs antimineras", como AIDA, y "conocidos pobladores antimineros", se encontraban opuestos a la reactivación de las actividades del complejo por lo que exhortaron a la comunidad de La Oroya a "cerrar filas y expulsar a esta[s] [personas]". Asimismo, refirieron que las organizaciones "antimineras" fueron "una[s] de las artífices" del cierre del Complejo Metalúrgio, el cual constitutía la "principal fuente de desarrollo económico" de La Oroya[156].

101. Asimismo, en la transmisión en vivo del noticiero "Vocero Regional" de "Radio Karisma" de 26 de septiembre de 2023, dos voceros de la empresa Metalúrgica Business Perú criticaron las labores efectuadas por organizaciones no gubernamentales y pobladores de La Oroya en oposición a las actividades realizadas por el complejo, señalando que estaban "sirviendo a otros intereses"[157]. No obra en el expediente denuncia alguna ante las autoridades estatales por estos hechos[158].

VIII
FONDO

102. El Tribunal procederá a determinar si el Estado cumplió con su deber de respetar y garantizar los derechos al medio ambiente sano, la salud, la vida, la integridad personal, la niñez, el acceso a la información, la participación política, y las garantías judiciales y la protección judicial, por su respuesta a las actividades del CMLO y sus consecuencias en las presuntas víctimas del caso. De esta forma, y en razón de los alegatos de las partes y la Comisión, la Corte analizará el fondo del presente caso en dos capítulos. En el primer capítulo, evaluará los alegatos respecto de: a) la presunta violación a los derechos al medio ambiente sano, la salud, la vida, la integridad personal, la niñez, el acceso a la información y la participación política, en relación con las obligaciones de respetar y garantizar los derechos y el deber de adoptar disposiciones de derecho interno. En el segundo capítulo, analizará b) la presunta violación a los derechos a las garantías judiciales y la protección judicial, en relación con la obligación de respetar los derechos.

VIII-1
DERECHOS AL MEDIO AMBIENTE SANO, SALUD, INTEGRIDAD PERSONAL, VIDA, NIÑEZ, ACCESO A LA INFORMACIÓN, Y PARTICIPACIÓN[159]

A. Alegatos de la Comisión y de las partes

103. La ***Comisión*** señaló que la ausencia de sistemas adecuados de control de las actividades en el CMLO mediante un marco regulatorio claro, la falta de supervisión constante y efectiva, la ausencia de sanciones o acciones inmediatas para atender las situaciones de degradación ambiental alarmante, la aquiescencia y facilitación estatal para impedir que se mitigaran los efectos ambientales nocivos de la actividad metalúrgica en La Oroya, y la falta de transparencia activa han permitido que las

156 Comunicado de prensa de la empresa Metalúrgica Business Perú S.A., de 3 de septiembre de 2023.

157 *Cfr*. Radio Karisma La Oroya, "Noticiero Vocero Digital" de 26 de septiembre de 2023.

158 De acuerdo con lo informado por el Estado, no ha sido presentada ninguna solicitud de garantías personales relacionada con la Metalúrgica Business Perú S.A.A. *Cfr*. Ministerio del Interior, Informe No. 009-2023-VOI/DGIN/SROV de 24 de octubre de 2023 (expediente de prueba, folio 30264).

159 Artículos 26, 4, 5, 19, 13 y 23 de la Convención Americana, respectivamente.

actividades minero metalúrgicas en el CMLO generaran niveles de contaminación muy altos. Ello ha impactado seriamente la salud de las 80 presuntas víctimas, afectado el medio ambiente sano, e impedido el acceso a la información y la participación política. Asimismo, la Comisión alegó que el Estado incumplió su obligación reforzada de garantía de la salud de niños y niñas, por lo que es responsable de la violación de los derechos de la niñez en perjuicio de las 23 presuntas víctimas que eran niños o niñas al momento de presentar la petición inicial. De esta forma, concluyó que Perú violó los derechos a la vida digna, integridad personal, medio ambiente sano, a la salud y acceso a la información en materia ambiental y participación pública, y niñez, previstos respectivamente en los artículos 4.1, 5.1, 13.1, 19, 23.1.a y 26 de la Convención Americana en relación con los artículos 1.1 y 2 del mismo instrumento, en perjuicio de las personas identificadas en su Anexo Único al Informe de Fondo. Finalmente, la Comisión concluyó que el Estado peruano incumplió la obligación de progresividad recogida en el artículo 26 antes referido en relación con los derechos a la salud y el medio ambiente sano al no justificar la falta de adecuación y correspondencia progresiva de sus estándares e indicadores ambientales internos con aquellos recomendados por entidades internacionales especializadas, y al adoptar medidas regresivas específicas sin ninguna fundamentación.

104. Los ***representantes*** sostuvieron que el Estado no implementó medidas adecuadas para la supervisión y fiscalización de las actividades en el CMLO pese a los riesgos que estas conllevaban para el medio ambiente, la salud, la integridad personal y la vida de los pobladores de La Oroya. En particular, los representantes señalaron que el Estado incumplió con su obligación de garantizar el goce del más alto nivel de salud, pues las condiciones del entorno creadas a causa de la ausencia de control efectivo del CMLO, y la falta de un plan de seguimiento epidemiológico, han afectado y seguirán afectando la vida e integridad de los miembros de La Oroya. Los representantes señalaron que el Estado desconoció la obligación de prevención cualificada de respeto y garantía del derecho a la vida e integridad personal de personas en situación de vulnerabidad, específicamente respecto de las mujeres, mujeres gestantes, las personas mayores, las y los niños. En relación con los niños y niñas, alegaron que el Estado incumplió sus deberes especiales de protección respecto de las 53 presuntas víctimas que eran niños o niñas al momento que el Estado tuvo conocimiento de la contaminación ambiental en La Oroya, en 1986. Respecto del derecho a la vida, los representantes alegaron que la negligencia del Estado frente a la crisis en La Oroya ha resultado en la muerte de dos víctimas debido a graves afectaciones a la salud: Juan 5 y María 14. En relación con el derecho al acceso a la información y la participación política, los representantes sostuvieron que el Estado no emprendió acciones para producir información vital sobre el grado de contaminación ambiental en La Oroya, lo que además ha imposibilitado en la práctica la participación efectiva de las presuntas víctimas en la toma de decisiones. Por lo anterior, los representantes sostuvieron que el Estado es responsable por la violación a los derechos contenidos en los artículos 4, 5, 13, 19, 23 y 26 de la Convención Americana, en relación con los artículos 1.1 y 2 de la Convención Americana.

105. El ***Estado*** sostuvo que la controversia en el presente caso gira en torno al cumplimiento de la decisión del Tribunal Constitucional en 2006. En ese sentido, señaló que a partir de dicha decisión se adoptaron acciones dirigidas a reducir la contaminación ambiental, por lo que no existió aquiescencia o tolerancia respecto de las actividades contaminantes en el CMLO. En el mismo sentido, el Estado alegó haber adoptado medidas de remediación frente a daños ambientales, incluyendo la aprobación de los instrumentos de remediación ambiental. Respecto de los alegatos sobre la violación al derecho a la vida, el Estado sostuvo que no existe relación entre el contexto ambiental de La Oroya y los fallecimientos que ocurrieron en el área. Respecto de la alegada

violación al derecho a la información y la participación política, el Estado sostuvo que ha garantizado que las personas interesadas cuenten con oportunidades para la participación efectiva en la adopción de decisiones en materia ambiental, y se ha cumplido con informar el público sobre estas oportunidades de participación de forma debida. El Estado consideró que la Corte no debe considerar los alegatos de los representantes respecto a la salud y el medio ambiente, en tanto no cuentan con fundamento idóneo y eficaz para demostrarlos. En particular, no existe relación de causalidad entre la sintomatología presentada por las presuntas víctimas y la exposición a materiales pesados. Respecto a los alegatos relacionados con la violación al artículo 19 de la Convención, el Estado consideró que la delimitación del número niños y niñas presuntamente afectados debe situarse al momento en el que se presenta la petición, y no así al año 1986, como proponen los representantes. Asimismo, señaló que los representantes y la Comisión no establecieron un nexo entre las supuestas afectaciones a los niños y niñas y la contaminación ambiental. Sin perjuicio de ello, destacó que se adoptaron medidas diferenciadas de protección. En consecuencia, el Estado sostuvo que no existió responsabilidad internacional por las violaciones a los derechos alegados por la Comisión y los representantes.

B. Consideraciones de la Corte

106. Los alegatos de la Comisión y las partes permiten advertir que una de las principales controversias jurídicas del presente caso es determinar si el Estado es responsable por la violación a diversos derechos protegidos por la Convención Americana como resultado de las actividades minero-metalúrgicas realizadas en el CMLO por la empresa pública Centromin, y por la empresa privada Doe Run. En el presente acápite, la Corte se pronunciará respecto de las obligaciones de los Estados para el respeto y garantía de los derechos humanos frente acciones u omisiones de empresas públicas y privadas; posteriormente, se referirá al contenido de los derechos al medio ambiente sano, la salud, la vida, la integridad personal, la niñez, el acceso a la información y la participación política; finalmente, analizará los hechos del presente caso para determinar la existencia de violaciones a los derechos humanos protegidos por la Convención Americana.

B.1. Obligaciones del Estado para el respeto y garantía de los derechos humanos frente a acciones u omisiones de empresas públicas y privadas

107. La Corte, desde sus primeras sentencias, ha señalado que la primera obligación asumida por los Estados Parte, en los términos del artículo 1.1 de la Convención, es la de "respetar los derechos y libertades" reconocidos en dicho instrumento. De esta forma, el ejercicio de la función pública tiene unos límites que derivan de que los derechos humanos son atributos inherentes a la dignidad humana y, en consecuencia, son superiores al poder del Estado. En ese sentido, la protección a los derechos humanos parte de la afirmación de la existencia de ciertos atributos inviolables de la persona humana que no pueden ser legítimamente menoscabados por el ejercicio del poder público. Se trata de esferas individuales que el Estado no puede vulnerar o en los que solo puede penetrar limitadamente. Así, la protección de los derechos humanos comprende necesariamente la noción de la restricción al ejercicio del poder estatal[160].

108. La segunda obligación de los Estados es la de "garantizar" el libre y pleno ejercicio de los derechos reconocidos en la Convención a toda persona sujeta a su jurisdicción. Esta

[160] *Cfr. Caso Velásquez Rodríguez Vs. Honduras. Fondo, supra,* párr. 165, y *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras, supra*, párr. 42.

obligación implica el deber de los Estados Parte de organizar todo el aparato gubernamental y, en general, todas las estructuras a través de las cuales se manifiesta el ejercicio del poder público, de manera tal que sean capaces de asegurar jurídicamente el libre y pleno ejercicio de los derechos humanos. El Tribunal recuerda que la obligación de garantizar el libre y pleno ejercicio de los derechos humanos no se agota con la existencia de un orden normativo dirigido a hacer posible el cumplimiento de esta obligación, sino que comparta la necesidad de una conducta gubernamental que asegure la existencia, en la realidad, de una eficaz garantía del libre y pleno ejercicio de los derechos humanos[161].

109. En relación con lo anterior, este Tribunal ha establecido que la obligación de garantía se proyecta más allá de la relación entre los agentes estatales y las personas sometidas a su jurisdicción, y abarca el deber de prevenir, en la esfera privada, que terceros vulneren los bienes jurídicos protegidos[162]. No obstante, la Corte ha considerado que un Estado no puede ser responsable por cualquier violación de derechos humanos cometida por particulares dentro de su jurisdicción. El carácter *erga omnes* de las obligaciones convencionales de garantía a cargo de los Estados no implica su responsabilidad ilimitada frente a cualquier acto de particulares. Así, aunque un acto, omisión o hecho de un particular tenga como consecuencia jurídica la violación de los derechos de otro, este no es automáticamente atribuible al Estado, sino que corresponde analizar las circunstancias particulares del caso y la concreción de las obligaciones de garantía[163].

110. En relación con las obligaciones de los Estados respecto de las actividades empresariales, este Tribunal ha notado que el Consejo de Derechos Humanos hizo suyos los "Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para 'proteger, respetar y remediar'" (en adelante los "Principios Rectores")[164]. En particular, el Tribunal ha destacado y retomado en su jurisprudencia los tres pilares de los Principios Rectores, así como los principios fundacionales que se derivan de estos pilares, los cuales resultan fundamentales en la determinación del alcance de las obligaciones en materia de derechos humanos de los Estados y las empresas[165]:

I. El deber del Estado de proteger los derechos humanos

- Los Estados deben proteger contra las violaciones de los derechos humanos cometidas en su territorio y/o su jurisdicción por terceros, incluidas las empresas. A tal efecto deben adoptar las medidas apropiadas para prevenir, investigar, castigar y reparar esos abusos mediante políticas adecuadas, actividades de reglamentación y sometimiento a la justicia.

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161 *Cfr. Caso Velásquez Rodríguez Vs. Honduras*, *supra*, párr. 166 y 167, y *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras, supra*, párr. 43.

162 *Cfr. Caso de la "Masacre de Mapiripán" Vs. Colombia, supra*, párr. 111, y *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras, supra*, párr. 44.

163 *Cfr. Caso de la Masacre de Pueblo Bello Vs. Colombia.* Sentencia de 31 de enero de 2006. Serie C No. 140*., supra*, párr. 123, y *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras, supra*, párr. 44.

164 Consejo de Derechos Humanos. *Los derechos humanos y las empresas transnacionales y otras empresas.* A/HRC/RES/17/4, 6 de julio de 2011, resolutivo 1.

165 *Cfr. Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras, supra*, párr. 47, y *Caso Vera Rojas y otros Vs. Chile, supra,* párr. 84. Al respecto ver también: Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (ACNUDH). *Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para "proteger, respetar y remediar"*, HR/PUB/11/04, 2011.

- Los Estados deben enunciar claramente qué se espera de todas las empresas domiciliadas en su territorio y/o jurisdicción que respeten los derechos humanos en todas sus actividades.

II. La responsabilidad de las empresas de respetar los derechos humanos

- Las empresas deben respetar los derechos humanos. Eso significa que deben abstenerse de infringir los derechos humanos de terceros y hacer frente a las consecuencias negativas sobre los derechos humanos en las que tengan alguna participación.

- La responsabilidad de las empresas de respetar los derechos humanos se refiere a los derechos humanos internacionalmente reconocidos – que abarcan, como mínimo, los derechos enunciados en la Carta Internacional de Derechos Humanos y los principios relativos a los derechos fundamentales establecidos en la Declaración de la Organización Internacional del Trabajo relativa a los principios y derechos fundamentales en el trabajo.

- La responsabilidad de respetar los derechos humanos exige que las empresas:

  a) Eviten que sus propias actividades provoquen o contribuyan a provocar consecuencias negativas sobre los derechos humanos y hagan frente a esas consecuencias cuando se produzcan;

  b) Traten de prevenir o mitigar las consecuencias negativas sobre los derechos humanos directamente relacionadas con operaciones, productos o servicios prestados por sus relaciones comerciales, incluso cuando no hayan contribuido a generarlos.

- La responsabilidad de las empresas de respetar los derechos humanos se aplica a todas las empresas independientemente de su tamaño, sector, contexto operacional, propietario y estructura. Sin embargo, la magnitud y la complejidad de los medios dispuestos por las empresas para asumir esa responsabilidad puede variar en función de esos factores y de la gravedad de las consecuencias negativas de las actividades de la empresa sobre los derechos humanos.

- Para cumplir con su responsabilidad de respetar los derechos humanos, las empresas deben contar con políticas y procedimientos apropiados en función de su tamaño y circunstancias, a saber:

  a) Un compromiso político de asumir su responsabilidad de respetar los derechos humanos;

  b) Un proceso de diligencia debida en materia de derechos humanos para identificar, prevenir, mitigar y rendir cuentas de cómo abordan su impacto sobre los derechos humanos;

  c) Unos procesos que permitan reparar todas las consecuencias negativas sobre los derechos humanos que hayan provocado o contribuido a provocar.

III. El acceso a mecanismos de reparación

- Como parte de su deber de protección contra las violaciones de derechos humanos relacionadas con actividades empresariales, los Estados deben tomar medidas apropiadas para garantizar, por las vías judiciales,

> administrativas, legislativas o de otro tipo que correspondan, que cuando se produzcan ese tipo de abusos en su territorio y/o jurisdicción los afectados puedan acceder a mecanismos de reparación eficaces.

111. Adicionalmente, en el marco de las obligaciones generales del Estado, que se derivan del artículo 1.1 y 2 de la Convención Americana, los Estados tienen el deber de evitar las violaciones a derechos humanos producidas por empresas públicas y privadas, por lo que deben adoptar medidas legislativas y de otro carácter para prevenir dichas violaciones, e investigar, castigar y reparar tales violaciones cuando ocurran. De esta forma, los Estados se encuentran obligados a reglamentar que las empresas adopten acciones dirigidas a respetar los derechos humanos reconocidos en los distintos instrumentos del Sistema Interamericano de Protección de Derechos Humanos –incluidas la Convención Americana y el Protocolo de San Salvador. En virtud de esta regulación, las empresas deben evitar que sus actividades provoquen o contribuyan a provocar violaciones a derechos humanos, y adoptar medidas dirigidas a subsanar dichas violaciones. El Tribunal considera que la responsabilidad de las empresas es aplicable con independencia de su tamaño o del sector, sin embargo, sus responsabilidades pueden diferenciarse en la legislación en virtud de la actividad y el riesgo que conlleven para los derechos humanos[166].

112. Asimismo, este Tribunal ha considerado que, en la consecución de los fines antes mencionados, los Estados deben adoptar medidas destinadas a que las empresas cuenten con: a) políticas apropiadas para la protección de los derechos humanos; b) procesos de diligencia debida en relación con los derechos humanos para la identificación, prevención y corrección de violaciones a los derechos humanos, así como para garantizar el trabajo digno y decente; y c) procesos que permitan a la empresa reparar las violaciones a derechos humanos que ocurran con motivo de las actividades que realicen, especialmente cuando estas afectan a personas que viven en situación de pobreza o pertenecen a grupos en situación de vulnerabilidad[167]. El Tribunal ha considerado que, en este marco de acción, los Estados deben impulsar que las empresas incorporen prácticas de buen gobierno corporativo con enfoque *stakeholder* (interesado o parte interesada), que supongan acciones dirigidas a orientar la actividad empresarial hacia el cumplimiento de las normas y los derechos humanos, incluyendo y promoviendo la participación y compromiso de todos los interesados vinculados, y la reparación de las personas afectadas[168].

113. Adicionalmente, la Corte recuerda que el numeral primero del artículo 25 de la Convención Americana establece que "[t]oda persona tiene derecho a un recurso sencillo y rápido o a cualquier otro recurso efectivo ante los jueces o tribunales competentes, que la ampare contra actos que violen sus derechos fundamentales reconocidos por la

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166 *Cfr. Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, *supra,* párr. 48; Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (ACNUDH). Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para "proteger, respetar y remediar", HR/PUB/11/04, 2011, principios 1 a 14; Comisión Interamericana de Derechos Humanos. *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, REDESCA, 1 de noviembre de 2019, párrs. 89 y 121, y Comité Jurídico Interamericano. Resolución "Responsabilidad Social de las Empresas en el Campo de los Derechos Humanos y el Medio Ambiente en las Américas", CJI/RES. 205 (LXXXIV-O/14); y Comité Jurídico Interamericano. *Guía de Principios sobre Responsabilidad Social de las Empresas en el Campo de los Derechos Humanos y el Medio Ambiente en las Américas*, 24 de febrero de 2014, CJI/doc.449/14 rev.1., corr. 1, puntos a y b.

167 *Cfr. Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, *supra*, párr. 49, y Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (ACNUDH). *Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para "proteger, respetar y remediar"*, HR/PUB/11/04, 2011, principios 15 a 24.

168 *Cfr. Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, *supra*, párr. 49, y *Caso Vera Rojas y otros Vs. Chile, supra,* párr. 86.

Constitución, la ley o la presente Convención […]"[169]. De esta forma, los Estados deben garantizar la existencia de mecanismos judiciales o extrajudiciales que resulten eficaces para remediar las violaciones a los derechos humanos. En este sentido, los Estados tienen la obligación de eliminar las barreras legales y administrativas existentes que limiten el acceso a la justicia, y adopten aquellas destinadas a lograr su efectividad. El Tribunal ha destacado la necesidad de que los Estados aborden aquellas barreras culturales, sociales, físicas o financieras que impiden acceder a los mecanismos judiciales o extrajudiciales a personas que pertenecen a grupos en situación de vulnerabilidad[170].

114. En complemento a lo anterior, este Tribunal ha señalado que son las empresas las primeras encargadas de tener un comportamiento responsable en las actividades que realicen, pues su participación activa resulta fundamental para el respeto y la vigencia de los derechos humanos. Las empresas deben adoptar, por su cuenta, medidas preventivas para la protección de los derechos humanos de sus trabajadoras y trabajadores, así como aquellas dirigidas a evitar que sus actividades tengan impactos negativos en las comunidades en que se desarrollen o en el medio ambiente[171]. En este sentido, la Corte ha considerado que la regulación de la actividad empresarial no requiere que las empresas garanticen resultados, sino que debe dirigirse a que éstas realicen evaluaciones continuas respecto a los riesgos a los derechos humanos, y respondan mediante medidas eficaces y proporcionales de mitigación de los riesgos causados por sus actividades, en consideración a sus recursos y posibilidades, así como con mecanismos de rendición de cuentas respecto de aquellos daños que hayan sido producidos. Se trata de una obligación que debe ser adoptada por las empresas y regulada por el Estado[172].

B.2. Derecho al medio ambiente sano, salud, vida, integridad personal, niñez, acceso a la información y participación política

B.2.1. El contenido del derecho al medio ambiente sano

115. La Corte ha señalado que el derecho a un medio ambiente sano se encuentra incluido entre los derechos protegidos por el artículo 26 de la Convención Americana, dada la obligación de los Estados de alcanzar el "desarrollo integral" de sus pueblos, que surge de los artículos 30, 31, 33 y 34 de la Carta de la OEA[173]. De esta forma, la Corte ha considerado que existe una referencia con el suficiente grado de especificidad para derivar la existencia del derecho al medio ambiente sano reconocido por la Carta de la OEA. En consecuencia, el derecho al medio ambiente sano es un derecho protegido por el artículo 26 de la Convención.

116. Respecto al contenido y alcance de ese derecho, el Tribunal recuerda que el artículo 11 del Protocolo de San Salvador, ratificado por Perú el 17 de mayo de 1995,

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169 *Cfr. Caso Velásquez Rodríguez Vs. Honduras, Excepciones Preliminares, supra*, párr. 91, y *Caso Vera Rojas y otros Vs. Chile, supra,* párr. 87.

170 *Cfr. Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, *supra*, párr. 50, y *Caso Vera Rojas y otros Vs. Chile, supra,* párr. 87.

171 *Cfr. Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, *supra*, párr. 51, y *Caso Vera Rojas y otros Vs. Chile, supra,* párr. 88. Al respecto ver: Comité Jurídico Interamericano. *Guía de Principios sobre Responsabilidad Social de las Empresas en el Campo de los Derechos Humanos y el Medio Ambiente en las Américas*, *supra*, punto a.

172 *Cfr. Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, *supra*, párr. 51, y *Caso Vera Rojas y otros Vs. Chile, supra,* párr. 88.

173 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 57, y *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina, supra*, párr. 202.

señala que "1. Toda persona tiene derecho a vivir en un medio ambiente sano y a contar con servicios públicos básicos. 2. Los Estados Parte promoverán la protección, preservación y mejoramiento del medio ambiente"[174]. De modo adicional, la Corte advierte que el derecho al ambiente ha sido objeto de reconocimiento por diversos países de América: al menos 16 Estados del continente lo incluyen en sus Constituciones[175]. En particular, el artículo 2 de la Constitución Política del Perú establece que "Toda persona tiene derecho… [a] la paz, a la tranquilidad, al disfrute del tiempo libre y al descanso, así como a gozar de un ambiente equilibrado y adecuado al desarrollo de su vida"[176].

117. Adicionalmente, la Asamblea General de la Organización de las Naciones Unidas reconoció al derecho a un ambiente limpio, saludable y sostenible como un derecho humano, y que dicho derecho se encuentra relacionado con otros derechos y el derecho internacional vigente[177]. Por su parte, el Consejo de Derechos Humanos ha establecido que los Estados deben adoptar políticas para el disfrute del derecho a un medio ambiente limpio, saludable y sostenible, en particular con respecto a la biodiversidad y los ecosistemas[178]. En un sentido similar, la Corte nota que el Relator Especial sobre Derechos Humanos y Medio Ambiente ha desarrollado los Principios Marco sobre Derechos Humanos y el Medio Ambiente, el cual reconoce la obligación de los Estados de "garantizar un medio ambiente sin riesgos, limpio, saludable y sostenible con el fin de respetar, proteger y hacer efectivos los derechos humanos" así como de "respetar, proteger y hacer efectivos los derechos humanos con el fin de garantizar un medio ambiente sin riesgos, limpio, saludable y sostenible[179]."

118. Tomando en consideración lo antes señalado, la Corte ha reconocido que el derecho a un medio ambiente sano constituye un interés universal y es un derecho fundamental para la existencia de la humanidad. Asimismo, ha establecido que el derecho al medio ambiente sano está comprendido por un conjunto de elementos procedimentales y sustantivos[180]. De los primeros surgen obligaciones en materia de acceso a la información (*infra* párr. 144 a 149), participación política (*infra* párr. 150 a 152) y acceso a la justicia (*infra* párr. 272)[181]. Dentro de los segundos se encuentran el

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174 El Protocolo de San Salvador fue firmado por Perú el 11 de noviembre de 1988 y luego ratificado el 17 de mayo de 1995. El depósito del instrumento de ratificación se hizo el 4 de junio de 1995.

175 Las constituciones de los siguientes Estados consagran el derecho a un medio ambiente sano: (1) Constitución de la Nación Argentina, art. 41; (2) Constitución Política del Estado de Bolivia, art. 33; (3) Constitución de la República Federativa del Brasil, art. 225; (4) Constitución Política de la Republica de Chile, art. 19.8; (5) Constitución Política de Colombia, art. 79; (6) Constitución Política de Costa Rica, art. 50; (7) Constitución de la República del Ecuador, art. 14; (8) Constitución de la República de El Salvador, art. 117; (9) Constitución Política de la República de Guatemala, art. 97; (10) Constitución Política de los Estados Unidos Mexicanos, art. 4; (11) Constitución Política de Nicaragua, art. 60; (12) Constitución Política de la República de Panamá, arts. 118 y 119; (13) Constitución Nacional de la República de Paraguay, arts. 7 y 8; (14) Constitución de la República Dominicana, arts. 66 y 67, y (16) Constitución de la República Bolivariana de Venezuela, arts. 127 y 129.

176 *Cfr.* Constitución Política del Perú, art. 2.22).

177 Naciones Unidas. Asamblea General. El derecho a un medio ambiente limpio, saludable y sostenible. Resolución 76/300 de la Asamblea General de la Organización de las Naciones Unidas de 28 de julio de 2022, puntos 1 y 2.

178 *Cfr.* Naciones Unidas. Consejo de Derechos Humanos. El derecho a un medio ambiente limpio, saludable y sostenible, resolución de 28 de octubre de 2021.

179 Naciones Unidas. Consejo de Derechos Humanos. Informe del Relator Especial sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente seguro, limpio, saludable y sostenible, 24 de enero de 2018, principios marco 1 y 2.

180 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párrs. 62 y 212.

181 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 212.

aire, el agua, el alimento, el ecosistema, el clima, entre otros. En este sentido, este Tribunal ha señalado que el derecho al medio ambiente sano "protege los componentes del […] ambiente, tales como bosques, ríos, mares y otros, como intereses jurídicos en sí mismos, aún en ausencia de certeza o evidencia sobre el riesgo a las personas individuales"[182]. De esta forma, los Estados están obligados a proteger la naturaleza no solo por su utilidad o efectos respecto de los seres humanos, sino por su importancia para los demás organismos vivos con quienes se comparte el planeta. Lo anterior no obsta, desde luego, a que otros derechos humanos puedan ser vulnerados como consecuencia de daños ambientales.

119. En atención a lo anterior, la Corte advierte que la contaminación del aire y del agua puede constituir una causa de efectos adversos para la existencia de un medio ambiente saludable y sostenible, en tanto puede afectar los ecosistemas acuáticos, la flora, la fauna y el suelo a través del depósito de contaminantes y la alteración de su composición, y puede tener consecuencias para la salud y las condiciones de vida de las personas[183]. En ese sentido, la contaminación del aire y del agua puede afectar derechos como el medio ambiente sano, la vida, la salud, la alimentación, y la vida digna cuando ésta produce daños significativos a los bienes básicos protegidos por dichos derechos[184]. Estos derechos se encuentran reconocidos en la Convención Americana y el Protocolo de San Salvador, así como en otros instrumentos internacionales de protección de derechos humanos en el ámbito regional y universal[185]. Asimismo, han sido reconocidos por este Tribunal en su jurisprudencia[186].

120. En razón de ello, las personas gozan del derecho a respirar un aire cuyos niveles de contaminación no constituyan un riesgo significativo al goce de sus derechos humanos, particularmente a los derechos al medio ambiente sano, la salud, la integridad personal y la vida. Las personas gozan del derecho a respirar aire limpio como un componente sustantivo del derecho al medio ambiente sano, y, por ende, el Estado está obligado a: a) establecer leyes, reglamentos y políticas que regulen estándares de calidad del aire que no constituyan riesgos a la salud; b) monitorear la calidad del aire e informar a la población de posibles riesgos a la salud; c) realizar planes de acción para controlar la calidad del aire que incluyan la identificación de las principales fuentes de contaminación del aire, e implementar medidas para hacer cumplir los estándares de

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182 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párrs. 59, 62 y 64, y *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, *supra,* párr. 203. En un sentido similar ver: Suprema Corte de Justicia de la Nación (México), amparo en revisión 307/2016, párr. 76, y Corte Constitucional (Colombia), Sentencia T-614/19.

183 Directrices mundiales de la OMS sobre la calidad del aire: partículas en suspensión (PM2.5 y PM10), ozono, dióxido de nitrógeno, dióxido de azufre y monóxido de carbono Ginebra: Organización Mundial de la Salud; 2021, pág. 74; OMS, "Evolution of WHO Air Quality Guidelines: Past, Present and Future", Copenhague, Dinamarca: Oficina Regional de la OMS para Europa (2017), pág. 2; Informe A/HRC/40/55 del Relator Especial. Las principales obligaciones en materia de derechos humanos relacionadas con el disfrute de un medio ambiente sano, seguro, limpio, saludable y sostenible, 8 de enero de 2019, párr. 44.

184 El Tribunal Europeo de Derechos Humanos ha abordado la relación entre la contaminación atmosférica y la violación a los derechos en sus decisiones. Al respecto ver, *inter alia*: TEDH, Fadeyeva c. Rusia, No. 55724/00. Sentencia de 9 de junio de 2005; TEDH, Okyay y otros contra Turquía, No. 36220/97. Sentencia de 12 de julio de 2005; TEDH, Ledyayeva y otros c. Rusia Nos. 53157/99, 53247/99, 53695/00 y 56850/00. Sentencia de 26 de octubre de 2006; TEDH, Cordella y otros c. Italia, No. 54413/13. Sentencia de 24 de enero de 2019; TEDH, A.A. y otros c. Italia, No. 37277/16. Sentencia de 5 de mayo de 2022, y TEDH, Pavlov y otros c. Rusia No 31612/09. Sentencia del 11 de octubre de 2022.

185 Convención Americana, artículos 4 y 26; Protocolo de San Salvador, artículos 10, 11, y 12; Pacto Internacional de DESC, artículos 11 y 12.

186 *Cfr. Opinión Consultiva OC-23/17, supra,* párrs. 108 a 114, y *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina, supra,* párrs. 202, 210 y 222.

calidad del aire[187]. En ese sentido, los Estados deben diseñar sus normas, planes y medidas de control de la calidad del aire de conformidad con la mejor ciencia disponible[188] y de conformidad con los criterios de disponibilidad, accesibilidad, sostenibilidad, calidad y adaptabilidad e, inclusive, a partir de la cooperación internacional[189].

121. Asimismo, las personas gozan del derecho a que el agua se encuentre libre de niveles de contaminación que constituyan un riesgo significativo al goce de sus derechos humanos, particularmente a los derechos al medio ambiente sano, la salud y la vida. Este elemento sustantivo del derecho al medio ambiente sano impone la obligación para los Estados consistentes en: a) diseñar normas y políticas que definan los estándares de la calidad del agua y, reforzadamente, en aguas tratadas y residuales que sean compatibles con la salud humana y de los ecosistemas; b) monitorear los niveles de contaminación de las masas de agua y, de ser el caso, informar los posibles riesgos a la salud humana y a la salud de los ecosistemas; c) realizar planes y, en general, emprender toda práctica con la finalidad de controlar la calidad del agua que incluyan la identificación de sus principales causas de contaminación; d) implementar medidas para hacer cumplir los estándares de calidad del agua, y e) adoptar acciones que aseguren la gestión de los recursos hídricos de forma sostenible[190]. La Corte igualmente considera que los Estados deben diseñar sus normas, planes y medidas de control de la calidad del agua de conformidad con la mejor ciencia disponible, atento a los criterios de disponibilidad, accesibilidad, sostenibilidad, calidad y adaptabilidad e, inclusive, a partir de la cooperación internacional[191].

122. Como complemento de lo anterior, la Corte recuerda que en el caso *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina* fue establecido que el derecho al agua se encuentra protegido por el artículo 26 de la Convención Americana. Ello se desprende de las normas de la Carta de la OEA, en tanto

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187 Comité de Derechos Económicos, Sociales y Culturales, Observación General No. 14 (2000): El derecho al disfrute del más alto de nivel posible de salud (artículo 12 del Pacto Internacional de Derechos Económicos, Sociales y Culturales). E/C.12/2000/4, 11 de agosto de 2000, párrs. 34 y 36. Naciones Unidas. Consejo de Derechos Humanos. Derecho a un medio ambiente, limpio, saludable y sostenible: el medio ambiente no tóxico. Informe del Relator Especial sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, A/HRC/49/53, 12 de enero de 2022, párr. 116.

188 El derecho de las personas a participar y beneficiarse del progreso científico y sus aplicaciones ha sido reconocido en diversos instrumentos internacionales de protección de derechos humanos (*Cfr.* Declaración Universal de los Derechos Humanos, artículo 27 y Pacto Internacional de Derechos Económicos, Sociales y Culturales, artículo 15.1 b)). En ese sentido, la Carta de la Organización de los Estados Americanos le impone el deber a los Estados de difundir entre sí los beneficios de la ciencia y la tecnología para su aprovechamiento (*Cfr.* Carta de la OEA, artículo 38), lo que presupone que dichos beneficios puedan también aprovechados por la población y guíen la actuación de los gobiernos a través de su política pública.

189 GTPSS, Indicadores de Progreso para medición de derechos contemplados en el protocolo de San Salvador: Segundo Agrupamiento de Derechos. Documento definitivo elaborado por el Grupo de Trabajo para el análisis de los informes nacionales previstos en el Protocolo de San Salvador en cumplimiento del mandato previsto en la Resolución AG/RES 2582 (XL-0-10) y AG/RES 2666 (XLI-O/11), AG/RES 2713 (XLII-O/12), y A/RES 2798 (XLIII-O/13) luego del periodo de consulta elevado a los Estados y a la Sociedad Civil, que tuvo lugar desde el 3 de diciembre 2012 al 30 de septiembre de 2013. OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, 5 noviembre 2013, párr. 38

190 ONU. Consejo de Derechos Humanos. Los derechos humanos y la crisis mundial del agua: contaminación del agua, escasez de agua y desastres relacionados con el agua. Informe del Relator Especial sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible. A/HRC/46/28. 19 de enero de 2021, párrs. 52-55 y 59.

191 GTPSS, Indicadores de Progreso: Segundo Agrupamiento de Derechos. *supra*, párr. 38, e Informe A/HRC/37/59 y Anexo, *supra*, párrs. 61 a 77.

las mismas permiten derivar derechos de los que, a su vez, se desprende el derecho al agua. Al respecto, la Corte señaló que entre aquellos se encuentran el derecho a un medio ambiente sano (*supra* párr. 115), el derecho a la alimentación adecuada, el derecho a la salud, y el derecho a participar en la vida cultural, los cuales se encuentran protegidos por el artículo 26 de la Convención. Este derecho también se encuentra reconocido en la Declaración Universal de los Derechos Humanos en su artículo 25 y en el Pacto Internacional de Derechos Económicos, Sociales y Culturales (PIDESC), en su artículo 11, y encuentra sustento en las constituciones de los Estado de la región que reconocen los derechos al medio ambiente sano, la salud y la alimentación[192].

123. En cuanto a su contenido normativo del derecho al agua como derecho autónomo, la Corte ha expresado que "el acceso al agua […] comprende 'el consumo, el saneamiento, la colada, la preparación de alimentos y la higiene personal y doméstica', así como para algunos individuos y grupos también […] 'recursos de agua adicionales en razón de la salud, el clima y las condiciones de trabajo'". Asimismo, que "el acceso al agua" implica "obligaciones de realización progresiva", pero que "sin embargo, los Estados tienen obligaciones inmediatas, como garantizar [dicho acceso] sin discriminación y adoptar medidas para lograr su plena realización". Además, que los Estados deben brindar protección frente a actos de particulares, de forma que terceros no menoscaben el disfrute del derecho al agua, así como "garantizar un mínimo esencial de agua", en aquellos "casos particulares de personas o grupos de personas que no están en condiciones de acceder por sí mismos al agua […], por razones ajenas a su voluntad"[193].

124. En este punto, el Tribunal precisa que existe una estrecha relación entre el derecho al agua como faceta sustantiva del derecho al medio ambiente sano y el derecho al agua como derecho autónomo. La primera faceta protege los cuerpos de agua como elementos del medio ambiente que tienen un valor en sí mismo, en tanto interés universal, y por su importancia para los demás organismos vivos incluidos los seres humanos. La segunda faceta reconoce el rol determinante que el agua tiene en los seres humanos y su sobrevivencia, y, por lo tanto, protege su acceso, uso y aprovechamiento por los seres humanos. De este modo, la Corte entiende que la faceta sustantiva del derecho al medio ambiente sano que protege este componente parte de una premisa ecocéntrica, mientras que -por ejemplo- el derecho al agua potable y su saneamiento se fundamenta en una visión antropocéntrica. Ambas facetas se interrelacionan, pero, no en todos los casos, la vulneración de uno implica necesariamente la violación del otro.

125. Por otra parte, la Corte recuerda que el derecho al medio ambiente sano incluye el derecho al aire limpio y al agua. Este derecho se encuentra cubierto por la obligación de respeto y de garantía, prevista en el artículo 1.1 de la Convención, una de cuyas formas de observancia consiste en prevenir violaciones. Esta obligación se proyecta a la esfera privada para evitar que terceros vulneren los bienes jurídicos protegidos, y abarca todas aquellas medidas de carácter jurídico, político, administrativo y cultural que promuevan la salvaguarda de los derechos humanos y que aseguren que sus eventuales violaciones sean efectivamente consideradas y tratadas como un hecho ilícito[194]. En esta

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192 *Cfr. Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina, supra*, párrs. 210, 222, 231 y 226.

193 *Cfr*. *Opinión Consultiva OC-23/17*, *supra,* párrs. 111 y 121, y *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina, supra*, párrs. 227 y 229.

194 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 118, y *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, *supra,* párr. 207.

línea, la Corte ha señalado que en ciertas ocasiones los Estados tienen la obligación de establecer mecanismos adecuados para supervisar y fiscalizar ciertas actividades a efecto de garantizar los derechos humanos, protegiéndolos de las acciones de entidades públicas, así como de personas privadas[195]. La obligación de prevenir es de medio o comportamiento y no se demuestra su incumplimiento por el mero hecho de que un derecho haya sido violado[196].

126. En relación con lo anterior, la Corte ha destacado que el principio de prevención de daños ambientales forma parte del derecho internacional consuetudinario. Este principio entraña la obligación de los Estados de llevar adelante las medidas que sean necesarias *ex ante* la producción del daño ambiental, teniendo en consideración que, debido a sus particularidades, frecuentemente no será posible, luego de producido tal daño, restaurar la situación antes existente. En virtud de este principio, los Estados están obligados a usar todos los medios a su alcance con el fin de evitar que las actividades que se lleven a cabo bajo su jurisdicción causen daños significativos al medio ambiente[197]. Esta obligación debe cumplirse bajo un estándar de debida diligencia, el cual debe ser el apropiado y proporcional al grado de riesgo de daño ambiental[198], lo que implica que en actividades que se sabe son más riesgosas, como la utilización de sustancias altamente contaminantes, como en el caso en estudio, la obligación tiene un estándar más alto. Por otro lado, la Corte ha señalado que si bien no es posible realizar una enumeración detallada de todas las medidas que podrían tomar los Estados a los fines de cumplir este deber, pueden señalarse algunas, relativas a actividades potencialmente dañosas: a) regular; b) supervisar y fiscalizar; c) requerir y aprobar estudios de impacto ambiental; d) establecer planes de contingencia, y e) mitigar en casos de ocurrencia de daño ambiental[199].

127. Asimismo, la Corte se ha referido al principio de precaución en materia ambiental. Este principio se refiere a las medidas que se deben adoptar en casos donde no existe certeza científica sobre el impacto que pueda tener una actividad respecto del medio ambiente. La Corte ha entendido que los Estados deben actuar conforme al principio de precaución a efectos de la protección del derecho a la vida y a la integridad personal, en casos donde haya indicadores plausibles que una actividad podría acarrear daños graves e irreversibles al medio ambiente, aún en ausencia de certeza científica. Por lo tanto, los Estados deben actuar con la debida cautela para prevenir el posible daño[200]. En efecto, la Corte considera que, en el contexto de la protección de los derechos a la vida y a la integridad personal, y del derecho a la salud, los Estados deben actuar conforme al principio de precaución, por lo cual, aún en ausencia de certeza científica, deben adoptar las medidas que sean "eficaces" para prevenir un daño grave o irreversible.

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195 *Cfr*. *Caso Ximenes Lopes Vs. Brasil. Fondo, Reparaciones y Costas*. Sentencia de 4 de julio de 2006. Serie C No. 149, párrs. 86, 89 y 99, y *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, *supra,* párr. 152.

196 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 118, y *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, *supra,* párr. 207.

197 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 142, *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, *supra,* párr. 208.

198 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 142, *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, *supra,* párr. 208.

199 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 145, *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, *supra,* párr. 208.

200 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 142.

128. El principio de precaución en materia ambiental se encuentra relacionado con el deber de los Estados de preservar el ambiente para permitir a las generaciones futuras oportunidades de desarrollo y de viabilidad de la vida humana. Al respecto, la Corte nota que el principio de equidad intergeneracional requiere a los Estados coadyuvar activamente por medio de la generación de políticas ambientales orientadas a que las generaciones actuales dejen condiciones de estabilidad ambiental que permitan a las generaciones venideras similares oportunidades de desarrollo. El principio de equidad intergeneracional se deriva de diversos instrumentos de derecho internacional como la Carta de Derechos y Deberes Económicos de los Estados, la Declaración de Estocolmo, la Declaración de Río, la Convención Marco de las Naciones Unidas sobre Cambio Climático, y el Acuerdo de París sobre Cambio Climático[201]. También forma parte del derecho de la Unión Europea[202], y su contenido ha sido referido por distintos Tribunales Internacionales como la Corte Internacional de Justicia[203], y este Tribunal en su Opinión Consultiva OC-23/17[204], así como por tribunales de la región en países como Colombia[205], y Canadá[206].

129. Los Estados han reconocido el derecho al medio ambiente sano, el cual conlleva una obligación de protección que atañe a la Comunidad Internacional en su conjunto[207]. Es difícil imaginar obligaciones internacionales con una mayor trascendencia que aquéllas que protegen al medio ambiente contra conductas ilícitas o arbitrarias que causen daños graves, extensos, duraderos e irreversibles al medio ambiente en un escenario de crisis climática que atenta contra la supervivencia de las especies. En vista de lo anterior, la protección internacional del medio ambiente requiere del reconocimiento progresivo de la prohibición de conductas de este tipo como una norma imperativa (*jus cogens*) que gane el reconocimiento de la Comunidad Internacional en su conjunto como norma que no admita derogación[208]. Esta Corte ha señalado la

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201 *Cfr.* Carta de Derechos y Deberes Económicos de los Estados, Resolución 3281 de la Asamblea General de las Naciones Unidas, de 12 de diciembre de 1974; Declaración de Estocolmo sobre el Medio Ambiente Humano, Conferencia de las Naciones Unidas sobre el Medio Ambiente Humano, de 16 de junio de 1972; Declaración de Río sobre el Medio Ambiente y el Desarrollo, Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo, de 3 al 14 de junio de 1992, Principio 3, y Acuerdo de París sobre Cambio Climático, Convención Marco de las Naciones Unidas sobre el Cambio Climático, de 4 de noviembre de 2016, Preámbulo y artículo 1.

202 *Cfr.* Resolución 2396 (2021) de la Asamblea Parlamentaria del Consejo de Europa, Anclar el derecho a un medio ambiente saludable: necesidad de una mayor acción por parte del Consejo de Europa, 29 de septiembre de 2021.

203 *Cfr.* ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 de julio de 1996, párrs. 35 y 36.

204 *Cfr*. *Opinión Consultiva OC-23/17*, *supra*, párr. 59.

205 *Cfr.* Corte Constitucional de Colombia, Sentencia STC 4360-2018 de 4 de abril de 2018, párrs. 11, 12 y 14.

206 *Cfr.* Corte Suprema de Canadá, Caso Tsilhqot'in Nation v. British Columbia, 26 de junio de 2014, párrs. 15, 74 y 86.

207 *Cfr.* AG ONU A/Res/76/300. El derecho humano a un ambiente limpio, sano y sostenible, 28 de julio de 2022; Declaración de Estocolmo, 16 de junio de 1972, principio 2; Carta Mundial de la Naturaleza, 28 de octubre de 1982, Principios Generales; Declaración de Rio sobre el Medio Ambiente y Desarrollo, principio 7; Declaración de Johannesburgo, 4 de septiembre de 2002, párr. 13. Asimismo, ver: ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *supra*, párr, 29.

208 La comunidad internacional ya ha definido una serie de conductas prohibidas por el *jus cogens* que incluyen la prohibición del uso de la fuerza en las relaciones internacionales, el genocidio, la esclavitud, el apartheid, los crímenes de lesa humanidad, la desaparición forzada de personas, entre otras. *Cfr.* ICJ Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 5 de febrero de 1970, párr. 33; Estatuto de Roma de la Corte Penal Internacional, en vigor desde el 1 de julio de 2002, artículos 5-8; Draft

importancia de las expresiones jurídicas de la Comunidad Internacional cuyo superior valor universal resulta indispensables para garantizar valores esenciales o fundamentales[209]. En este sentido, garantizar el interés de las generaciones tanto presentes como futuras y la conservación del medio ambiente contra su degradación radical resulta fundamental para la supervivencia de la humanidad[210].

B.2.2. Derecho a la salud

130. En relación con el derecho a la salud, la Corte ha advertido que el artículo 34.i y 34.l de la Carta de la OEA establece, entre los objetivos básicos del desarrollo integral, el de la "[d]efensa del potencial humano mediante la extensión y aplicación de los modernos conocimientos de la ciencia médica", así como de las "[c]ondiciones urbanas que hagan posible una vida sana, productiva y digna". Por su parte, el artículo 45 destaca que "el hombre sólo puede alcanzar la plena realización de sus aspiraciones dentro de un orden social justo", por lo que los Estados convienen en dedicar esfuerzos a la aplicación de principios, entre ellos el: "h) Desarrollo de una política eficiente de seguridad social". De esta forma, tal como ha sido señalado en diversos casos, la Corte reitera que existe una referencia con el suficiente grado de especificidad para derivar la existencia del derecho a la salud reconocido por la Carta de la OEA. En consecuencia, el derecho a la salud es un derecho protegido por el artículo 26 de la Convención[211].

131. Respecto al contenido y alcance de este derecho, este Tribunal recuerda que el artículo XI de la Declaración Americana permite identificar el derecho a la salud al referir que toda persona tiene derecho "a que su salud sea preservada por medidas sanitarias y sociales, relativas a […] la asistencia médica, correspondientes al nivel que permitan los recursos públicos y los de la comunidad"[212]. De igual manera, el artículo 10 del Protocolo de San Salvador establece que toda persona tiene derecho a la salud, entendida como el disfrute del más alto nivel de bienestar físico, mental y social, e indica que la salud es un bien público[213]. El mismo artículo establece que, entre las medidas para garantizar el derecho a la salud, los Estados deben impulsar "la total inmunización contra las principales enfermedades infecciosas", "la prevención y el tratamiento de las enfermedades endémicas, profesionales y de otra índole", y "la satisfacción de las necesidades de salud de los grupos de más alto riesgo y que por sus condiciones de pobreza sean más vulnerables".

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conclusion on the identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, International Law Commission, 2022, Conclusión 23.

209 *Cfr. La denuncia de la Convención Americana sobre Derechos Humanos y de la Carta de la Organización de los Estados Americanos y sus efectos sobre las obligaciones estatales en materia de derechos humanos (Interpretación y alcance de los artículos 1, 2, 27, 29, 30, 31, 32, 33 a 65 y 78 de la Convención Americana sobre Derechos Humanos y 3.l), 17, 45, 53, 106 y 143 de la Carta de la Organización de los Estados Americanos).* Opinión Consultiva OC-26/20 de 9 de noviembre de 2020. Serie A No. 26, párr. 102.

210 *Cfr*. *Opinión Consultiva OC-23/17*, *supra,* párr. 59.

211 *Cfr. Caso Poblete Vilches y otros Vs. Chile, supra*, párr. 106, y *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*, *supra*, párr. 80.

212 Aprobada en la Novena Conferencia Panamericana celebrada en Bogotá, Colombia, 1948.

213 El artículo 10.1 del Protocolo de San Salvador establece: "[t]oda persona tiene derecho a la salud, entendida como el disfrute del más alto nivel de bienestar físico, mental y social. 2. Con el fin de hacer efectivo el derecho a la salud los Estados partes se comprometen a reconocer la salud como un bien público y particularmente a adoptar las siguientes medidas para garantizar este derecho: a. la atención primaria de la salud, entendiendo como tal la asistencia sanitaria esencial puesta al alcance de todos los individuos y familiares de la comunidad; [y] b. la extensión de los beneficios de los servicios de salud a todos los individuos sujetos a la jurisdicción del Estado".

132. Asimismo, el derecho a la salud está reconocido a nivel constitucional en Perú, en su artículo 7 de la Constitución Política[214]. Además, la Corte observa un amplio consenso regional en la consolidación del derecho a la salud, el cual se encuentra reconocido explícitamente en diversas constituciones y leyes internas de los Estados de la región, entre ellas: Argentina, Barbados, Bolivia, Brasil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Haití, México, Nicaragua, Panamá, Paraguay, República Dominicana, Surinam, Uruguay y Venezuela[215].

133. En relación con lo anterior, la Corte ha señalado que la salud constituye un estado de completo bienestar físico, mental y social, y no solamente la ausencia de afecciones o enfermedades[216]. Asimismo, la Corte ha señalado que la salud requiere de ciertas precondiciones necesarias para una vida saludable[217], por lo que se relaciona directamente con el acceso a la alimentación y al agua[218]. Por tanto, la contaminación ambiental, en tanto puede afectar el suelo, agua y aire, lo que a su vez puede alterar gravemente las precondiciones de la salud humana, puede ser la causa de afectaciones al derecho a la salud. De esta forma, la garantía del derecho a la salud incluye la protección contra daños graves al medio ambiente. Sobre este último punto, el Comité DESC ha señalado que la obligación de respetar el derecho a la salud implica que los Estados deben abstenerse "de contaminar ilegalmente la atmósfera, el agua y la tierra, por ejemplo, mediante los desechos industriales de las instalaciones propiedad del Estado, utilizar o ensayar armas nucleares, biológicas o químicas si, como resultado de esos ensayos, se liberan sustancias nocivas para la salud del ser humano"[219].

134. Adicionalmente, el Tribunal recuerda que la obligación general de protección a la salud se traduce en el deber estatal de asegurar el acceso de las personas a servicios esenciales de salud, garantizando una prestación médica de calidad y eficaz, así como de impulsar el mejoramiento de las condiciones de salud de la población[220]. Este derecho

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[214] El artículo 7 establece que: "Todos tienen derecho a la protección de su salud, la del medio familiar y la de la comunidad así como el deber de contribuir a su promoción y defensa. La persona incapacitada para velar por sí misma a causa de una deficiencia física o mental tiene derecho al respeto de su dignidad y a un régimen legal de protección, atención, readaptación y seguridad.".

[215] Entre las normas constitucionales de los Estados Partes de la Convención Americana, se encuentran: Argentina (art. 42); Barbados (art. 17.2.A); Bolivia (art. 35); Brasil (art. 196); Chile (art. 19) Colombia (art. 49); Costa Rica (art. 21 y Sentencia 1915-92 de la Sala Constitucional de la Corte Suprema de Justicia de Costa Rica de 22 de julio de 1992); Ecuador (art. 32); El Salvador (art. 65); Guatemala (arts. 93 y 94); Haití (art. 19); México (art. 4); Nicaragua (art. 59); Panamá (art. 109); Paraguay (art. 68); Perú (art. 7); República Dominicana (art. 61); Suriname (art. 36); Uruguay (art. 44), y Venezuela (art. 83).

[216] *Cfr*. *Caso Artavia Murillo y otros (Fecundación in Vitro) Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 28 de noviembre de 2012. Serie C No. 257, párr. 148, y *Caso Brítez Arce Vs. Argentina*, *supra*, párr. 60.

[217] Entre dichas condiciones se encuentran la alimentación y la nutrición, la vivienda, el acceso a agua limpia potable y a condiciones sanitarias adecuadas, condiciones de trabajo seguras y sanas y un medio ambiente sano. *Cfr.* Comité DESC, Observación General No. 14: El derecho al disfrute del más alto de nivel posible de salud (artículo 12 del Pacto Internacional de Derechos Económicos, Sociales y Culturales). Doc. ONU E/C.12/2000/4, 11 de agosto de 2000, párr. 4. *Véase también,* Comité Europeo de Derechos Sociales, *Demanda Nº 30/2005, Fundación para los derechos humanos "Marangopoulos" Vs. Grecia* (Fondo). Decisión del 6 de diciembre de 2006, párr. 195.

[218] *Cfr*. *Caso Comunidad Indígena Yakye Axa Vs. Paraguay, supra*, párr. 167, *Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay, supra*, párrs. 156 a 178, y *Opinión Consultiva OC-23/17*, *supra,* párr. 110.

[219] Comité DESC, Observación General No. 14: El derecho al disfrute del más alto de nivel posible de salud (artículo 12 del Pacto Internacional de Derechos Económicos, Sociales y Culturales). Doc. ONU E/C.12/2000/4, 11 de agosto de 2000, párr. 34..

[220] *Cfr. Caso Poblete Vilches y otros Vs. Chile, supra*, párr. 118, y *Caso Brítez Arce Vs. Argentina, supra, párr. 61.*

abarca la atención de salud oportuna y apropiada conforme a los principios de disponibilidad, accesibilidad, aceptabilidad y calidad, cuya aplicación dependerá de las condiciones prevalecientes en cada Estado[221]. El cumplimiento de la obligación del Estado de respetar y garantizar este derecho deberá dar especial cuidado a los grupos vulnerables y marginados, y deberá realizarse de conformidad con los recursos disponibles de manera progresiva y de la legislación nacional aplicable[222].

B.2.3. Derecho a la vida y la integridad personal

135. La Corte ha afirmado que el derecho a la vida es fundamental en la Convención Americana, por cuanto de su salvaguarda depende la realización de los demás derechos[223]. En virtud de ello, los Estados tienen la obligación de garantizar la creación de las condiciones que se requieran para su pleno goce y ejercicio[224]. En este sentido, la Corte ha señalado en su jurisprudencia constante que el cumplimiento de las obligaciones impuestas por el artículo 4 de la Convención Americana, relacionado con el artículo 1.1 de la misma, no solo presupone que ninguna persona sea privada de su vida arbitrariamente (obligación negativa), sino que además, a la luz de su obligación de garantizar el pleno y libre ejercicio de los derechos humanos, requiere que los Estados adopten todas las medidas apropiadas para proteger y preservar el derecho a la vida (obligación positiva)[225] de todos quienes se encuentren bajo su jurisdicción[226].

136. Asimismo, los Estados deben adoptar las medidas necesarias para crear un marco normativo adecuado que disuada cualquier amenaza al derecho a la vida; establecer un sistema de justicia efectivo capaz de investigar, castigar y reparar toda privación de la vida por parte de agentes estatales o particulares[227]; y salvaguardar el derecho a que no se impida el acceso a las condiciones que garanticen una vida digna[228], lo que incluye la adopción de medidas positivas para prevenir la violación de este derecho[229]. En razón de lo anterior, se han presentado circunstancias excepcionales que permiten fundamentar y analizar la violación del artículo 4 de la Convención respecto de personas que no fallecieron como consecuencia de los hechos violatorios. Entre las condiciones necesarias para una vida digna, la Corte se ha referido al acceso y calidad del agua, alimentación y salud, indicando que estas condiciones impactan de manera aguda el derecho a una existencia digna y las condiciones básicas para el ejercicio de otros

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221 *Cfr. Caso Poblete Vilches y otros Vs. Chile, supra*, párrs. 120 y 121, y *Caso Valencia Campos y otros Vs. Bolivia, supra, párr.* 234.

222 *Cfr*. *Caso Cuscul Pivaral y otros Vs. Guatemala, supra*, párr. 107, y *Caso Valencia Campos y otros Vs. Bolivia, supra, párr. 234.*

223 *Cfr. Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala. Fondo.* Sentencia de 19 de noviembre de 1999, Serie C No. 63, párr. 144, y *Opinión Consultiva OC-23/17*, *supra,* párr. 108.

224 *Cfr. Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala, supra*, párr. 144, y *Opinión Consultiva OC-23/17*, *supra,* párr. 108.

225 *Cfr. Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala, supra*, párr. 144, y *Opinión Consultiva OC-23/17, supra, párr.* 108.

226 *Cfr*. *Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala, supra,* párr. 139, y *Opinión Consultiva OC-23/17, supra, párr.* 108.

227 *Cfr. Caso de la Masacre de Pueblo Bello, supra*, párr. 120, y *Opinión Consultiva OC-23/17, supra, párr.* 109.

228 *Cfr. Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala, supra*, párr. 144, y *Caso Cuscul Pivaral y otros Vs. Guatemala, supra, párr. 155*.

229 *Cfr. Caso Comunidad Indígena Sawhoyamaxa vs. Paraguay, supra*, párr. 153, y *Caso Integrantes y Militantes de Unión Patriótica Vs. Colombia, supra*, párr. 264.

derechos humanos[230]. Asimismo, la Corte ha incluido la protección del medio ambiente como una condición para la vida digna[231].

137. En cuanto el derecho a la integridad personal, la Corte reitera que la violación del derecho a la integridad física y psíquica de las personas tiene diversas connotaciones de grado y que abarca desde la tortura hasta otro tipo de vejámenes o tratos crueles, inhumanos o degradantes, cuyas secuelas físicas y psíquicas varían de intensidad según factores endógenos y exógenos (duración de los tratos, edad, sexo, salud, contexto, vulnerabilidad, entre otros) que deberán ser analizados en cada situación concreta[232].

138. Ahora bien, la Corte ha señalado que si bien cada uno de los derechos contenidos en la Convención tiene su ámbito, sentido y alcance propios[233], existe una estrecha relación entre el derecho a la vida y el derecho a la integridad personal. En este sentido, existen ocasiones en que la falta de acceso a las condiciones que garantizan una vida digna también constituye una violación al derecho a la integridad personal[234], por ejemplo, en casos vinculados con la salud humana[235]. Asimismo, la Corte ha reconocido que determinados proyectos o intervenciones en el medio ambiente pueden representar un riesgo a la vida y a la integridad personal de las personas[236].

B.2.4. Derechos de la niñez

139. La Corte ha señalado que, conforme al artículo 19 de la Convención Americana, el Estado se encuentra obligado a promover las medidas de protección especial orientadas en el principio del interés superior de la niña y del niño, asumiendo su posición de garante con mayor cuidado y responsabilidad en consideración a su condición especial de vulnerabilidad. En ese sentido, la Corte ha establecido que la protección de la niñez tiene como objetivo último el desarrollo de la personalidad de las niñas y los niños, y el disfrute de los derechos que les han sido reconocidos. De esta forma, las niñas y los niños tienen derechos especiales a los que corresponden deberes específicos por parte de la familia, la sociedad y el Estado. Además, su condición exige una protección especial debida por este último y que debe ser entendida como un derecho adicional y complementario a los demás derechos que la Convención reconoce a toda persona[237].

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230 *Cfr*. *Caso Comunidad Indígena Yakye Axa Vs. Paraguay, supra,* párr. 167 y *Opinión Consultiva OC-23/17*, *supra,* párr. 110.

231 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 109.

232 *Cfr*. *Caso Loayza Tamayo Vs. Perú. Fondo.* Sentencia de 17 de septiembre de 1997. Serie C No. 33, párrs. 57 y 58, y *Caso García Rodríguez y otro Vs. México. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 25 de enero de 2023. Serie C No. 482, párr. 193.

233 *Cfr. Caso Manuel Cepeda Vargas Vs. Colombia. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 26 de mayo de 2010. Serie C No. 213, párr. 171, y *Opinión Consultiva OC-23/17*, *supra,* párr. 114.

234 *Cfr. Caso "Instituto de Reeducación del Menor" Vs. Paraguay. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 2 de septiembre de 2004. Serie C No. 112, párr. 170, y *Opinión Consultiva OC-23/17*, *supra,* párr. 114.

235 *Cfr. Caso Albán Cornejo y otros. Vs. Ecuador. Fondo Reparaciones y Costas.* Sentencia de 22 de noviembre de 2007. Serie C No. 171, párr. 117, y *Opinión Consultiva OC-23/17*, *supra,* párr. 114.

236 *Cfr. Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador.* Fondo y Reparaciones. Sentencia de 27 de junio de 2012. Serie C No. 245, párr. 249, y *Opinión Consultiva OC-23/17*, *supra,* párr. 114.

237 *Cfr. Condición jurídica y derechos humanos del niño. Opinión Consultiva OC-17/02 de 28 de agosto de 2002*. Serie A No. 17, párrs. 53, 54, 60, 86, 91, y 93, y *Caso María y otros Vs. Argentina, supra*, párr. 84.

140. Adicionalmente, la Corte ha señalado que el interés superior de los niños y niñas constituye un principio regulador de la normativa relativa a los derechos de la niñez que se funda en la dignidad misma del ser humano, en las características propias de los niños y las niñas, y en la necesidad de propiciar el desarrollo de éstos[238]. Asimismo, el Comité de los Derechos del Niño ha señalado, en su Observación General número 14 que el concepto del interés superior del niño "es garantizar el disfrute pleno y efectivo de todos los derechos reconocidos por la Convención [de los Derechos del Niño]"[239]. El mismo Comité, ha señalado que "los Estados deben adoptar medidas para hacer frente a los peligros y riesgos que la contaminación del medio ambiente local plantea a la salud infantil en todos los entornos". El Comité ha puesto de manifiesto que "[l]as intervenciones en materia de medio ambiente deben hacer frente, entre otras cosas, al cambio climático, que es una de las principales amenazas a la salud infantil y empeora las disparidades en el estado de salud. En consecuencia, los Estados han de reservar a la salud infantil un lugar central en sus estrategias de adaptación al cambio climático y mitigación de sus consecuencias"[240].

141. La Corte considera que la protección especial a los niños y niñas, como grupo especialmente vulnerable a los efectos de la contaminación ambiental[241], cobra especial relevancia tomando en cuenta el principio de equidad intergeneracional[242]. En virtud de este principio, el derecho a un medio ambiente sano se constituye como un interés universal que se debe tanto a las generaciones presentes como a las futuras. Se ha señalado que los derechos de las generaciones futuras imponen la obligación a los Estados de respetar y garantizar el disfrute de los derechos humanos de niñas y niños, y abstenerse de toda conducta que ponga en peligro sus derechos en el futuro[243]. En este sentido, el Comité de los Derechos del Niño, en su Observación General No. 26 ha considerado que, de conformidad con el concepto de "equidad intergeneracional", los Estados deben tomar en cuenta las necesidades de las generaciones futuras, así como los efectos a corto, medio y largo plazo de las medidas relacionadas con el desarrollo de los niños[244].

142. En relación con lo anterior, la Corte considera que el principio del interés superior constituye un mandato de priorización de los derechos de las niñas y niños frente a cualquier decisión que pueda afectarlos (positiva o negativamente), tanto en el ámbito judicial, administrativo y legislativo. En razón de ello, y en virtud del principio de equidad intergeneracional, el Estado debe prevenir que las actividades contaminantes de las

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238 *Cfr. Opinión Consultiva OC-17/02*, *supra*, párr. 56.

239 Comité de los Derechos del Niño, Observación General No. 14. El derecho del niño a que su interés superior sea una consideración primordial (artículo 3, párrafo 1), 29 de mayo de 2013, párr. 4.

240 Comité de los Derechos del Niño, Observación General No. 15. El derecho del niño al disfrute del más alto nivel posible de salud (artículo 24), 17 de abril de 2013, párr. 49 y 50.

241 *Cfr. Opinión Consultiva OC-23/17*, *supra,* párr. 67.

242 Conferencia de las Naciones Unidas sobre el Medio Ambiente Humano, 16 de junio de 1972, preámbulo; Declaración de Río sobre el Medio Ambiente y el Desarrollo, 1992, principio 3, y Asamblea General de las Naciones Unidas, Resolución aprobada por la Asamblea General el 25 de septiembre de 2015, 70/1. "Transformar nuestro mundo: la Agenda 2030 para el Desarrollo Sostenible", Preámbulo. Asimismo ver: Naciones Unidas. Informe de las Naciones Unidas de la Comisión Mundial sobre el Medio y Desarrollo, de 4 de agosto de 1987, p. 23 y Resolución 3/2021 de la CIDH y REDESCA sobre "Emergencia Climática: Alcance y obligaciones interamericanas de derechos humanos", párr. 21, disponible en: http://www.oas.org/es/cidh/decisiones/pdf/2021/Resolucion_3-21_SPA.pdf.

243 Principios de Maastricht sobre los derechos humanos de las generaciones futuras, Julio 2023, Principio 7.

244 Comité de los Derechos del Niño, Observación General No. 26, CRC/G/GC/26, de 22 de agosto de 2023, párr. 11.

empresas afecten los derechos de niñas y niños, y en consecuencia deben adoptar medidas especiales de protección para mitigar los efectos de la contaminación ambiental cuando esta constituya un riesgo significativo para niños y niñas, adoptar medidas para atender a quienes hayan sido afectados por dicha contaminación, y evitar que los riesgos continúen. En particular, cuando el tipo de contaminación producida por las operaciones de las empresas constituyan un riesgo elevado para los derechos de la niñez, "los Estados deben exigir un proceso más estricto de diligencia debida y un sistema eficaz de vigilancia"[245].

143. Adicionalmente, la Corte resalta la relación entre la protección de la niñez y las acciones contra la emergencia climática. Desde el Acuerdo de París, ratificado por Perú el 22 de julio de 2016, se ha reconocido que "el cambio climático es un problema de toda la humanidad"[246]. La Organización de las Naciones Unidas ha señalado que la minería y otros procesos industriales que implican la quema de carbón, petróleo o gas producen gases de efecto invernadero que contribuyen al cambio climático y, en esa medida se constituyen como un riesgo a la salud de las personas[247]. En ese sentido, el Comité de los Derechos del Niño ha señalado que los niños y niñas pueden verse especialmente afectados por el cambio climático, "tanto por la forma en que experimentan sus efectos como por la posibilidad de que el cambio climático les afecte a lo largo de sus vidas"[248]. La Corte encuentra que, por esta razón, los Estados tienen un deber reforzado de protección a la niñez y las acciones contra riesgos a su salud producidos por la emisión de gases contaminantes que contribuyen al cambio climático.

B.2.5. Derecho al acceso a la información y la participación política

B.2.5.1. Derecho al acceso a la información

144. Esta Corte ha señalado que el artículo 13 de la Convención, al estipular expresamente los derechos a buscar y a recibir informaciones, protege el derecho que tiene toda persona a solicitar el acceso a la información bajo el control del Estado, con las salvedades permitidas bajo el régimen de restricciones de la Convención[249]. El actuar del Estado debe regirse por los principios de publicidad y transparencia en la gestión pública, lo que hace posible que las personas que se encuentran bajo su jurisdicción ejerzan el control democrático de las gestiones estatales, de forma tal que puedan cuestionar, indagar y considerar si se está dando un adecuado cumplimiento de las funciones públicas[250]. El acceso a la información de interés público, bajo el control del Estado, permite la participación en la gestión pública, a través del control social que se

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245 Comité de los Derechos del Niño, Observación General No. 16. CRC/C/GC/16, 17 de abril de 2013, párr. 62

246 Acuerdo de París, firmado el 12 de diciembre de 2015, Preámbulo.

247 Organización de Naciones Unidas, "Causas y Efectos del Cambio Climático", disponible en: https://www.un.org/es/climatechange/science/causes-effects-climate-change

248 Comité de los Derechos del Niño, Decisión adoptada por el Comité con arreglo al Protocolo Facultativo de la Convención sobre los Derechos del Niño relativo a un procedimiento de comunicaciones, en relación con la comunicación núm. 104/2019, párr. 10.13.

249 *Cfr. Caso Claude Reyes y otros Vs. Chile. Fondo, Reparaciones y Costas.* Sentencia de 19 de septiembre de 2006. Serie C No. 151, párr. 77, y *caso Tabares Toro y otros Vs. Colombia. Fondo, Reparaciones y Costas.* Sentencia de 23 de mayo de 2023. Serie C No. 491, párr. 90. Al respecto, ver también: *Opinión Consultiva OC-23/17, supra*, párr. 213.

250 *Cfr. Caso Claude Reyes y otros Vs. Chile*, *supra*, párr. 86, y *Caso Baraona Bray Vs. Chile, supra*, párr. 90. Al respecto ver también: *Opinión Consultiva OC-23/17, supra*, párr. 213.

puede ejercer con dicho acceso[251] y, a su vez, fomenta la transparencia de las actividades estatales y promueve la responsabilidad de los funcionarios sobre su gestión pública[252].

145. En relación con actividades que podrían afectar el medio ambiente, esta Corte ha resaltado que constituyen asuntos de evidente interés público el acceso a la información sobre actividades y proyectos que podrían tener impacto ambiental. En este sentido, la Corte ha considerado de interés público información sobre actividades de exploración y explotación de los recursos naturales en el territorio de las comunidades indígenas[253] y el desarrollo de un proyecto de industrialización forestal[254]. Asimismo, respecto al alcance y contenido de la obligación de los Estados respecto del acceso a la información, la Corte ha señalado que la información debe ser entregada sin necesidad de acreditar un interés directo para su obtención o una afectación personal, salvo en los casos en que se aplique una legítima restricción[255]. Por otra parte, respecto a las características de esta obligación, las Directrices de Bali[256] y distintos instrumentos internacionales[257] y regionales[258] establecen que el acceso a la información ambiental debe ser asequible, efectivo y oportuno[259].

146. Adicionalmente, conforme lo ha reconocido esta Corte, el derecho de las personas a obtener información se ve complementado con una correlativa obligación positiva del

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[251] *Cfr*. *Caso Claude Reyes y otros Vs. Chile*, *supra*, párr. 86, y *Caso Baraona Bray Vs. Chile*, *supra*, párr. 90. Al respecto ver también: *Opinión Consultiva OC-23/17, supra*, párr. 213.

[252] *Cfr. Caso Palamara Iribarne Vs. Chile. Fondo, Reparaciones y Costas.* Sentencia de 22 de noviembre de 2005. Serie C No. 135, párr. 83, y *Caso Baraona Bray Vs. Chile*, *supra*, párr. 90. Al respecto ver también: *Opinión Consultiva OC-23/17*, *supra*, párr. 213.

[253] *Cfr*. *Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador, supra*, párr. 230, y Opinión Consultiva OC-23/17, *supra*, párr. 214.

[254] *Cfr*. *Caso Claude Reyes y otros Vs. Chile*, *supra*, párr. 73, y Opinión Consultiva OC-23/17, *supra*, párr. 214.

[255] *Cfr. Caso Claude Reyes y otros Vs. Chile, supra*, párr. 77, y *Opinión Consultiva OC-23/17*, *supra,* párr. 219.

[256] Directrices para la Elaboración de Legislación Nacional sobre el Acceso a la Información, la Participación del Público y el Acceso a la Justicia en Asuntos Ambientales (Directrices de Bali), adoptadas en Bali el 26 de febrero de 2010 por el Consejo de PNUMA, Decisión SS.XI/5, parte A, directriz 1.

[257] *Véase por ejemplo*, Convenio sobre la Protección y Utilización de los Cursos de Agua Transfronterizos y de los Lagos Internacionales de la Comisión Económica para Europa, entrada en vigor el 6 de octubre de 1996, art. 16.2; Convenio sobre la Protección del Medio Marino de la Zona del Mar Báltico, entrada en vigor el 17 de enero de 2000, art. 17.2, y Estrategia Interamericana para la Promoción de la Participación Pública en la Toma de Decisiones sobre Desarrollo Sostenible, aprobada en Washington en abril de 2000 por el Consejo Interamericano para el Desarrollo Sostenible, OEA/Ser.W/II.5, CIDI/doc. 25/00 (20 de abril de 2000), págs. 19 y 20, disponible en: https://www.oas.org/dsd/PDF_files/ispspanish.pdf.

[258] *Véase, inter alia*, Acuerdo de Cooperación Ambiental de América del Norte, adoptado en el 14 de septiembre de 1993 por los gobiernos de Canadá, los Estados Unidos de México y los Estados Unidos de América, entrada en vigor el 1 de enero de 1994, art. 4; Convenio sobre la Evaluación del Impacto Ambiental en un Contexto Transfronterizo (Convenio de Espoo), entrada en vigor el 10 de septiembre de 1997, arts. 2.6 y 4.2; Protocolo sobre Evaluación Ambiental Estratégica al Convenio sobre la evaluación del impacto ambiental en un contexto transfronterizo, entrada en vigor el 11 de julio de 2010, art. 8; Convenio Marco para la Protección del Medio Ambiente del Mar Caspio, entrada en vigor el 12 de agosto de 2006, art. 21.2; Convención sobre el acceso a la información, la participación del público en la toma de decisiones y el acceso a la justicia en asuntos ambientales (Convención de Aarhus) de la Comisión Económica para Europa, entrada en vigor el 30 de octubre de 2001, art. 1; Convenio sobre la protección y utilización de los cursos de agua transfronterizos y de los lagos internacionales de la Comisión Económica para Europa, entrada en vigor el 6 de octubre de 1996, art. 16, y Convención Africana sobre la Conservación de la Naturaleza y los Recursos Naturales (revisión de la Convención de 1968), entrada en vigor en julio de 2016, art. XVI.

[259] *Cfr. Opinión Consultiva OC-23/17*, supra, párr. 220.

Estado de suministrarla, de forma tal que la persona pueda tener acceso a conocerla y valorarla[260]. En este sentido, la obligación del Estado de suministrar información de oficio, conocida como la "obligación de transparencia activa", impone el deber a los Estados de suministrar información que resulte necesaria para que las personas puedan ejercer otros derechos, lo cual es particularmente relevante en materia del derecho a la vida, integridad personal y salud. Asimismo, este Tribunal ha indicado que la obligación de transparencia activa en estos supuestos impone a los Estados la obligación de suministrar al público la máxima cantidad de información en forma oficiosa. Dicha información debe ser completa, comprensible, brindarse en un lenguaje accesible, encontrarse actualizada y brindarse de forma que sea efectiva para los distintos sectores de la población[261].

147. Además, la Corte ha reiterado que el derecho de acceso a la información bajo el control del Estado admite restricciones, siempre y cuando estén previamente fijadas por ley, respondan a un objetivo permitido por la Convención Americana ("el respeto a los derechos o a la reputación de los demás" o "la protección de la seguridad nacional, el orden público o la salud o la moral públicas"), y sean necesarias y proporcionales en una sociedad democrática, lo que depende de que estén orientadas a satisfacer un interés público imperativo[262]. En consecuencia, aplica un principio de máxima divulgación con una presunción de que toda información es accesible, sujeta a un sistema restringido de excepciones, por lo que resulta necesario que la carga de la prueba para justificar cualquier negativa de acceso a la información recaiga en el órgano al cual la información fue solicitada[263]. En caso de que proceda la negativa de entrega, el Estado deberá dar una respuesta fundamentada que permita conocer cuáles son los motivos y normas en que se basa para no entregar la información[264]. La falta de respuesta del Estado constituye una decisión arbitraria[265].

148. En relación con lo anterior, el Acuerdo de Escazú, el cual no ha sido aún ratificado por Perú, y por lo tanto no es vinculante para el Estado, establece que los Estados Parte deben "garantizar el derecho del público de acceder a la información ambiental que está en su poder, bajo su control o custodia, de acuerdo con el principio de máxima publicidad"[266]. Por su parte, el Tribunal Europeo de Derechos Humanos ha señalado que las autoridades que realizan actividades peligrosas, que puedan implicar riesgos para la salud de las personas, tienen la obligación positiva de establecer un procedimiento efectivo y accesible para que los individuos puedan acceder a toda la información relevante y apropiada para que puedan evaluar los riesgos a los cuales pueden

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260 *Cfr. Caso Claude Reyes y otros Vs. Chile, supra*, párr. 77, y *Opinión Consultiva OC-23/17*, *supra*, párr. 221.

261 *Cfr. Caso Furlan y familiares Vs. Argentina, supra*, párr. 294, y *Opinión Consultiva OC-23/17, supra*, párr. 221.

262 *Cfr. Caso Claude Reyes y otros Vs. Chile*, *supra*, párrs. 88 a 91, y *Caso Baraona Bray Vs. Chile*, *supra*, párr. 104. Al respecto ver también: *Opinión Consultiva OC-23/17*, *supra*, párr. 224.

263 *Cfr*. *Caso Pueblos Kaliña y Lokono Vs. Surinam, supra*, párr. 262, y *Opinión Consultiva OC-23/17, supra*, párr. 240.

264 *Cfr*. *Caso Claude Reyes y otros Vs. Chile, supra*, párr. 77, y *Caso Flores Bedregal y otras Vs. Bolivia. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 17 de octubre de 2022. Serie C No. 467, párr. 132. Al respecto ver también: *Opinión Consultiva OC-23/17*, *supra*, párr. 240.

265 *Cfr*. *Caso Claude Reyes y otros Vs. Chile, supra*, párrs. 98 y 120, y *Opinión Consultiva OC-23/17*, *supra*, párr. 224.

266 Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe, entrada en vigor el 22 de abril de 2021, art. 5.

enfrentarse[267]. A su vez, la Comisión Africana de Derechos Humanos y de los Pueblos también ha reconocido la obligación de dar acceso a la información con respecto a actividades peligrosas para la salud y el medio ambiente, en el entendido que ello otorga a las comunidades, expuestas a un particular riesgo, la oportunidad de participar en la toma de decisiones que las afecten[268].

149. Por otro lado, la Corte ha señalado que la participación pública representa uno de los pilares fundamentales de los derechos instrumentales o de procedimiento, dado que es por medio de la participación que las personas ejercen el control democrático de las gestiones estatales y así pueden cuestionar, indagar y considerar el cumplimiento de las funciones públicas. En ese sentido, la participación permite a las personas formar parte del proceso de toma de decisiones y que sus opiniones sean escuchadas. En particular, la participación pública facilita que las comunidades exijan responsabilidades de las autoridades públicas para la adopción de decisiones y, a la vez, mejora la eficiencia y credibilidad de los procesos gubernamentales. Como ya se ha mencionado en ocasiones anteriores, la participación pública requiere la aplicación de los principios de publicidad y transparencia y, sobre todo, debe ser respaldada por el acceso a la información que permite el control social mediante una participación efectiva y responsable[269].

B.2.5.2. Derecho a la participación política

150. El derecho a la participación de los ciudadanos en la dirección de los asuntos públicos se encuentra consagrado en el artículo 23.1.a) de la Convención Americana[270]. Con respecto a asuntos ambientales, la Corte ha establecido que la participación representa un mecanismo para integrar las preocupaciones y el conocimiento de la ciudadanía en las decisiones de políticas públicas que afectan al medio ambiente. Asimismo, la participación en la toma de decisiones aumenta la capacidad de los gobiernos para responder a las inquietudes y demandas públicas de manera oportuna, construir consensos y mejorar la aceptación y el cumplimiento de las decisiones ambientales[271]. Al respecto, el Acuerdo de Escazú señala que cada Estado Parte "deberá asegurar el derecho de participación del público y, para ello, se compromete a implementar una participación abierta e inclusiva en los procesos de toma de decisiones ambientales, sobre la base de los marcos normativos interno e internacional"[272].

151. Asimismo, la Corte advierte que el derecho a la participación política en temas ambientales se encuentra consagrado en diversos instrumentos de Derecho

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267 TEDH, Caso Guerra y otros Vs. Italia [GS], No. 14967/89. Sentencia de 19 de febrero de 1998, párr. 60; TEDH, Caso McGinley y Egan Vs. Reino Unido, No. 21825/93 y 23414/94. Sentencia de 9 de julio de 1998, parr. 101; TEDH, Caso Taşkin y otros Vs. Turquía, No. 46117/99. Sentencia de 10 de noviembre de 2004, párr. 119, y TEDH, *Caso Roche Vs. Reino Unido*, No. 32555/96. Sentencia de 19 de octubre de 2005, párr. 162.

268 Comisión Africana de Derechos Humanos y de los Pueblos, Caso Centro de Acción por los Derechos Sociales y Económicos y Centro de Derechos Económicos y Sociales Vs. Nigeria. Comunicación 155/96. Decisión de 27 de octubre de 2001, párr. 53 y puntos resolutivos.

269 *Cfr. Caso Claude Reyes y otros Vs. Chile, supra*, párr. 86, y *Opinión Consultiva OC-23/17*, *supra*, párr. 226.

270 El artículo 23.1.a) de la Convención Americana establece que "[t]odos los ciudadanos deben gozar de los siguientes derechos y oportunidades: a) de participar en la dirección de los asuntos públicos, directamente o por medio de representantes libremente elegidos".

271 *Cfr*. Opinión Consultiva OC-23/17, *supra*, párr. 228.

272 Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe, entrada en vigor el 22 de abril de 2021, art. 7.

Internacional, tales como la Declaración de Estocolmo[273], la Carta Mundial de la Naturaleza de Nairobi[274], la Declaración de Río[275], la Convención de Aarhus[276], y el Convenio sobre Diversidad Biológica[277]. En este punto, el Tribunal considera pertinente recordar que la referencia a fuentes, principios y criterios del corpus iuris internacional, en este caso en materia ambiental, no implica que asuma competencia sobre otros tratados o que les reconozca obligatoriedad para los Estados. Esta normativa se utiliza como criterio interpretativo para la determinación del alcance de los derechos protegidos por la Convención Americana y otros instrumentos que son vinculantes para el Estado y sobre los que la Corte tiene competencia, de conformidad con el artículo 29 de la Convención[278].

152. La Corte ha estimado que el derecho de participar en los asuntos públicos consagrado en el artículo 23.1.a) de la Convención Americana establece la obligación de los Estados de garantizar la participación de las personas bajo su jurisdicción en la toma de decisiones y políticas que pueden afectar el medio ambiente, sin discriminación, de manera equitativa, significativa y transparente, para lo cual previamente deben haber garantizado el acceso a la información relevante. Asimismo, que en lo que se refiere a la participación pública, el Estado debe garantizar oportunidades para la participación efectiva desde las primeras etapas del proceso de adopción de decisiones e informar al público sobre estas oportunidades de participación. Finalmente, los mecanismos de participación pública en materia ambiental son variados e incluyen, entre otros, audiencias públicas, la notificación y consultas, participación en procesos de formulación y aplicación de leyes, así como mecanismos de revisión judicial[279].

B.3. Análisis del caso concreto

B.3.1. Respecto del derecho al medio ambiente sano

153. La Oroya es una ciudad que tiene una población aproximada de 33,000 habitantes (*supra* párr. 67). En 1922 se construyó e instaló en dicha ciudad el CMLO. Inicialmente fue operado por la compañía privada "Cerro de Pasco Corporation". En 1974 el CMLO fue nacionalizado y pasó a ser propiedad de la empresa estatal "Centromin". En 1997 fue vendido a la empresa privada "Doe Run". Las actividades en el CMLO han consistido en la fundición y el refinamiento de concentrados de cobre, plomo y zinc, y en la recuperación de metales y productos como oro, plata, bismuto, cadmio indio y

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273 Declaración de Estocolmo sobre Medio Ambiente, celebrada entre el 5 y 16 de junio de 1972, principio 23.

274 Carta Mundial de la Naturaleza de Nairobi, adoptada y solemnemente proclamada por la Asamblea General de las Naciones Unidas, en su Resolución 37/7, de 28 de octubre de 1982, principio 16.

275 Declaración de Río sobre el Medio Ambiente y el Desarrollo, celebrada entre el 3 y el 14 de junio de 1992, principio 10.

276 Convención sobre el Acceso a la Información, la Participación del Público en la Tomada de Decisiones y el Acceso a las Justicia en Asuntos Ambientales -Convención de Aarhus-, de 25 de junio de 1998.

277 Convenio sobre Diversidad Biológica, adoptada en junio de 1992, art. 1.

278 *Cfr. Caso Familia Pacheco Tineo Vs. Bolivia*, *supra,* párr. 143, y *Derechos a la libertad sindical, negociación colectiva y huelga, y su relación con otros derechos, con perspectiva de género (interpretación y alcance de los artículos 13, 15, 16, 24, 25 y 26, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos, de los artículos 3, 6, 7 y 8 del Protocolo de San Salvador, de los artículos 2, 3, 4, 5 y 6 de la Convención de Belem do Pará, de los artículos 34, 44 y 45 de la Carta de la Organización de los Estados Americanos, y de los artículos II, IV, XIV, XXI y XXII de la Declaración Americana de los Derechos y Deberes del Hombre).* Opinión Consultiva OC-27/21 de 5 de mayo de 2021. Serie A No. 27, párr. 49.

279 *Cfr. Opinión Consultiva OC-23/17*, *supra*, párrs. 231 a 232.

antimonio, y subproductos químicos como sulfato de cobre, sulfato de zinc, ácido sulfúrico, oleum, trióxido de arsénico, polvo de zinc, bisulfito de sodio, óxido de zinc y concentrado de zinc-plata. Las actividades de fundición y refinamiento de estos metales generan emisiones residuales y fugitivas de gases y partículas en suspensión que pueden llegar al aire, al agua y al suelo. Estas emisiones afectan el espacio geográfico donde se han ubicado los habitantes de La Oroya.

154. Dicho lo anterior, y en consideración a los alegatos de las partes, la principal controversia del caso consiste en determinar si el Estado es responsable por la violación a los derechos humanos de las presuntas víctimas ante los posibles daños producidos por las actividades minero-metalúrgicas realizadas en el CMLO. De esta forma, corresponde establecer si las actividades en el CMLO efectivamente produjeron niveles de contaminación que constituían un riesgo significativo para el medio ambiente y para la salud, integridad personal y vida de las presuntas víctimas. En este punto, el Tribunal considera pertinente recordar que en el presente caso los alegatos sobre la responsabilidad del Estado presentados por la Comisión y por los representantes se refieren a dos situaciones distintas: a) la responsabilidad estatal por las afectaciones a los derechos humanos de los habitantes de La Oroya cuando el CMLO era operado por la empresa Centromin, esto es por una empresa estatal, y b) la responsabilidad del Estado por las violaciones a los derechos humanos de los habitantes de La Oroya mientras el CMLO era operado por un particular, esto es la empresa Doe Run.

155. En relación con el primer supuesto, la Corte recuerda que el deber de respetar los derechos, contenido en el artículo 1.1 de la Convención, establece límites a la acción del Estado que derivan de las obligaciones internacionales establecidas en la Convención. En esa medida, cuando la vulneración a derechos humanos es consecuencia de la actuación de una empresa estatal, el Estado estaría incumpliendo sus obligaciones de respeto debido a que el ilícito internacional es directamente atribuible a un agente estatal. Tal como lo señala la Comisión de Derecho Internacional, se considera un hecho del Estado "el comportamiento de todo órgano del Estado, ya sea que ejerza funciones legislativas, ejecutivas, judiciales o de otra índole"[280]. Asimismo, el Principio 4 de los Principios Rectores sobre Empresas y Derechos Humanos reconoce que las violaciones a los derechos humanos cometidas por empresas estatales pueden implicar una violación a las obligaciones conforme al derecho internacional del propio Estado, y establece el nexo entre el Estado y las empresas en los siguientes términos:

> Los Estados deben adoptar medidas adicionales de protección contra las violaciones de derechos humanos cometidas por empresas de su propiedad o bajo su control, o que reciban importantes apoyos y servicios de organismos estatales, como los organismos oficiales de crédito a la exportación y los organismos oficiales de seguros o de garantía de las inversiones, exigiendo en su caso, la debida diligencia en materia de derechos humanos[281].

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[280] Reporte de la Comisión de Derecho Internacional trabajando en su 53º período de sesiones, 23 de abril – 1 de junio y 2 de julio, Registro Oficial de la Asamblea GENERAL, 53 Sesión, Suplemento No. 10. (A/56/10), artículo 4. Dicho artículo establece lo siguiente: "Se considerará hecho del Estado según el derecho internacional el comportamiento de todo órgano del Estado, ya sea que ejerza funciones legislativas, ejecutivas, judiciales o de otra índole, cualquiera que sea su posición en la organización del Estado y tanto si pertenece al gobierno central como a una división territorial del Estado. 2. Se entenderá que órgano incluye toda persona o entidad que tenga esa condición según el derecho interno del Estado".

[281] Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (ACNUDH). *Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para "proteger, respetar y remediar"*, HR/PUB/11/04, 2011, Principio 4.

156. Por otra parte, en relación con el segundo supuesto, la Corte recuerda que, de conformidad con el mismo artículo 1.1 de la Convención, en virtud del deber de garantizar los derechos, que incluye el deber de prevenir su vulneración, los Estados están obligados a regular, supervisar y fiscalizar la práctica de actividades peligrosas de empresas privadas que impliquen riesgos significativos a los derechos humanos reconocidos en la Convención Americana y otros tratados sobre los que ejerce su competencia[282]. Ahora bien, la Corte destaca que un Estado no puede ser responsable por cualquier violación de derechos humanos cometida entre particulares dentro de su jurisdicción. En efecto, las obligaciones convencionales de garantía a cargo de los Estados no implican una responsabilidad ilimitada de los Estados frente a cualquier acto o hecho de particulares, pues sus deberes de adoptar medidas de prevención y protección de los particulares en sus relaciones entre sí se encuentran condicionados al conocimiento de una situación de riesgo real e inmediato para un individuo o grupo de individuos determinado y a las posibilidades razonables de prevenir o evitar ese riesgo[283].

157. En relación con lo anterior, la Corte considera que las obligaciones generales de respeto y garantía se concretan y complementan con las obligaciones específicas que surgen en materia de protección al derecho al medio ambiente sano, las cuales han sido reiteradas en la presente Sentencia (*supra* párr. 125). En particular, la Corte recuerda que, de conformidad con el principio de prevención de daños ambientales, los Estados tienen la obligación de llevar a cabo las medidas necesarias y utilizar todos los medios a su alcance para evitar que las actividades llevadas a cabo en su jurisdicción causen daños significativos al medio ambiente de conformidad con un estándar de debida diligencia que incluye el deber de regular, supervisar y fiscalizar dichas actividades. Este estándar de debida diligencia es aplicable tanto para las acciones de entidades públicas como privadas que realicen actividades que constituyan un riesgo posible para el medio ambiente.

158. En el caso concreto, la Corte advierte que, de los informes elaborados por la Oficina Nacional de Evaluación de Recursos Naturales en 1986, por DIGESA en 1999, por el gobierno local de la Provincia de Yalili en 2003, por el Ministerio de Salud en 2005, por la Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología del Congreso de la República de 2007, por el Dr. Fernando Serrano de 2007, por el Ministerio de Ambiente de 2011 y 2017 (*supra* párrs. 76 a 84), se desprende con claridad que: a) las actividades metalúrgicas en el CMLO son la causa principal de la contaminación ambiental por arsénico, cadmio, plomo y otros metales en el aire, el suelo y el agua en La Oroya; b) que ya en 1981, fecha en que el Perú aceptó la competencia contenciosa de este Tribunal, el Estado ya tenía conocimiento de dicha contaminación ambiental, y c) de que estas actividades tenían un impacto negativo en el aire, suelo, agua, y en los habitantes de La Oroya. Asimismo, la Corte recuerda que el Tribunal Constitucional, en su sentencia de 2006, concluyó que los niveles de contaminación por plomo y otros elementos químicos generaron afectaciones a los derechos a la salud y el medio ambiente de la población de La Oroya[284].

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[282] *Cfr. Caso de los Empleados de la Fábrica de Fuegos de Santo Antônio de Jesus y sus familiares Vs. Brasil, supra*, párr. 118, y *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras, supra*, párr. 55.

[283] *Cfr. Caso de la Masacre de Pueblo Bello Vs. Colombia, supra,* párr. 123, y *Caso López Soto y otros Vs. Venezuela. Fondo, Reparaciones y Costas.* Sentencia de 26 de septiembre de 2018. Serie C No. 362, párr. 139. .

[284] *Cfr.* Sentencia del Tribunal Constitucional de 12 de mayo de 2006 (expediente de prueba, folio .836). Sobre este particular el perito Oscar Cabrera señaló lo siguiente: "los procesos industriales que implican el

159. De esta forma, el Tribunal considera que se encuentra probada la presencia de altos niveles de contaminación ambiental en La Oroya; las causas de dicha contaminación, y que el Estado conocía que ésta constituía un riesgo significativo para el medio ambiente y la salud de las personas. En razón de ello, la Corte procederá a analizar los hechos relacionados con el cumplimiento del Estado de sus obligaciones de regulación, supervisión y fiscalización de las actividades de metalúrgicas del CMLO, la cual fue operada por Centromin, una empresa estatal, y por Doe Run, una empresa privada que adquirió el CMLO en 1997. En esta parte del análisis la Corte se referirá a normas y hechos relevantes para la calificación de responsabilidad del Estado a partir de 1981, año desde el cual la Corte puede ejercer su competencia contenciosa sobre Perú respecto de la contaminación ambiental en La Oroya y sobre sus efectos en la salud de sus habitantes (*supra* párr. 17).

i) Respecto del deber de regulación

160. La Corte procederá a analizar si el Estado cumplió con su deber de regular las actividades minero-metalúrgicas en el CMLO. Al respecto, la Corte recuerda que la Constitución Política del Perú de 1979 reconoció el derecho de las personas de "habitar en un ambiente saludable, ecológicamente equilibrado y adecuado para el desarrollo para la vida y la preservación del paisaje y la naturaleza"[285]. La Constitución Política de 1979 también establecía que "[t]odos tienen el deber de conservar dicho ambiente", y que [e]s obligación del Estado prevenir y controlar la contaminación ambiental". Asimismo, la Constitución Política de 1993 reconoció el derecho "[a] la paz, a la tranquilidad, al disfrute del tiempo libre y al descanso, así como a gozar de un ambiente equilibrado y adecuado al desarrollo de [la] vida"[286]. De esta norma se ha derivado la protección constitucional del derecho fundamental al medio ambiente, el cual implica: 1) el derecho de gozar de ese medio ambiente, y 2) el derecho a que ese medio ambiente se preserve[287].

161. Asimismo, en 1993 se promulgó el Reglamento para la Protección Ambiental en la Actividad Minero-Metalúrgica, como norma específica que establece las disposiciones reglamentarias respecto de "la protección del medio ambiente para la actividad minero-metalúrgica". Ese Reglamento contiene las obligaciones de los titulares de la actividad minero-metalúrgica, y los procedimientos y las autoridades encargadas de verificar el cumplimiento de dichas obligaciones. En particular, resulta especialmente relevante el Capítulo II, que define las obligaciones de los titulares de actividades minero-metalúrgicas respecto del PAMA. Como fue señalado previamente, el PAMA tiene como objetivo la reducción de los niveles de contaminación ambiental hasta lograr los niveles máximos permisibles, y establece las bases sobre las cuales los titulares de la actividad minero-metalúrgica debe identificar y contemplar el tratamiento del impacto ambiental

manejo de metales forman parte del universo de actividades inherentemente riesgosas para la salud física y mental. Ello en tanto (…) la fundición y refinamiento de metales necesariamente produce desechos industriales no deseados que son tóxicos para la salud (e.g. plomo, cadmio o arsénico)". Al respecto ver: Peritaje de Oscar Cabrera (expediente de prueba, folio 29316).

285 Constitución Política del Perú de 1979, Artículo 123.

286 Constitución Política del Perú de 1993. Artículo 2, 22).

287 *Cfr.* Sentencia del Tribunal Constitucional de 12 de mayo de 2006 (expediente de prueba, folio .825).

de las actividades minero-metalúrgicas[288]. En sentido similar, el Tribunal constata que las obligaciones ambientales del sector minero-metalúrgico se encuentran contenidas en una serie de instrumentos normativos, los cuales también contemplan mecanismos de supervisión y fiscalización de las actividades de dicho sector[289].

162. De lo anterior se desprende que en Perú no existió una legislación reglamentaria específica en materia de protección del medio ambiente respecto de la actividad minero-metalúrgica previo a 1993. Ello a pesar de que se aprobaron normas en materia ambiental e incorporaron obligaciones ambientales generales en otros instrumentos legales aplicables al sector minero. Esta omisión constituyó una violación al deber de regulación. La Corte nota que con posterioridad a 1993 se desarrolló una regulación que prevé obligaciones para reducir o eliminar las emisiones y/o vertimientos que resultaran de las actividades minero-metalúrgicas en Perú, como era el caso de aquellas llevadas a cabo en el CMLO. Sin embargo, no constata alegatos específicos de la Comisión o los representantes respecto de la inconvencionalidad de dicha legislación, por lo que centrará su análisis en el cumplimiento de las obligaciones del Estado respecto de la supervisión y fiscalización de las actividades del CMLO.

ii) Respecto del deber de supervisión y fiscalización

163. Respecto de esta obligación, se acreditó que el Estado realizó múltiples acciones de supervisión y fiscalización de las actividades del CMLO dirigidas a lograr el cumplimiento de las obligaciones establecidas en el PAMA por las actividades en el CMLO, y de otras acciones de monitoreo dirigidas a mitigar el daño ambiental producido por las actividades contaminantes[290]. Asimismo, la Corte constata que el cumplimiento de dichas obligaciones tenía una alta complejidad logística, financiera y técnica, que no podía realizarse de manera inmediata, sino que requería de un desarrollo progresivo. Sin embargo, la Corte nota que, de la información contenida en el expediente, la mayor parte de las medidas adoptadas por el Estado fueron realizadas con posterioridad al año 2010. Esto es, décadas después de que el Estado tuviera conocimiento de los altos niveles de contaminación en La Oroya. Asimismo, para el año 2004, es decir, 8 años después de la aprobación del PAMA en 1996, algunos de los proyectos que representaban una mayor inversión, y cuyo objetivo era fundamental para mitigar los impactos ambientales, tenían porcentajes de cumplimiento bajos[291]. Si bien Doe Run había cumplido con algunos de sus compromisos con el PAMA, la Corte comprueba que esto sucedió respecto de aquellos que tenían menores montos de inversión, y cuyo impacto era relativamente menor a aquel producido por proyectos más costosos y con alto impacto ambiental (*supra* párr. 70).

164. En relación con lo anterior, el proyecto cuyo menor cumplimiento se registró fue la Planta de Ácido Sulfúrico. Esto, a pesar de que la construcción de dicha planta cumplía

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288 *Cfr.* Decreto Supremo N°016-93-EM. Reglamento para la Protección Ambiental Minero-Metalúrgica. Diario Oficial El Peruano, de 1 de mayo de 1993, artículos 9 a 19 (expediente de prueba, folio .59). El Decreto Supremo N°016-93-EM fue derogado por el Decreto Supremo N° 040-2014-EM de fecha 12 de noviembre de 2014 (expediente de prueba, folios 28611-28641).

289 *Cfr*. Peritaje de Patricia Mercedes Gallegos Quesquén (expediente de prueba, folio 28930) y Declaración de Katherine Andrea Melgar Támara (expediente de prueba, folios 28819 a 28857).

290 *Cfr.* Declaración de Katherine Andrea Melgar Támara (expediente de prueba, folios 28819 a28857), y escrito de contestación del Estado.

291 En particular, la construcción de la Planta de Ácido Sulfúrico se encontraba cumplido al 7.4%; la Planta Tratamiento Agua Madre Refinería de Cobre se encontraba cumplido a un 44%, y la Refinería de Cobre la Planta de Tratamiento de Efluentes Líquidos Industriales se encontraba cumplido al 35%.

el objetivo de reducir la emisión de dióxido de azufre por las chimeneas del CMLO[292], y en consecuencia resultaba esencial para el cumplimiento de obligaciones ambientales. En ese sentido, la Corte advierte que Doe Run expresó en su solicitud de prórroga excepcional de 2005 que la producción de ácido sulfúrico era la opción más viable para mitigar los efectos del dióxido de azufre y del material particulado contenidos en las emisiones gaseosas generadas por las operaciones del CMLO[293]. Esta conclusión fue también respaldada por los comentarios al "Plan de Acción para el Mejoramiento de la Calidad del Aire y la Salud de La Oroya" presentados en el año 2006, donde se señaló que "[u]n elemento central de un Plan para alcanzar el estándar de SO_2 es la construcción de la planta de ácido sulfúrico, con todas las etapas y tiempos límite concretamente especificados, para asegurar el desarrollo de este proyecto muy importante"[294]. De esta forma, la Corte considera que el Estado tenía conocimiento respecto de la función central que tenía la construcción de la planta para efectos de mantener los valores de dióxido de azufre permitidos por la normativa ambiental.

165. A pesar de lo anterior, el Estado realizó diversas modificaciones al cumplimiento de los compromisos ambientales de la empresa Doe Run respecto del PAMA. Estas modificaciones incluyeron la concesión de prórrogas excepcionales para el cumplimiento de las obligaciones ambientales. En este sentido, la Corte recuerda que el 19 de mayo de 2006, y el 26 de septiembre de 2009, el gobierno aprobó vía ley la modificación de los plazos para el cumplimiento del PAMA para el CMLO en respuesta a solicitudes de Doe Run. Las prórrogas otorgadas por el Estado al cumplimiento de los compromisos del PAMA por parte de Doe Run ocurrieron en el marco de lo previsto por el Reglamento de la Actividad Minero-Metalúrgica, el cual autorizaba cambios al PAMA por razones técnicas, económicas, sociales, ecológicas y ambientales. Asimismo, la Corte observa que el Estado otorgó las prórrogas al cumplimiento del PAMA tomando especial consideración las imposibilidades técnicas y económicas de Doe Run para el cumplimiento de los programas[295].

166. En el Decreto Supremo Nº 046-2004-EM, mediante el cual se establecieron disposiciones para la prórroga de plazos para el cumplimiento de los PAMA, el Estado consideró *inter alia* que "algunos de los problemas ambientales considerados en los [PAMA] ha[bían] sido subdimensionados […]"[296], y en 2006 consideró que la prórroga ofrecía una "mayor tutela del interés público frente a la sola aplicación de las sanciones

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[292] *Cfr.* Modificaciones al PAMA del Complejo Metalúrgico de la Fundición de La Oroya. Anexo 11 al escrito del Estado de 7 de marzo de 2006 en el trámite de medidas cautelares (expediente de prueba, folio .163), y Doe Run Perú. Solicitud de prórroga excepcional del plazo de cumplimiento para el proyecto plantas de ácido sulfúrico. Diciembre del 2005 (expediente de prueba, folio 19962).

[293] *Cfr.* Doe Run Perú. Solicitud de prórroga excepcional del plazo de cumplimiento para el proyecto plantas de ácido sulfúrico. Diciembre del 2005 (expediente de prueba, folio 19991).

[294] *Cfr*. Anna Cederstay PhD en Química, Comentarios sobre el Plan de Acción para el Mejoramiento de la Calidad del Aire y la Salud de La Oroya, de marzo de 2006 (expediente de prueba, folio 25427).

[295] *Cfr.* Ministerio de Energía y Minas, Resolución Ministerial No. 257-2006- MEM/DM del 29 de mayo de 2006 (expediente de prueba, folios .0.179 al 0.186 del informe de fondo), y Ley Nº 29410 del 26 de septiembre del 2009, Ley que prorroga el plazo para el financiamiento y la culminación del proyecto planta de ácido sulfúrico y modificación del circuito de cobre del complejo metalúrgico de La Oroya (expediente de prueba, folio 20091).

[296] *Cfr*. Decreto Supremo N° 046-2004-EM, mediante el cual se Establecen Disposiciones para la Prórroga Excepcional de Plazos para el Cumplimiento de Proyectos Medioambientales Específicos contemplados en Programas de Adecuación y Manejo Ambiental, del 29 de diciembre de 2004 (expediente de prueba, folios 27569 al 27574)

previstas"[297]. Lo anterior, a pesar de que las autoridades tenían conocimiento de la situación de contaminación ambiental y sus efectos. Sobre este particular la Corte observa que el Ministerio de Energía y Minas mencionó explícitamente en la Resolución Ministerial Nº 257-2006-MEM/DM, mediante el cual se otorgó la prórroga del PAMA en el año 2006, un informe preparado por la Universidad ESAN el cual estableció que la imposibilidad del cumplimiento de los compromisos del PAMA por parte de Doe Run se debía, en parte, a "la falta de previsión y cumplimiento de los avances que la empresa ya debiera haber realizado y por las situaciones económico financieras que habrían impedido a la empresa cumplir con esta obligación […]"[298]. En el caso de la prórroga de 10 meses otorgada en 2009, no se desprende que existiera una motivación para su otorgamiento. Asimismo, la Corte advierte que la planta de ácido sulfúrico de cobre nunca fue terminada por parte de Doe Run, y que, para el año 2009 tenía un avance en su construcción del 53% del total según información presentada por el Estado, mientras que el proyecto de modernización del circuito de cobre se encontraba avanzado en un 46%[299].

167. En este punto, la Corte considera pertinente recordar que, de acuerdo con la *Opinión Consultiva 23/17*: "[e]l nivel de intensidad necesario en la supervisión y fiscalización dependerá del nivel de riesgo que entrañe la actividad o conducta"[300]. Además, recuerda que la debida diligencia en materia de derechos humanos debe incluir una evaluación del impacto real y potencial de las actividades sobre los derechos humanos, cuya magnitud y complejidad variarán en función del tamaño de la empresa, así como su sector industrial, contexto operacional, forma de propiedad y estructura y la gravedad de sus consecuencias negativas sobre los derechos humanos[301]. Lo anterior, pues parte de la obligación de prevención de daños ambientales consiste en vigilar el cumplimiento y la implementación efectivos de la legislación u normas relativas a la protección del medio ambiente[302]. Asimismo, la Corte recuerda que, conforme a dicho deber de prevención, los Estados tienen la obligación hacer cumplir las leyes que tienen por objeto o por efecto hacer respetar los derechos humanos a las empresas, incluyendo al medio ambiente sano.

168. Por esta razón, la Corte considera que, cuando las autoridades resolvieron sobre las solicitudes de prórroga respecto del PAMA del CMLO, omitieron tomar en debida consideración tanto de la situación específica del nivel de cumplimiento de los programas que existía al momento de las solicitudes, como de los efectos que estaba teniendo la contaminación en el medio ambiente. La Corte advierte que, de esta forma, el Estado, al no tomar en consideración dichos elementos, ni tener fundamento técnico para justificar las prórrogas, incumplió dos puntos centrales que corresponden a su deber de debida diligencia para la protección efectiva del medio ambiente: omitió el análisis de si

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297 *Cfr*. Ministerio de Energía y Minas, Resolución Ministerial No. 257-2006-MEM/DM, de 29 de mayo de 2006 (expediente de prueba, folios .179 al .185).

298 *Cfr*. Ministerio de Energía y Minas, Resolución Ministerial No. 257-2006-MEM/DM, de 29 de mayo de 2006 (expediente de prueba, folios 0.179 al 0.186).

299 *Cfr*. Ministerio de Salud, Nota Informativa No. 019-2009-DGSP-ESNP/MINSA, de 16 de marzo de 2009. Anexo al Informe No. 34-2009-JUS/PPES, presentado dentro de la Medida Cautelar N°271-65, el 17 de marzo de 2009. Anexos a la información enviada por el Estado para reunión de trabajo en el marco del 134º Periodo Ordinario de Sesiones de la CIDH, de 21 de marzo de 2009. (expediente de prueba, folio .697)

300 *Cfr*. Americana sobre Derechos Humanos). Opinión Consultiva OC-23/17, *supra*,párr. 154.

301 Organización de las Naciones Unidas [ONU] (2012). La responsabilidad de las empresas de respetar los derechos humanos. Guía para la interpretación. Nueva York y Ginebra: ONU.

302 Opinión Consultiva OC-23/17, *supra*, párr. 154. CIJ, Caso de las plantas de celulosa sobre el Río Uruguay (Argentina Vs. Uruguay). Sentencia de 20 de abril de 2010, párrs. 197, 204 y 205.

la prórroga permitía o no un mejor cumplimiento de los objetivos previstos por el PAMA, los cuales encontraban asidero en la legislación en materia ambiental, e ignoró la evidencia sobre la presencia de contaminantes en el aire, suelo y agua que más bien requerían una acción inmediata por parte del Estado.

169. Asimismo, existían informes que resaltaban que las acciones de fiscalización del Estado resultaban inadecuadas. En particular, desde el Informe de la Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, en junio de 2007, se concluyó que el cumplimiento de los PAMA era insuficiente[303]. Dicho informe estimó que el Ministerio de Energía y Minas estaba adoptando una actitud "permisiva y ambivalente" al conceder las modificaciones referidas al PAMA, bajo el argumento de considerar las dificultades económicas por las que atravesaba la compañía y "sin considerar los riesgos a la salud pública"[304]. Por ello concluyó que "las medidas que estaba implementando el Estado peruano relacionadas con la gestión ambiental, así como la atención del problema de salud pública ambiental, no tendrán resultados efectivos, si no ha[bía] una reducción drástica de las emisiones de las fuentes contaminadoras"[305].

170. Por otra parte, ya en el 1999, la DIGESA estableció que las concentraciones de plomo en el aire eran 17.5 veces superior al estándar trimestral de 1.5 µg/m^3 para plomo según la EPA, a esa fecha, y que la concentración de plomo en el agua de hasta 70 veces el límite máximo permisible (0,03 mg/L, según la Ley de Aguas (*supra* párr. 77). Asimismo, que en el año 2003 el gobierno local de la Provincia de Yauli había concluido que existían altos niveles de contaminantes tóxicos de cadmio y arsénico en la atmósfera, y que los niveles de plomo excedían los lineamientos de la OMS (*supra* párr. 78). En el mismo sentido, el Tribunal Constitucional, en su sentencia de 2006, había señalado que "los niveles de contaminación por plomo y otros elementos químicos en la Ciudad de La Oroya ha[bían] sobrepasado estándares mínimos reconocidos internacionalmente, generando graves afectaciones de los derechos a la salud y el medio ambiente equilibrado y adecuado de la población de esta ciudad"[306].

171. Asimismo, el Tribunal advierte la presencia constante de niveles de plomo, material particulado, cadmio, dióxido de azufre, arsénico y mercurio en el aire en La Oroya por encima de los niveles considerados como permisibles por la regulación nacional y la OMS, respectivamente. Con respecto a los niveles de plomo, en 2004, los promedios de plomo en aire del fueron 2.0 y 2.7 µg/m^3 en La Oroya, siendo entre 4 y 5 veces mayores al nivel recomendado por la OMS de 0.5 µg/m^3 (microgramos por metro cúbico) como promedio anual[307]. Al respecto, de acuerdo con lo reportado en la demanda

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303 *Cfr.* Congreso de la República, Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, ambiente y Ecología. "El problema de salud pública ambiental en La Oroya", de junio de 2007 (expediente de prueba, folio .646).

304 *Cfr.* Congreso de la República, Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, ambiente y Ecología. "El problema de salud pública ambiental en La Oroya", de junio de 2007 (expediente de prueba, folio .667).

305 *Cfr.* Congreso de la República, Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, ambiente y Ecología. "El problema de salud pública ambiental en La Oroya", de junio de 2007 (expediente de prueba, folio .667).

306 *Cfr*. Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio .836).

307 *Cfr*. Concentración de Plomo en Material Particulado, enero a agosto de 2004. Proveído por Doe Run Perú al Ministerio de Energía y Minas de Perú. Ver niveles recomendados en Presidencia del Consejo de Ministros. Decreto Supremo No. 074-2001-PCM. Publicado el 24 de marzo de 2001 en el Diario Oficial El Peruano (Anexo 7 de la solicitud para medidas cautelares, MC-271 05, La Oroya); y Petición de caso, Comunidad de la Oroya, diciembre, 2006 (expediente de prueba, folio .341).

de acción de cumplimiento, la Estación de Huanchán superó los 6,000 µg/m^3 de plomo, la Estación del Hotel Inca superó los 1,000 µg/m^3 de plomo, y la Estación Sindicato de Obreros (en La Oroya Antigua) superó los 1,000 µg/m^3 de plomo en el año 2000[308], superando ampliamente los estándares de la OMS. Más aún, en el informe elaborado por la Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología en 2007 se indicó que, según el análisis de la calidad del aire de los últimos 5 años, al 2006 ninguna estación cumplía con los ECAs (Estándares de Calidad del Aire) para plomo anual[309].

172. Una situación similar sucedió con la presencia de material particulado. En efecto, datos reportados del Organismo de Supervisión de la Inversión en Energía y Minería (OSINERGMIN), al verificar el cumplimiento del PAMA, reportaron que en 2007 la estación de Huanchán, —la más cercana al complejo—, excedió 5 veces de las 3 permitidas el estándar de calidad del aire de partículas menores de 150 µg/m^3[310]. Lo mismo sucedió para el cadmio, pues para el 2006, la estación de Huanchán reportó valores que superan en 48 veces el lineamiento de la OMS[311]. Las estaciones del Sindicato y de Hotel Inca, por su parte, mostraron valores superiores a los lineamientos de la OMS, 22 y 14 veces, respectivamente[312]. Ahora bien, con respecto al dióxido de azufre (SO_2), la información presentada ante la Corte mostró que los estándares de calidad de aire se excedieron en varias ocasiones y particularmente durante los años 2007 al 4 de junio de 2009. Al respecto, las mediciones anuales evidenciaron que, entre el 2007 y el 4 de junio de 2009 el estándar de calidad de aire para el dióxido de azufre se excedió en todas las estaciones de muestreo, mientras que, en el 2009 la única estación que no superó los estándares de calidad del aire para dióxido de azufre fue la estación de Huari. En ese mismo sentido, el 15 de septiembre de 2008, la estación de monitoreo del Sindicato de La Oroya superó significativamente los niveles de dióxido de azufre horario hasta 14,000 µg/m^3[313]. De esta forma, de 78 supervisiones entre los años 2016 y 2022 se determinó que se habría superado la excedencia de SO_2 en el 2016, 2017, 2020 y 2021 en 2, 3, 6 y 10 veces respectivamente[314].

173. En tal sentido, el perito Howard Mielke señaló, con base en el análisis de los datos trimestrales de calidad del aire reportados por año entre 1995 y 2010 al Ministerio de Energías y Minas, que en dicho marco temporal los agentes contaminantes "sobrepasaron los estándares de calidad del aire" vigente en Perú para el dióxido de azufre y el plomo del aire, así como las directrices recomendadas por el MINEM y la OMS

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308 *Cfr*. Demanda de Acción de incumplimiento, interpuesta el 6 de diciembre de 2002 (expediente de prueba, folio .792).

309 *Cfr*. Congreso de la República, Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología. "El problema de salud pública ambiental en La Oroya", junio de 2007. (expediente de prueba, folio 0.660).

310 *Cfr*. Osinergmin. Verificación de cumplimiento de los compromisos de ampliación del PAMA del Complejo Metalúrgico de La Oroya. Abril 2008 (expediente de prueba, folios 21745).

311 *Cfr*. Congreso de la República, Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología. "El problema de salud pública ambiental en La Oroya", junio de 2007. (expediente de prueba, folio .661).

312 *Cfr*. Congreso de la República, Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, ambiente y Ecología, "El problema de salud pública ambiental en La Oroya", junio de 2007 (expediente de prueba, folio .661).

313 *Cfr*. OSINERGMIN, Oficio N° 813-2008-OS-GFM del 27 de noviembre de 2008, Queja por fuerte descenso de humos y gases tóxicos emanados por la empresa Doe Run cubriendo a La Oroya Antigua y parte de La Oroya Nueva el día 15 de setiembre de 2008 (expediente de prueba, folio 5790).

314 *Cfr*. Declaración de Katherine Andrea Melgar Támara (expediente de prueba, folios 28835 al 28839).

para el cadmio. En el caso del arsénico, "también se superó la meta [del PAMA] de emisiones anuales". Además, las emisiones de polvo contaminado con plomo, cadmio y arsénico de la fundición "se acumularon en el suelo y son persistentes en las muestras de suelo a la fecha del informe"[315]. En ese sentido, la Corte advierte que los rebasamientos de los estándares de calidad ambiental se han sostenido en el tiempo[316]. Asimismo, la Corte constata que durante el tiempo que el CMLO estuvo inactivo existió un descenso significativo de los contaminantes atmosféricos[317].

174. La Corte advierte que los materiales contaminantes presente en La Oroya se llegaron a depositar en el suelo y el agua como resultado de la contaminación en el aire. Sobre este particular, este Tribunal nota que, de acuerdo con estudios realizados en 2002, 2004 y 2009 se concluyó que existió contaminación por plomo en el polvo de la superficie al interior de las viviendas en La Oroya[318]. Un estudio de 2004 concluyó que de 50 muestras tomadas en las viviendas, 44 (88%) estaban por encima de la antigua norma estadounidense de la época (40 ug/pie^2 equivalente a 431 µg/m^2)[319]. Aunado a lo anterior, un estudio realizado entre junio de 2008 y marzo de 2009 por parte de Ground Water Internacional para Activos Mineros S.A. concluyó que las emisiones de plomo, cadmio, y arsénico, ocasionados por la fundición de La Oroya habían afectado alrededor de 2.300 kilómetros cuadrados de suelos en la región central[320].

175. Asimismo, la Corte observa que en el año 2017 se publicó un estudio de 75 muestras de suelo en La Oroya tomadas en un lapso de 5 años, el cual señaló que "el 100% [de las muestras tomadas] supera[ba] el ECA suelo que [era] de 70 mg/kg [de plomo]". En el mismo estudio se realizaron muestras en tres puntos del río Mantaro, el cual abastece de agua a La Oroya en diferentes sectores habitacionales. De acuerdo con el estudio "[t]odas las muestras tomadas del rio Mantaro […] indic[aron] que el río no [era] apto para conservar el medio de vida acuático superando el ECA agua que [era] de 0,001 mg/L [de plomo]"[321]. Sobre la base de lo anterior, el perito Howard Mielke señaló que en la actualidad "los residentes de La Oroya están excesivamente expuestos a múltiples fuentes y vías de exposición de sustancias tóxicas del CMLO" las cuales "se acumulan en el suelo y en el agua potable"[322]. En ese mismo sentido, el perito señaló que un estudio de 2021 encontró niveles de plomo en concentraciones elevadas en los

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315 *Cfr*. Peritaje de Howard Mielke rendido ante fedatario público (expediente de prueba, folio 29232).

316 *Cfr.* Declaración de Katherine Andrea Melgar Támara (expediente de prueba, folios 28835 al 28839).

317 *Cfr*. Peritaje de Howard Mielke (expediente de prueba, folio 29233), y Faucher, M., Sipra, H., Wooten, N. Analysis of Air Quality and Medical Record Data. Yale School of Forestry & Environmental Studies. December 2015 (expediente de prueba, folios 20773 a 20774)

318 *Cfr*. Declaración de Katherine Andrea Melgar Támara (expediente de prueba, folios 28835 al 28839), y Arce, Siles; Calderón Marilú. Suelos contaminados con plomo en la Ciudad de La Oroya Junín y su impacto en las aguas del Río Mantaro. Rev. del Instituto de Investigación FIGMMG-UNMSM vol 20 n° 40, 2017: págs. 48–55 (expediente de prueba, folio 20815 y 20816).

319 *Cfr*. Peritaje de Howard Mielke (expediente de prueba, folio 29234).

320 *Cfr.* Arce, Siles; Calderón Marilú. Suelos contaminados con plomo en la Ciudad de La Oroya Junín y su impacto en las aguas del Río Mantaro. Rev. del Instituto de Investigación FIGMMG-UNMSM vol 20 n° 40, 2017: págs. 48–55 (expediente de prueba, folio 20810). Al respecto, ver también: Diario El Comercio, "Fundición de La Oroya: contaminación 2.300 km2 de suelos con minerales", de 11 de noviembre de 2009 (expediente de prueba, folios 20801 y 20802).

321 *Cfr*. Arce, Siles, Calderón Marilú, "Suelos contaminados con plomo en la Ciudad de La Oroya Junín y su impacto en las aguas del Río Mantaro", Rev. del Instituto de Investigación FIGMMG-UNMSM vol 20 n° 40, 2017: págs. 48–55 (expediente de prueba, folios 20813 y 20814).

322 *Cfr*. Peritaje escrito de Howard Mielke (expediente de prueba, folios 29237 y 29238).

pastos de la comunidad campesina de Paccha, situada a 20 kilómetros del CMLO. Las muestras determinaron una presencia media de 19,7 mg/kg, por encima del ECA peruano de 10 mg/kg[323].

176. De esta forma, ha sido demostrado que la actividad metalúrgica del CMLO contaminó el aire, agua y suelo de La Oroya por encima de los estándares de calidad ambiental permitidos por la legislación peruana y las recomendaciones internacionales respecto de las emisiones de sustancias tóxicas emitidas por la actividad del CMLO, y que el Estado tuvo conocimiento sobre esta situación. Asimismo, que las acciones del Estado resultaron la causa de dicho daño al medio ambiente cuando Centromin operaba el CMLO, y que sus omisiones en la fiscalización de las actividades de Doe Run permitieron que continuaran produciéndose dichos daños con posterioridad a la privatización de la empresa. Lo anterior constituye una violación al derecho al medio ambiente sano, protegido por el artículo 26 de la Convención Americana.

177. Además, la Corte recuerda que, tal como se señaló en la Opinión Consultiva No. 23 sobre medio ambiente y derechos humanos:

> El derecho humano a un medio ambiente sano se ha entendido como un derecho con connotaciones tanto individuales como colectivas. En su dimensión colectiva, el derecho a un medio ambiente sano constituye un interés universal, que se debe tanto a las generaciones presentes y futuras. Ahora bien, el derecho al medio ambiente sano también tiene una dimensión individual, en la medida en que su vulneración puede tener repercusiones directas o indirectas sobre las personas debido a su conexidad con otros derechos, tales como el derecho a la salud, la integridad personal o la vida, entre otros. La degradación del medio ambiente puede causar daños irreparables en los seres humanos, por lo cual un medio ambiente sano es un derecho fundamental para la existencia de la humanidad[324].

178. Asimismo, este Tribunal estableció en la Opinión Consultiva antes señalada que:

> El derecho al medio ambiente sano como derecho autónomo, a diferencia de otros derechos, protege los componentes del medio ambiente, tales como bosques, ríos, mares y otros, como intereses jurídicos en sí mismos, aún en ausencia de certeza o evidencia sobre el riesgo a las personas individuales. Se trata de proteger la naturaleza y el medio ambiente no solamente por su conexidad con una utilidad para el ser humano o por los efectos que su degradación podría causar en otros derechos de las personas, como la salud, la vida o la integridad personal, sino por su importancia para los demás organismos vivos con quienes se comparte el planeta, también merecedores de protección en sí mismos[325].

179. En razón de lo anterior, la Corte considera que los altos niveles de contaminación por arsénico, cadmio, dióxido de azufre, plomo y otros metales contaminantes en el aire, el suelo y el agua afectaron los distintos elementos del medio ambiente en La Oroya por sí mismo, generando también un riesgo sistémico a la salud, vida e integridad personal de sus habitantes. Este Tribunal recuerda que el Estado tuvo conocimiento de estos altos niveles de contaminación, pero no adoptó las medidas necesarias para prevenir que siguieran ocurriendo (*supra* párr. 176), ni para atender a las personas que hubieran adquirido enfermedades relacionadas con dicha contaminación (*infra* párr. 213). Las

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323 *Cfr*. Peritaje escrito de Howard Mielke (expediente de prueba, folio 29237).

324 *Cfr*. *Opinión Consultiva OC-23/17, supra*, párr. 59.

325 *Cfr*. *Opinión Consultiva OC-23/17, supra*, párr. 62.

omisiones estatales constituyeron, de esta forma, violaciones a la dimensión colectiva del derecho al medio ambiente sano, protegido por el artículo 26 de la Convención.

180. Además, la Corte recuerda que el perito Marco Orellana señaló que las zonas de sacrificio son "áreas donde la contaminación ambiental es tan grave, que constituye una violación sistemática de los derechos humanos de sus residentes"[326]. En ese sentido, este Tribunal considera que la gravedad y duración de la contaminación producida por el CMLO durante décadas permite presumir que La Oroya se constituyó como una "zona de sacrificio", pues se encontró durante años sujeta a altos niveles de contaminación ambiental que afectaron el aire, el agua y el suelo, y en esa medida pusieron en riesgo la salud, integridad y la vida de sus habitantes.

B.3.2. Respecto de las obligaciones de desarrollo progresivo en relación con el derecho al medio ambiente sano

181. Por otra parte, el presente caso plantea un tema de regresividad en términos del artículo 26 de la Convención, en relación con el artículo 2 de la Convención. La calidad del aire prevista por la normativa peruana vigente en el año 2008 establecía un límite de 365 $\mu g/m^3$ de dióxido de azufre como promedio de 24 horas, no pudiendo excederse más de una vez al año. Posteriormente, en agosto de 2008, el Estado aprobó a través del Decreto Supremo Nº 003-2008-MINAM sobre estándares de calidad del aire un valor diario máximo de 80 $\mu g/m^3$ aplicable a partir de enero de 2009, y definió que, a partir de enero de 2014, el valor diario debía ser de 20 $\mu g/m^3$ en un periodo de 24 horas. Como parte de sus consideraciones, el Estado señaló que los estándares o parámetros para el control y la protección ambiental "deb[ían] tomar en cuenta los establecidos por la Organización Mundial de la Salud o las entidades a nivel internacional especializadas en cada uno de los temas ambientales"[327]. Al respecto, la Corte observa que en 2005 la OMS había establecido como máximo permisible 20 $\mu g/m^3$ de dióxido de azufre en un periodo de 24 horas[328].

182. Por otra parte, el 6 de junio de 2017, a través del Decreto Supremo Nº 003-2017-MINAM, el Estado aprobó nuevos Estándares de Calidad para el Aire. Estos estándares fijaron el límite permitido de dióxido de azufre en 250 $\mu g/m^3$ en un periodo de 24 horas, es decir, más de 12 veces el límite máximo permitido anteriormente, no pudiendo excederse más de 7 veces al año el límite permitido[329]. La Comisión señaló que por medio de la aprobación de nuevos estándares de calidad el Estado permitió una flexibilización de los límites permitidos sin haber sustentado las razones de tal decisión y fue omiso en establecer cómo se avanzaría para lograr un estándar acorde a los parámetros internacionales. El Estado, por su parte, en sus alegatos ante este Tribunal, señaló que, en 2017 existía una necesidad de adecuar los valores de dióxido de azufre permitidos a la realidad interamericana, tomando como referencia los valores permitidos por otros países miembros de la Organización para la Cooperación y el Desarrollo Económicos (OCDE).

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326 *Cfr*. Declaración pericial de Marcos Orellana rendida en la Audiencia Pública del presente caso, durante el 153º Período Ordinario de Sesiones, el cual se llevó a cabo en Montevideo, Uruguay.

327 *Cfr.* Decreto Supremo N° 003-2008-MINAM, 21 de agosto de 2008 (expediente de prueba, folios .1080 a .1083). Al respecto ver también: Decreto Supremo Nº 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental del Aire.

328 *Cfr.* Organización Mundial de la Salud, Air Quality Guidelines Global Update, 2005, pág. 415.

329 *Cfr.* Decreto Supremo N°003-2017-MINAM publicado el 7 de junio de 2017 (expediente de prueba, folios .1297 a .1299).

183. En relación con lo anterior, la Corte ha establecido que, en virtud del artículo 26 de la Convención, es plenamente competente para analizar violaciones a los derechos que derivan de las normas económicas, sociales y de educación, ciencia y cultura contenidas en la Carta de la OEA. Asimismo, este Tribunal ha señalado que existen dos tipos de obligaciones que derivan de dichas normas: aquellas de exigibilidad inmediata y aquellas de carácter progresivo. Respecto a las segundas, la Corte considera que el desarrollo progresivo de los derechos económicos, sociales, culturales y ambientales no podrá lograrse en un breve periodo de tiempo y que, en esa medida, "requiere un dispositivo de flexibilidad necesaria que refleje las realidades del mundo y las dificultades que implica para cada país el asegurar dicha efectividad"[330].

184. La Corte también ha establecido que en el marco de dicha flexibilidad, en cuanto al plazo y modalidades de realización, el Estado tendrá esencialmente, aunque no exclusivamente, una obligación de hacer, es decir, de adoptar providencias y brindar los medios y elementos necesarios para responder a las exigencias de efectividad de los derechos involucrados, siempre en la medida de los recursos económicos y financieros de que disponga para el cumplimiento del respectivo compromiso internacional adquirido[331]. Así, la implementación progresiva de dichas medidas podrá ser objeto de rendición de cuentas y, de ser el caso, el cumplimiento del respectivo compromiso adquirido por el Estado podrá ser exigido ante las instancias llamadas a resolver eventuales violaciones a los derechos humanos[332].

185. Como correlato de lo anterior, la Corte ha considerado que se desprende un deber – si bien condicionado – de no regresividad, que no siempre deberá ser entendido como una prohibición de medidas que restrinjan el ejercicio de un derecho. Al respecto, el Tribunal ha retomado lo señalado por el CDESC en el sentido que "las medidas de carácter deliberadamente re[gresivo] en este aspecto requerirán la consideración más cuidadosa y deberán justificarse plenamente por referencia a la totalidad de los derechos previstos en el Pacto [Internacional de Derechos Económicos, Sociales y Culturales] y en el contexto del aprovechamiento pleno del máximo de los recursos de que [el Estado] disponga"[333]. En la misma línea, la Comisión Interamericana ha considerado que para evaluar si una medida regresiva es compatible con la Convención Americana, se deberá "determinar si se encuentra justificada por razones de suficiente peso"[334].

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330 *Cfr. Caso Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") Vs. Perú. Excepción Preliminar, Fondo, Reparaciones y Costas*, *supra*, párr. 102, y *Caso Cuscul Pivaral y otros Vs. Guatemala, supra,* párr. 141. Al respecto ver también: Comité de Derechos Económicos, Sociales y Culturales, Observación General No. 3: La índole de las obligaciones de los Estados Partes (párrafo 1 del artículo 2 del Pacto), 14 de diciembre de 1990, U.N. Doc. E/1991/23, párr. 9.

331 *Cfr. Caso Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") Vs. Perú, supra*, párr. 102, y *Caso Cuscul Pivaral y otros Vs. Guatemala, supra,* párr. 142. Al respecto ver también: Comité de Derechos Económicos, Sociales y Culturales, Declaración sobre la "Evaluación de la obligación de adoptar medidas hasta el 'máximo de los recursos de que disponga' de conformidad con un protocolo facultativo del Pacto", 21 de septiembre de 2007, U.N. Doc. E/C.12/2007/1, párrs. 8 y 9.

332 *Cfr. Caso Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") Vs. Perú, supra*, párr. 102, y *Caso Cuscul Pivaral y otros Vs. Guatemala, supra,* párr. 142.

333 *Cfr. Caso Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") Vs. Perú, supra*, párr. 103, y *Caso Cuscul Pivaral y otros Vs. Guatemala, supra,* párr. 143.

334 *Cfr. Caso Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") Vs. Perú, supra*, párr. 103, y *Caso Cuscul Pivaral y otros Vs. Guatemala, supra,* párr. 143.

186. En el presente caso, respecto a la modificación de los estándares de calidad del aire vinculados con el dióxido de azufre en el aire en el año 2017, la Corte considera que se trató de una medida regresiva respecto del ámbito de protección del derecho al medio ambiente sano, pues fue el propio Estado quien estableció en el Decreto Supremo Nº. 003-2008-MINAM que el estándar de calidad del aire fijado por la OMS era la guía para la determinación del estándar máximo para establecer el riesgo al medio ambiente y la salud (*supra* párr. 181). De esta forma, la modificación regresiva del estándar de protección de la calidad del aire requería una consideración cuidadosa, que se justificara en referencia a la totalidad de los derechos, en el contexto del máximo aprovechamiento de los recursos que el Estado dispusiera[335]. Además, la Corte recuerda que, conforme al principio de precaución, los Estados deben actuar con debida cautela para prevenir posibles daños graves e irreversibles al medio ambiente, aún ante la ausencia de evidencia científica.

187. En ese sentido, la Corte concluye que el Decreto Supremo Nº 003-2017-MINAM implicó una medida deliberadamente regresiva en la protección al derecho al medio ambiente sano, en particular respecto del derecho al aire limpio, que no encontró justificación en el contexto de las obligaciones internacionales del Estado respecto de sus obligaciones de desarrollo progresivo de los derechos económicos, sociales, culturales y ambientales. En consecuencia, la Corte concluye que el Estado incumplió con su obligación de desarrollo progresivo del derecho al medio ambiente sano.

B.3.3. Respecto del derecho a la salud

188. Por otra parte, tanto la Comisión como los representantes alegaron que la ausencia de medidas adecuadas por parte del Estado para la protección del derecho a un medio ambiente sano tuvo como consecuencia una afectación del derecho a la salud y la vida e integridad personal de las presuntas víctimas. Por su parte, el Estado alegó que los representantes no presentaron pruebas idóneas que permitieran establecer que las dolencias y afectaciones presuntamente ocurridas a las presuntas víctimas, ni que la muerte de algunas de ellas fueran resultado de la contaminación ambiental en La Oroya. Al respecto, este Tribunal procederá a analizar si el Estado es responsable por los efectos que la contaminación ambiental producida por el CMLO pudo tener en la salud de las presuntas víctimas, y por las acciones posteriores adoptadas por el Estado para atenderles.

189. En relación con lo anterior, en primer lugar, la Corte advierte que la OMS ha señalado que el plomo, el cadmio, el mercurio y el arsénico son cuatro de los 10 metales que más amenazan la salud pública[336]. En ese sentido, existe robusta evidencia de los efectos que puede tener la exposición a estos metales para la salud. Respecto al plomo, su presencia en el organismo alcanza al cerebro, el hígado, los riñones y los huesos, y puede tener efectos en el sistema nervioso, producir hipertensión arterial, lesiones renales y afectar los órganos reproductores. La inhalación de cadmio o su ingesta puede producir enfermedades renales, producir irritación grave del estómago y aumentar la fragilidad de los huesos, además, ha sido asociado con el cáncer de pulmón. Por otra

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335 Al respecto el perito Christian Courtis señaló lo siguiente: "si la progresividad en materia ambiental significa la adecuación de las medidas adoptadas al riesgo o afectación ambiental, serán medidas regresivas aquellas que rebajen injustificadamente los estándares ambientales existentes, sin evidencia de que los estándares anteriores fueran inadecuados a la luz de evidencia científica validada, o de que la situación ambiental haya mejorado y por ende sean adecuados otros estándares menos rigurosos". *Cfr.* Peritaje de Christian Courtis (expediente de prueba, folio 28784).

336 *Cfr.* OMS. *10 Chemicals of public health concern,* de 1 de junio de 2020.

parte, se ha señalado que la exposición al arsénico se encuentra asociada al cáncer de piel, pulmón, vejiga, riñón, próstata e hígado, así como con efectos cardiovasculares, neurológicos y respiratorios. Respecto del dióxido de azufre, se ha señalado que su exposición puede afectar los ojos y la piel, y su presencia es inherentemente peligrosa para la salud humana[337].

190. Asimismo, la Corte advierte que la OMS ha señalado que la presencia de plomo en el cuerpo puede constituir un riesgo para el desarrollo de un feto durante el embarazo, y afectar de manera más aguda a los niños y niñas respecto de los adultos. Además, se ha demostrado que la exposición al plomo puede causar anemia, debilidad general, presión arterial alta, enfermedades del corazón, reducir la fertilidad, afectar el comportamiento y producir daños en los riñones y en el cerebro. Estas enfermedades pueden incluir daño renal, hipertensión, efectos en el tracto gastrointestinal, cáncer, e incluso, la muerte. En un sentido similar, se ha establecido que el envenenamiento por exposición al plomo puede tener consecuencias en el desarrollo del sistema nervioso de niños y niñas, en su desarrollo intelectual y crecimiento físico, en su comportamiento, en su vista y su sistema circulatorio y digestivo. De esta forma, la OMS ha señalado que las consecuencias de la exposición a contaminación ambiental afectan también la salud mental de las personas[338].

191. En lo que se refiere a las afectaciones a la salud de los habitantes de La Oroya, la Corte considera pertinente señalar que el informe de DIGESA de 1999 había establecido que el promedio de plomo en sangre de los niños evaluados en La Oroya era de 33,6 µg/dL, y en personas mayores de 10 años el promedio de plomo en sangre era de 36,5 µg/dL, cuando el límite máximo para ambos grupos poblacionales era de 10 µg/dL[339]. Estos resultados fueron asociados principalmente a la contaminación producida por el CMLO. Por otra parte, el Estudio de Niveles de Plomo de la Sangre de la Población en La Oroya publicado por Doe Run en el año 2001 concluyó que los niveles de plomo en la sangre de los niños en La Oroya se encontraban por encima de los lineamientos de la OMS (10 µg/dL), y estableció que "[e]l plomo no cumple ninguna función dentro del organismo humano y puede causar efectos tóxicos en la salud de la persona que haya tenido suficiente exposición y absorción del mismo"[340].

192. Asimismo, la Corte recuerda que los informes del gobierno local de la Provincia de Yauli de 2003, del Ministerio de Salud de 2005, y de la Comisión de Pueblos Andinos, Amazónicos, Afroperuanos y Ecología de 2007, establecieron respectivamente que la contaminación ambiental en La Oroya era lo suficientemente alta como para: a) producir infecciones respiratorias agudas, b) que el 99% de los niños menores de 6 años tuvieran niveles de plomo por encima del máximo recomendado, y c) producir problemas

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337 *Cfr.* Peritaje de Oscar Cabrera (expediente de prueba, folios 29308 a 29311).

338 *Cfr.* OMS. Intoxicación por plomo, de 11 de octubre 2021 (expediente de prueba, folio 20978); CDC. Lead: Health Problems Caused by Lead, de 18 de junio de 2018 (expediente de prueba, folio 20982); The LEAD Group Inc., Health Impacts of Lead Poisoning A preliminary listing of the health effects & symptoms of lead poisoning, de 27 de septiembre de 2020 (expediente de prueba, folio 20985); OMS, ¡No contamines mi futuro!, El Impacto de los Factores Medioambientales en la Salud Infantil, Ginebra (expediente de prueba, folio 21643); Tort B, Choi YH, Kim EK, Jung YS, Ha M, Song KB, Lee YE. Lead exposure may affect gingival health in children, de 4 de mayo de 2018 (expediente de prueba, folio 21679).

339 *Cfr*. Dirección General de Salud Ambiental del Ministerio de Salud, Estudio de Plomo en Sangre en una Población Seleccionada de La Oroya, del 23 al 30 de noviembre de 1999 (expediente de prueba, folios .485 a .543).

340 *Cfr.* Estudio de Niveles de Plomo en la Sangre de la Población en La Oroya 2000-2001, desarrollado por Doe Run Perú en el año 2001 (expediente de prueba, folio 21689).

cardiovasculares en la población. Además, la Corte recuerda que el Tribunal Constitucional, en su sentencia de 2006, tuvo por acreditada "la existencia de exceso de contaminación en el aire de la ciudad de La Oroya, y que en el caso de contaminación por plomo en la sangre, especialmente en los niños, se sobrepasó el límite máximo establecido por la Organización Mundial de la Salud (10 µg/100 ml)"[341]. La Corte reitera que no existe controversia respecto a que la presencia de plomo y otros metales en el aire, suelo y tierra se encontraba directamente relacionada con la actividad metalúrgica del CMLO.

193. Además, este Tribunal advierte que un estudio realizado por la Escuela de estudios Forestales y Medioambientales de la Universidad de Yale relacionado con la calidad del aire en La Oroya entre los años 2009 y 2014 concluyó que los tres elementos que superaban los ECA en La Oroya (plomo, cadmio y dióxido de azufre) eran "peligrosos para la salud humana". Asimismo, el estudio consideró que los residentes de La Oroya habían experimentado los efectos negativos para la salud asociados con el aumento de los niveles de estos elementos. Cualitativamente, según explica el estudio, los síntomas reportados por los pacientes de La Oroya coinciden con ciertos síntomas de intoxicación por plomo, cadmio y dióxido de azufre. Cuantitativamente, los niveles en sangre de los pacientes de La Oroya eran, en promedio, más altos durante las épocas de operaciones más intensas del CMLO[342].

194. Respecto a los niveles de metales presentes en la sangre de las presuntas víctimas, la Corte advierte que se realizaron una serie de dosajes médicos en los años 2008-2009, 2010-2011, 2013-2014, 2016 y 2019, en el marco de las medidas implementadas por parte del Estado para la atención médica de las presuntas víctimas. El primero de estos estudios en los años 2008-2009 incluyó la toma de muestras de sangre y orina para determinar el dosaje de metales, las cuales fueron enviadas al CDC. El estudio encontró niveles de plomo en sangre y orina en 44 personas (67,7% de las muestras), cadmio en 48 personas (73,8% de las muestras) y arsénico en 49 personas (75,4% de las muestras)[343]. Los valores reportados por DIGESA en el marco de los dosajes realizados en 2008 y 2009 arrojaron valores promedio entre los 104 µg/L y los 36 µg/L de arsénico en orina[344]. De acuerdo con el Centro para el Control y Prevención de Enfermedades (CDC) los niveles de arsénico pueden considerarse "normales" si se encuentran por debajo de los 50 µg/L[345].

195. De acuerdo con información presentada por los representantes, la mitad de las personas dosadas en el 2009 contaban con niveles de plomo en sangre superiores a los 20 µg/dL[346]. Con base en los datos obtenidos en los dosajes realizados en los años 2013,

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341 *Cfr*. Tribunal Constitucional de Perú, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio .831).

342 *Cfr*. University of Yale, School of Forestry and Environmental Studies, "Analysis of Aire Quality and Medical Record Data, Doe Run Matallurgical Complex, La Oroya, Perú", de diciembre 2015 (expediente de prueba, folio 20797).

343 *Cfr*. Ministerio de Salud, Informe No. 019-2009-DGSP-ESNP/MINSA, de 16 de marzo de 2009 (expediente de prueba, folio .703).

344 *Cfr*. Estimaciones efectuadas por los representantes sobre la base de los Informes de DIGESA (expediente de prueba, carpeta de material audiovisual).

345 *Cfr.* Centro para el Control y Prevención de Enfermedades, Guía para el manejo médico de arsénico compuestos inorgánicos arsénicos.

346 *Cfr*. Estimaciones efectuadas por los representantes sobre la base de los Informes de DIGESA (expediente de prueba, carpeta de material audiovisual), y Resultados históricos de los dosajes de plomo, cadmio y arsénico de las presuntas víctimas (expediente de prueba, folios 25325 a 25327).

2017 y 2019, las personas dosadas habían presentado resultados promedio de 7,36 µg/dL, 5,84 µg/dL y 5,99 µg/dL de plomo en sangre, respectivamente[347]. Por otra parte, los representantes presentaron información sobre el promedio de cadmio en orina en junio de 2008, octubre de 2008, febrero de 2009, junio de 2013, y octubre de 2016, el cual fue superior al nivel de referencia de 0,20 µg/L vigente en los Estados Unidos de Norteamérica durante dicho marco temporal[348]. En relación con las cantidades de arsénico en orina, se observa que, de acuerdo con los resultados de un dosaje realizado en el 2019, el porcentaje de arsénico en orina presentaba sumas mínimas que llegaban hasta los 5,39 µg/L, y máximas que ascendían hasta los 63,55 µg/L[349].

196. Por su parte, el perito Howard Mielke señaló que, dado que el plomo, el cadmio, el mercurio y el arsénico se encuentran en el aire, suelo, y agua de La Oroya es posible que ingresen al cuerpo humano de sus pobladores, pudiendo producir trastornos neurológicos y de comportamiento, enfermedades pulmonares, dolencias cardiacas, enfermedades hepáticas, insuficiencia renal y acortamiento de la vida. En particular, respecto del plomo, indicó que los niveles de exposición a este metal por parte de las presuntas víctimas entre los años 2009 al 2019 mostraron una media inicial de plomo en sangre de 20,6 µg/dL que disminuyó a 7,3 µg/dL en 2011 y posteriormente a 5,3 µg/dL en 2011, para finalmente llegar a 5,5 µg/dL en 2019. Estas mediciones se encontraron en todo momento por encima del valor de referencia de 3,5 µg/dL del valor de referencia del Centro de Control de Enfermedades de los Estados Unidos[350]. En este punto también cabe señalar que la OMS ha establecido que no existe nivel seguro de ingesta de plomo[351].

197. En segundo lugar, la Corte recuerda que las 80 presuntas víctimas del presente caso viven o vivieron en La Oroya con posterioridad al establecimiento del CMLO en 1922, y por lo tanto, estuvieron expuestas a la contaminación por plomo, cadmio, mercurio y arsénico en el aire, suelo y/o agua durante años. Asimismo, del acervo probatorio se desprende que las presuntas víctimas han sufrido distintos padecimientos de salud a lo largo de su vida[352]. En ese sentido, respecto de alteraciones al sistema oseo, María 30 ha padecido osteoporosis; María 1, 8, 10, 11, 12, 15, 16, 23, 30, 31, 34, 35, 36, 37, 38, y Juan 7, 10, 27, 28, 41 y 42 han padecido de dolores en sus huesos; María 13, 24, 30, y Juan 26 han padecido dolor lumbar. María 1, 9, 15, 19, 28, 29, 33, 34, y Juan 2, 7, 8, 12, 15, 16, 23, 31, 33, 35, 38, y 41 han padecido de problemas visuales, lagrimeo o irritación en los ojos.

198. Por otra parte, la Corte advierte que María 1, 6, 7, 18, 30 y 31 y Juan 11, 15, 18, 39, 41, y 42 han padecido de dolor articular o pérdida de fuerza en los miembros; María

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347 *Cfr*. Estimaciones efectuadas por los representantes sobre la base de los Informes de DIGESA (expediente de prueba, carpeta de material audiovisual), y Resultados históricos de los dosajes de plomo, cadmio y arsénico de las presuntas víctimas (expediente de prueba, folios 25325 a 25327).

348 *Cfr*. Fernando Serrano, Estudio sobre la contaminación ambiental en los hogares de La Oroya y Concepción y sus efectos en la salud de sus residentes, Informe de Primeros Resultados Biológicos, de 6 de diciembre de 2005 (expediente de prueba, folios 18513, 18514 y 18515).

349 *Cfr*. Ministerio de Salud, Instituto Nacional de Salud, Centro Nacional de Salud Ocupacional y Protección del Ambiente para la Salud (expediente de prueba, folios 22689 a 22691).

350 *Cfr*. Peritaje de Howard Mielke (expediente de prueba, folios 29242 y 29243).

351 *Cfr*. OMS, Preventing disease through healthy environments. Exposure to Lead: a major public health concern, 2nd edition. 21 de octubre de 2021.

352 *Cfr.* Expedientes médicos de salud de las presuntas víctimas, Juan 1 a 42, y María 1 a 37 (expediente de prueba, folios 24275 a 24928), y Declaraciones ante fedatario público de Juan 1, 2, 6, 8, 15, 18, 25, 30, el hijo de Juan 12 y María 3, 9, 16, 24, 25, 32, 33 y 37 (expediente de prueba, folios 28950 a 29112).

31 ha sufrido artritis; Juan 12 ha padecido de artrosis, y María 12 ha padecido de reumatismo extraarticular. María 10, y Juan 5, 9, 10, 12, 19, 26, 29 y 30 han padecido de pérdida de audición o deficiencias auditivas; María 13 ha padecido de tinnitus; María 4 y Juan 8, y 27 han padecido de dolores o infecciones en el oído; María 8 y Juan 8 han padecido de sangrados nasales; María 23 ha padecido de sinusitis; María 2, 17, 18, 30, 31, 32, 33, 34, 37 y Juan 1, 32 y 33, han padecido amigdalitis; María 1, 3, 12, 20, 23, 24, 28, 29, 30, 31, 32, 34, 35, 36, 37, y Juan 2, 7, 41 y 42 han padecido de picazón, ardor o dolor de garganta; y María 16, Juan 2, y 31 han padecido rinitis.

199. Respecto a los problemas respiratorios, María 13, 30, 33, y Juan 7, 11, 21, 26, 28, 32, 33, han padecido faringitis; María 13, 21, 22, 30, 31, 32, 33, 34, y Juan 2, 3, 4, 6, 7, 25, y 30 han padecido asma; María 8, 10, 13, 30, 33, 34, y Juan 8 han padecido neumonía o bronconeumonía; María 10, 13, 21, 22, 30, 31, 33, 34, y Juan 18, 23, 30, 32, 33, 34, 35, y 40 han padecido bronquitis; y María 1, 2, 3, 6, 7, 13, 17, 20, 21, 22, 23, 28, 29, 30, 31, 33, 34, 35, 36, 37, y 38, y Juan 1, 3, 4, 5, 6, 9, 11, 12, 16, 18, 25, 26, 27, 29, 30, 33, 39, y 40, han padecido tos, y Juan 25 ha padecido de silicosis pulmonar.

200. Respecto de problemas neuropsiquiátricos, María 1, 7, 9, 16, 18, 23, 29, 31, 35, 36, 37, 38, y Juan 4, 10, 11, 21, 26, 29, 41, y 42 han padecido de alteración del sueño; María 1, 3, 9, 11, 16, 20, 23, 30, 33, 38, y Juan 5, 10, 23, 27, y 36 han padecido de cansancio o fatiga, María 2, 3, 10, 13, 16, y Juan 5, 12, 17, 19, 25, y 32 han padecido ansiedad o estrés; Juan 17 ha padecido de alteración del ánimo; María 6, 13, 18, 23, 29, 30, 31, 32, 34, 35, 37, y 38, y Juan 6, 9, 11, 17, 18, y 19 han padecido de irritabilidad o apatía; María 21, 22, 23, y Juan 23, 26, 27, 28, y 36 han padecido dificultades de aprendizaje y problemas de atención; María 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, y Juan 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 17, 18, 19, 25, 26, 28, 31, 33, 39, y 41 han padecido dolor de cabeza; María 5, 13, 25, y Juan 21, 25 y 31 han padecido de convulsiones; María 3, y Juan 12, y 23, han padecido de parestesias; y finalmente, Juan 25 y 26 han padecido de pérdida de memoria.

201. En lo que se refiere a problemas cardiovasculares, la Corte advierte que María 30 ha padecido de arritmia; María 6, 9, 31, 35, 36, 37, 38, y Juan 5, 13, 19, y 41 han padecido de hipertensión arterial. Además, María 3, 5, 8, 9, 11, 16, 20, 23, 27, 29, 30, 31, y 36, y Juan 6, 8, 28, 31, 39, 40 y 42 han padecido de dolor abdominal o problemas gastrointestinales tales como el dolor estomacal; María 6, 7, 8, 17, 31, 34, 35, 38, y Juan 4, 9, 14, 21, 39, 40 y 42 han padecido de pérdida de apetito; y María 4, 18, 23, 29, 30, 36, y Juan 3, 5, 8, 9, 23, 27, 28, 33, 34, y 39 han padecido de deposiciones diarreicas.

202. Asimismo, el Tribunal advierte que algunas presuntas víctimas han presentado síntomas en el sistema tegumentario: María 3, 4, 10, y Juan 19 y 22, han padecido de xerosis o descamación; María 9, 19, 32 y Juan 10, 11, 26, y 30 han presentado ronchas o erupciones en la piel; María 15, 16, 19, 23, 31, 32, y Juan 2, 11, y 30 han padecido de alergias; y Juan 19, 22, 25 y 31 han padecido dermatitis. Otras presuntas víctimas han padecido afectaciones en la sangre, la circulación y el sistema renal: María, 4 y 36 y Juan 26, y 42 han padecido de problemas en los riñones; y María 2, 10, 15, 16, 19, 23, y Juan 18, 21, 22, 23, 25, 27, 28, 31, 34 y 39 han padecido anemia o problemas de hemoglobina.

203. En tercer lugar, este Tribunal nota que, durante la audiencia pública del presente caso, el testigo John Maximiliano Astete Cornejo explicó que la sintomatología general

de personas expuestas a ciertos contaminantes no es suficiente para concluir que el daño a la salud se deba a dicha exposición, pues requiere un análisis particularizado[353]. En ese sentido, el Estado alegó la ausencia de un nexo causal entre las posibles enfermedades de las presuntas víctimas y la exposición a contaminantes en La Oroya. Al respecto, este Tribunal constata que, en efecto, no existe información suficiente que permita establecer los niveles de presencia de los metales antes mencionados en la sangre de las presuntas víctimas durante todo el periodo en que se encontraron expuestas a dicha contaminación, o la forma específica en que dicha exposición causó las enfermedades que adquirieron. Lo anterior se debe a la ausencia de estudios practicados durante la mayor parte del tiempo que existió la exposición a dichos contaminantes, la ausencia de un seguimiento puntual a los posibles impactos específicos en la salud de cada una de las presuntas víctimas, y las limitaciones de la ciencia médica para establecer dicha causalidad.

204. Ahora bien, en relación con la anterior, la Corte considera que, en casos como el presente, donde: a) se encuentra demostrado que determinada contaminación ambiental es un riesgo significativo para la salud de las personas (*supra* párrs. 189 y 190); b) las personas estuvieron expuestas a dicha contaminación en condiciones que se encontraran en riesgo (*supra* párrs. 191 a 202), y c) el Estado es responsable por el incumplimiento de su deber de prevenir dicha contaminación ambiental (*supra* parrs.153 a 157), no resulta necesario demostrar la causalidad directa entre las enfermedades adquiridas y su exposición a los contaminantes[354]. En estos casos, para establecer la responsabilidad estatal por afectaciones al derecho a la salud, resulta suficiente establecer que el Estado permitió la existencia de niveles de contaminación que pusieran en riesgo significativo la salud de las personas y que efectivamente las personas estuvieron expuestas a la contaminación ambiental, de forma tal que su salud estuvo en riesgo. En todo caso, en estos supuestos le corresponderá al Estado demostrar que no fue responsable por la existencia de altos niveles de contaminación y que esta no constituía un riesgo significativo para las personas.

205. La Corte advierte que existe evidencia científica respecto a que la mera exposición a altos niveles de contaminantes -como los generados por la actividad del CMLO- constituyen un riesgo para la salud de las personas, incluso cuando la exposición a la contaminación ha cesado y no existan rastros de la contaminación en el organismo de las personas por el paso del tiempo[355]. Asimismo, se ha demostrado que la exposición simultánea a diversos agentes contaminantes genera riesgos acumulativos a la salud de

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353 *Cfr*. Declaración de John Maximiliano Astete Cornejo rendida en la Audiencia Pública del presente caso, durante el 153º Período Ordinario de Sesiones, el cual se llevó a cabo en Montevideo, Uruguay.

354 *Cfr*. TEDH, Pavlov y otros c. Rusia, no. 3161/09, Sentencia de 11 de octubre de 2022, párr. 61; ver también Locascia y otros c. Italia, no. 35648/10, Sentencia de 19 de octubre de 2023, párr. 148. Asimismo, diversos tribunales nacionales en la región americana, tales como Canadá, Ecuador, Colombia y Costa Rica han acreditado afectaciones a la salud como resultado de la contaminación industrial derivada de las actividades realizadas por empresas privadas. Resolución No. 230-18-SEP-CC de la Corte Constitucional de la República de Ecuador, de 27 de junio de 2018; Resolución T-733-17 de la Sala Plena de la Corte Constitucional de la República de Colombia, de 15 de diciembre 2017; y Resolución no. 02740-2015 de la Sala Constitucional de la Corte Suprema de Justicia de la República de Costa Rica, de 27 de febrero de 2015, y Resolución no. 03870-2021 de la Sala Constitucional de la Corte Suprema de Justicia de la República de Costa Rica, de 26 de febrero de 2021.

355 *Cfr.* Declaración pericial de Hugo Villa (expediente de prueba, folio 29151). El perito Hugo Villa señaló que para el diagnóstico de la exposición a contaminación de los habitantes de La Oroya no solo se debían analizar los dosajes en sangre y orina, sino que resultaba necesario tomar en consideración los antecedentes de la exposición y el cuadro clínico.

las personas[356]. Por esta razón, la Corte considera que las presuntas víctimas del caso se encontraron en una situación de riesgo significativo para su salud ante la exposición durante años a altos niveles de metales pesados y de contaminación ambiental en La Oroya. Asimismo, no queda duda que la fuente principal de contaminación en La Oroya era la actividad minero-metalúrgica del CMLO, y que el Estado incumplió con su deber prevenir la existencia de altos niveles de contaminación en el aire, suelo y agua (*supra* párr. 176).

206. Como complemento de lo anterior, este Tribunal advierte que los representantes demostraron que las enfermedades producidas por la exposición constante a altas cantidades de plomo, cadmio, mercurio y arsénico pueden afectar el cerebro, los pulmones, el hígado, los riñones, los huesos, el sistema reproductivo y los dientes, y perjudicar de manera más aguda a los niños e incluso a los fetos durante el embarazo. Asimismo, demostraron que las presuntas víctimas del caso presentan enfermedades en el sistema óseo, renal, cardiovascular, respiratorio, y neuropsiquiátrico, llegando a padecer de tumores y cáncer. Inclusive aquellas presuntas víctimas que inicialmente no presentan síntomas no están exentas de enfermarse en el futuro por los efectos acumulativos que la exposición a la contaminación puede generar. Así, aun cuando la vulneración al derecho a la salud se produjo por el riesgo significativo resultado de la exposición constante a los metales producidos por la actividad del CMLO en La Oroya, la Corte constata que en el presente caso se produjeron enfermedades en las presuntas víctimas del caso como resultado de dicha exposición.

207. Asimismo, este Tribunal recuerda que los Estados deben actuar conforme al principio de precaución a efectos de prevenir la violación de los derechos de las personas en los casos en los que haya indicadores plausibles que una actividad podría acarrear daños graves e irreversibles al medio ambiente, aún en ausencia de certeza científica[357]. Por ello, aún en ausencia de certeza científica individualizada, pero donde existen elementos que permitan presumir la existencia de un riesgo significativo para la salud de las personas por la exposición a niveles altos de contaminación ambiental, los Estados deben adoptar las medidas que sean eficaces para prevenir la exposición a dicha contaminación[358]. Por esta razón, la Corte considera que la ausencia de certeza científica sobre los efectos particulares que la contaminación ambiental puede tener en la salud de las personas no puede ser motivo para que los Estados pospongan o eviten la adopción de medidas preventivas, y tampoco puede ser invocada como justificación para la ausencia de adopción de medidas de protección general de la población.

208. En este punto, este Tribunal considera pertinente resaltar que los efectos acumulativos de los metales en los organismos de las presuntas víctimas precisaban que el Estado realizara análisis particularizados de su situación de salud, que tomara en cuenta los antecedentes de la exposición y la historia clínica de cada una de ellas, y que adoptara medidas para la atención médica. También requería de un análisis sostenido en el tiempo, ya que las enfermedades pueden llegar a manifestarse años después de la exposición. Lo anterior, más aún, cuando fue el propio Estado quien no proporcionó atención individualizada y sostenida a quienes estaban sufriendo síntomas por contaminación de metales pesados. En ese sentido, la Corte recuerda que la OMS ha establecido que no existe nivel seguro para la salud por la ingesta de plomo.

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356 *Cfr.* Agencia de Protección Ambiental de EUA, Framework for Cumulative Risk Assesment. EPA Office of Research and Development, Center for Public Health and Environmental Assesment, mayo 2003, p. 7.

357 *Cfr*. *Opinión Consultiva OC-23/17*, *supra*, párr. 180.

358 *Cfr. Opinión Consultiva OC-23/17*, *supra*, párr. 180.

209. Ahora bien, respecto al cumplimiento de las obligaciones en materia de atención de la salud, el Estado adoptó una serie de medidas respecto de la atención médica de la población en La Oroya[359], y en particular, respecto de las presuntas víctimas. En lo que refiere a estas últimas, y tal como fue señalado anteriormente, se realizaron dosajes médicos en los años 2008-2009, 2010-2011, 2013-2014, 2016 y 2019, y evaluaciones médicas a los beneficiarios de las medidas cautelares. Al respecto, el Estado informó que en el año 2008, de los 65 beneficiarios de las medidas provisionales, 62 acudieron a la toma de muestras, 61 se presentaron a evaluaciones médicas, 56 a evaluación psiquiátrica y 3 no se presentaron a ninguna evaluación médica[360]. En julio de 2014, el Ministerio de Salud peruano señaló que, de las personas inicialmente beneficiarias de las medidas cautelares, 42 recibían atención médica mediante el Seguro Integral de Salud, 18 beneficiarios lo hacían a través de el Seguro Social de Salud (ESSALUD) y otros dos pacientes no acudían a ninguna de las entidades públicas de salud[361].

210. Por otra parte, la Corte recuerda que el 29 de marzo de 2019 el Estado adoptó el "Plan de Acción de Salud para los beneficiarios de la Medida Cautelar Nº 271-05 Caso La Oroya y su ampliación 2019-2022"[362] con el objetivo de "[f]ortalecer la atención integral, especializada y oportuna de los beneficiarios de la Medida Cautelar Nº 271-05 y su ampliación"[363]. De acuerdo con un informe elaborado por el MINSA de fecha 3 de febrero de 2021, el Estado realizó el 21 y 22 de junio de 2019 la toma de muestras para dosaje de metales pesados (plomo, cadmio y arsénico) a 38 presuntas víctimas residentes en La Oroya, Chupaca, Huancayo, Jauja y Tarma[364]. Asimismo, los días 23 y 24 de junio de 2019 el Estado efectuó una toma de muestra para dosaje de metales pesados a 10 presuntas víctimas residentes en Lima[365]. Aunado a lo anterior, el informe constata que "de los 38 beneficiarios que participaron en la primera etapa, 28 acudieron a recibir atención integral en la segunda etapa"[366]. El Estado señaló en su escrito de argumentos

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[359] *Cfr.* Declaración del testigo Hugo Villa (expediente de prueba, folio 29146 y 29152). El testigo explicó que el hospital en La Oroya de ESSALUD atendió a los trabajadores y sus familias, así como a otras personas que vivián en la comunidad. El testigo explicó los diversos síntomas que los pacientes tenían y que, en casos de intoxicación, para las personas aseguradas en ESSALUD, se realizaba atención especializada de los pacientes. En cambio, para personas no afiliadas, MINSA atendía con el personal que tenía disponible.

[360] *Cfr*. Ministerio de Salud, Informe No. 019-2009-DGSP-ESNP/MINSA, de 16 de marzo de 2009 (expediente de prueba, folio .703).

[361] *Cfr*. Ministerio de Salud, Informe No. 018-2014-GRJ-DRSJ-DESP-ESNMP, de 15 de julio de 2014 (expediente de prueba, folio .675).

[362] *Cfr*. Gobierno Regional de Junín, Dirección Regional de Salud, "Documento Técnico: Plan de Acción de Salud para los Beneficiarios de la Medida Cautelar no. 271-05-Caso La Oroya, y su ampliación", DESP-DAIS-ESMP/RSJAUJA/MRLO (expediente de prueba, folios 27898 a 27922).

[363] *Cfr*. Gobierno Regional de Junín, Dirección Regional de Salud, "Documento Técnico: Plan de Acción de Salud para los Beneficiarios de la Medida Cautelar no. 271-05-Caso La Oroya, y su ampliación", DESP-DAIS-ESMP/RSJAUJA/MRLO (expediente de prueba, folio 27901).

[364] *Cfr*. Informe nº 014-2021-UFAPEMPyOSQ-DENOT-DGIESP/MINSA, dirigido al señor W.B.N.B., Director Ejecutivo de la Dirección de Prevención y Control de Enfermedades no transmisibles, raras y huérfanas, de 3 de febrero de 2021 (expediente de prueba, folios 28308 y 28309).

[365] *Cfr*. Informe nº 014-2021-UFAPEMPyOSQ-DENOT-DGIESP/MINSA, dirigido al señor W.B.N.B., Director Ejecutivo de la Dirección de Prevención y Control de Enfermedades no transmisibles, raras y huérfanas, de 3 de febrero de 2021 (expediente de prueba, folios 28308 y 28309).

[366] *Cfr*. Informe nº 014-2021-UFAPEMPyOSQ-DENOT-DGIESP/MINSA, dirigido al señor W.B.N.B., Director Ejecutivo de la Dirección de Prevención y Control de Enfermedades no transmisibles, raras y huérfanas, de 3 de febrero de 2021 (expediente de prueba, folio 28309).

finales escritos que las presuntas víctimas "fueron referidas a las Instituciones Prestadoras de Salud a fin de recibir la atención especializada"[367].

211. En relación con lo anterior, la Corte considera que las acciones del Estado en la realización de dosajes a las presuntas víctimas y las acciones dirigidas a la atención médica como parte del "Plan de Acción de Salud para los beneficiarios de la Medida Cautelar Nº 271-05 Caso La Oroya y su ampliación 2019-2022" constituyen medidas positivas para la garantía del derecho a la salud de las presuntas víctimas. Sin embargo, se advierte que las declaraciones de las presuntas víctimas demuestran que, si bien se han realizado los referidos dosajes y han existido planes de acción y atención médica, no ha existido un tratamiento específico dirigido a abordar las enfermedades que han contraído a causa de la contaminación ambiental. En ese sentido, la Corte nota que Juan 2 y Juan 15 expresaron que nunca recibieron un diagnóstico especializado por las enfermedades asociadas a la contaminación, María 3 expresó que no ha existido una atención integral, y María 24 declaró que solo había recibido "jarabes" y "paracetamol" ante los síntomas para sus enfermedades[368].

212. En relación con las condiciones de atención de salud de las presuntas víctimas, el doctor Villa Becerra, quien se desempeñó como médico en el Seguro Social de Salud (ESSALUD) entre 1979 y 2021, indicó en su declaración testimonial escrita que "el Centro de Salud de La Oroya, dependiendo del MINSA, atendía con personal muy limitado y sin experiencia en el tema de problemas de salud provocados por la intoxicación por metales y metaloides"[369]. En sentido similar, de acuerdo con lo señalado en el peritaje de Marisol Yáñez en relación con la infraestructura médica, "el único centro de salud al que pueden acudir en La Oroya, las [presuntas] víctimas del caso, ha sido declarado inhabitable desde hace siete años"[370]. En lo que respecta a la calidad de la atención médica recibida, la perita Yáñez indicó que, con base en lo señalado por las presuntas víctimas en las entrevistas realizadas para la elaboración del peritaje, "el sistema de salud no cumplió con los requisitos mínimos en el cuidado y tratamiento de los habitantes de La Oroya"[371].

213. De lo anterior se desprende que la atención a la salud por parte del Estado no ha contado con establecimientos adecuados para el tratamiento de las enfermedades que las presuntas víctimas han contraído por su exposición a la contaminación ambiental, puesto que el centro de salud ubicado en La Oroya no contaba con las condiciones adecuadas para identificar y tratar las enfermedades que podían derivarse de la contaminación ambiental a la que se encontraban expuestas las presuntas víctimas; que los centros médicos donde se podría dar tratamiento a las enfermedades no han estado al alcance real de las presuntas víctimas, puesto que para poder recibir la atención médica adecuada debían desplazarse fuera de La Oroya; y que el tipo de tratamiento

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367 *Cfr*. Escrito de Argumentos Finales Escritos del Estado, de 19 de noviembre de 2022, pág. 151 (expediente de fondo, folio 1417).

368 *Cfr*. Declaración de Juan 2 (expediente de prueba, folio 28964); Declaración de Juan 15 (expediente de prueba, folio 29009); Declaración de María 3 (expediente de prueba, folio 29044); Declaración de María 24 (expediente de prueba, folio 29069). En un sentido similar ver: Declaración de Juan 1 (expediente de prueba, folio 28953); Declaración de Juan 6 (expediente de prueba, folio 28974); Declaración de Juan 8 (expediente de prueba, folio 28986); Declaración de Juan 24 (expediente de prueba, folio 29026); Declaración de Juan 30 (expediente de prueba, folio 29035); Declaración de María 16 (expediente de prueba, folio 29063); Declaración de María 24 (expediente de prueba, folio 29069), y Declaración de María 32 (expediente de prueba, folio 29087).

369 *Cfr*. Declaración de Hugo Villa Becerra (expediente de prueba, folio 29152).

370 *Cfr*. Peritaje de Marisol Yáñez (expediente de prueba, folio 29383).

371 *Cfr*. Peritaje de Marisol Yáñez (expediente de prueba, folio 29383).

médico que han recibido no ha sido adecuado para sus enfermedades, pues los medicamentos y atención recibida demuestran una evidente insuficiencia para contrarrestar los efectos de la exposición a la contaminación. Lo anterior representa un incumplimiento del deber del Estado de atención a la salud de conformidad con los elementos de disponibilidad, accesibilidad y calidad en perjuicio de las presuntas víctimas.

214. Tomando en consideración todo lo anterior, la Corte considera probado que la exposición a la contaminación ambiental de las presuntas víctimas tuvo como consecuencia que estuvieran en una situación de riesgo significativo para contraer enfermedades y que de hecho desarrollaron algunas de estas enfermedades. La existencia de altos niveles de contaminación ambiental se encontró vinculada a las acciones y omisiones estatales en materia de prevención de las actividades metalúrgicas en el CMLO, lo cual constituyó una violación al derecho al medio ambiente sano. Las condiciones ambientales creadas por las actividades de Centromin, y posteriormente de Doe Run, la ausencia de acciones suficientes por parte del Estado para controlar los efectos de la contaminación atmosférica, y la ausencia de atención médica adecuada, permiten atribuir la responsabilidad internacional del Estado por los efectos que la actividad de dicha empresa tuvo en el derecho a la salud de las presuntas víctimas del caso, contenido en el artículo 26 de la Convención Americana.

B.3.4. Respecto de los derechos a la vida y la integridad personal

B.3.4.1. Derecho a la vida de Juan 5 y María 14.

215. Los representantes alegaron que el Estado es responsable por la violación al derecho a la vida por la muerte de dos presuntas víctimas: Juan 5 y María 14. Respecto de Juan 5, la Corte constata que nació el 12 de diciembre de 1959, y que desde su infancia padeció de un soplo en el corazón, del cual fue operado en 1997 cuando le colocaron dos válvulas. Asimismo, tuvo problemas de salud en la vesícula, y por esa razón fue operado en 1996. En 2004 padeció complicaciones en el oído derecho, y a lo largo de su vida tuvo otros problemas de salud como inflamación en el hígado, problemas respiratorios, y gastrointestinales. Juan 5 falleció el 19 de septiembre de 2008 habiendo sufrido recientemente de una hemorragia subaracnoidea y pulmonar. La Corte advierte que si bien las muestras toxicológicas mostraron que al momento de su muerte tuvo resultados negativos por la presencia de arsénico, mercurio, cadmio, alcohol etílico y otras sustancias químicas, en los dosajes realizados en junio de 2008 presentó niveles de 11,30 µg/dL de plomo en sangre, 131,50 µg/dL de arsénico en orina, y 13,0 µg/dL de cadmio en orina[372].

216. Por su parte, María 14, quien pertenece al mismo grupo familiar que Juan 5, nació el 16 de septiembre de 1988. Desde los 7 años tuvo problemas en la piel y fue diagnosticada con linfoma cutáneo de células cuando tenía 14 años. Según obra en el expediente, María 14 no recibió atención médica de urgencia, y, posterior a su diagnóstico, recibió tratamientos de quimioterapia, aunque después fue suspendido por decisión de sus padres. En los estudios de laboratorio que le fueron entregados en marzo de 2006 se determinó que tuvo niveles en sangre de 0,96 µg/L de mercurio, 0,45 µg/L de cadmio y de 13,0 µg/L de plomo. La suspensión del tratamiento del cáncer se debió, según fue expresado por los representantes, por malos tratos recibidos en el hospital.

[372] *Cfr*. Expediente médico de Juan 5 (expediente de prueba, folios 24290 a 24312), e Informe del Ministerio de Salud No. 08-210-DGSP-ESNAPACMPOSQ/MINSA, de 22 de abril de 2010 (expediente de prueba, folio .763).

María 14 falleció el 4 de abril de 2006, a los 17 años de edad, como resultado de un cáncer de piel denominado linfoma cutáneo de células "T"[373].

217. Este Tribunal ha señalado que, para efectos de determinar la responsabilidad internacional del Estado en casos de muerte en el contexto médico es preciso acreditar los siguientes elementos: a) cuando por actos u omisiones se niegue a un paciente el acceso a la salud en situaciones de urgencia médica o tratamientos médicos esenciales, a pesar de ser previsible el riesgo que implica dicha denegación para la vida del paciente; o bien, se acredite una negligencia médica grave[374], y b) la existencia de un nexo causal, entre el acto acreditado y el daño sufrido por el paciente[375]. Cuando la atribución de responsabilidad proviene de una omisión, se requiere verificar la probabilidad de que la conducta omitida hubiese interrumpido el proceso causal que desembocó en el resultado dañoso. Dichas verificaciones deberán tomar en consideración la posible situación de especial vulnerabilidad del afectado[376], y frente a ello las medidas adoptadas para garantizar su situación[377].

218. En relación con lo anterior, la Corte recuerda que la conclusión sobre la responsabilidad del Estado por la violación al derecho a la salud se basó en la convicción de que las condiciones ambientales generadas por las actividades en el CMLO generaron un riesgo significativo para la salud de las presuntas víctimas ante la exposición durante años de altos niveles de contaminación ambiental en La Oroya (*supra* párr. 205). En ese sentido, la Corte recuerda que la exposición a contaminación por plomo, cadmio, mercurio, arsénico y dióxido de azufre produce afectaciones a la salud, y que en particular la exposición a arsénico se ha asociado al cáncer de piel, problemas cardiovasculares y enfermades pulmonares. Asimismo, la Corte advierte que, tal como lo señaló anteriormente, el Estado no proveyó de un tratamiento médico adecuado a las presuntas víctimas que adquirieron enfermedades por la exposición a la contaminación ambiental en La Oroya.

219. En tal sentido, la Corte recuerda que la contaminación ambiental en La Oroya puso en riesgo a las presuntas víctimas de contraer enfermedades relacionadas con el cáncer de piel y problemas pulmonares, como las que provocaron la muerte de Juan 5 y María 14. En esa lógica, en tanto el Estado es responsable por las afectaciones a la salud producidas por la contaminación ambiental en La Oroya, que incluyen aquellas que produjeron la muerte de Juan 5 y María 14, la Corte considera que el Estado también es responsable por la violación al derecho a la vida de dichas personas, en términos del artículo 4.1 de la Convención. Tomando en consideración, además, la ausencia de tratamiento médico adecuado por parte del Estado ante dichas enfermedades, tal como fue señalado previamente y se desprende de la prueba presentada.

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373 *Cfr*. Historia Clínica Hospital Nacional Guillermo Alemanara Irigoyen (expediente de prueba, folio .750); Resultados de Laboratorio de María 14 (expediente de prueba, folio .753), y Expediente médico de María 14 (expediente de prueba, folios 24720 a 24741).

374 *Cfr. Caso Ximenes Lopes Vs. Brasil*, *supra,* párrs. 120-122, 146 y 150, y *Caso Manuela y otros Vs. El Salvador, supra*, párr. 243.

375 *Caso Poblete Vilches y otros Vs. Chile, supra,* párr. 148, y *Caso Manuela y otros Vs. El Salvador, supra,* párr. 243.

376 *Cfr. Caso Comunidad Indígena Xákmok Kásek Vs. Paraguay. Fondo, Reparaciones y Costas.* Sentencia de 24 de agosto de 2010. Serie C No. 214, párr. 227, y *Caso Manuela y otros Vs. El Salvador, supra,* párr. 243.

377 *Cfr. Caso Ximenes Lopes Vs. Brasil*, *supra,* párr. 125, y *Caso Manuela y otros Vs. El Salvador, supra,* párr. 243.

B.3.4.2. Derecho a la vida digna

220. La Corte observa que la Comisión y los representantes también alegaron que el Estado es responsable por la violación a los derechos a la vida de las 80 presuntas víctimas debido a la ausencia de condiciones mínimas para una vida digna como resultado de la contaminación ambiental en la ciudad de La Oroya. Respecto a dicho alegato, la Corte advierte que ha sido demostrado que las presuntas víctimas del caso han vivido durante años en la ciudad de La Oroya en un ambiente contaminado con metales pesados que ha tenido un impacto en la calidad del suelo, el agua y el aire. Dichas condiciones de vida han traído como consecuencia que las presuntas vícitmas hayan visto afectado su derecho al medio ambiente sano y a la salud, e incluso su derecho a la vida en los casos de Juan 5 y María 14.

221. La Corte recuerda que el derecho a la vida no solo impone una prohibición al Estado de privar arbitrariamente a una persona de la vida, sino también impone obligaciones positivas para proteger y preservar la vida. En este sentido, la Corte ha señalado que en ciertas circunstancias es posible analizar una violación al artículo 4 de la Convención cuando las personas han visto afectadas las condiciones para tener una vida digna. Asimismo, la Corte recuerda que el artículo 11 de la Convención toda persona tiene derecho "al respeto de su honra y al reconocimiento de su dignidad". Entre las condiciones necesarias para una vida digna, la Corte se ha referido al acceso y calidad del agua, alimentación y salud, indicando que estas condiciones impactan de manera aguda el derecho a una existencia digna y las condiciones básicas para el ejercicio de otros derechos humanos. Asimismo, la Corte ha incluido la protección del medio ambiente como una condición para la vida digna (*supra* párr. 136).

222. En el caso concreto, la Corte advierte que la exposición a la contaminación ambiental en La Oroya tuvo como consecuencia alteraciones en el estilo de vida de las presuntas víctimas. Estas afectaciones incluyeron que a) las personas no pudieran salir de sus casas cuando los niveles de contaminación eran muy elevados; b) no pudieran beber agua de forma segura por la presencia de partículas contaminantes; c) las ventanas tuvieran que estar cerradas por la presencia de gases en el ambiente; d) las personas tuvieran problemas de ansiedad, y e) que la actividad de agricultura y ganadería fuera severamente afectada ante los altos niveles de contaminación del suelo, agua y aire[378]. La perita Marisol Yáñez señaló en su peritaje escrito que las consecuencias derivadas de la contaminación ambiental produjeron, a su vez, un detrimento en la calidad de vida de las presuntas víctimas:

> La mayor parte de las víctimas expresan que sienten que la situación ha roto su proyecto de vida, modificando la manera en que hubieran querido vivirla de una manera drástica, repercutiendo en situaciones como el encontrar empleo, destacar en los estudios o poder finalizarlos de una manera satisfactoria, o en general, el poder conseguir una mayor calidad de vida, tanto para sí mismos como para su familia[379].

223. En razón de lo expuesto, este Tribunal considera que las afectaciones producidas al estilo de vida de las presuntas víctimas que resultaron de la contaminación ambiental

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[378] *Cfr*. Declaración de Juan 1 (expediente de prueba, folios 28957 a 28962); Declaración de Juan 2 (expediente de prueba, folio 28971); Declaración de Juan 8 (expediente de prueba, folio 28982); Declaración de Juan 18 (expediente de prueba, folio 29015), y Peritaje de Marisol Yañez (expediente de prueba, folios 29349 a 29577), y Expedientes Médicos de las presuntas víctimas (expediente de prueba, folios 24274 a 24929).

[379] *Cfr*. Peritaje de Marisol Yañez (expediente de prueba, folio 29418).

constituyen una violación del derecho a su vida digna, contenido en el artículo 4.1 de la Convención Americana.

B.3.4.3. Derecho a la integridad personal

224. Este Tribunal recuerda que los representantes y la Comisión presentaron alegatos relacionados con la alegada violación del derecho a la integridad personal. La Corte ha señalado en su jurisprudencia que el derecho a la integridad física y psíquica de las personas tiene diversas connotaciones de grado, y que abarca desde la tortura hasta otro tipo de vejámenes o tratos crueles, inhumanos o degradantes, cuyas secuelas físicas y psíquicas varían de intensidad según factores endógenos y exógenos, y que deberán ser analizadas en cada situación concreta (*supra* párrs. 137 y 138).

225. En el caso, la Corte recuerda que las presuntas víctimas han sufrido de intimidaciones y han sido estigmatizadas con motivo de su oposición al CMLO, tal como se desprende de las declaraciones de Juan 1[380], Juan 2[381], Juan 6[382], Juan 8[383], Juan 18[384],

[380] *Cfr*. Declaración de Juan 1 (expediente de prueba, folio 28955) "Con las denuncias fuimos perseguidos por la empresa, nos acusaban de ser anti-mineros. La población nos satanizaba diciendo que nosotros buscábamos el cierre de la empresa […] Nosotros hemos sido perseguidos por la misma empresa, maltratados psicológicamente por los mismos trabajadores que eran nuestros mismos vecinos […] Nosotros hemos tenido que escapar, salir, vivir afuera y a veces llegar por la noche, era como si estuviéramos enfrentando una guerra".

[381] *Cfr*. Declaración de Juan 2 (expediente de prueba, folio 28962), "[…] [D]ecidí trabajar con organizaciones sociales que denunciaban el problema de contaminación en La Oroya […] Fue ahí cuando recién cambió mi vida. Empezó la estigamatización en mi contra y eso afectó mi economía y la de mi familia, por cuanto yo tenía mi restaurante y mi sauna […] Los trabajadores de la empresa venían a mi restaurante […] y luego dejaron de venir".

[382] *Cfr*. Declaración de Juan 6 (expediente de prueba, folios 28972 y 28973). "A partir de ahí empezó el problema porque el dueño de Doe Run se dio cuenta que nos estábamos organizando para demandarlos. Y entonces empezaron los hostigamientos más fuertes, incluso contra los mismos trabajadores. Nos querían confundir. Muchos fuimos agredidos y amenazados".

[383] *Cfr*. Declaración de Juan 8 (expediente de prueba, folio 28984). "[…] [A] nuestra familia siempre nos preguntaba porque queríamos pelear contra la empresa, nos acosaban con este tipo de pregunta hasta el día de hoy. Mi papá me [contaba] mucho sobre cómo una vez demandamos contra [sic] el Estado [y] las personas se enteraron de eso y nos amedrentaron al punto de perseguirnos, hacernos amenazas de muerte y quemarnos la casa".

[384] *Cfr*. Declaración de Juan 18 (expediente de prueba, folio 29016). "En los procesos que se iniciaron por parte del MOSAO para proteger la salud tuve miedo de reclamar mis derechos. Había ofensas indirectamente de los trabajadores contra la población de La Oroya. Incluso amenazas. A mí, personalmente, me trataron de matar".

Juan 30[385], María 9[386], María 16[387] y María 25[388]. Asimismo, este Tribunal advierte que dichas intimidaciones produjeron que algunas de ellas tuvieran que abandonar La Oroya. Al respecto, María 1 declaró que el presidente de la junta vecinal le informó que "t[enía] que irse" porque "los trabajadores" le iban a "destruir, […] pegar, y le [iban] a quemar [su] casa", por lo que tuvo que desplazarse de La Oroya, de manera que, a la fecha "por temor […] no pued[e] vivir en su tierra"[389].

226. La Corte también observa que los habitantes de La Oroya que decidían someterse a evaluaciones de metales en sangre también recibieron hostigamientos por otros habitantes de La Oroya, quienes se referían a ellos por las personas de la comunidad como sujetos "emplomados". De acuerdo con la declaración rendida por María 13 en la audiencia pública, era "normal" que las personas preguntaran por otros habitantes de La Oroya aludiendo a ellos como los vecinos "emplomados"[390].

227. Asimismo, de acuerdo con lo referido por la perita Marisol Yáñez, las amenazas a los opositores de la contaminación ambiental producida por el CMLO han ocasionado sufrimientos "psicoemocionales" que se manifiestan en el cuerpo y se reflejan en los siguientes indicadores del "Trastorno de Estrés Post Traumático" (TEPT): a) dificultades para conciliar o mantener el sueño, b) irritabilidad, c) dificultades para concentrarse, esfuerzos para evitar pensamientos, d) sentimientos o conversaciones sobre el suceso traumático, e) esfuerzos para evitar actividades, lugares o personas que motivan recuerdos del trauma, f) incapacidad para recordar un aspecto importante del trauma, g) sensación de desapego o enajenación frente a los demás y h) restricción de la vida afectiva[391].

228. Por otra parte, este Tribunal estima que la contaminación ambiental también ha provocado sufrimientos entre las presuntas víctimas que resultaron de su exposición a la contaminación ambiental y la ausencia de respuesta por parte del Estado ante los efectos de dicha exposición. Sobre este particular, este Tribunal advierte que la falta de acceso a una atención médica compatible con los estándares interamericanos en la

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385 *Cfr*. Declaración de Juan 30 (expediente de prueba, folio 29035). "Después de organizarnos para denunciar el tema de la contaminación fuimos muy atacados. Cuando nos reuníamos en la casa o local de alguno de los miembros […] decían que éramos delincuentes, no podíamos caminar tranquilos".

386 *Cfr*. Declaración de María 9 (expediente de prueba, folio 29052). "No hubo respuesta del Estado [a] los actos de hostilidad que sufrió la familia. Se pedía garantías, también a través de los abogados, Policía Nacional, […] pero no hubo respuestas. En una ocasión, mi mamá vendía comida en la calle y una vez regresando mi papá estaba caminando por la pista y a la vez pasaba un camión de la empresa y uno de ellos le tiró un ladrillo sin darle […] Intentaron quemar las casas de quieren habían hecho la denuncia de contaminación ante el Estado".

387 *Cfr*. Declaración de María 16 (expediente de prueba, folio 29061). "La contaminación era denunciada, pero la respuesta era más estigmatización e incluso agresiones físicas. Un día estábamos reunidos en la casa del señor [G.], varias de las personas que estábamos haciendo las denuncias de la contaminación, y a pesar de que muchos de nosotros éramos niños, y ellos lo sabían, un grupo de personas afuera empezaron a tirar tomates a la casa y a forzar las puertas para entrar y atacarnos".

388 *Cfr*. Declaración de María 25 (expediente de prueba, folio 29079). "Recuerdo que una vez mi papá reclamó y las personas empezaron a molestar, discriminar y hasta le amenazaron solo por reclamar. El Estado nunca ofreció apoyo a esta situación de discriminación, y tampoco tenía la intención de reclamar o representarnos".

389 *Cfr*. Declaración de María 1 rendida en la Audiencia Pública del presente caso, durante el 153º Período Ordinario de Sesiones, el cual se llevó a cabo en Montevideo, Uruguay.

390 *Cfr*. Declaración de María 13 rendida en la Audiencia Pública del presente caso, durante el 153º Período Ordinario de Sesiones, el cual se llevó a cabo en Montevideo, Uruguay.

391 *Cfr*. Peritaje de Marisol Yañez (expediente de prueba, folio 29402).

materia (*supra* párr. 213) produjo en las presuntas víctimas un sentimiento de incertidumbre. Al respecto, el Dr. Hugo Villa señaló que a las presuntas víctimas se les informaba que estaban "emplomad[as]" y se les "dejaban a su suerte, con el miedo y la angustia y la ansiedad de no saber en qué depararía eso, [y] que efectos tendría en su vida"[392].

229. Además, la Corte constata que los efectos de la contaminación afectaron la salud psicoemocional de las presuntas víctimas. María 3 declaró padecer de "alteraciones del sueño"[393], en concreto refirió que en el psicólogo "[l]e enviaron una pastilla de un medicament[o] contra el insomnio y para la ansiedad que [l]e diagnosticaron", y que "[l]e mandaban hacer ejercicios de relajación y respiración" pero que "nada de eso e[ra] suficiente"[394]. Asimismo, Juan 6 declaró sobre las dificultades de aprendizaje y de atención[395] que han afectado a sus hijos[396]. Asimismo, señaló que su hijo, quien habría vivido siempre en La Oroya, es "muy irritable y le duele mucho la cabeza"[397]. Por su parte, Juan 18 declaró haber sido diagnosticado en 2009 con "irritabilidad"[398].

230. Este Tribunal advierte que la degradación ambiental afecta el modo de vida de las personas, pudiendo llegar a producir el desplazamiento humano y la migración forzada[399]. En el caso, la Corte constata que las afectaciones a la salud producidas por la contaminación ambiental provocaron que algunas presuntas víctimas tuvieran que abandonar La Oroya. Al respecto, María 16 declaró que vivió en La Oroya hasta los 12 años, momento en el que "decidi[eron] salir de [la zona] porque [su] estado de salud y el de [sus] hermanas estaban muy mal", y en razón de que un doctor de la localidad le recomendó a su madre que, si "quería tener vivas" a sus hijas, "[las] tenía que sacar de La Oroya"[400]. Asimismo, Juan 15 declaró que "[a]l iniciar el colegio […] [su] mamá decidió que [él] debía salir de La Oroya para estar en un mejor ambiente" por lo que "[s]e mud[ó] a Jauja por un año"[401].

231. En este punto, la Corte considera pertinente señalar que las afectaciones derivadas de la contaminación ambiental recaen de forma desproporcionada sobre las personas, los grupos y las comunidades que ya soportan el peso de la pobreza, la

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392 *Cfr*. Declaración del Dr. Hugo Villa mencionado en el peritaje de Marisol Yáñez (expediente de prueba, folio 29384).

393 Al respecto, Juan 6 señaló que "[e]n las noches a veces, no podemos dormir bien". Juan 25 señaló que "en la noche ya no podemos dormir". *Cfr*. Declaraciones de Juan 6 y Juan 25 (expediente de prueba folios 28973 y 29025, respectivamente).

394 *Cfr*. Declaración de María 3 (expediente de prueba, folio 29044).

395 Con base en la información que obra en el expediente María 21 y María 22 han afirmado padecer de problemas de aprendizaje. Asimismo, Juan 23 y Juan 26, han afirmado padecer problemas de concentración o concentración. *Cfr*. Declaraciones de María 21, María 22, Juan 23, Juan 26, y Juan 36 (expediente médico de María 21, María 22, Juan 23, y Juan 26, folios 24777; 24780; 24463; 24496; y 24577).

396 *Cfr*. Declaración de Juan 6 (expediente de prueba, folio 28974).

397 *Cfr*. Declaración de Juan 6 (expediente de prueba, folio 28973).

398 *Cfr*. Declaración de Juan 18 (expediente de prueba, folio 29016).

399 De acuerdo con cifras del Programa de Naciones Unidas para el Medio Ambiente (PNUMA), para el año "2050 podría haber hasta 200 millones de personas desplazadas por motivos ambientales. Es decir, en un mundo donde vivirán 9.000 millones de personas, 1 de cada 45 podría verse obligada a dejar su hogar por causas ambientales". Al respecto ver: PNUMA, "Fronteras. Nuevos tema de interés ambiental. Desplazamiento ambiental: movilidad humana en el Antropoceno", de 2017, página 71.

400 *Cfr*. Declaración de María 16 (expediente de prueba, folio 29061).

401 *Cfr*. Declaración de Juan 15 (expediente de prueba, folio 29005).

discriminación y la marginación sistémica[402]. Así, el riesgo de daño es particularmente alto para aquellos segmentos de la población que se encuentran actualmente en una situación de marginación o vulnerabilidad, incluyendo a las mujeres embarazadas, niños, niñas, adolescentes[403], y personas mayores[404].

232. Al respecto, el Comité para la Eliminación de la Discriminación contra la Mujer señaló que los Estados deben adoptar medidas eficaces para reducir las emisiones de carbono, la degradación del suelo y la contaminación y todos los demás peligros y riesgos ambientales que contribuyen al cambio climático, al tener efectos negativos desproporcionados en las mujeres[405]. La perita Caroline Weill señaló que el trabajo de cuidado desigualmente asignado a las mujeres se hace más pesado a raíz de los impactos de la contaminación ambiental[406]. En el caso, María 16 declaró que su madre "[les] cuidaba y sufría por [sus] malestares y los de [sus] hermanas"[407]. Asimismo, la Corte advierte que algunas presuntas víctimas han señalado tener problemas de fertilidad[408], y, de acuerdo con lo señalado por María 13 en la audiencia pública, cuatro personas en estado de embarazo sufrieron de un "dolor de cabeza profundo" y "perdieron a sus bebés"[409].

233. Por otra parte, el Consejo de Derechos Humanos de la ONU indicó que "[p]or sí misma, la edad no hace a las personas más vulnerables a los riesgos climáticos, pero sí que la acompañan varios factores físicos, políticos, económicos y sociales que pueden tener ese efecto". De acuerdo con lo señalado por María 25: "es traumatizante recordar todas esas memorias, porque desde que t[iene] uso de [la] razón veía el humo, como [su] población sufría, principalmente los ancianos y niños", y que dicho trauma es algo que "todos [en La Oroya] lo carga[n]"[410]. La perita Yañez señaló que "[l]os adultos mayores describieron a la vejez como más dolorosa, debido a que todas las afectaciones

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402 Consejo de Derechos Humanos, Informe del Relator Especial sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, 30 de diciembre de 2019, párrs. 31 y 32.

403 *Cfr*. Resolución 3/2021 de la CIDH y REDESCA sobre "Emergencia Climática: Alcance y obligaciones interamericanas en materia de derechos humanos", 31 de diciembre de 2021, párr. 19.

404 *Cfr*. La Convención Interamericana sobre la Protección de los Derechos Humanos de las Personas Mayores define a la persona mayor como "[a]quella de 60 años o más, salvo que la ley interna determine una edad base menor o mayor, siempre que esta no sea superior a los 65 años. Este concepto incluye, entre otros, el de persona adulta mayor". Por su parte, la Ley No. 30490, Ley de la Persona Adulta Mayor, define a la persona adulta mayor como "aquella que tiene 60 o más años de edad". En relación con los daños diferenciados de la contaminación sobre las personas mayores ver: Peritaje de Marisol Yañez (expediente de prueba, folios 29446 a 29452). Al respecto ver también: Vargas, S.; Onatra, W.; Osorno, L.; Páez, E.; Sáenz, O. Contaminación atmosférica y efectos respiratorios en niños, en mujeres embarazadas y en adultos mayores (expediente de prueba, folios 22158 a 22173).

405 *Cfr.* Naciones Unidas. Comité para la Eliminación de la Discriminación contra la Mujer. Recomendación general núm. 37 (2018) sobre las dimensiones de género de la reducción del riesgo de desastres en el contexto del cambio climático, 13 de marzo de 2018, párr. 46.

406 *Cfr*. Peritaje de Caroline Weill (expediente de prueba, folios 29170 y 29171).

407 *Cfr*. Declaración de María 16 (expediente de prueba, folio 29061).

408 *Cfr*. Expedientes Médicos de las presuntas víctimas (expediente de prueba, folios 24274 a 24929).

409 *Cfr*. Declaración de María 13 rendida en la Audiencia Pública del presente caso, durante el 153º Período Ordinario de Sesiones, el cual se llevó a cabo en Montevideo, Uruguay.

410 *Cfr*. Declaración de María 25 (expediente de prueba, folio 29079).

[…] pasaban a su fase crónica, y manifestaban que no ha[bían] instituciones especializadas para poder cuidar de ellos, quedando prácticamente […] abandonados"[411].

234. En razón de lo expuesto, este Tribunal considera que los sufrimientos producidos a las presuntas víctimas que resultaron de su exposición a la contaminación ambiental y de actos de hostigamiento, constituyen una violación del derecho a la integridad personal, contenido en el artículo 5.1 de la Convención Americana.

B.3.5. Respecto de los derechos de la niñez

235. La Corte recuerda que la Comisión señaló que el Estado incumplió con sus obligaciones de protección reforzada de garantía de la salud de las 23 presuntas víctimas que eran niños o niñas al momento de presentar la petición inicial ante dicho órgano. Los representantes alegaron que el Estado desconoció la situación de vulnerabilidad de niños y niñas e incumplió sus deberes especiales de protección de 71 presuntas víctimas, las cuales fueron niños o niñas en algún momento desde que el Estado tuvo conocimiento de la contaminación ambiental en la ciudad de La Oroya. El Estado alegó que no fue demostrado el nexo causal entre la contaminación atmosférica y las afectaciones a la salud de niñas o niños, por lo que no existía responsabilidad internacional por violaciones al artículo 19 de la Convención. Además, señaló que habría tomado medidas especiales de protección en favor de los niños y niñas en la comunidad de La Oroya.

236. En relación con lo anterior, la Corte advierte que los estudios presentados como prueba en el presente proceso permiten establecer que los niños y niñas se pueden ver particularmente afectados en su salud y desarrollo como resultado de la exposición a metales pesados[412], particularmente al plomo. En ese sentido, la Corte advierte que la OMS ha establecido que la exposición de niños y niñas a la contaminación atmosférica puede tener efectos adversos desde el nacimiento, incrementar la mortalidad infantil, afectar el desarrollo neuronal, incrementar la obesidad infantil, afectar el funcionamiento y crecimiento de los pulmones, producir condiciones como asma, e inclusive provocar cáncer[413]. Asimismo, la Corte nota que la exposición de los niños y niñas a compuestos químicos producen un daño mayor en el organismo, lo que puede afectar a su vez el desarrollo físico y mental de la persona[414]. Finalmente, este Tribunal también observa que los niños y niñas pueden tener mayores posibilidades de exposición a la contaminación debido a factores conductuales que derivan de su edad y que aumentan la posibilidad de introducir agentes contaminantes a su cuerpo[415].

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411 *Cfr*. Peritaje de Marisol Yáñez (expediente de prueba, folio 29558).

412 *Cfr.* Agency for Toxic Substances and Disease Registry (ASTDR), "Toxicological Profile for Sulfur Dioxide", diciembre de 1998, pág. 43 (expediente de prueba, folio 21984); ASTDR, Perfil Toxicológico para el Arsénico, diciembre de 2003 (expediente de prueba, folio 23169 a 23170); ATSDR, "Toxicological Profile for Cadmium", septiembre de 2012 (expediente de prueba, folio 22215 a 22216); y U.S. Environmental Protection Agency (EPA), Efectos en la salud por exposición al mercurio, junio de 2014 (expediente de prueba, folio 23191 a 23192).

413 *Cfr.* OMS, Air Pollution and Child Health: Prescribing clean air. Summary, 2018 (expediente de prueba, folio 21784); ver en sentido similar, The LEAD Group Inc., Health Impacts of Lead Poisoning A preliminary listing of the health effects & symptoms of lead poisoning, de septiembre de 2020 (expediente de prueba, folios 20985 a 20993).

414 *Cfr.* Agency for Toxic Substances and Disease Registry (ASTDR), "Toxicological Profile for Lead", agosto de 2020, (expediente de prueba, folio 21329), y Organización Mundial de la Salud, Intoxicación por plomo y salud, 31 de agosto de 2022 https://www.who.int/es/news-room/factsheets/detail/lead-poisoning-and-health.

415 *Cfr*. OMS, Air Pollution and Child Health: Prescribing clean air. Summary, 2018 (expediente de prueba, folio 21784); EPA- United States Environmental Protection Agency. Integrated Science Assessment for Lead.

237. La Corte recuerda que (*supra* párr. 76) es posible establecer que el Estado tuvo conocimiento de la exposición a la contaminación ambiental en niños y niñas desde 1981, año desde el cual este Tribunal puede ejercer su competencia contenciosa respecto de Perú. Asimismo, la Corte recuerda que el estudio elaborado por Doe Run en 2001 concluyó que los niveles de plomo en sangre de niños y niñas estaban por encima de los recomendados por la OMS, mostrando los siguientes resultados: de 0 a 3 años, 26,1 µg/100 ml; de 4 a 6 años, 23,7 µg/100 ml; de 7 a 15 años, 20,3 µg/100 ml; y, en grupo de niños y niñas mayores de 16, 13,7 µg/100 ml. Adicionalmente, la Corte recuerda que en el año 2005 el Ministerio de Salud realizó estudios en los que analizó muestras de sangre de 788 niños y niñas que vivían en La Oroya y concluyó que 99,9% de ellos tenían niveles de plomo por encima de lo recomendable. Asimismo, señaló que "[e]n La Oroya, las afectaciones respiratorias en los niños [y niñas] [constituían] un problema de salud con una tendencia creciente en la morbilidad y la mortalidad"[416].

238. Asimismo, el Tribunal advierte que, desde 1981, 57 presuntas víctimas fueron o son niños o niñas[417]: Juan 2, Juan 3, Juan 4, Juan 6, Juan 8, Juan 9, Juan 10, Juan 14, Juan 16, Juan 20, Juan 21, Juan 22, Juan 23, Juan 24, Juan 26, Juan 27, Juan 28, Juan 30, Juan 31, Juan 32, Juan 33, Juan 34, Juan 35, Juan 36, Juan 37, Juan 38, Juan 39, Juan 40, Juan 42, María 3, María 4, María 5, María 6, María 8, María 9, María 10, María 12, María 14, María 15, María 16, María 17, María 18, María 19, María 21, María 22, María 23, María 24, María 25, María 26, María 27, María 28, María 29, María 32, María 33, María 34, María 35, y María 37. Estas presuntas víctimas presentaron afectaciones a su salud, vida digna e integridad personal como resultado de la contaminación ambiental en La Oroya (*supra* párrs. 214, 223 y 234). Ahora bien, la Corte recuerda que, como fue señalado anteriormente, la exposición a contaminación de metales pesados, y particularmente por plomo, produce riesgos diferenciados para la salud de los niños y niñas, pues su organismo resiente de mayor forma la contaminación, lo que afecta a su desarrollo. En ese sentido, la Corte advierte que la perita Marisol Yañez señaló en su declaración en la audiencia pública del presente caso que la exposición a la contaminación de las presuntas víctimas que eran niños y niñas, además de afectar su salud, limitó aspectos de su vida como su posibilidad de relacionarse, hacer ejercicio físico y además generó "alta insatisfacción" en su vida[418].

239. En relación con lo anterior, la Corte nota la declaración de María 9, quien señaló que desde que era una niña sufrió los efectos de la contaminación atmosférica tanto en su salud como en su vida social. En particular se refirió a cómo, cuando el CMLO estaba en actividad, se "notab[a] el ardor [en] la garganta, el ardor [en] la vista, que no podía[n] respirar, [y que] la piel empezaba a resecarse más". La presunta víctima

https://ordspub.epa.gov/ords/eims/eimscomm.getfile?p_download_id=518908%20, 2013, págs. 81-84; Peritaje de Howard Mielke (expediente de prueba, folio 29234); peritaje de Oscar Cabrera (expediente de prueba, folio 29309).

416 *Cfr.* Estudio de Niveles de Plomo en la Sangre de la Población en La Oroya 2000-2001, desarrollado por Doe Run Perú en el año 2001 (expediente de prueba, folio 21689); Ministerio de Salud, Dirección General de Salud Ambiental, "Censo Hemático del Plomo y Evaluación Clínica-Epidemiológica en poblaciones seleccionadas de La Oroya Antigua", de 2005 (expediente de prueba, folio .479 a .481), y Ministerio de Salud, "Prevalencia de las Enfermedades Respiratorias en Niños Escolares de 3-14 años y factores asociados a la calidad del aire, La Oroya, Junín, Perú. 2002-2003", de junio de 2005 (expediente de prueba, folio .552).

417 En la Opinión Consultiva 17/02 de 28 de agosto de 2002 la Corte estableció que el término "niño o niña" se refiere a las personas que "no haya[n] cumplido 18 años de edad". *Cfr. Condición Jurídica y Derechos Humanos del Niño.* Opinión Consultiva OC-17/02 de 28 de agosto de 2002. Serie A No. 17, párr. 42.

418 *Cfr*. Declaración de Marisol Yañez rendida en la Audiencia Pública del presente caso, durante el 153º Período Ordinario de Sesiones, el cual se llevó a cabo en Montevideo, Uruguay.

también señaló que la contaminación tuvo efectos en el ámbito social, puesto que en su proceso educativo tuvo que soportar "el ardor en la garganta"[419]. En un sentido similar, María 32 expresó que durante su infancia vivió a 5 kilómetros de distancia del CMLO, y recordó que en ese tiempo "siempre había que estar dentro de la casa ya que había mucha contaminación" y que, cuando estaba en el colegio, "sufri[ó] de los bronquios, sinusitis y enfermedades respiratorias, sobre todo al hacer actividades al aire libre"[420]. Asimismo, Juan 24 sufrió de trastornos en el lenguaje, bajo nivel académico y cefalea, y Juan 39 sufrió durante su niñez dolores de cabeza y musculares, mareos, cólicos, bajo apetito y tos frecuente (Ver Anexo 3).

240. Por su parte, la testigo María Mercedes Lu De Lama señaló que el grupo con mayor riesgo de exposición al plomo eran niñas y niños, puesto que sus actividades principales las realizaban en parques y al aire libre. En particular, señaló que en La Oroya "los patios de las escuelas, centros pre-escolares, canchas o campos de juego fulbito, parques y otras zonas están asfaltados". Esto produce, explicó la testigo, que en estas zonas se acumule el plomo reciente transportado por las partículas del aire, y de ahí que los niños y niñas estén más expuestos a ingerirlas al llevarse la mano a la boca o a la cara[421]. En un sentido similar, el perito Howard Mielke señaló que el plomo en polvo es una de las formas más frecuentes de exposición para niños y niñas, sobre todo para aquellos que "gatean en superficies exteriores e interiores de su comunidad residencial". Este polvo puede ser injerido directamente por el contacto con el suelo, y también llevado a sus hogares, donde puede ser injerido por otras personas. Lógicamente, entre más presencia de plomo hay en el aire, más riesgo de injerirlo existe para los niños y niñas[422].

241. Por otra parte, la Corte advierte que el Estado señaló haber realizado distintas medidas diferenciadas de protección a favor de niños y niñas atendiendo a su situación de vulnerabilidad. En ese sentido, destacó la aprobación de la "Guía de Práctica Clínica para el Manejo de Pacientes con Intoxicación por Plomo" de 2007, en la cual se establecieron parámetros diferenciados en función a la edad. Al respecto destacó que "desde el año 2007 se procuró reducir los niveles de plomo en la sangre de personas afectadas, a partir de la adaptación de un enfoque diferenciado con base a su edad"[423]. Adicionalmente, señaló que se han emitido diversas directivas orientadas a guiar la actuación médica respecto de intoxicación con plomo y otras sustancias. Sin perjuicio de la efectividad que dichas medidas pudieron tener en la atención de la salud de la población en La Oroya, la Corte considera que no existen elementos de prueba que permitan establecer el impacto que estas u otras medidas tuvieron en la protección de la salud de las presuntas víctimas del caso que eran niños y niñas desde que el Estado tuvo conocimiento de los niveles de contaminación.

242. En razón de lo anterior, la Corte considera que las presuntas víctimas que eran niños y niñas se encontraban en una situación de vulnerabilidad frente a la contaminación ambiental producida por el CMLO, lo cual requería medidas especiales de protección frente a los impactos diferenciados que dicha contaminación podía tener en su salud y vida. De esta forma, la Corte considera que el incumplimiento del deber del

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419 *Cfr*. Declaración de María 9 (expediente de prueba, folio 29051)

420 *Cfr.* Declaración de María 32 (expediente de prueba, folio 29086).

421 *Cfr.* Declaración de Mercedes Lu De Lama (expediente de prueba, folio 29128).

422 *Cfr.* Declaración del perito Howard Mielke (expediente de prueba, folio 29235).

423 *Cfr*. Escrito de contestación del Estado de 20 de julio de 2022, párr. 416 (expediente de fondo, folio 691).

Estado de fiscalización y control de las actividades de Centromin y de Doe Run, lo cual constituyó una violación del derecho al medio ambiente sano, y que tuvo como consecuencia la afectación de la salud, la vida digna y la integridad personal de las víctimas del caso, también constituyó un incumplimiento de su deber de protección especial de los derechos de la niñez en términos del artículo 19 de la Convención Americana.

243. Adicionalmente, este Tribunal considera pertinente señalar que, de conformidad con el principio de equidad intergeneracional, los Estados deben cumplir con sus obligaciones de protección del medio ambiente tomando en consideración los efectos que los daños al medio ambiente tienen en las generaciones presentes y futuras. La Corte considera que esta obligación adquiere especial relevancia respecto de los niños y niñas, toda vez que son ellos quienes pueden verse afectados en mayor medida por las consecuencias presentes y futuras de los daños al medio ambiente[424]. En este sentido, la Corte considera que este principio impone obligaciones reforzadas de protección a la niñez respecto de la prevención de daños a su salud como resultado de la contaminación ambiental, y la atención posterior por las enfermedades adquiridas con motivo de ella.

244. Al respecto, la Corte advierte que la Asamblea General de la ONU ha reconocido al desarrollo como un derecho que conlleva la obligación del Estado de "formular políticas públicas de desarrollo nacional adecuadas con el fin de mejorar constantemente el bienestar de la población entera y de todos los individuos […]"[425]. En un sentido similar, la Agenda 2030 ha señalado como uno de sus objetivos meta para el desarrollo sostenible la promoción de políticas orientadas al desarrollo que apoyen las actividades productivas y la creación de puestos de trabajo"[426]. Asimismo, se ha establecido que los Estados deben procurar desvincular la producción y el consumo eficiente de los recursos humanos de la degradación del medio ambiente[427]. La Corte considera que, en efecto, los Estados tienen la obligación de impulsar el desarrollo sostenible en beneficio de las personas y las comunidades para lograr su bienestar económico, social, cultural y político, pero deben cumplirla en el marco permitido por los derechos humanos, y en particular el derecho al medio ambiente sano. El desarrollo sostenible y la protección del medio ambiente resultan fundamentales para el bienestar de toda la población, pero lo es especialmente para los niños y niñas, quienes -dada la etapa de su vida- pueden verse afectados desproporcionadamente por la falta de oportunidades económicas y por la degradación del medio ambiente.

245. En definitiva, la Corte considera que el impacto que la contaminación ambiental tuvo en las presuntas víctimas del caso fue mayor cuando eran niños o niñas, y que el Estado no adoptó medidas especiales de protección efectivas que atendiera a su

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424 *Cfr*. Comité de los Derechos Del Niño, Observación General No. 26 relativa a los derechos del niño y el medio ambiente, con especial atención al cambio climático, 22 de agosto de 2023, párr. 24.

425 Declaración sobre el derecho al desarrollo, Resolución 41/128 de la Asamblea General de las Naciones Unidas, de 4 de diciembre de 1986; Carta de las Naciones Unidas de 26 de junio de 1945, artículos 1, 55 y 56; Pacto Internacional de Derechos Civiles y Políticos, de 16 de diciembre de 1966, artículos 1.1. y 1.2.; Pacto Internacional de Derechos Económicos, Sociales y Culturales; artículos 1.1. y 1.2.; Declaración Universal de los Derechos Humanos de 10 de diciembre de 1948, artículo 22; Carta de Derechos y Deberes Económicos de los Estados, de 14 de diciembre de 1974; Declaración de Río sobre el Medio Ambiente y el Desarrollo, de 3 a 14 de junio de 1992, Principio 2; Conferencia Mundial de Derechos Humanos, Declaración y Programas de Acción de Viena, de 25 de junio de 1992, Punto 2.

426 Agenda 2030 para el Desarrollo Sostenible, Resolución de la Asamblea General de las Naciones Unidas de 25 de septiembre de 2015, meta objetivo 8.3.

427 *Cfr*. Agenda 2030 para el Desarrollo Sostenible, Resolución de la Asamblea General de las Naciones Unidas de 25 de septiembre de 2015, meta objetivo 8.4.

condición de vulnerabilidad. En consideración a lo anterior, la Corte concluye que el Estado violó los derechos contenidos en el artículo 19 de la Convención Americana, en relación con el artículo 26 del mismo instrumento, en perjuicio de 57 presuntas víctimas eran niños o niñas desde 1981.

B.3.6. Derecho a la información y la participación política

246. Dicho lo anterior, la Corte procederá a analizar los alegatos relacionados con la alegada violación al derecho a la información y a la participación política en perjuicio de las presuntas víctimas. En primer lugar, este Tribunal considera pertinente recordar que el Estado tuvo conocimiento de los niveles de contaminación ambiental en La Oroya, y las consecuencias que ésta podía tener para la salud de la población, al menos desde el año 1981 (*supra* párr. 76). Asimismo, la Corte recuerda que tanto el Tribunal Constitucional con su sentencia de 2006, como la Comisión Interamericana con su resolución de medidas cautelares de 2007, las cuales fueron ampliadas en 2014, hicieron notar los riesgos a la salud que los habitantes de La Oroya enfrentaban por la exposición a la contaminación producida por el CMLO (*supra* párrs. 86 a 91).

B.3.6.1. Derecho a la información

247. Este Tribunal recuerda que el deber de proveer información por parte del Estado imponía una obligación de naturaleza positiva que le permitiera a los habitantes de La Oroya, y en particular a las presuntas víctimas, tener información completa y comprensible para poder ejercer sus derechos que podían verse afectados por la exposición a niveles altos de contaminación ambiental. En particular, la Corte recuerda que, con base de un estándar de "obligación de transparencia activa", el Estado debe suministrar información de oficio a los interesados y a la población en general. El cumplimiento de esta obligación es necesario para que las personas puedan ejercer sus derechos, especialmente al medio ambiente sano, la salud, la integridad personal y la vida (*supra* párr. 146)

248. Teniendo en cuenta lo anterior, la Corte advierte que el Estado adoptó diversas medidas con el objetivo de informar a la población sobre la contaminación en La Oroya. En el año 2003 se adoptó el Reglamento de los Niveles de Estados de Alerta Nacionales para Contaminantes del Aire con el objetivo de activar un conjunto de medidas para proteger la salud y evitar la exposición excesiva de la población a la contaminación[428]. Dicho Decreto establece que "DIGESA [debía] inform[ar] a la comunidad respecto de la declaratoria de estados de alerta a través de medios de comunicación más rápidos y adecuados para cada caso"[429]. En lo que respecta a las declaraciones de estados de alerta, la Corte observa que, a partir de julio de 2007, el Ministerio de Salud, a través de DIGESA y el Gobierno Regional de Junín, activó un sistema de estados de alerta por contaminación atmosférica por Material Particulado (PM10) y Dióxido de Azufre (SO_2),

[428] *Cfr*. Decreto Supremo No. 009- 2003-SA que "Aprueba el Reglamento de los Niveles de Estados de Alerta Nacionales para Contaminantes del Aire", publicado en el Diario Oficial El Peruano de 25 de julio de 2002 (expediente de prueba, folio .1301).

[429] *Cfr*. Decreto Supremo No. 009- 2003-SA que "Aprueba el Reglamento de los Niveles de Estados de Alerta Nacionales para Contaminantes del Aire", publicado en el Diario Oficial El Peruano de 25 de julio de 2002 (expediente de prueba, folio .1301).

el cual establecía tres parámetros de alerta: "estado de cuidado", "estado de peligro", y "alerta de emergencia"[430].

249. Con base en lo establecido en el "Plan de Contingencia para Estados de Alerta por Contaminación del Aire en la Cuenca Atmosférica de La Oroya" de julio de 2007, para declarar un estado de "emergencia" debían presentarse concentraciones mayores a 420 $\mu g/m^3$ de material particulado en un promedio de 24 horas, o, en el caso del dióxido de azufre, de más de 2500 $\mu g/m^3$ en un promedio de 3 horas. De acuerdo con datos proporcionados por Doe Run al Consejo Nacional del Ambiente, solo en el año 2006 se produjeron 183 episodios de "emergencia" por dióxido de azufre en la estación de monitoreo del "Sindicato de La Oroya"[431]. De acuerdo con lo señalado por los representantes, la información de las declaraciones de Estado de Alerta estuvo disponible por medio de internet, a través de la página web de DIGESA[432].

250. Asimismo, la Corte nota que en el año 2007 el Estado aprobó el "Plan de Acción para la Mejora de la Calidad del Aire de la Cuenca Atmosférica de La Oroya", mediante el cual estableció que "se deb[ía] informar a la población a través de los medios de comunicación la implementación de los estados de alerta, elaborar contenidos para campañas de difusión, así como materiales informativos"[433]. Además, en el marco de la aprobación del "Plan de Acción para el Mejoramiento de la Calidad del Aire y la Salud de La Oroya" de 1 de marzo de 2006, se estableció la creación de un "Sistema de Información Ciudadana", con el objetivo de "ofrecer información a la ciudadanía a partir del 2007, su implementación se desarrollará teniendo en cuenta el diseño de una base de datos"[434].

251. La Corte también nota que en año 2012 se instalaron pantallas en La Oroya para que la población tuviera conocimiento de las condiciones de calidad del aire, así como de las declaraciones de estados de alerta. Dichas pantallas disponían de códigos de colores para facilitar la comprensión para los habitantes de La Oroya. La instalación de dichas pantallas se realizó como resultado de un convenio suscrito entre la empresa "Right Business" y Doe Run, en conjunto con la Municipalidad Provincial[435]. En relación con las referidas pantallas, los representantes señalaron que la información disponible en las pantallas "no se daba en tiempo real" sino que la media móvil del estado de la calidad del aire se daba a conocer a los ciudadanos "en un intervalo de 3 horas"[436].

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[430] *Cfr*. Decreto del Consejo Directivo No. 015-2007-CONAM/CD, "Plan de Contingencia para Estados de Alerta por Contaminación del Aire en la Cuenca Atmosférica de La Oroya", de 18 de julio de 2007 (expediente de prueba, folios a 25499 a 25533).

[431] *Cfr*. Decreto del Consejo Directivo No. 015-2007-CONAM/CD, "Plan de Contingencia para Estados de Alerta por Contaminación del Aire en la Cuenca Atmosférica de La Oroya", de 18 de julio de 2007 (expediente de prueba, folios a 25499 a 25533).

[432] *Cfr*. Escrito de Solicitudes, Argumentos y Pruebas de 4 de febrero de 2022, párr. 339, pág. 129 (expediente de fondo, folio 247), y Declaración de María 3 (expediente de prueba, folio 29043).

[433] *Cfr*. Plan de Acción para la Mejora de la Calidad del Aire de la Cuenca Atmosférica de La Oroya, Documento concordado con el Decreto N°020-2006-CONAM/CD y Decreto N°026-2006-CONAM-2006 (expediente de prueba, folios .935 a .1018).

[434] *Cfr.* Plan de Participación Ciudadana del Plan de Adecuación de las Actividades Minero-Metalúrgicas a los Estándares de Calidad Ambiental de Aire, de 01 de marzo de 2006 (expediente de prueba, folio 28000).

[435] *Cfr*. Diario "Correo", "Con pantallas gigantes población de La Oroya controlará calidad del aire", de 27 de diciembre de 2012 (expediente de prueba, folios 0.1321 y 0.1322).

[436] *Cfr*. Escrito de los representantes ante la Comisión Interamericana, MC-271-05, de mayo de 2015 (expediente de prueba, folio 25549).

Asimismo, los representantes señalaron que la iniciativa de las pantallas, "no fue sostenida en el tiempo, y solo funcionó por un corto periodo de tiempo".

252. Por otra parte, la Corte advierte que el Estado adoptó algunas medidas de difusión en forma de folletos sobre higiene personal, nutrición familiar y vivienda, así como información sobre medidas para el mejoramiento de la salud. Dichos folletos señalaban que la contaminación en La Oroya se generaba "principalmente por el funcionamiento del Complejo Metalúrgico pero también por la existencia de talleres de reciclaje de baterías, talleres de soldadura, imprentas, alto tránsito vehicular y sobre todo tierra y polvo ya contaminado desde hace más de 80 años". En virtud de ello, señalaban que "la convivencia de la ciudad requiere" una serie de recomendaciones relacionadas con la higiene personal, del hogar, la limpieza y la buena alimentación. En concreto, los referidos folletos incluían información relacionada con "la higiene personal y salud ambiental en instituciones educativas", "pasos a seguir para una buena higiene personal", "higiene familiar y de viviendas", "higiene personal y nutricional para gestantes", así como de atención a personas menores de edad[437]. Asimismo, la perita Yañez de la Cruz señaló que en el centro de salud de La Oroya se recomendaban ciertos comportamientos a la población para el cuidado del hogar[438].

253. Respecto a lo anterior, la Corte advierte que no existe información sobre acciones adoptadas por el Estado para informar a la población sobre la situación de contaminación ambiental y sus riesgos para la salud previo al año 2003. Por otra parte, respecto a las acciones adoptadas a partir de la adopción del Reglamento de los Niveles de Estados de Alerta en el año 2003, se observa que la información de dichos estados de alerta fue difundida por internet y, a partir de 2012, a través de tres pantallas distribuidas en La Oroya. Asimismo, que los folletos informativos distribuidos por el Estado, y los programas para informar estuvieron dirigidos a promover medidas de higiene en la población, sin que se advirtieran los riesgos a la salud existentes debido a la exposición a la contaminación ambiental producida por el CMLO.

254. En ese sentido, Juan 1 expresó que "la empresa no ha dado información suficiente sobre los impactos de salud. Solo han dado información sobre cuidado: que hay que alimentarse mejor, con verduras, leche y frutas. Pero la persona con un sueldo mínimo y viviendo aquí [en La Oroya] no podía asumir estos costo[s]"[439]. Asimismo, Juan 6 señaló que "[l]a empresa nunca nos dijo ni explicó nada […] Nunca nos comentaron que estaban contaminando, ni nos ofrecieron llevarnos al médico, o darnos medicamentos, nada. Prácticamente no les importábamos"[440]. Por su parte, Juan 8 afirmó que "el Estado nunca nos dio información sobre los impactos de la contaminación, pese [a] que yo recuerdo que la empresa emitía boletines […] Los boletines no eran de información sobre cuidado, peligros o riesgos sobre la exposición de gas o del agua"[441]. En sentido similar,

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437 *Cfr*. Folletos de distribución general a La Oroya, elaborados por el equipo del Convenio de Cooperación entre el Ministerio de Salud – MINSA/DIGESA y la Empresa Doe Run Perú. SRL. (expediente de prueba, folios 0.1020 a 0.1070).

438 *Cfr.* Peritaje de Marisol Yáñez (expediente de prueba, folio 29385). Estas recomendaciones se referían a lo siguiente: 1. No levantar polvo; 2. Evitar el uso de escobas o escobillones; 3. Limpieza en húmedo; 4. No tener animales, porque el pelaje se queda la ceniza; 5. Alimentación rica en hierro, zinc y calcio; 6. Vigilar que los pequeños no se expongan; 7. Lavado de ropa (utilizar ropa blanca); 8. Lavado de juguetes; 9. Uso de agua limpia; 10. Instalación de rincón de aseo dentro del hogar.

439 *Cfr.* Declaración de Juan 1 (expediente de prueba, folio 28952).

440 *Cfr.* Declaración de Juan 6 (expediente de prueba, folio 28971).

441 *Cfr.* Declaración de Juan 8 (expediente de prueba, folio 28983).

Juan 30, María 3, María 16 y María 25 se refirieron en sus declaraciones a la ausencia de información a la población por parte del Estado o de Doe Run sobre la contaminación ambiental o sus efectos en La Oroya[442].

255. En virtud de lo anterior, la Corte considera que las medidas adoptadas por el Estado fueron claramente insuficientes para lograr un acceso efectivo a la información relacionada con el estado de la calidad del aire y el agua, lo cual impidió que las presuntas víctimas tuvieran los elementos suficientes para conocer sobre los riesgos a su salud, integridad personal y vida por la exposición a los contaminantes producidos por el CMLO. Además, la Corte nota que dicha información era del conocimiento del Estado, por lo que se encontraba obligado a suministrarla activamente de conformidad con su obligación de transparencia activa, que implica el deber del Estado de suministrar al público información completa, comprensible y en un lenguaje accesible. De esta forma, el Estado afectó el derecho a la información contenido en el artículo 13 de la Convención Americana.

B.3.6.2. Derecho a la participación política

256. La Corte recuerda que el derecho a la participación política es uno de los pilares fundamentales de la democracia, pues a través de su ejercicio las personas pueden establecer límites a las gestiones estatales y cuestionar, indagar y considerar el cumplimiento de las funciones públicas. La participación permite a las personas formar parte del proceso de toma de decisiones y así participar en la dirección de los asuntos públicos que afecten el medio ambiente. Este Tribunal ha destacado que este derecho conlleva la obligación de los Estados de garantizar la participación de las personas en la toma de decisiones que pueden afectar el medio ambiente, lo cual se relaciona con la obligación de proveer información relevante. Esta participación debe ser efectiva desde las primeras etapas del proceso de toma de decisiones, lo cual puede realizarse a través de diversos mecanismos (*supra* párr. 152).

257. En el presente caso, la Corte advierte que el Estado adoptó medidas legislativas para la participación ciudadana en materia ambiental. En particular, la Corte constata que la Ley General de Ambiente, Ley N° 28611 de 2005 reconoció el derecho de toda persona a participar en los "procesos de toma de decisiones de la gestión ambiental y en las políticas y acciones que incidan sobre ella"[443]. Asimismo, que el Reglamento de Participación Ciudadana en el Subsector Minero aprobado mediante Decreto Supremo N° 028-2008-EM reconoce los derechos a la participación, el derecho de acceso a la información, los principios de vigilancia ciudadana y de diálogo continuo[444]. En el mismo sentido, la Corte advierte la existencia de las normas que regulan el Proceso de Participación Ciudadana en el Subsector Minero, que tienen por objeto "desarrollar mecanismos de participación ciudadana […] así como las actividades, plazo y criterios específicos, para el desarrollo de procesos de participación en cada una de las etapas de la actividad minera"[445].

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442 *Cfr.* Declaración de Juan 30 (expediente de prueba, folio 29034); Declaración de María 3 (expediente de prueba, folio 29043); Declaración de María 16 (expediente de prueba, folio 29061), y Declaración de María 25 (expediente de prueba, folio 29079).

443 *Cfr*. Ley General de Ambiente, artículos 46-48 (expediente de prueba, folios 19903 a 19932).

444 *Cfr.* Decreto Supremo No. 028-2008-EM que aprueba el Reglamento de Participación Ciudadana en el Subsector Minero, de 27 de mayo de 2008 (expediente de prueba, folios 27927 a 27931).

445 *Cfr.* Resolución Ministerial No. 304-2008-MEM/DM de 24 de junio de 2008, publicada en el Diario Oficial El Peruano de 24 de junio de 2008 (expediente de prueba, folios 27933 a 27941).

258. Asimismo, entre las medidas de participación ciudadana, se advierte que el Estado convocó a un proceso de participación ciudadana previo a la presentación de la solicitud de prórroga excepcional del proyecto de "Planta de Ácido Sulfúrico" del PAMA del 2006, mediante la Resolución Nº 257-2006-MEM/DM [446]. Al respecto, el MINEM informó que en el marco de la prórroga excepcional del proyecto de "Planta de Ácido Sulfúrico" del PAMA de La Oroya se convocó a un proceso de participación ciudadana con el objetivo de "someter a la ciudadanía los aspectos centrales de dicha solicitud" y que "el MINEM cuente con mayores elementos de juicio para la evaluación de la solicitud"[447]. Además, la Corte advierte que, mediante la Resolución Directoral Nº 272-2015-MEM-DGAAM de 10 de julio de 2015, — misma que aprobó el Instrumento de Gestión Ambiental Correctivo del CMLO—, se estableció que el 8 de junio 2015 la Asociación de Comités de Promoción Social y Vecinal de Yauli La Oroya se apersonó a la DGAAM y señalaron que habrían sido informados sobre el Plan de Adecuación de del CMLO a los nuevos Estándares de Calidad del Aire[448].

259. El Estado también señaló que los Decretos Supremos Nº003-2017-MINAM y Nº 004-2017-MINAM (referidos a los Estándares de Calidad del Aire y Agua, respectivamente), fueron publicados y sometidos a consulta pública de forma previa su aprobación. Asimismo, indicó que el MINAM habría llevado a cabo "foros de presentación y discusión técnico-científica" sobre los proyectos de Decreto Supremo de Estándares de Calidad del Agua en diversas ciudades peruanas a lo largo de mayo de 2017[449].

260. Lo anterior permite a este Tribunal constatar que el Estado adoptó algunas medidas para la participación de la población de La Oroya en la toma de decisiones relacionadas con la política ambiental. Sin embargo, no cuenta con elemento alguno que permita establecer si las medidas adoptadas por el Estado permitieron a las presuntas víctimas tener una oportunidad efectiva de ser escuchadas y participar en la toma de decisiones respecto a aquellos aspectos sometidos a la participación ciudadana, ni cómo es que éstos fueron tomados en cuenta por el Estado al momento de decidir sobre su política ambiental respecto del CMLO. En este punto, la Corte considera pertinente resaltar que la participación de los habitantes de La Oroya era de especial relevancia, en razón de los posibles efectos que la contaminación podía tener en el ejercicio de otros derechos. Por tanto, el Estado debía adoptar medidas positivas que permitieran la participación efectiva de dichos habitantes.

261. De esta forma, la Corte advierte que el Estado incumplió con su deber de adoptar medidas que permitieran una efectiva participación política de las presuntas víctimas, y, en ese sentido, afectó su derecho a la participación política tutelado en el artículo 23 de la Convención Americana.

B.4. Conclusión

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446 *Cfr*. Ministerio de Energía y Minas. Resolución Ministerial 257-2006-MEM/DM, de 29 de mayo de 2006 (expediente de prueba, folios 20044 a 20052).

447 *Cfr.* Ministerio de Energía y Minas, Informe N° 814-2021-MINEM/OGAJ de fecha 6 de setiembre de 2021 (expediente de prueba, folio 27979).

448 *Cfr.* Ministerio de Energía y Minas, Resolución Directoral N° 161-2015-MEM/DGAAM (expediente de prueba, folio 27944).

449 *Cfr*. Escrito de contestación de 20 de julio de 2022, párr. 352 (expediente de fondo, folio 678).

262. La Corte concluye que los Estados se encuentran obligados a utilizar todos los medios a su alcance a fin de evitar daños significativos al medio ambiente en general, y al aire limpio y al agua en particular. En ese sentido, la Corte destaca que la obligación de prevención en materia ambiental impone al Estado el deber de regular, supervisar y fiscalizar las actividades que impliquen riesgos significativos al medio ambiente. Asimismo, la Corte recuerda que el Estado tiene la obligación de prevenir la contaminación ambiental como parte de su deber de garantizar el derecho a la salud, la vida digna y la integridad personal, lo que a su vez conlleva el deber de proveer servicios de salud a personas afectadas por dicha contaminación, más aún cuando esto pueda impactar la integridad personal o la vida de las personas. En un sentido similar, la Corte advierte que la contaminación ambiental puede tener un impacto diferenciado en grupos en situación de vulnerabilidad, particularmente los niños y niñas, por lo que el Estado está obligado a adoptar medidas especiales de protección del medio ambiente y la salud de la niñez, de conformidad con el principio del interés superior y de equidad intergeneracional. Además, la Corte recuerda que el Estado se encuentra obligado a garantizar el acceso a la información de conformidad con el principio de transparencia activa en materia ambiental, para que las personas puedan ejercer sus derechos. Finalmente, este Tribunal recuerda el derecho de las personas de participación efectiva en las decisiones de política pública que afectan al medio ambiente, como parte de su derecho a participar en la dirección de asuntos públicos.

263. En lo que se refiere al caso concreto, no existe controversia respecto a la presencia de altos niveles de contaminación ambiental en La Oroya por plomo, cadmio, arsénico, dióxido de azufre y otros metales en el aire, suelo y agua; que la principal causa de contaminación ambiental era resultado de la actividad metalúrgica del CMLO, y que el Estado tenía conocimiento sobre esta contaminación y sus efectos en las personas. En razón de ello, el análisis del presente caso se realizó respecto del cumplimiento de las obligaciones del Estado en la protección de los derechos que se pudieron ver afectados por dicha contaminación ambiental, tanto en su dimensión individual como colectiva. En ese sentido, el Estado incumplió con su deber de regulación previo al año 1993, y además incumplió con su deber de supervisión y fiscalización de las actividades del CMLO al otorgar prórrogas para el cumplimiento de las obligaciones establecidas en el PAMA de Doe Run. El Estado incumplió con su deber de prevención al otorgar dichas prórrogas, a pesar de la evidencia técnica acerca de la presencia de contaminantes en La Oroya, lo cual requería acciones inmediatas por parte del Estado de conformidad con su deber de debida diligencia para evitar daños significativos al medio ambiente, y en general por sus omisiones en la fiscalización efectiva de las actividades del CMLO. La afectación al medio ambiente también constituyó una violación al derecho al medio ambiente sano durante el tiempo que el CMLO fue operado por Centromin. Asimismo, la Corte determinó que el Decreto Supremo Nº 0003-2017-MINAM, que modificó en el año 2017 los valores máximos de dióxido de azufre permisibles en el aire, constituyó una medida deliberadamente regresiva que violó la obligación de desarrollo progresivo respecto del derecho al medio ambiente sano.

264. Relacionado con lo anterior, se corroboró que la exposición al plomo, cadmio, arsénico y dióxido de azufre constituían un riesgo significativo para la salud humana, pues estos metales pueden depositarse en el cerebro, hígado, riñones, huesos, pulmones, ojos y piel, y producir enfermedades como resultado de dicha exposición. Asimismo, la Corte constató que las 80 presuntas víctimas del caso presentaron enfermedades que resultaban coincidentes con aquellas generadas con la exposición a los metales antes señalados, y que no recibieron atención médica adecuada por parte del Estado respecto a dichas enfermedades. En un sentido similar, la Corte encontró que la exposición a la contaminación ambiental produjo graves alteraciones en la calidad de

vida de las presuntas víctimas, generando además sufrimientos físicos y psicológicos que afectaron su derecho a la vida digna y la integridad personal. La Corte advirtió además que dicha exposición tuvo un mayor impacto en las mujeres y los adultos mayores. En el caso de Juan 5 y María 14, se consideró que el Estado es responsable por la violación de su derecho a la vida, por la ausencia de medidas adecuadas de prevención para la afectación de sus derechos al medio ambiente sano y la salud. Por otra parte, la Corte determinó que la exposición de la contaminación ambiental de las presuntas víctimas cuando eran niños y niñas tuvo un impacto diferenciado debido a su condición de vulnerabilidad, y que el Estado no adoptó medidas especiales de protección frente a esta exposición a la contaminación. En ese sentido, se señaló que el Estado incumplió con su deber especial de protección de la niñez.

265. Por otra parte, se determinó que el Estado tenía una obligación positiva de proveer información completa y comprensible respecto de la contaminación ambiental a la que las presuntas víctimas se encontraban expuestas por las actividades del CMLO, y sobre los riesgos que dicha contaminación implicaba para su salud. La Corte encontró que no existieron medidas de información previo al año 2003, y que las acciones posteriores para informar sobre la contaminación ambiental y sus efectos fueron insuficientes. Esta omisión estatal constituyó un incumplimiento de su deber de transparencia activa, lo que además puso en riesgo el ejercicio de otros derechos como la salud, la integridad personal, la vida y la participación política. En un sentido similar, la Corte concluyó que el Estado no demostró la existencia de espacios de participación efectiva en la toma de decisiones en materia ambiental en perjuicio de las presuntas víctimas. La posibilidad de participación resultaba especialmente relevante ante aquellas decisiones que podían modificar los plazos para el cumplimiento de las obligaciones medioambientales de Doe Run, lo que constituyó una violación al derecho a la participación política. Además, se advirtió que la ausencia de información constituyó un obstáculo a la efectiva participación política de la población y una violación al derecho al acceso a la información.

266. En razón de lo anterior, la Corte concluye que el Estado es responsable por la violación a los derechos al medio ambiente sano, la salud, la integridad personal, la vida, el acceso a la información y la participación política, establecidos en los artículos 26, 5, 4.1, 13 y 23 de la Convención Americana, en relación con los artículos 1.1 y 2 del mismo instrumento, en perjuicio de las 80 presuntas víctimas señaladas en el Anexo 2 de la presente sentencia; es responsable por la violación a los derechos de la niñez, en relación con el derecho al medio ambiente sano, la salud, integridad personal y vida, establecido en el artículo 19 de la Convención Americana, en relación con los artículos 26, 4.1, 5 y 1.1 del mismo instrumento, en perjuicio de Juan 2, Juan 3, Juan 4, Juan 6, Juan 8, Juan 9, Juan 10, Juan 14, Juan 16, Juan 20, Juan 21, Juan 22, Juan 23, Juan 24, Juan 26, Juan 27, Juan 28, Juan 30, Juan 31, Juan 32, Juan 33, Juan 34, Juan 35, Juan 36, Juan 37, Juan 38, Juan 39, Juan 40, Juan 42, María 3, María 4, María 5, María 6, María 8, María 9, María 10, María 12, María 14, María 15, María 16, María 17, María 18, María 19, María 21, María 22, María 23, María 24, María 25, María 26, María 27, María 28, María 29, María 32, María 33, María 34, María 35, y María 37; es responsable por la violación del derecho a la vida, establecido en el artículo 4.1 de la Convención Americana, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de Juan 5 y María 14; y es responsable por la violación a la obligación de desarrollo progresivo, en términos del artículo 26 de la Convención Americana, en relación con el artículo 1.1 y 2 del mismo instrumento.

VIII-2
DERECHO A LA PROTECCIÓN JUDICIAL EN RELACIÓN CON EL CUMPLIMIENTO DE LOS FALLOS INTERNOS Y EL DEBER DE INVESTIGAR

A. Alegatos de la Comisión y de las partes

267. La ***Comisión*** alegó que el Estado no cumplió con el fallo del Tribunal Constitucional de 12 de mayo de 2006. En ese sentido, sostuvo que el Estado no implementó oportunamente el sistema de atención para pacientes con intoxicación de plomo que se requería en dicha comunidad, que las medidas de implementar planes de acción para el mejoramiento de la calidad del aire en La Oroya fueron tardías e ineficaces, que no cuenta con información sobre medidas efectivas de vigilancia epidemiológica y ambiental, y que no consta acción alguna promovida por el Tribunal Constitucional para dictar medidas coercitivas y lograr la ejecución de la sentencia. En vista de lo anterior, la Comisión concluyó que el Estado es responsable por la violación al derecho a la protección judicial en relación con el cumplimiento de los fallos internos previsto en el artículo 25.2.c) de la Convención Americana en relación con el artículo 1.1 del mismo instrumento, en perjuicio de las presuntas víctimas. Adicionalmente, la Comisión recordó que una serie de presuntas víctimas han denunciado que han sido objeto de amenazas, hostigamientos o represalias por parte de trabajadores de la empresa Doe Run debido a las denuncias que realizaron sobre la contaminación que les afectaba en La Oroya. En particular, señaló que María 1, Juan 2 y Juan 11 denunciaron actos de hostigamiento o represalias en su contra por haber protestado o denunciado los altos niveles de contaminación en La Oroya, sin que existiera investigación alguna. Por estos hechos, la Comisión estimó que el Estado incumplió su obligación de investigar en los términos referidos de los artículos 8 y 25 de la Convención.

268. Los ***representantes*** alegaron que el Estado violó los derechos al acceso a la justicia, garantías judiciales y debido proceso, por: a) el incumplimiento tardío, parcial e insuficiente de la sentencia del Tribunal Constitucional; b) la ausencia de acciones administrativas efectivas de supervisión y fiscalización al Complejo Metalúrgico de La Oroya, y c) la falta de investigación y sanción de los responsables de los hostigamientos y estigmatizaciones en contra de las y los defensores ambientales en La Oroya. En particular, los representantes señalaron que, en relación con el incumplimiento tardío, parcial e insuficiente de la Sentencia del Tribunal Constitucional. Por otro lado, los representantes alegaron que el Estado desconoció el derecho del acceso a la justicia, garantías judiciales y debido proceso, debido a la ausencia de acciones administrativas efectivas de supervisión y fiscalización del CMLO. Por otro lado, alegaron que el Estado no garantizó el derecho a la justicia pues no investigó o sancionó a los responsables de los hostigamientos y estigmatizaciones en contra de las y los defensores ambientales en La Oroya. En ese sentido, señalaron que las presuntas víctimas del caso deben ser reconocidas como defensoras ambientales, pues algunas han ejercido por años una labor de defensores y defensoras de los derechos al ambiente sano y la salud de la población de La Oroya, a causa de la contaminación generada por las operaciones del CMLO. Por lo anterior, los representantes concluyeron que el Estado violó los derechos al acceso a la justicia, garantías judiciales y debido proceso consagrados en los artículos 8 y 25 de la Convención Americana, en relación con el artículo 1.1 de la Convención Americana.

269. El ***Estado*** alegó que una acción de cumplimiento, tal como se encontraba regulada por el Estado peruano, no debería ser analizada a efecto de determinar una posible responsabilidad internacional por la contravención del artículo 25 de la Convención. En concreto, sostuvo que la acción de cumplimiento es un recurso de alcance colectivo que no tiene por objeto la tutela de un derecho humano individual y, por tanto, no es un

recurso que deba analizarse en el marco del artículo 25 de la Convención, y que la acción de amparo era el recurso idóneo y efectivo que debió ser agotado por las presuntas víctimas. Además, el Estado sostuvo que la demora en la ejecución de algunas medidas no entrañó un retardo injustificado al respetar la garantía del plazo razonable. Por otro lado, el Estado sostuvo que en el presente caso las actuaciones denunciadas como actos de amenazas u hostigamiento no ostentan la intensidad suficiente para ser consideradas como tales y justificar una investigación *ex - oficio* por parte del Estado peruano. De esta forma, sostuvo el Estado, tales actuaciones no resultan disuasorias, concretas ni suficientemente intensas como para ocasionar razonable zozobra en las presuntas víctimas al grado de ser consideradas "actos de amenaza". Aunado a lo anterior, sostuvieron que los presuntos actos de amenaza u hostigamiento denunciados por los peticionantes no fueron puestos en conocimiento de las autoridades competentes, sino que fueron denunciados ante entidades estatales sin facultades para realizar actos de investigación, así como denunciados a agentes privados, como medios de comunicación cuyas trasmisiones no son necesariamente conocidas por los agentes del Estado. Por lo anterior, el Estado sostuvo que no es responsable por la violación a los artículos 8 y 25 de la Convención.

B. Consideraciones de la Corte

270. El Estado alegó que la acción de cumplimiento es un recurso de alcance colectivo que no tiene por objeto la tutela de un derecho humano individual y, por lo tanto, que no se trata de un recurso que deba analizarse en el marco del artículo 25 de la Convención Americana. En consecuencia, sostuvo que el recurso de amparo era el recurso idóneo y efectivo que debió ser agotado por las presuntas víctimas. Al respecto, este Tribunal recuerda que, tal como lo estableció previamente (*supra* párr. 37), la acción de cumplimiento constituía un recurso judicial idóneo para la protección de los derechos de las presuntas víctimas, en tanto era un medio a través del cual podían protegerse los derechos al medio ambiente sano y la salud de los habitantes de La Oroya. Asimismo, que, en tanto la naturaleza de la sentencia dictada por el Tribunal Constitucional en 2006 buscaba abarcar a todos los habitantes de La Oroya, y las presuntas víctimas del presente caso tenían tal calidad, no resultaba necesario que fuesen accionantes de dicho recurso para entender que eran beneficiarios de sus efectos. Por esta razón, la Corte considera que las presuntas víctimas gozaban del derecho a que la sentencia del Tribunal Constitucional fuera cumplida por parte del Estado, en términos del artículo 25.2.c) de la Convención Americana. En ese sentido, para evaluar las acciones del Estado en relación con el cumplimiento de sus obligaciones derivadas de los artículos 8 y 25 de la Convención Americana, la Corte analizará primero las acciones respecto del cumplimiento de la sentencia del Tribunal Constitucional de 6 de mayo de 2006, para posteriormente pronunciarse respecto de los presuntos actos de hostigamientos sufridos por las presuntas víctimas.

271. Por otra parte, se estima que los alegatos de los representantes respecto a las consecuencias jurídicas ante la ausencia de acciones administrativas de supervisión y fiscalización al CMLO, y la alegada violación al artículo 26 de la Convención por la falta de cumplimiento de la sentencia del Tribunal Constitucional, ya fue abordado por este Tribunal en el análisis respecto al cumplimiento del deber de prevención del Estado. Por lo que no considera pertinente analizar autónomamente dichos alegatos a la luz del artículo 8, 25 y 26 de la Convención.

B.1. Sobre el cumplimiento de la sentencia del Tribunal Constitucional

272. El artículo 25 de la Convención Americana reconoce el derecho a la protección judicial. Este Tribunal ha señalado que de la protección de este derecho es posible identificar dos obligaciones concretas del Estado. La primera, consagrar normativamente y asegurar la debida aplicación de recursos efectivos ante las autoridades competentes, que amparen a todas las personas bajo su jurisdicción contra actos que violen sus derechos fundamentales o que conlleven a la determinación de los derechos y obligaciones de estas[450]. La segunda, garantizar los medios para ejecutar las respectivas decisiones y sentencias definitivas emitidas por tales autoridades competentes, de manera que se protejan efectivamente los derechos declarados o reconocidos[451]. En este sentido, el artículo 25.2.c) de la Convención consagra el derecho al cumplimiento, por las autoridades competentes, de toda decisión en que se haya estimado procedente el recurso[452].

273. Por otro lado, en el contexto de la protección ambiental, la Corte ha establecido que los Estados tienen la obligación de garantizar el acceso a la justicia, en relación con las obligaciones estatales para la protección del medio ambiente protegidas por la Convención Americana. En este sentido, los Estados deben garantizar que los individuos tengan acceso a recursos, sustanciados de conformidad con las reglas del debido proceso legal, para impugnar cualquier norma, decisión, acto u omisión de las autoridades públicas que contraviene o puede contravenir las obligaciones de derecho ambiental; para asegurar la plena realización de los demás derechos de procedimiento, es decir, el derecho al acceso a la información y la participación pública, y para remediar cualquier violación de sus derechos, como consecuencia del incumplimiento de obligaciones de derecho ambiental[453].

274. En relación con el cumplimiento de las sentencias, este Tribunal ha indicado que la responsabilidad estatal no termina cuando las autoridades competentes emiten una decisión o sentencia, sino que requiere además que el Estado garantice los medios y mecanismos eficaces para ejecutar las decisiones definitivas, de modo que se protejan de manera efectiva los derechos declarados[454]. Asimismo, este Tribunal ha establecido que la efectividad de las sentencias depende de su ejecución, cuyo proceso debe tender a la materialización de la protección del derecho reconocido en el pronunciamiento judicial mediante la aplicación idónea de dicho pronunciamiento[455]. La Corte también ha señalado que para lograr plenamente la efectividad de la sentencia la ejecución debe ser completa, perfecta, integral y sin demora[456].

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450 *Cfr. Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala. Fondo*. Sentencia de 19 de noviembre de 1999. Serie C No. 63, párr. 237, y *Caso Federación Nacional de Trabajadores Marítimos y Portuarios (FEMAPOR) Vs. Perú, supra*, párr. 77.

451 *Cfr. Caso Baena Ricardo y otros Vs. Panamá. Competencia*. Sentencia de 28 de noviembre de 2003. Serie C No. 104, párr. 79, y *Caso Federación Nacional de Trabajadores Marítimos y Portuarios (FEMAPOR) Vs. Perú, supra*, párr. 77.

452 *Cfr. Caso Muelle Flores Vs. Perú, supra*, párr. 124, y *Caso Meza Vs. Ecuador. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 14 de junio de 2023. Serie C No. 493, párr. 59.

453 *Cfr*. *Opinión Consultiva OC-23/17*, *supra*, párr. 237.

454 *Cfr. Garantías judiciales en estados de emergencia (Arts. 27.2, 25 y 8 Convención Americana sobre Derechos Humanos).* Opinión Consultiva OC-9/87 de 6 de octubre de 1987. Serie A No. 9, párr. 24, y *Caso Federación Nacional de Trabajadores Marítimos y Portuarios (FEMAPOR) Vs. Perú, supra*, párr. 78.

455 *Cfr. Caso Las Palmeras Vs. Colombia. Reparaciones y Costas*. Sentencia de 26 noviembre de 2002. Serie C No. 96, párr. 58, y *Caso Federación Nacional de Trabajadores Marítimos y Portuarios (FEMAPOR) Vs. Perú, supra*, párr. 78.

456 *Cfr. Caso Mejía Idrovo Vs. Ecuador. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 5 de julio de 2011. Serie C No. 228, párr. 105, y *Caso Meza Vs. Ecuador, supra,* párr. 60.

275. En el presente caso, la Corte advierte que no existe controversia respecto a que la sentencia de 12 de mayo de 2006 del Tribunal Constitucional constituyó un recurso idóneo para la protección de los derechos de las presuntas víctimas. En efecto, dicha decisión reconoció los altos niveles de contaminación en el aire en La Oroya y los riesgos que esto conllevaba para la salud de la población, y ordenó una serie de medidas dirigidas a la protección de dichos bienes jurídicos. Sin embargo, corresponde a la Corte analizar si el Estado cumplió con las órdenes de la sentencia del Tribunal Constitucional de conformidad con sus obligaciones derivadas del artículo 25.2.c) de la Convención Americana.

i) Respecto de la orden de implementar un sistema de emergencia para atender la salud de las personas contaminadas por plomo en La Oroya

276. La Corte recuerda que la primera orden del Tribunal Constitucional en su sentencia de 12 de mayo de 2006 señala lo siguiente:

> Ordena que el Ministerio de Salud, en el plazo de treinta (30) días, implemente un sistema de emergencia para atender la salud de las personas contaminadas por plomo en la ciudad de La Oroya, debiendo priorizar la atención médica especializada de niños y mujeres gestantes, a efectos de su inmediata recuperación, conforme se expone en los fundamentos 59 a 61 de la presente sentencia, bajo apercibimiento de aplicarse a los responsables las medidas coercitivas establecidas en el Código Procesal Constitucional[457].

277. La Corte resalta que el Tribunal Constitucional requirió que el Ministerio de Salud implemente un "sistema de emergencia". Asimismo, la Corte nota que el TC se refiere a los fundamentos 59 a 61 de la misma sentencia, donde resaltó que el Estado, frente a la contaminación que daña o pone en riesgo la salud de las personas, tiene la siguiente obligación:

> […] dichos mandatos exigen al Ministerio de Salud, en su calidad de ente rector del Sistema Nacional de Salud, la protección, recuperación y rehabilitación de las personas, no solo mediante la implementación de un «sistema ordinario», sino también mediante la implementación de un «sistema de emergencia» que establezca acciones inmediatas ante situaciones de grave afectación de la salud de la población[458].

278. Asimismo, la Corte resalta que el Tribunal Constitucional definió un plazo preciso "de treinta (30) días" para implementar dicho sistema de emergencia, y estableció que el propósito del mismo sería la "inmediata recuperación" de las personas contaminadas por plomo en La Oroya[459]. De la misma forma, el Tribunal Constitucional clarificó que la implementación de este sistema de emergencia no debía ser de carácter general, sino que debía ser implementada para fines específicos: "atender la salud de las personas contaminadas por plomo en la ciudad de La Oroya". Dentro de este público objetivo, el Tribunal Constitucional definió dos grupos prioritarios que requerían una atención especializada: los "niños, [niñas] y mujeres gestantes". El Tribunal Constitucional resaltó, en el considerando 61 de la sentencia, que la protección del derecho a la salud "debe ser

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457 *Cfr*. Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio .839).

458 *Cfr*. Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio .834).

459 *Cfr*. Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio .839).

inmediata, pues la grave situación que atraviesan los niños y mujeres gestantes contaminados, exig[ía] del Estado una intervención concreta, dinámica y eficiente [...]"[460].

279. En relación con lo anterior, se desprenden tres puntos centrales de la orden del Tribunal Constitucional respecto de la implementación de un sistema de emergencia: a) que la situación de salud de los pobladores de La Oroya era "grave", y por ello requería un accionar urgente conforme con tal situación; b) el propósito del sistema era recuperar la salud de la población contaminada por plomo en La Oroya, y c) que las mujeres gestantes y los niños obtuvieran una atención priorizada y especializada. De esta forma, esta Corte considera que la orden del Tribunal Constitucional no solo se dirigía a la implementación de acciones que beneficiaran la protección de la salud de los habitantes de La Oroya de forma general, sino que el Tribunal Constitucional requirió al Estado realizar acciones específicas de atención de emergencia para atender la salud de las personas contaminadas por plomo, dando prioridad a los niños, niñas y mujeres gestantes.

280. Tomando en cuenta lo anterior, la Corte constata que el Estado informó sobre las siguientes acciones estatales de cumplimiento de la sentencia: i) En primer lugar, en el año 2006, en cuanto a atención a niños, el Gobierno Regional de Junín y Doe Run Perú previeron atención especializada[461]; de la cual se informó lo siguiente: i.i) que la Provincia de Yauli-La Oroya contaba con un Centro de Salud Nivel I-3, dos en Yauli y Morococha de nivel I-2 y nueve puestos de Salud de niveles entre I-1 e I-2; i.ii) que se había priorizado la atención "al binomio madre-niño y gestante" para mejorar la cobertura del seguro social de la población (del 40% al 60%), por lo que se habría solicitado la colaboración de Run Doe para la construcción de un Centro Obstétrico; i.iii) que se habían fortalecido las actividades de promoción y se habían realizado controles anuales de plomo en sangre, control pre-natal, psicoprofilaxis y estimulación fetal precoz; i.iv) que se había realizado un convenio con Doe Run para crear un sistema de referencia para niños y niñas en hospitales de especialidad; y i.v) que se realizaron acciones de coordinación para la atención médica especializada para casos de pobladores de La Oroya[462].

281. Por otra parte, ii) en el año 2007, el Ministerio de Salud: ii.i) incorporó a la población de La Oroya al Seguro Integral de Salud (SIS)[463]; ii.ii) mejoró la infraestructura de un centro obstétrico[464]; ii.iii) fortaleció el equipo del Centro de Salud de La Oroya[465]; ii.iv) aprobó una Guía de Práctica Clínica para el Manejo de Pacientes con Intoxicación por Plomo[466]; y ii.v) desarrolló un Sistema de Atención de las Personas

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460 *Cfr*. Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folios .834).

461 *Cfr*. Dirección General de Salud, Oficio N°4631-2006/DG/DIGESA de 5 de agosto de 2006. Anexo al escrito del Estado de 8 de febrero de 2007 aportado en el trámite de las medidas cautelares (expediente de prueba, folio .846).

462 *Cfr.* Dirección General de Salud, Oficio No. 4631-2006/DG/DIGESA de 4 de agosto de 2006 (expediente de prueba, folio .846).

463 *Cfr*. Dirección General de Salud, Oficio N°4631-2006/DG/DIGESA de 4 de agosto de 2006 (expediente de prueba, folio .876).

464 *Cfr*. Dirección General de Salud, Oficio N°4631-2006/DG/DIGESA de 4 de agosto de 2006 (expediente de prueba, folio .876).

465 *Cfr* Dirección General de Salud, Oficio N°4631-2006/DG/DIGESA de 4 de agosto de 2006 (expediente de prueba, folio .876).

466 *Cfr* Dirección General de Salud, Oficio N°4631-2006/DG/DIGESA de 4 de agosto de 2006 (expediente de prueba, folio .877).

Intoxicadas con Plomo del distrito de La Oroya[467]. Asimismo, iii) entre 2004 y 2010 el Ministerio de Salud incrementó las atenciones médicas desde el año 2007 al 2009 de 62 a 130, y en el año 2010 se realizaron 95 atenciones[468].En 2008 puso en operación el módulo Materno Perinatal, respecto al centro asistencial en la salud de La Oroya. En ese sentido, reportó que "se mejoró el Servicio de Emergencia con infraestructura y equipamiento", pero no proveyó detalles adicionales sobre la naturaleza de estos mejoramientos o a quienes beneficiaron[469].

282. Por otro lado, iv) en el año 2013 el Estado brindó atención médica a los beneficiarios de la medida cautelar en el Centro de Salud La Oroya, en el marco de la Estrategia Sanitaria Nacional de Atención a Personas Afectadas por Contaminación con Metales Pesados y Otras Sustancias Químicas.[470]. Finalmente, v) en 2018, el MINSA emitió el Documento Técnico "Lineamientos de Política Sectorial para la Atención Integral de las Personas Expuestas a Metales Pesados, Metaloides y Otras Sustancias Químicas"[471]. Asimismo, DIRESA Junín adoptó un "Plan de Acción de Salud para los Beneficiarios de la Medida Cautelar Nº 271-05: Caso La Oroya y su Ampliación, 2020-2024"[472].

283. La Corte reconoce la importancia de las acciones del Estado adoptadas respecto de la atención a la salud de la población de La Oroya en cumplimiento de la sentencia del Tribunal Constitucional, así como las acciones tomadas con una orientación especial a mujeres gestantes, por ejemplo, a través del mejoramiento del centro obstétrico y el módulo Materno Perinatal. Sin embargo, el Tribunal considera que estas acciones no pueden considerarse un "sistema de emergencia" orientado a atender de forma urgente las necesidades de las personas intoxicadas por plomo en La Oroya, tal como lo ordenó el Tribunal Constitucional. De esta forma, la Corte considera que las acciones del Estado no cumplieron con la orden del Tribunal Constitucional de atender de forma "concreta, dinámica y eficiente" a la población contaminada por plomo de La Oroya, con especial atención prioritaria a mujeres gestantes, niños y niñas, y, por tanto, concluye que el Estado no cumplió con la primera orden del Tribunal Constitucional.

ii) Respecto de la orden de expedir un diagnóstico de línea base para poder implementar planes de acción para el mejoramiento de la calidad del aire en La Oroya

284. En la sentencia de 12 de mayo de 2006, el Tribunal Constitucional ordenó lo siguiente en relación con la calidad de aire en La Oroya:

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467 *Cfr* Dirección General de Salud, Oficio N°4631-2006/DG/DIGESA de 4 de agosto de 2006 (expediente de prueba, folios .877 y .878).

468 *Cfr.* Estrategia Sanitaria Nacional de Atención a personas afectadas por contaminación con metales pesados y otras sustancias químicas, Informe N°015-2011-DGSPESNAPACMPOSQ/MINSA de 21 de marzo de 2011 (expediente de prueba, folio .904).

469 *Cfr.* Estrategia Sanitaria Nacional de Atención a personas afectadas por contaminación con metales pesados y otras sustancias químicas, Informe N°015-2011-DGSPESNAPACMPOSQ/MINSA de 21 de marzo de 2011 (expediente de prueba, folio .904).

470 *Cfr.* Plan de la Estrategia Sanitaria Regional de Vigilancia y Control de Riesgos por Contaminación con Metales Pesados y Otras Sustancias Químicas", 15 de julio de 2014 (expediente de prueba, folio .675).

471 *Cfr.* Resolución Ministerial No. 979-2018/MINSA, de 25 de octubre de 2018 (expediente de prueba, folio 27869 y 27870).

472 *Cfr.* Plan de Acción de Salud para los Beneficiarios de la Medida Cautelar No. 271-05: Caso La Oroya y su Ampliación, 2020-2024 y anexos (expediente de prueba, folio 27898).

> Ordena que el Ministerio de Salud, a través de la Dirección General de Salud Ambiental (Digesa), en el plazo de treinta (30) días, cumpla con realizar todas aquellas acciones tendentes a la expedición del diagnóstico de línea base, conforme lo prescribe el artículo 11° del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental del Aire, de modo tal que, cuanto antes, puedan implementarse los respectivos planes de acción para el mejoramiento de la calidad del aire en la ciudad de La Oroya[473].

285. La Corte destaca que el fallo del TC establece que el Estado debe realizar las siguientes acciones: i) expedir un diagnóstico de línea base; ii) que debe ser usado lo más pronto posible para implementar planes de acción; y iii) que dicho plan tiene como propósito el mejoramiento de la calidad del aire en La Oroya. En ese sentido, en primer lugar, la Corte nota que el artículo 11° del Decreto Supremo 074-2001-PCM describe el objetivo y manera en que el diagnóstico de línea base debe ser elaborado, y los subsecuentes artículos describen los principales aspectos de dichos diagnósticos: el monitoreo, inventario de emisiones, y estudios epidemiológicos. El artículo 11 señala lo siguiente:

> El diagnóstico de línea base tiene por objeto evaluar de manera integral la calidad del aire en una zona y sus impactos sobre la salud y el ambiente. Este diagnóstico servirá para la toma de decisiones correspondientes a la elaboración de los Planes de Acción y de manejo de la calidad del aire. Los diagnósticos de línea de base serán elaborados por el Ministerio de Salud, a través de la Dirección General de Salud Ambiental - DIGESA, en coordinación con otras entidades públicas sectoriales, regionales y locales así como las entidades privadas correspondientes, sobre la base de los siguientes estudios, que serán elaborados de conformidad con lo dispuesto en artículos 12, 13 , 14 y 15 de esta norma:
>
> a) Monitoreo
> b) Inventario de emisiones
> c) Estudios epidemiológicos[474].

286. Respecto de las acciones del Estado en cumplimiento de la orden del Tribunal Constitucional, consta que el 23 de junio de 2006 el CONAM aprobó el "Plan de Acción para la Mejora de la Calidad del Aire en la Cuenca Atmosférica de La Oroya" destinado a cumplir con "estrategias, políticas y medidas de acción" para "controlar la contaminación ambiental"[475]. En su informe al Tribunal Constitucional de 4 de agosto de 2006, el Ministerio de Salud reportó haber realizado acciones de monitoreo de la calidad del aire en septiembre 2001, marzo 2003 y septiembre 2003, así como 13 inventarios de emisiones y 13 estudios epidemiológicos, que juntos constituyeron el diagnóstico de línea base que sirvió como la base para el Plan de Acción[476]. De lo anterior, se desprende

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473 *Cfr*. Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio .839).

474 *Cfr*. Decreto Supremo PCM-D.S. No 074-2001, Reglamento de Estándares Nacionales de Calidad Ambiental, en Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folios .832 y .839).

475 *Cfr.* Decreto del Consejo Directivo No. 020-2006-CONAM/CD "Plan de Acción para la Mejora de la Calidad del Aire en la Cuenca Atmosférica de La Oroya" de 23 de junio de 2006, publicado el 2 de agosto de 2006 (expediente de prueba, folios .401 y .402); Plan de Acción para la Mejora de la Calidad del Aire de la Cuenca Atmosférica de La Oroya, Documento concordado con el DCD N°020-2006-CONAM/CD y DCD N°026-2006-CONAM-2006 (expediente de prueba, folios .936 a .1018).

476 *Cfr.* Dirección General de Salud, Oficio N°4631-2006/DG/DIGESA de 4 de agosto de 2006 (expediente de prueba, folios .847 a .849).

que el Estado elaboró un diagnóstico de línea base, el cual fue utilizado para diseñar y aprobar un plan de acción, tal como lo ordenó el Tribunal Constitucional.

287. Dicho Plan de Acción definió 8 objetivos y 23 metas específicas para proteger la salud de los habitantes y reducir las emisiones[477], y estableció que se debía informar a la población a través de los medios de comunicación, los estados de alerta y campañas de difusión[478]. Para llevar a cabo lo anterior se desplegaron las siguientes actuaciones desde el punto de vista legal: i) el 21 de agosto de 2008, el Presidente de la República aprobó nuevos Estándares de Calidad del Aire a través del Decreto Supremo N°003-2008-MINAM[479]; ii) el 12 de julio de 2013 mediante la Resolución Ministerial Nº 205-2013-MINAM estableció que las cuencas atmosféricas de La Oroya, Ilo, y Arequipa serían exceptuadas del nuevo estándar de calidad de aire a partir del 1 de enero de 2014[480]; iii) además, el 10 de julio de 2015, el MINAM aprobó el "Instrumento de Gestión Ambiental Correctivo de la unidad minera La Oroya", el cual prevé que el complejo tendría un plazo de 14 años para adecuarse a los estándares ambientales[481]. Finalmente, iv) el 6 de junio de 2017, mediante Decreto Supremo Nº 003-2017-MINAM, se aprobaron nuevos Estándares de Calidad Ambiental para el Aire[482].

288. Ahora bien, para evaluar si el Estado cumplió con el fallo del Tribunal Constitucional en su totalidad, es importante evaluar si las acciones del Estado fueron efectivas para realizar el diagnóstico de línea base e implementar planes de acción con el propósito de mejorar la calidad del aire en La Oroya, tal como fue ordenado. En ese sentido, se destaca que, del escrito de la demanda civil de 4 de octubre de 2017, por parte de los representantes de las presuntas víctimas ante el Vigésimo Juzgado Civil, se destaca que la calidad del aire en La Oroya, como elemento central que motivó la presentación de la acción constitucional no había mejorado de manera sustancial. Ello, considerando que las autoridades peruanas no habían realizado acciones destinadas a mejorar efectivamente la calidad del aire, razón por la cual los pobladores de La Oroya continuarían "padeciendo una situación de vulnerabilidad"[483].

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477 *Cfr.* Decreto del Consejo Directivo No. 020-2006-CONAM/CD "Plan de Acción para la Mejora de la Calidad del Aire en la Cuenta Atmosférica de La Oroya" de 23 de junio de 2006, publicado el 2 de agosto de 2006 (expediente de prueba, folio .402).

478 La medida señalada se encontraba precedida por la existencia de varias normas aprobadas por MINEM, las cuales regulaban los límites máximos permisibles (LMP) y estándares de control ambiental (ECA). Entre estas normas se encontraba el Reglamento Nacional para la aprobación de Estándares de Calidad del Aire y Límites Máximos Permisibles de 1998 (Decreto Supremo No. 044-98-PCM), el Reglamento sobre Estándares de Calidad Ambiental del Aire de 2001 (Decreto Supremo No. 074-2001-PCM), el Reglamento de la Ley del Sistema Nacional de Gestión Ambiental (Decreto Supremo No. 008-2005-PCM) de enero de 2005, y la Ley General del Ambiente (Ley No. 28611 de octubre de 2005). *Cfr.* Plan de Acción para la Mejora de la Calidad del Aire de la Cuenca Atmosférica de La Oroya, Documento concordado con el DCD N°020-2006-CONAM/CD y DCD N°026-2006-CONAM-2006 (expediente de prueba, folios 0.987, 0.993 a 0.994), y Ministerio de Energía y Minas, Oficio No. 693-2007/JUS/CNDH-SE, junio 2007 (expediente de prueba, folio 0.84)

479 *Cfr.* Decreto Supremo N°003-2008-MINAM, de 21 de agosto de 2008 (expediente de prueba, folio .1083).

480 *Cfr.* Resolución Ministerial N°205-2013-MINAM, de 12 de julio de 2013 (expediente de prueba, folio .1086).

481 *Cfr.* Ministerio de Energía y Minas, Informe N°581-2015-MEMDGAAM/DNAM/DGAM/CMLO de 10 de julio de 2015 (expediente de prueba, folio .1202).

482 *Cfr.* Decreto Supremo N°003-2017-MINAM de 6 de junio de 2017 (expediente de prueba, folios .1297 a .1299).

483 *Cfr.* Representantes de las víctimas. Escrito de las representantes al Vigésimo Juzgado Civil de Lima, de 4 de octubre de 2017(expediente de prueba, folio 25931).

289. La Corte observa que en el Informe N°214-2021/DCOVI/DIGESA de 3 de febrero 2021, la DIGESA consideró que esta "ha[bía] cumplido con la ejecución del Diagnóstico de Línea Base, establecido en el Decreto Supremo Nº 074-2001-PCM, en lo referente a monitoreos de calidad del aire e inventarios de emisiones en la ciudad de La Oroya"[484]. No obstante lo anterior, la Corte recuerda que de la prueba presentada ante este Tribunal se desprende que, si bien el Estado adoptó medidas para la protección del medio ambiente resultado de las actividades del CMLO, la calidad del aire continuó estando por debajo de los lineamientos establecidos por la OMS y la legislación nacional, incluso hasta el año 2022.

290. En razón de lo anterior, la Corte considera que el Estado cumplió con la expedición del diagnóstico de línea base y la aprobación de un Plan de Acción, pero encuentra que las acciones de este no dieron efectividad a la orden del Tribunal Constitucional en lo que se refiere al mejoramiento de la calidad del aire en La Oroya, incumpliendo con la segunda orden de la sentencia del Tribunal Constitucional de 12 de mayo de 2006.

iii) Respecto a la orden de realizar acciones para declarar el Estado de Alerta en La Oroya

291. En la sentencia de 12 de mayo de 2006, el Tribunal Constitucional ordenó lo siguiente en relación con los Estados de Alerta en La Oroya:

> Ordena que el Ministerio de Salud, en el plazo de treinta (30) días, cumpla con realizar todas las acciones tendientes a declarar el Estado de Alerta en la ciudad de La Oroya, conforme lo disponen los artículos 23 y 25 del Decreto Supremo 074-2001-PCM y el artículo 105 de la Ley 26842[485].

292. El artículo 23 del Decreto Supremo Nº. 074-2001-PCM define el objetivo de los estados de alerta de la siguiente manera:

> La declaración de los estados de alerta tiene por objeto activar en forma inmediata un conjunto de medidas destinadas a prevenir el riesgo a la salud y evitar la exposición excesiva de la población a los contaminantes del aire que pudieran generar daños a la salud humana.
>
> El Ministerio de Salud es la autoridad competente para declarar los estados de alerta, cuando se exceda o se pronostique exceder severamente la concentración de contaminantes del aire, así como para establecer y verificar el cumplimiento de las medidas inmediatas que deberán aplicarse, de conformidad con la legislación vigente y el inciso c) del Art. 25 del presente reglamento. Producido un estado de alerta, se hará de conocimiento público y se activarán las medidas previstas con el propósito de disminuir el riesgo a la salud[486].

293. Por su parte, el artículo 25 del Decreto Supremo Nº 074-2001-PCM señala que el Ministerio de Salud tiene asignada la función de "c) declarar los estados de alerta

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484 *Cfr*. DIGESA. Informe N°214-2021/DCOVI/DIGESA., de 3 de febrero de2021 (expediente de prueba, folio 25484).

485 *Cfr*. Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio 21848).

486 *Cfr*. Decreto Supremo PCM-D.S. No 074-2001, de 22 de junio de 2001 (expediente de prueba, folio 21851).

nacionales a los que se refiere el artículo 23 del […] reglamento"[487]. Al respecto, la Corte advierte que el 25 de junio de 2003 se aprobó el Reglamento de Niveles de Estados de Alerta Nacionales para Contaminantes del Aire (en adelante también "el Reglamento de Estados de Alerta") para regular y establecer los Estados de Alerta. Este se modificó el 10 de mayo de 2005[488]. Así, el 23 de junio de 2006 el CONAM aprobó una Consulta Pública para el Plan de Contingencia para Estados de Alerta por Contaminación del Aire en la Cuenca Atmosférica La Oroya, que posteriormente fue elaborado por un grupo de estudio ambiental y aprobado en el año 2007[489].

294. En octubre de 2007 el CONAM aprobó el "Plan de Contingencias para los Estados de Alerta por Contaminación del Aire en la Cuenca Atmosférica de La Oroya", a fin de definir las acciones a efectivizar frente la contaminación aguda de la zona[490]. Además, a partir del 6 de agosto de 2008, la DIGESA inició la Declaratoria de los Niveles de Estados de Alerta en la ciudad de La Oroya[491]. Asimismo, comprueba que el Estado adoptó acciones dirigidas a difundir la norma antes mencionada y que se instalaron pantallas para el conocimiento de la población de los estados de alerta[492].

295. No obstante, también está demostrado que pasaron más de dos años después de la sentencia de mayo de 2006 hasta que comenzaron los estados de alerta en La Oroya, y que las propias autoridades del Estado manifestaron preocupación por la demora en la aprobación del Plan de Contingencias[493]. En ese sentido, según la DIGESA, dicha demora impidió la declaración de seis estados de alerta en octubre de 2006 y quince en noviembre del mismo año que hubieran sido declarados, si el plan hubiera sido aprobado[494]. Asimismo, la Corte advierte que de la prueba presentada se desprende que las medidas adoptadas para informar a la población sobre los Estados de alerta fueron limitadas e insuficientes para prevenir los riesgos a la salud y evitar la exposición de la población a la contaminación, tal como lo requería el Decreto Supremo Nº 074-2001-PCM[495].

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487 *Cfr*. Decreto Supremo PCM-D.S. No 074-2001, de 22 de junio de 2001 (expediente de prueba, folio 21851).

488 *Cfr.* Decreto Supremo No. 012-2005-SA que modificó el Reglamento de los Niveles de Estados de Alerta Nacionales para Contaminantes del Aire (expediente de prueba, folio .1306).

489 *Cfr.* Ministerio de Energía y Minas, Oficio No. 693-2007/JUS/CNDH-SE, de junio de 2007 (expediente de prueba, folios .87 y .88); Decreto del Consejo directivo del CONAM N° 021-2006-CONAM/CD, de fecha 23 de junio de 2006 (expediente de prueba, folio 27814), y Informe No. 011-2009-DGCA-VMGA/MINAM, de 10 de marzo de 2009 (expediente de prueba, folio .1311).

490 *Cfr.* Informe No. 011-2009-DGCA-VMGA/MINAM, de 10 de marzo de 2009 (expediente de prueba, folio .1311).

491 *Cfr.* Oficio Circular N° 120-2008/DG/DIGESA de 13 de agosto de 2008 (expediente de prueba, folio .1314).

492 *Cfr.* Diario Correo, "Con pantallas gigantes población de La Oroya controlará calidad de aire", nota de prensa de 27 de diciembre de 2012 (expediente de prueba, folio .1321).

493 Obra en el expediente que mediante comunicación de 26 de diciembre de 2006, la señora M.C.C.R, entonces Directora General de DIGESA, expresó a M.E.B.A., entonces presidente del Consejo Nacional del Ambiente, su "preocupación en relación con la demora en la aprobación del Plan de Contingencias para Estados de Alertas por Contaminación del Aire en la ciudad de La Oroya" Dirección General de Salud Ambiental, Oficio N° 8254-2006/DG/DIGESA, de 26 de diciembre de 2006. (expediente de prueba, folio .1308).

494 *Cfr.* Dirección General de Salud Ambiental, Oficio N° 8254-2006/DG/DIGESA, de 26 de diciembre de 2006. (expediente de prueba, folio .1308).

495 Se observa en el Informe de Mediciones de Dióxido de Azufre en La Oroya de Agosto 9, 12 y 19 de 2012, publicado por DIGESA en la página web de la Dirección de Salud Ambiental se detectaron emisiones de

296. Al respecto, la Corte observa que si bien en el Informe N°214-2021/DCOVI/DIGESA de 3 de febrero 2021 la DIGESA consideró que esta "ha[bía] cumplido en realizar las declaraciones de estados de alerta según lo establecido en el Decreto Supremo Nº 074-2001-PCM y también en el Decreto Supremo Nº 009-2003-SA"[496], de la información disponible en el expediente, se advierte que dicho sistema era deficiente y no fue efectivo. Lo anterior, pues en algunas ocasiones se detectaron emisiones de dióxido de azufre que superaron los valores de emergencia, peligro y cuidado, que no dieron lugar a las alertas[497]. Asimismo, destacan en el expediente demandas judiciales que resaltan que dichos estados de alerta "no han operado de manera regular y tampoco han sido efectivos para comunicar la situación de riesgo a la que se enfrentan los pobladores" señalando que, en "los pocos meses que alcanzaron a operar no fueron efectivos, dado que la información no llegaba a la población, y, por ende, no cumplía su cometido"[498].

297. En razón de ello, la Corte concluye que, si bien el Estado realizó las declaraciones de estados de alerta, estas no fueron efectivas. Lo cual lleva a la conclusión de que el Estado no cumplió con la tercera orden del Tribunal Constitucional.

iv) Respecto a la orden de realizar acciones para establecer programas de vigilancia epidemiológica y ambiental en La Oroya

298. En la sentencia de 12 de mayo de 2006, el Tribunal Constitucional ordenó lo siguiente en relación con vigilancia epidemiológica y ambiental:

> Ordena que la Dirección General de Salud Ambiental (Digesa), en el plazo de treinta (30) días, cumpla con realizar acciones tendientes a establecer programas de vigilancia epidemiológica y ambiental en la zona que comprende a la ciudad de La Oroya[499].

299. En relación con el establecimiento de programas de vigilancia epidemiológica y ambiental, la Corte nota que el MINSA realizó censos hemáticos y controles en pobladores de La Oroya, midiendo sus niveles de plomo en 2004, 2005 y 2010[500]. Mediante el "Plan de Acción para la Mejora de la Calidad del Aire en la Cuenca Atmosférica de la Oroya" (Decreto del Consejo Directivo N° 020-2006-CONAM/CD), se previeron algunas medidas para mejorar la calidad del aire y prevenir su deterioro, y se estableció como "Objetivo 7" la "vigilancia epidemiológica y ambiental", misma que

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dióxido de azufre que superaron los valores de emergencia, peligro y cuidado, que no dieron lugar a las alertas. *Cfr.* Promedio Móvil – Consultas, agosto 10-12, 19 de 2012, publicado en la página web de la Dirección de Salud Ambiental del Ministerio de Salud (DIGESA) (expediente de prueba, folios .1324, .1328, .1332, .1336).

496 *Cfr*. DIGESA. Informe N°214-2021/DCOVI/DIGESA, de 3 de febrero de 2021 (expediente de prueba, folio 25484).

497 *Cfr*. Informe de Mediciones de Dióxido de Azufre en La Oroya de Agosto 9, 12 y 19 de 2012 según información publicada por DIGESA, publicado en la página web de la Dirección de Salud Ambiental del Ministerio de Salud (DIGESA). Anexo al escrito de los peticionarios de 12 de septiembre de 2012. (expediente de prueba, folios .1323 a.1340).

498 *Cfr.* Representantes de las víctimas. Escrito de las representantes al Vigésimo Juzgado Civil de Lima, de 4 de octubre de 2017 (expediente de prueba, folio 25931).

499 *Cfr*. Tribunal Constitucional, Sentencia de 12 de mayo de 2006 (expediente de prueba, folio .839).

500 También fueron realizados controles "centinela" para medir los niveles de plomo en la sangre de pobladores de La Oroya entre el 2004 y 2010. *Cfr.* Dirección General de Salud, Oficio N°4631-2006/DG/DIGESA de 4 de agosto de 2006 (expediente de prueba, folio .855), y Estrategia Sanitaria Nacional de Atención a personas afectadas por contaminación con metales pesados y otras sustancias químicas, Informe N°015-2011-DGSP-ESNAPACMPOSQ/MINSA de 21 de marzo de 2011 (expediente de prueba, folios .909 a .910).

incluyó tres metas: i) Meta 20: sistema de vigilancia epidemiológica ambiental del 100% de la población iniciado el 2006; ii) Meta 21: personas menores de 16 años, gestantes y personas de la tercera edad, en la zona de La Oroya Antigua alcanzar un nivel promedio ponderado de plomo en sangre en el rango de 15·a 20 µg/dL a junio del año 2008; y iii) Meta 22: estudio independiente del impacto de la flora y fauna de consumo humano contaminada en la salud de la población de La Oroya durante el 2007[501].

300. Asimismo, la Corte comprueba que mediante el Convenio de Cooperación de 19 de junio de 2006 entre el Ministerio de Salud, el Gobierno Regional de Junín y la empresa Doe Run Perú, el MINSA se comprometió a participar en la supervisión de las diferentes actividades de vigilancia epidemiológica ambiental, programas preventivos, atención y tratamiento de caso especiales, en coordinación con la Dirección Regional de Salud Ambiental (DIRESA) competente [502]. Además, que mediante el Informe Final sobre la Solicitud de Prórroga Excepcional del Proyecto "Plantas de Ácido Sulfúrico" de 25 de mayo de 2006 se estableció que Doe Run debía realizar acciones de "[v]igilancia epidemiológica ambiental en toda la cuenca atmosférica de La Oroya"[503]. En un sentido similar, la Corte nota que mediante los "Lineamientos de Política Sectorial para la atención integral de la salud de las personas expuestas a metales pesados, metaloides pesados, metaloides y otras sustancias químicas" se estableció como Estrategia 3.2: el "[f]ortalecimiento de las capacidades del personal de la salud y de los actores sociales, sobre todo de aquellos que se encuentren cerca o en los alrededores de las zonas de riesgo para asegurar la vigilancia epidemiológica y el análisis de la situación de salud de la población expuesta a metales pesados, metaloides y otras sustancias químicas"[504]. Además, en 2006, el Estado creó la empresa estatal Activos Mineros S.A.C. Entre sus funciones se designó la remediación de pasivos ambientales en La Oroya[505]. Dicha empresa realizó diversos proyectos y obras de remediación en la zona rural y urbana de La Oroya[506].

301. Al respecto, la Corte considera que, si bien los dosajes de sangre permitieron conocer la situación epidemiológica de la población en La Oroya y de algunas presuntas víctimas beneficiarias de las medidas cautelares, éstas no resultan suficientes para ser consideradas como un programa de vigilancia epidemiológica, tal como lo ordenó el Tribunal Constitucional. Asimismo que, si bien existieron referencias a acciones dirigidas a la realización de una vigilancia epidemiológica y ambiental, en un sentido similar a lo ordenado por el Tribunal Constitucional, la Corte carece de elementos para determinar si estas medidas efectivamente existieron y fueron ejecutadas por DIGESA, alguna otra instancia del Ministerio de Salud, o Doe Run. En este punto, se advierte que en un escrito de la demanda civil de 4 de octubre de 2017 de los representantes de las presuntas víctimas ante el Vigésimo Juzgado Civil destacaron que: "aún no existe un programa de

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501 *Cfr*. Decreto del Consejo Directivo del CONAM N° 020-2006-CONAM/CD, de fecha 23 de junio de 2006 (expediente de prueba, folio 27834)

502 *Cfr*. Convenio N° 029-2006-MINSA, de 19 de junio de 2006 (expediente de prueba, folio 27828).

503 *Cfr*. Informe N° 118-2006-MEM-AAM/AA/RC/FV/AL/HS/PR/AV/FQ/CC de fecha 25 de mayo de 2006 (expediente de prueba, folio 27720).

504 *Cfr*. Resolución Ministerial N° 979-2018/MINSA, de fecha 25 de octubre de 2018 (expediente de prueba, folio 27890)

505 *Cfr.* Activos Mineros S.A.C., Informe N°007-2013-GO, Remediación ambiental de las áreas de suelos afectados por las emisiones de gases y material particulado del CMLO, de 3 de octubre de 2013 (expediente de prueba, folio 0.1342).

506 *Cfr.* Activos Mineros S.A.C., Informe N°007-2013-GO, Remediación ambiental de las áreas de suelos afectados por las emisiones de gases y material particulado del CMLO, de 3 de octubre de 2013 (expediente de prueba, folios 0.1342 a 0.1350).

vigilancia epidemiológica y ambiental, que esté haciendo seguimiento constante a las enfermedades, grupos de edad, temporalidad de la presencia, entre otros, que son elementos fundamentales para este tipo de estudios"[507]. En razón de ello, la Corte concluye que el Estado no cumplió con la cuarta orden del Tribunal Constitucional.

302. Por todo lo anterior, el Estado de Perú incumplió con su deber de garantizar el cumplimiento de la sentencia del Tribunal Constitucional de 12 de mayo de 2006, en violación al artículo 25.2.c) de la Convención Americana, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de las 80 personas listadas en el Anexo 2 de la presente Sentencia.

B.2 La alegada falta de investigación de denuncias formuladas por presuntos hostigamientos

303. La Corte ha reconocido que el derecho a un recurso judicial implica el deber de investigar con debida diligencia las presuntas violaciones de derechos humanos, sancionar los responsables, y otorgar una reparación adecuada a las víctimas. Con respecto al deber de investigar, se ha señalado que, cuando se trata de amenazas y atentados a la integridad y a la vida de los defensores de derechos humanos, "son particularmente graves porque tienen un efecto no sólo individual, sino también colectivo"[508].

304. En relación con lo anterior, la Corte ha considerado que la calidad de defensora o defensor de derechos humanos se deriva de la labor que se realiza, con independencia de que la persona que lo hace sea un particular o un funcionario público[509], o de si la defensa se ejerce respecto de los derechos civiles y políticos o de los derechos económicos, sociales, culturales y ambientales[510]. Asimismo, este Tribunal ha precisado que las actividades de promoción y protección de los derechos pueden ejercerse de forma intermitente u ocasional, por lo que la calidad de persona defensora de derechos humanos no constituye necesariamente una condición permanente[511].

305. La definición de la categoría de defensoras o defensores de derechos humanos es amplia y flexible debido a la propia naturaleza de esta actividad. Por ello, una persona que realice una actividad de promoción y defensa de derechos humanos, o tenga reconocimiento social de su defensa, deberá ser considerada como persona defensora. En esta categoría se incluyen, por supuesto, los defensores ambientales, también llamados defensores de derechos humanos ambientales o defensores de derechos humanos en asuntos ambientales[512].

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[507] *Cfr*. Representantes de las víctimas. Escrito de las representantes al Vigésimo Juzgado Civil de Lima, de 4 de octubre de 2017) (expediente de prueba, folio 25932).

[508] *Cfr. Caso Nogueira de Carvalho y otro Vs. Brasil. Excepciones Preliminares y Fondo***.** Sentencia de 28 de noviembre de 2006. Serie C No. 161.62, párr. 76, y *Caso Sales Pimenta Vs. Brasil.* Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 30 de junio de 2022. Serie C No. 454, párr. 89.

[509] *Cfr. Caso Luna López Vs. Honduras. Fondo, Reparaciones y Costas.* Sentencia de 10 de octubre de 2013. Serie C No. 269, párr. 122, y C*aso Baraona Bray Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 24 de noviembre de 2022. Serie C No. 481. párr. 70.

[510] *Cfr. Caso Kawas Fernández Vs. Honduras. Fondo, Reparaciones y Costas.* Sentencia de 3 de abril de 2009. Serie C No. 196, párr. 147 y 148, y *Caso Baraona Bray Vs. Chile, supra,* párr. 70.

[511] *Cfr. Caso Defensor de Derechos Humanos y otros Vs. Guatemala, Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 28 de agosto de 2014. Serie C No. 283, párr. 129, y *Caso Baraona Bray Vs. Chile, supra,* párr. 70.

[512] *Cfr. Caso Baraona Bray Vs. Chile, supra,* párr. 71.

306. Este Tribunal ha reconocido que, dada la importancia de esta labor, el libre y pleno ejercicio de este derecho impone a los Estados el deber de crear condiciones legales y fácticas en las cuales puedan desarrollar libremente su función[513]. Lo anterior es particularmente relevante si se tiene en cuenta la interdependencia e indivisibilidad entre los derechos humanos y la protección del medio ambiente y las dificultades asociadas a la defensa del medio ambiente en los países de la región, en los que se observa un número creciente de denuncias de amenazas, actos de violencia y asesinatos de ambientalistas con motivo de su labor[514].

307. En este punto, y previo al análisis sobre la alegada ausencia de investigación ante los actos de hostigamiento en perjuicio de algunas presuntas víctimas, la Corte considera pertinente señalar que dichos actos de hostigamiento han ocurrido en un contexto de conflictividad social que prevalece hasta la fecha en La Oroya. Este contexto ha sido resultado de las reacciones que han seguido a las denuncias por la contaminación por las actividades del CMLO. En efecto, otros habitantes de La Oroya, en algunos casos trabajadores del CMLO, han percibido las acciones de las presuntas víctimas como amenazas a las fuentes de empleo generadas por las actividades minero-metalúrgicas de La Oroya. Al respecto, la perita Marisol Yáñez señaló que la "gran cantidad de amenazas" recibidas por las presuntas víctimas fueron realizadas "por parte de los trabajadores de la empresa incitados tanto por el temor a perder sus empleos como por las incitaciones recibidas dentro de la empresa"[515].

308. La Corte procederá a analizar los alegatos sobre la presunta ausencia de investigación por parte del Estado respecto de los actos de hostigamientos ocurridos en perjuicio de las presuntas víctimas María 11, María 13, Juan 7, Juan 12, Juan 13, Juan 17, y Juan 19[516], María 1[517], y Juan 7[518] quienes presentaron denuncias ante autoridades estatales reclamando haber sido acosados en represalia por las actividades que desempeñaban en defensa de la salud y el ambiente en La Oroya. Asimismo, analizará la alegada falta de investigación de la denuncia formulada por Juan 2[519] respecto de las presuntas afectaciones a la salud y al ambiente producidas por las actividades del CMLO.

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513 *Cfr. Caso Nogueira de Carvalho y otro Vs. Brasil, supra*, párr. 77 y *Caso Baraona Bray Vs. Chile, supra,* párr. 79.

514 *Cfr. Caso Kawas Fernández Vs. Honduras, supra*, párr. 149 y *Caso Baraona Bray Vs. Chile, supra,* párr. 79.

515 *Cfr*. Peritaje de Marisol Yáñez (expediente de prueba, folio 29401).

516 *Cfr.* Denuncia presentada ante la Sub Prefectura de Yauli de 28 de abril de 2004 (expediente de prueba, folio .1377). Asímismo, de acuerdo con la declaración ante fedatario público del hijo de Juan 12, este fue "despedi[do] porque entró en conflicto de intereses con la empresa [Doe Run]" debido a que"[se había convertido] en una figura política reconocida en la ciudad, con una mirada muy crítica de la contaminación generada por el Complejo". El hijo de Juan 12 también refirió que su padre "fue amenazado y amedrentado" y que "por tal motivo dej[ó] de hacer campaña", y "decidió regresar a Lima y mantener un perfil bajo". Finalmente señaló que su padre "tenía miedo" de que le "hicieran daño a sus hijos o familiares"[516]. No obra en el expediente evidencia de que el Estado haya investigado los hechos denunciados. *Cfr.* Declaración ante fedatario público de C.A.M.H., hijo de Juan 12 (expediente de prueba, folios 28996 a 28997).

517 *Cfr*. Nota dirigida a la Dirección General de Gobierno Interior enviada el 24 de abril de 2012 (expediente de prueba, folios .1406 a .1408).

518 *Cfr*. Subprefectura provincia de Yauli-La Oroya, Resolución N°60-2019-VOI/DGIN/SPROV, de 22 de julio de 2019 (expediente de prueba, folio .1420).

519 *Cfr*. Denuncia presentada al Fiscal de la Provincia de Yauli - La Oroya el 15 de agosto de 2007 (expediente de prueba, folios .1386 a .1394).

309. Por un lado, la Corte nota que María 1, María 11, María 13, Juan 7, Juan 12, Juan 13, Juan 17, y Juan 19 eran integrantes del Movimiento por la Salud en La Oroya (MOSAO), cuyo objetivo, de acuerdo con los representantes era adoptar "las medidas que redujeran la contaminación ambiental a niveles acordes con la protección de la salud de la población" [520]. Asimismo, que las presuntas víctimas disfrutaban de reconocimiento social como defensores de la salud y el ambiente, razón por la cual habrían sido objeto de hostigamientos y represalias orientados a desalentar las denuncias y cuestionamientos sobre las actividades realizadas por el CMLO. Por otro lado, Juan 2 se desempeñaba al momento de los hechos como funcionario de la Municipalidad de Yauli, donde habría efectuado al menos una denuncia sobre el estado de calidad del aire en La Oroya para defender los derechos al medio ambiente y a la salud.

310. Visto lo anterior, la Corte considera que María 1, María 11, María 13, Juan 7, Juan 12, Juan 13, Juan 17, y Juan 19 y Juan 2 eran defensoras y defensores de derechos humanos al momento de los hechos en tanto disfrutaban en su mayoría de reconocimiento social y realizaban activamente labores de protección y promoción del medio ambiente y la salud, ya fuera dentro de colectivos como el MOSAO, como en los casos de María 1, María 11, María 13, Juan 7, Juan 12, Juan 13, Juan 17 y Juan 19; o bien desde el ejercicio de la función pública, como en el caso de Juan 2.

311. En este sentido, en primer lugar, la Corte observa que el 17 de marzo de 2004 miembros del MOSAO celebraron un plantón pacífico con el objetivo de oponerse al otorgamiento de la "licencia social" concedida a la empresa Doe Run Perú. De acuerdo con el relato de un medio de prensa local, el plantón fue "enérgicamente rechazado por la población y los comerciantes", mientras que los principales dirigentes "estuvieron cerca de ser linchados, siendo salvados por varios efectivos policiales que se apostaron a las afueras del local sindical"[521]. Consta en el expediente que este hecho fue denunciado ante el Sub Prefecto de la Provincia de Yauli, a través de una carta en que alegaron que habían sido "agredidos de forma verbal", que los trabajadores "lanzaron improperios y piedras" y "quemar[on] la Banderola" del MOSAO, y que los miembros de este movimiento también habían sido "sujetos de amenazas" en otras ocasiones. La denuncia fue presentada por María 11, María 13, Juan 7, Juan 12, Juan 13, Juan 17, y Juan 19[522], y recibida por el Sub Prefecto el día 29 de abril de 2004[523].

312. Además, la Corte recuerda que el 16 de noviembre de 2007 la Sociedad Peruana de Derecho Ambiental denunció ante la Ministra de Justicia una serie de presuntos actos de hostigamiento sufridos por los beneficiarios de las medidas cautelares ordenadas por

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[520] Los representantes informaron que, dentro de las personas que pertenecían al momento de los hechos al MOSAO, se encontraban Juan 7, 11, 13, y 19, así como María 3, 11 y 13. *Cfr*. Escrito de Solicitudes, Argumentos y Pruebas, de 4 de febrero de 2021 (expediente de fondo, folio 268). Ver también: Denuncia presentada ante la Sub Prefectura de Yauli de 28 de abril de 2004 (expediente de prueba, folio .1377), y Nota de dirigida a la Dirección General de Gobierno Interior enviada el 24 de abril de 2012 (expediente de prueba, folios .1406 a .1408), y Declaración de Juan 6 (expediente de prueba, folio 28972).

[521] *Cfr*. Nota de prensa: "En histórico día pueblo oroíno respaldó licencia social otorgada a Doe Run" marzo de 2004. Anexo 40 a la solicitud inicial de medida cautelar de 21 de noviembre de 2005 (expediente de prueba, folio .1373).

[522] *Cfr.* Denuncia presentada ante la Sub Prefectura de Yauli de 28 de abril de 2004 (expediente de prueba, folio .1379).

[523] *Cfr.* Denuncia presentada ante la Sub Prefectura de Yauli de 28 de abril de 2004 (expediente de prueba, folio .1377).

la Comision Interamericana de Derechos Humanos[524]. Algunos beneficiarios, presuntas víctimas del presente caso señalaron que en sus casas habían aparecido con "dibujos obscenos", mientras que otros indicaron haber recibido amenazas en contra de sus hijos menores de edad[525]. Algunos beneficiarios también alegaron haber sido "objeto de fotografías y señalamientos por personas que [eran] conocidas por defender los intereses de la empresa que oper[aba] el complejo metalúrico"[526]. Finalmente, algunos de ellos, quienes a su vez eran trabajadores del sindicato, indicaron que habían resurgido "comunicados amenazantes" a quienes "trabajaban por la salud y el ambiente"[527]. La carta de denuncia muestra sellos de recibo del Ministerio de Justicia, el Ministerio del Interior, la Defensoría del Pueblo, el Ministerio de Salud, y CONAM[528]. No obra en el expediente evidencia de que el Estado haya investigado los hechos denunciados.

313. Asimismo, consta que el 15 de agosto de 2007 Juan 2 denunció ante el Ministerio Público de La Oroya que ese día se estaba registrando una "enorme" contaminacion en La Oroya Antigua "por efecto de gases contaminantes con contenidos mayores a los límites establecidos por la OMS que emana[n] [de] la función de la empresa Doe Run Perú"[529]. En el marco de la referida denuncia, Juan 2 solicitó *inter alia* que "se requi[riera] al Ministerio de Salud (DIGESA) y ESSALUD y [a] la Comisión Municipal Ambiental, así como a la Parroquia de la Provincia – Mesa de Diálogo y a la Municipalidad Provincial de Yauli – La Oroya y a las ONG medioambientales que laboran en la jurisdicción a fin de que documentadamente inform[aran] sobre las gestiones y/o fiscalización que hubieran hecho para controlar la contaminación nociva"[530]. El 17 de agosto de 2007, es decir, dos días después de haber formulado la denuncia, Juan 2 fue separado de su trabajo en la Defensoría Municipal del Niño y el Adolescente[531]. En una declaracion brindada el 23 de agosto de 2007 en el programa "Diálogo Directo", Juan 2 adujo que "ha[bían] dos regidores que trabaj[aban] para Doe Run" y que "ellos habrían provocado [su] salida [de la Defensoría Municipal del Niño y el Adolescente]"[532]. No obra en el expediente prueba de que fuera iniciada una investigación en relación con la denuncia formulada por afectaciones al ambiente y a la salud presentada por Juan 2, ni su eventual despido de la Defensoría Municipal del Niño y el Adolescente.

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524 *Cfr.* Nota dirigida al Ministerio de Justicia de 16 de noviembre de 2007 (expediente de prueba, folios .1383 a .1385).

525 *Cfr.* Nota dirigida al Ministerio de Justicia de 16 de noviembre de 2007 (expediente de prueba, folios .1383 a .1385).

526 *Cfr.* Nota dirigida al Ministerio de Justicia de 16 de noviembre de 2007 (expediente de prueba, folios .1383 a .1385).

527 *Cfr.* Nota dirigida al Ministerio de Justicia de 16 de noviembre de 2007 (expediente de prueba, folios .1383 a .1385).

528 *Cfr.* Nota dirigida al Ministerio de Justicia de 16 de noviembre de 2007 (expediente de prueba, folios .1383 a .1385).

529 *Cfr*. Denuncia presentada al Fiscal de la Provincia de Yauli – La Oroya el 15 de agosto de 2007 (expediente de prueba, folios .1386 a.1394).

530 *Cfr*. Denuncia presentada al Fiscal de la Provincia de Yauli - La Oroya el 15 de agosto de 2007 (expediente de prueba, folios .1386 a .1394).

531 *Cfr*. Coordinadora Nacional de Radio, nota de prensa de 23 de agosto de 2007. Anexo al escrito de los peticionarios de 24 de agosto de 2007 en el trámite de las medidas cautelares (expediente de prueba, folios .1395 a .1397).

532 *Cfr*. Coordinadora Nacional de Radio, nota de prensa de 23 de agosto de 2007. Anexo al escrito de los peticionarios de 24 de agosto de 2007 en el trámite de las medidas cautelares (expediente de prueba, folios .1395 a .1397).

314. Por otra parte, el 24 de abril de 2012, María 1 solicitó garantías personales frente agresiones verbales e intimidaciones. Mediante una carta a la Dirección General de Gobierno Interior, María 1 denunció "agresiones verbales", volantes, panfletos y comentarios en las redes sociales que "incita[ron] a la violencia" contra su persona, lo que le habría hecho huir de La Oroya "para evitar que estas agresiones verbales se convi[rtieran] en física[s] y [pusieran] en peligro [sus] vidas"[533]. De acuerdo con lo referido por María 1 en la audiencia pública, el presidente de su junta vecinal y su secretario llegaron a su casa y le indicaron que tenía que irse de La Oroya "porque [iban] a bajar los trabajadores" y "les [iban] a pegar […] y a quemar su casa"[534]. Antes este panorama María 1 señaló que se tuvo que retirar de La Oroya y que "por el temor no puede vivir en [su] tierra"[535]. La denuncia de María 1 se presentó ante la Dirección General de Gobierno Interior del Ministerio del Interior con copia al señor D.L.C., funcionario del Ministro del Interior, la señora G.V., Adjunta para los Derechos Humanos de la Defensoría del Pueblo, el señor J.A.P.B., Fiscal de la Nación del Ministerio Público, y la señora M.T.M., Fiscal Provincial de Prevención del Delito – Huancayo. La denuncia muestra sellos de recibo de la Dirección General de Gobierno Interior, la Defensoría del Pueblo, y el Ministerio Público[536].

315. Asimismo, la Corte nota que María 11 presentó una denuncia ante la Subprefactura de la Provincia de Yauli en junio de 2019 mediante la cual efectuó una petición de garantías personales, aduciendo que el locutor del programa de Radio Karisma, utilizaba el referido programa para "pro[palar] e incita[r] a la población" en contra de su esposo, Juan 7, haciendo uso de una serie de "expresiones difamatorias y amenazas" vinculadas a su rol de activista[537]. Asimismo, indicó que en una publicación de Facebook de Radio Karisma se habían realizado distintos comentarios "incitando [a] la violencia" contra Juan 7[538]. El 22 de julio de 2019, la citada entidad estatal concedió la solicitud de garantías personales y dispuso que el locutor de Redio Karisma cesara los actos de "amenaza, coacción [y] hostigamiento", indicando además que este debía "absten[erse] de realizar cualquier acto que p[usiera] en riesgo la integridad, la paz y la tranquilidad de la solicitante, y [su] esposo"[539].

316. El Estado alegó que los hechos relatados por la Comisión y los representantes fueron denunciados frente órganos que no poseían competencia para investigarlos, y que "no ostentan la intensidad suficiente" para ser consideradas actos de amenazas u hostigamiento. En relación con el primer argumento, el Estado señaló que, dentro de la institucionalidad peruana, la Policía Nacional y el Ministerio Público constituían los órganos

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533 *Cfr*. Nota dirigida a la Dirección General de Gobierno Interior enviada el 24 de abril de 2012 (expediente de prueba, folios .1406 a .1408).

534 *Cfr*. Declaración de la presunta víctima María 1 rendida en la audiencia pública del presente caso celebrada en el 153 Periodo Ordinario de Sesiones en Montevideo, Uruguay.

535 *Cfr*. Declaración de la presunta víctima María 1 rendida en la audiencia pública del presente caso celebrada en el 153 Periodo Ordinario de Sesiones en Montevideo, Uruguay.

536 *Cfr*. Nota dirigida a la Dirección General de Gobierno Interior enviada el 24 de abril de 2012 (expediente de prueba, folios .1406 a .1408).

537 *Cfr*. Subprefectura provincia de Yauli-La Oroya, Resolución N°60-2019-VOI/DGIN/SPROV, de 22 de julio de 2019 (expediente de prueba, folios .1418 a.1420).

538 *Cfr*. Subprefectura provincia de Yauli-La Oroya, Resolución N°60-2019-VOI/DGIN/SPROV, de 22 de julio de 2019 (expediente de prueba, folios .1418 a.1420).

539 *Cfr*. Subprefectura provincia de Yauli-La Oroya, Resolución N°60-2019-VOI/DGIN/SPROV, de 22 de julio de 2019 (expediente de prueba, folio .1420).

competentes para investigar actos como los relatados en el presente caso[540]. En ese sentido, la Corte observa que las denuncias interpuestas por María 1 y Juan 2 fueron presentadas ante el Ministerio Público[541]. Respecto de las otras situaciones de hostigamiento, la Corte nota que estas fueron remitidas ante el Sub Prefecto de la Provincia de Yauli, en el caso de la denuncia formulada por MOSAO en marzo de 2004, y ante el Ministerio de Justicia, en el caso de la denuncia formulada por la Sociedad Peruana de Derecho Ambiental en noviembre de 2007.

317. Al respecto, la Corte considera que, con independencia de que las denuncias antes señaladas no hayan sido planteadas ante el órgano competente para investigarlas, su jurisprudencia en materia de protección de los defensores de derechos humanos señala que el Estado posee la obligación de "investigar seria y eficazmente las violaciones cometidas en su contra". Esta obligación supone que, cuando se efectúen denuncias sobre actos de hostigamiento a personas defensoras de derechos humanos ante instancias estatales que no sean *prima facie* competentes, estas no pueden omitir la realización de acciones encaminadas a dar cauce a dichas denuncias poniéndolas en conocimiento del órgano competente y orientando a las presuntas víctimas sobre la forma de proceder. Lo anterior resulta especialmente pertinente en casos donde existen elementos que muestren que la falta de actuación podría comprometer la vida e integridad personal de las personas defensoras de derechos humanos. Asimismo, este Tribunal ya ha considerado que no corresponde exigir a la persona afectada "que conozca con exactitud cuál es la autoridad en mejor capacidad de atender su situación, ya que corresponde al Estado establecer medidas de coordinación entre sus entidades y funcionarios para tal fin"[542].

318. En relación con el segundo argumento, el Estado señaló que las situaciones denunciadas por las presuntas víctimas no eran "suficientemente intensas" como para ser consideradas "actos de amenaza a la integridad y vida de las personas"[543]. En el caso concreto, las presuntas víctimas denunciaron haber sido sometidos a agresiones "verbales" y "físicas" que tuvieron lugar de forma sistemática y continuada, en virtud de las labores realizadas en defensa de la salud y el ambiente en La Oroya. La Corte advierte que estos hechos no habrían ocurrido de forma aislada o aleatoria, sino que, por el contrario, las situaciones relatadas por las presuntas víctimas se produjeron como resultado de un conflicto preexistente en La Oroya respecto de las actividades contaminantes de Doe Run y la necesidad de una acción estatal para su control. En tal sentido, la perita Marisol Yáñez indicó en la audiencia pública celebrada en el presente caso que en La Oroya existía un ambiente de "conflictividad social y de polarización"[544]. Sobre este particular, la Corte recuerda que Juan 1, Juan 2, Juan 6, Juan 8, Juan 18, Juan 30, María 9, María 16 y María 25 expresaron que, como resultado de sus acciones de protección al medio ambiente y la salud, fueron víctimas de acusaciones por parte de Doe

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[540] *Cfr.* Escrito de Contestación del Estado, 20 de julio de 2022 (expediente de fondo, folio 701).

[541] *Cfr*. Nota dirigida a la Dirección General de Gobierno Interior enviada el 24 de abril de 2012 (expediente de prueba, folios 0.1406 a 0.1408), y Denuncia presentada al Fiscal de la Provincia de Yauli – La Oroya el 15 de agosto de 2007 (expediente de prueba, folios .1386 a .1394).

[542] *Cfr*. *Caso Vélez Restrepo y Familiares Vs. Colombia. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 3 de septiembre de 2012. Serie C No. 248, párr. 201 y, *Caso Defensor de Derechos Humanos y otros Vs. Guatemala. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 28 de agosto de 2014. Serie C No. 283, párr. 155.

[543] *Cfr.* Escrito de Contestación del Estado, 20 de julio de 2022 (expediente de fondo, folio 701).

[544] *Cfr*. Declaración de la perita Marisol Yáñez rendida en la audiencia pública del presente caso celebrada en el 153 Periodo Ordinario de Sesiones en Montevideo, Uruguay.

Run y sus trabajadores (*supra* párr. 225), lo cual generó un ambiente de estigmatización y amedrentamientos en su contra.

319. La Corte reitera su jurisprudencia según la cual el Estado tiene la obligación de proteger a los defensores de los derechos humanos cuando son objeto de amenazas e investigar violaciones cometidas en su contra[545]. En el presente caso, la Corte considera que el Estado no logró acreditar haber brindado respuesta a las denuncias formuladas por María 11, María 13, Juan 7, Juan 12, Juan 13, Juan 17, y Juan 19, en marzo de 2004, Juan 2, en agosto de 2007 y María 1, en abril de 2012. En tal sentido, el Tribunal concluye que, considerando que estas denuncias se relacionaban con actos de hostigamiento hacia las personas defensoras del ambiente y/o con la salud en La Oroya, el Estado incumplió con su deber de investigar con debida diligencia los hechos denunciados. En consecuencia, el Estado es responsable por la violación de los artículos 8.1 y 25 de la Convención Americana, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de María 1, María 11, María 13, Juan 2, Juan 7, Juan 12, Juan 13, Juan 17 y Juan 19.

IX
REPARACIONES

320. Sobre la base de lo dispuesto en el artículo 63.1 de la Convención Americana, la Corte ha indicado que toda violación de una obligación internacional que haya producido daño comporta el deber de repararlo adecuadamente y que esa disposición recoge una norma consuetudinaria que constituye uno de los principios fundamentales del Derecho Internacional contemporáneo sobre responsabilidad de un Estado[546].

321. La reparación del daño ocasionado por la infracción de una obligación internacional requiere, siempre que sea posible, la plena restitución (*restitutio in integrum*), que consiste en el restablecimiento de la situación anterior. De no ser esto factible, como ocurre en la mayoría de los casos de violaciones a derechos humanos, el Tribunal determinará medidas para garantizar los derechos conculcados y reparar las consecuencias que las infracciones produjeron[547]. Por tanto, la Corte ha considerado la necesidad de otorgar diversas medidas de reparación a fin de resarcir los daños de manera integral, por lo que, además de las compensaciones pecuniarias, las medidas de restitución, rehabilitación, satisfacción y garantías de no repetición tienen especial relevancia por los daños ocasionados[548].

322. Asimismo, la jurisprudencia reiterada de este Tribunal ha señalado que las reparaciones deben tener un nexo causal con los hechos del caso, las violaciones declaradas, los daños acreditados, así como las medidas solicitadas para reparar los daños respectivos. Por lo tanto, la Corte deberá observar dicha concurrencia para

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545 *Cfr. Caso Nogueira de Carvalho y otro Vs. Brasil. Excepciones Preliminares y Fondo*. Sentencia de 28 de noviembre de 2006. Serie C No. 161.62, párr. 76.

546 *Cfr. Caso Velásquez Rodríguez Vs. Honduras. Reparaciones y Costas*. Sentencia de 21 de julio de 1989. Serie C No. 7, párr. 25, y *Caso Córdoba Vs. Paraguay, supra,* párr. 115.

547 *Cfr. Caso Velásquez Rodríguez Vs. Honduras*. Reparaciones y Costas, *supra*, párrs. 25 y 2, y *Caso Rodríguez Pacheco y otra Vs. Venezuela, supra,* párr. 152.

548 *Cfr. Caso de la Masacre de Las Dos Erres Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 24 de noviembre de 2009. Serie C No. 211, párr. 226, y *Caso Rodríguez Pacheco y otra Vs. Venezuela, supra,* párr. 152.

pronunciarse debidamente y conforme a derecho[549].

323. Tomando en cuenta las violaciones a la Convención Americana declaradas en el capítulo anterior, a la luz de los criterios fijados en la jurisprudencia del Tribunal en relación con la naturaleza y alcances de la obligación de reparar[550], seguidamente se analizarán las pretensiones presentadas por la Comisión y los representantes, así como los argumentos del Estado, con el objeto de disponer a continuación las medidas tendientes a reparar dichas violaciones.

A. Parte lesionada

324. Este Tribunal considera parte lesionada, en los términos del artículo 63.1 de la Convención, a quien ha sido declarado víctima de la violación de algún derecho reconocido en la misma. Por lo tanto, esta Corte considera como "parte lesionada" a las personas indicadas en el Anexo 2 de la presente Sentencia, quienes, en su carácter de víctimas de las violaciones declaradas en el capítulo VIII serán beneficiarios de las reparaciones que la Corte ordene. Asimismo, la Corte considera que por la naturaleza del presente caso las violaciones a los derechos humanos tuvieron un alcance colectivo (*supra* párr. 179), lo cual será tomado en cuenta en algunas de las medidas de reparación ordenadas (*infra*, párrs. 333, 334, y 346 a 355).

B. Obligación de investigar los hechos e identificar, juzgar y, en su caso, sancionar a los responsables

325. La ***Comisión*** y los ***representantes*** solicitaron realizar investigaciones penales, administrativas, civiles o de otra naturaleza, según corresponda, respecto de los actos de amenazas y hostigamientos a las víctimas de dichos hechos. Asimismo, solicitaron deducir las responsabilidades de funcionarios o terceros respecto a la contaminación ambiental en La Oroya que afectó la salud de las víctimas. Aunado a lo anterior, la Comisión recomendó al Estado "agotar mecanismos dirigidos a deducir eventuales responsabilidades de la empresa respectiva en relación con la contaminación ambiental en La Oroya".

326. Respecto de las investigaciones relacionadas con los actos de amenazas y hostigamientos, el ***Estado*** señaló que, al margen de que "no se haya verificado actos de hostigamiento en perjuicio de las presuntas víctimas", ya ha coordinado con distintas entidades estatales para identificar cualquier aspecto que pueda afectar la tranquilidad de las presuntas víctimas. Asimismo, señaló que, de acuerdo con la Policía Nacional del Perú, no se encuentran denuncias policiales contra la empresa Doe Run, desde el año 2006 a la fecha. Finalmente indicó que mediante la nota Nº 032-2021-JUS/PGE-PPES de fecha 14 de mayo de 2021 solicitó a los representantes de los beneficiarios de las medidas cautelares una reunión de coordinación, sin recibir respuesta a dicha solicitud.

327. La ***Corte*** recuerda que el Estado incumplió con su deber de investigar los actos de hostigamiento hacia las personas defensoras del ambiente y/o con la salud en La Oroya formuladas por María 1, María 11, María 13, Juan 7, Juan 12, Juan 13, Juan 17, y Juan 19 y Juan 2, quienes actuaron como defensores del medio ambiente o la salud en La

[549] *Cfr. Caso Ticona Estrada Vs. Bolivia. Fondo, Reparaciones y Costas*. Sentencia de 27 de noviembre de 2008. Serie C No. 191, párr. 110, y *Caso Rodríguez Pacheco y otra Vs. Venezuela, supra,* párr. 153.

[550] *Cfr. Caso Velásquez Rodríguez Vs. Honduras. Reparaciones y Costas, supra*, párrs. 25 a 27, y *Caso Rodríguez Pacheco y otra Vs. Venezuela, supra,* párr. 154.

Oroya. En ese sentido, ante la ausencia de investigación de los actos de hostigamiento de los defensores del medio ambiente antes mencionados, y teniendo en cuenta las conclusiones del Capítulo VIII de esta Sentencia en cuanto a las violaciones declaradas, la Corte dispone, conforme a su jurisprudencia[551], que el Estado deberá, en un plazo razonable, promover y continuar las investigaciones que sean necesarias para determinar, juzgar y, en su caso, establecer las responsabilidades, según corresponda, respecto de los hechos denunciados por las víctimas del presente caso.

328. En lo que respecta a las investigaciones relacionadas con la contaminación ambiental en La Oroya, el Estado alegó que ha conducido diligencias orientadas a investigar y sancionar faltas administrativas y delitos vinculados con la contaminación ambiental y señaló diversas medidas encaminadas a dichas investigaciones. Al respecto, la Corte constata que, de acuerdo con lo informado por el Estado, la Coordinación de Fiscalías Especializadas en Materia Ambiental[552], y la Dirección de Investigación y Criminal de la Dirección de Medio Ambiente de la Policía Nacional del Perú[553] han adelantado procesos administrativos y penales en relación con la contaminación en La Oroya que han sido archivados o no han resultado en una atribución directa de responsabilidad. Visto lo anterior, la Corte considera que el Estado deberá, en un plazo razonable, iniciar, promover y continuar las investigaciones que sean necesarias para determinar, juzgar y, en su caso, establecer las responsabilidades de funcionarios o terceros, según corresponda, respecto de la contaminación ambiental producida en La Oroya.

C. Medidas de restitución

329. La ***Comisión*** solicitó disponer de medidas de remediación del daño ambiental, que cuenten con la participación de las víctimas y que tengan como eje central los contenidos del derecho al medio ambiente y la salud. En particular, solicitó la realización de un estudio que establezca acciones que deben instrumentarse en el corto y largo plazo para remediar la contaminación ambiental de La Oroya y asegurar su implementación efectiva.

330. Los ***representantes*** solicitaron ordenar al Estado la realización de un diagnóstico de línea base y un plan de remediación ambiental, dirigido a la evaluación de los daños

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551 *Cfr*. Caso Velásquez Rodríguez Vs. Honduras. Fondo, *supra*, párr. 174, y, Caso Integrantes y Militantes de la Unión Patriótica Vs. Colombia, *supra,* párr. 554.

552 De acuerdo con lo informado por el Estado, en el año 2019 la Fiscalía Especializada en Materia Ambiental de Junín (FEMA) realizó investigaciones para atribuir responsabilidad penal por la contaminación ambiental. Mediante Oficio no. 116-2021-MP-FN-CN-FEMA de 3 de febrero de 2021 se informó que causa fue archivada debido a que el delito imputado a la empresa DRP de contaminación ambiental no había sido constatado, conforme a lo señalado en el Informe Pericial Oficial No. 0165-2020-MP-FN-GGOPERITEFOMA. Asimismo, se la Coordinación de las Fiscalías Especializadas en Materia Ambiental informó que la Caso No. 213-2014 que se encuentra "archivado". De acuerdo con el Estado, la FEMA habría determinado que "los hechos materia de la denuncia no configura[ban] delito de contaminación ambiental tipificado en el artículo 304 del Código Penal Peruano". *Cfr*. Escrito de contestación del Estado, de 20 de julio de 2022, párrs. 573 a 581 (expediente de fondo, folios 735 a 737).

553 El Estado informó que, de acuerdo con el Informe Legal No.1-2021-SCG-PNP-DIRNIC-DIRMEAMB UNIASJUR de fecha 5 de febrero de 2021, elaborado por la Unidad de Asesoría Jurídica de la Dirección de Medio Ambiente de la Policía Nacional del Perú, se dio inicio el 4 de julio de 2019 a una investigación a mano de la Fiscalía Especializada en Delitos Ambientales de Junín que se conoce bajo la Carpeta Fiscal No. 2206015200-2019-164-0. Dicha investigación habría tenido origen en una denuncia realizada en el Diario "Correo" de 4 de julio de 2019 sobre la "presunta intoxicación masiva por emisión de gases emanadas de la chimenea de la empresa Doe Run Perú". No obra en el expediente más información sobre el estado de esta causa. *Cfr*. Escrito de contestación del Estado, de 20 de julio de 2022, párrs. 582 y 583 (expediente de fondo, folio 737).

ambientales en La Oroya y la adopción de medidas dirigidas a remediarlos. De manera concreta, solicitaron que el Estado deberá realizar, en un período máximo de un año, un diagnóstico integral de línea base para determinar el estado actual de contaminación en La Oroya. Señalaron que dicho diagnóstico deberá incluir el análisis integral y conjunto respecto de la contaminación del aire, del agua y de los suelos. Además, indicaron que dicho diagnóstico deberá servir para diseñar y poner en marcha un plan para adelantar las acciones requeridas para atender la situación. En ese mismo sentido, solicitaron que el diagnóstico presente un mapeo de las fuentes y niveles de contaminación, para que, a partir de ello, el Estado defina medidas en el tiempo que permitan mitigar todas las fuentes de contaminación y remediar las zonas afectadas.

331. El ***Estado*** señaló que ya existe una empresa estatal encargada de conducir la ejecución de los PAMA denominada "Activos Mineros S.A.C.". El Estado explicó que, en el caso de La Oroya, esta empresa ejecuta el proyecto de remediación llamado "Remediación de las Áreas de Suelos Afectados por las Emisiones del Complejo Metalúrgico La Oroya (CMLO)". El Estado también señaló que en el año 2007 la Consultora Ground Water International (GWI), ejecutó el "Estudio de Remediación de las Áreas de Suelos Afectados por las Emisiones de Gases y Material Particulado del CMLO basado en Análisis de Riesgo a la Salud y a la Ecología". Asimismo, resaltó que en el año 2020 se creó la "Comisión Multisectorial Temporal para el Abordaje Integral e Integrado a favor de la Población Expuesta a Metales Pesados", con el objeto de elaborar un informe técnico que contenga estrategias de prevención, remediación, mitigación y control de la exposición a metales pesados.

332. La ***Corte*** recuerda que en el presente caso se determinó la responsabilidad internacional del Estado con motivo del incumplimiento del deber de prevención. La responsabilidad internacional fue el resultado de la afectación al medio ambiente por parte del Estado cuando Centromin operó el CMLO, ante la ausencia de medidas adecuadas de fiscalización por parte del Estado de las actividades de la empresa privada Doe Run, y por la adopción de medidas regresivas respecto de la protección del medio ambiente. Estos incumplimientos constituyeron una violación del deber de prevenir daños ambientales, los cuales fueron producidos por la exposición durante años a contaminantes que se encontraban en el aire, el agua y el suelo y que constituían un riesgo para la salud. Según la información que obra en el expediente, y que ha sido recogida en esta Sentencia, el aire, los suelos y el agua de La Oroya siguen teniendo la presencia de los contaminantes emitidos por la actividad del CMLO. En razón de ello, la Corte considera que corresponde al Estado adoptar medidas de restitución respecto del medio ambiente.

333. De esta forma, la Corte dispone que el Estado realice un diagnóstico de línea base para determinar el estado de la contaminación en el aire, suelo y agua en La Oroya, el cual deberá incluir un plan de acción para remediar los daños ambientales. El Estado deberá definir acciones a corto, mediano y largo plazo requeridas para la remediación de las áreas contaminadas, y comenzar a ejecutar dicho plan en un plazo no mayor de 18 meses desde la notificación de la presente Sentencia. El plan de acción deberá realizar un diagnóstico de las fuentes y niveles de contaminación y de los focos de contaminación en La Oroya para delimitar las áreas que tengan necesidad de remediación prioritaria atendiendo al riesgo que éstas conlleven para el medio ambiente y la salud, y realizar las acciones de descontaminación necesarias del aire, suelos y agua. La descontaminación deberá incluir las casas de las víctimas.

334. Las acciones de remediación deberán tomar en cuenta la información científica actualizada en materia de reparación de daños al medio ambiente provocado por metales

pesados, y deberá tomar en cuenta otros planes y programas previamente desarrollados para la remediación de daños ambientales en La Oroya. Asimismo, el Estado deberá implementar mecanismos de participación eficaces que permitan a las víctimas tomar conocimiento del plan de acción, emitir observaciones y que éstas sean consideradas antes, durante y después de su puesta en marcha. El Estado deberá informar a esta Corte en forma inmediata una vez que haya concluido con el diagnóstico de línea base y la elaboración del plan de acción. Lo anterior, de forma independiente del plazo de un año para presentar su primer informe dispuesto en el Punto Resolutivo 25 de esta Sentencia.

D. Medidas de rehabilitación

335. La ***Comisión*** solicitó que se ordene disponer las medidas de atención en salud física y mental de carácter integral, necesarias para la rehabilitación de las víctimas del presente caso, de ser su voluntad y de manera concertada, las cuales deben brindarse de manera gratuita, accesible y especializada, tomando en cuenta la localidad en la que se encuentra cada víctima. La Comisión señaló que dicha atención debe tener un carácter preferente en su calidad de víctimas de violaciones a derechos humanos y garantizar el principio de la primacía del interés superior del niño.

336. Los ***representantes*** solicitaron que se brinde atención integral en salud a las víctimas. En particular, solicitaron la realización de un diagnóstico médico especializado eintegral a las víctimas por parte de un equipo multidisciplinario de especialistas que incluya estudios biológicos, radiológicos y psicológicos, la evaluación individual de las víctimas así como la evaluación conjunta del grupo familiar y demás personas que compartan sus condiciones ambientales para determinar el nivel de riesgo. Asímismo, señalaron que el diagnostico deberá determinar el tratamiento indicado y disponer de las acciones requeridas para eliminar la exposición y el nivel de contaminación. Solicitaron que el diagnóstico y tratamiento médico incluya una perspectiva que atienda a las características diferenciadas de las víctimas en atención a su edad y género.

337. El ***Estado*** indicó que ha desplegado diversas acciones para la atención en salud de las presuntas víctimas. Dentro de ellas, destacó que: a) desarrolló un "Plan de Acción de Salud para los Beneficiarios de la Medida Cautelar Nro. 271-05-Caso La Oroya y su ampliación 2019-2022", el cual ha venido siendo ejecutado; b) las presuntas víctimas son afiliadas directas del Seguro Integral de Salud (SIS) Gratuito o el Seguro Social de Salud (EsSalud), y c) el Estado cuenta con instrumentos técnicos específicos para la atención en salud de la intoxicación por mercurio, y el abordaje integral a la población expuesta a metales pesados, metaloides y otras sustancias químicas.

338. La ***Corte*** dispone la obligación, a cargo del Estado, de brindar gratuitamente, y por el tiempo que sea necesario, a través de instituciones de salud públicas especializadas, o personal de salud especializado, y de forma inmediata, oportuna, adecuada y efectiva, el tratamiento médico, psicológico y psiquiátrico, en caso de ser requerido, de las víctimas de violaciones al derecho a la salud, integridad personal o vida digna, tomando en cuenta la localidad en la que estas se encuentran, y dando prioridad a las personas que sean niños, niñas o adultos mayores, al momento de la emisión de la presente Sentencia. El tratamiento deberá incluir, al menos, lo siguiente: a) un diagnóstico médico actualizado de cada víctima, que deberá contemplar los estudios especializados que sean requeridos, como evaluaciones neurológicas, psicométricas, radiológicas, y estudios complementarios de sangre y orina; b) el suministro gratuito y de por vida de los medicamentos o intervenciones médicas que eventualmente se requieran para el tratamiento de las dolencias o padecimientos diagnosticados, y c) los

gastos conexos de transporte relacionados con el desplazamiento de las víctimas que así lo requieran, desde su lugar de residencia hasta el sitio donde recibirán tratamiento médico. El Estado dispondrá de un plazo de seis meses, a partir de la notificación de la presente Sentencia, para la elaboración de un protocolo para el cumplimiento de esta medida. Asimismo, deberá informar sobre las atenciones médicas brindadas a las víctimas dentro del plazo de un año de acuerdo con lo dispuesto en el Punto Resolutivo 14 de esta Sentencia.

E. Medidas de satisfacción

339. Los ***representantes*** solicitaron, como medidas de satisfacción: a) la publicación de la sentencia y su resumen oficial en páginas web de distintas instituciones públicas y el Diario Oficial; b) la preparación de una versión de la sentencia de fácil entendimiento para niños, niñas y adolescentes a ser difundida "en medios escritos, radiales y virtuales a nivel nacional, regional y local de La Oroya, e incorporarlo en los textos de educación pública nacional, incluyendo y en particular, en los usados en educación pública en la zona de Yauli y La Oroya", y c) la realización de un acto de reconocimiento de responsabilidad internacional y pedido de disculpas públicas. El ***Estado*** manifestó su disposición de realizar la publicación de la Sentencia en el Diario Oficial, y en el portal de los Ministerios de Justicia y Derechos Humanos; no obstante recalcó que el resto de las solicitudes de los representantes son "excesivas" y no constituyen "medidas de satisfacción necesarias". La ***Comisión*** solicitó reparar integralmente las violaciones de derechos humanos evidenciadas en el presente caso.

340. La ***Corte*** estima, como lo ha dispuesto en otros casos[554], que el Estado debe publicar, en el plazo de seis meses, contado a partir de la notificación de la presente Sentencia: a) el resumen oficial de la Sentencia elaborado por la Corte, por una sola vez, en el Diario Oficial en un tamaño de letra legible y adecuado; b) el resumen oficial de la presente Sentencia elaborado por la Corte, por una sola vez, en un medio de comunicación de amplia circulación nacional en un tamaño de letra legible y adecuado, c) la presente Sentencia en su integridad, disponible por un período de un año, en las páginas web del Ministerio de Minas y Energía, el Ministerio de Salud y el Ministerio de Medio Ambiente, de manera accesible al público y desde la página de inicio del sitio web; d) una cartilla informativa o infografía de la Sentencia con lenguaje accesible para niños, niñas y adolescentes en las redes sociales de dos instituciones públicas dedicadas a la promoción y protección de la niñez y adolescencia que el Estado designe para tales fines, y e) dar difusión a la Sentencia en las cuentas de redes sociales oficiales del Ministerio de Minas y Energía, el Ministerio de Salud y el Ministerio de Medio Ambiente. Las publicaciones deberán indicar que la Corte Interamericana ha emitido una Sentencia en el presente caso declarando la responsabilidad internacional del Estado, así como el enlace por medio del cual se puede acceder de manera directa al texto completo de la misma. Esta publicación deberá realizarse por al menos cinco veces por parte de cada institución, en un horario hábil, así como permanecer publicada en sus perfiles de las redes sociales. El Estado deberá informar de forma inmediata a este Tribunal una vez que proceda a realizar cada una de las publicaciones dispuestas, independientemente del plazo de un año para presentar su primer informe dispuesto en el Punto Resolutivo 25 de la presente Sentencia.

341. Asimismo, se ordena al Estado la realización de un acto público de reconocimiento de responsabilidad internacional en relación con los hechos del presente caso, que

[554] *Cfr. Caso Cantoral Benavides Vs. Perú. Reparaciones y Costas.* Sentencia de 3 de diciembre de 2001. Serie C No. 88, párr. 79, y *Caso Córdoba Vs. Paraguay, supra,* párr. 128.

deberá celebrarse en La Oroya en el plazo de un año a partir de la notificación de la presente Sentencia. En dicho acto, el Estado deberá hacer referencia a las violaciones de los derechos humanos declaradas en esta Sentencia, así como a las medidas de reparación dirigidas a resarcir los daños ambientales y a la salud provocados. El referido acto deberá llevarse a cabo mediante una ceremonia pública presidida por altas autoridades del Estado. Asimismo, debe contar con la presencia de las víctimas declaradas en este Fallo y sus representantes, si así lo desean. Para tal efecto, el Estado deberá sufragar los gastos en que puedan incurrir. La determinación de la fecha, el lugar y las modalidades del acto, así como el contenido del mensaje que se verbalice durante el mismo, deberán ser acordados previamente con la víctima y/o sus representantes[555]. Dicho acto deberá ser difundido a través de medios de comunicación y, para su realización, el Estado cuenta con el plazo de un año contado a partir de la notificación de la presente Sentencia.

F. Garantías de no repetición

342. La ***Comisión*** recomendó al Estado la adopción de las siguientes medidas para evitar la repetición de los hechos del caso:

> a) compatibilizar los estándares de calidad de aire a nivel interno con los parámetros internacionales y de acuerdo con las obligaciones estatales de progresividad en la protección de los derechos económicos, sociales, culturales y ambientales (DESCA);
> b) asegurar que los valores de referencia que miden los niveles de plomo, arsénico, cadmio y otros metales tóxicos en las personas sean compatibles con los parámetros internacionales establecidos por las autoridades especializadas y las obligaciones de progresividad del Estado;
> c) asegurar la efectiva fiscalización y cumplimiento de los PAMA y en particular que las prórrogas o modificaciones que se realicen a los mismos obedezcan a criterios justificados a la luz de un enfoque de derechos humanos;
> d) poner en marcha sistemas de alerta de emergencia efectivos en casos de actividades peligrosas que aseguren que funcionarios públicos tomen medidas para prevenir afectaciones a la salud y al medio ambiente e incluya la obligación de proporcionar información a la población local;
> e) asegurar que el sistema de salud para los pobladores en La Oroya cuente con programas y servicios especializados que atiendan de manera efectiva las afectaciones a la salud que derivan de la contaminación ambiental y tome en cuenta las necesidades particulares de niños y niñas o pacientes que presenten alguna condición de vulnerabilidad;
> f) capacitar a autoridades judiciales y administrativas en asuntos ambientales con un enfoque de derechos humanos ante cualquier decisión, acción u omisión que afecte o pueda afectar de manera adversa al medio ambiente o contravenir normas jurídicas relacionadas con este, teniendo en cuenta instrumentos internacionales de empresas y derechos humanos;
> g) desarrollar un índice de información necesaria para el ejercicio o protección de los derechos humanos en el contexto de las actividades empresariales con base en el presente informe y aplicable a cualquier caso equivalente. Asegurar que sobre

[555] Véase, por ejemplo, *Caso del Penal Miguel Castro Castro Vs. Perú. Fondo, Reparaciones y Costas.* Sentencia de 25 de noviembre de 2006. Serie C No. 160, párr. 445, *Caso Pavez Pavez Vs. Chile. Fondo, Reparaciones y Costas.* Sentencia de 4 de febrero de 2022. Serie C No. 449, párr. 173, y *Caso Deras García y otros Vs. Honduras*, Fondo, Reparaciones y Costas. Sentencia de 25 de agosto de 2022. Serie C No. 462, párr. 109.

dicho listado se garanticen instrumentos de transparencia activa que hagan efectivo el derecho de acceso a la información de manera oportuna y completa. Fijar mecanismos de solicitud de acceso a la información que, a efectos de las actividades empresariales que tengan impactos en derechos humanos, sitúen a las corporaciones privadas como sujetos obligados a recibir, tramitar y responder solicitudes de acceso a la información, y, establecer mecanismos estatales de seguimiento a las respuestas negativas y/o evasivas tanto de las entidades públicas como de las empresas; y
h) adoptar mecanismos y/o aplicar los mecanismos existentes en la normativa interna, de manera efectiva, con el fin de garantizar la participación pública de las víctimas del presente caso y de la comunicad de La Oroya en la toma de decisiones y políticas en materia ambiental que pueda tener impactos sobre los derechos humanos.

343. Los ***representantes*** solicitaron que se ordenen las siguientes garantías de no repetición:

a) actualizar los valores nacionales de referencia para plomo, arsénico, cadmio y otros metales tóxicos conforme a los estándares actuales de la OMS, así como los Estándares de Calidad Ambiental y los Límites Máximos Permisibles relacionados con dichos elementos, para adoptar medidas "acordes a la realidad nacional";
b) desarrollar e implementar protocolos de atención médica para personas afectadas con metales tóxicos con perspectiva diferencial que incluyan la atención de salud de calidad para niñas, niños, mujeres y adultos mayores;
c) desarrollar una política pública nacional para mejorar la calidad de aire en zonas industriales del país que incluya el desarrollo de un sistema de monitoreo de calidad de aire que permita realizar vigilancia y control de la contaminación ambiental;
e) generar un sistema de información y datos de manera accesible y oportuna al público, con fines de informar adecuadamente y educar al público sobre los riesgos que supone para la salud la mala calidad del aire; y
f) ordenar al Estado revisar y complementar los planes actuales en relación con los procesos, planes y programas relacionados con la liquidación y/o cierre del CMLO para considerar el posible impacto de estas actividades en los derechos humanos de la población de La Oroya. En caso de que las actividades del Complejo fueran reanudadas, solicitaron que se ordene al Estado supervisar y fiscalizar de forma integral y eficaz las actividades de éste.

344. El ***Estado*** alegó lo siguiente respecto de las garantías de no repetición solicitadas por la Comisión y los representantes:

a) que la empresa estatal Activos Mineros S.A.C conduce la ejecución de los Programas de Adecuación y Manejo Ambiental, y cuenta con el proyecto "Remediación de las Áreas de Suelos Afectados por las Emisiones del Complejo Metalúrgico La Oroya", implementado por la Consultora *Ground Water International* mediante un estudio multidisciplinario. Asimismo, informó que, a través de la Comisión Multisectorial Temporal para el Abordaje integral e Integrado a favor de la Población Expuesta a Metales Pesados, viene elaborando un plan que incluirá "estrategias de prevención, remediación, mitigación y control de la exposición a metales pesados, teniendo como ejes estratégicos los aspectos ambientales y de salud";
b) que mediante el Decreto Supremo Nº 020-2021.MINAM de 22 de julio de 2021 se aprobó un Plan de Estándares de Calidad Ambiental (ECA) y Límites Máximos Permisibles (LMP) para el 2021-2023, en el cual se incorporan los estándares

internacionales adoptados por la OMS y se incorporan nuevos parámetros en relación con los metales pesados (como el Cadmio, Arsénico y Cromo);
c) que el Instituto Nacional de Salud ha indicado que el valor referencial de metales pesados de importancia clínica se ha ido reduciendo progresivamente, pues existen numerosos indicios que sugieren la posibilidad de que "no haya un umbral de concentración tóxica". Al respecto, el Estado precisó que ha tomado como referencia los parámetros del Centros para el Control y la Prevención de Enfermedades de los Estados Unidos (CDC-EEUU);
d) que cuenta con quince instrumentos de gestión ambiental relativos a la fiscalización del Complejo Metalúrgico La Oroya, y que las obligaciones vinculadas con la remediación ambiental se encuentran contenidas en el Plan de Cierre de Minas del Complejo Metalúrgico;
e) que se han ejecutado catorce monitoreos de calidad de aire en la ciudad de la Oroya orientados a la evaluación de la concentración de dióxido de azufre y metales pesados, y que también se ha aprobado un Plan de Contingencia para Estados de Alerta por Contaminación del Aire en la Cuenca Atmosférica de la Oroya. Asimismo, informó que durante el 2020 el Organismo de Evaluación y Fiscalización Ambiental (OEFA) realizó doce reportes respecto del cumplimiento de los ECA en la Oroya que registraron 284 estados de cuidado y seis estados de peligro;
h) señaló que ha diseñado e implementado múltiples cursos y capacitaciones sobre derecho ambiental a jueces, juezas y fiscales;
i) que cuenta con normativa y órganos especializados para garantizar la transparencia y acceso a la información ambiental, como el Sistema Nacional de Información Ambiental, la Autoridad Nacional de Transparencia y Acceso a la Información Pública, y el Tribunal de Transparencia y Acceso a la Información Pública;
j) que, dentro de todo proceso de evaluación de los estudios ambientales del Sistema Nacional de Certificación Ambiental para las Inversiones Sostenibles, se desarrollan los mecanismos de difusión y participación (antes y durante la elaboración y de cada estudio) previstos en el Plan de Participación Ciudadana correspondiente a cada proyecto de inversión en particular y la Ley General de Ambiente reconoce el derecho a participar en los procesos de tomas de decisiones relativas al ambiente y sus componentes;
k) que viene desarrollando acciones orientadas a resguardar la salud mental y física de las presuntas víctimas a través de documentos estratégicos como el "Plan de Acción de Salud para los beneficiarios de la Medida Cautelar Nº 271-05 Caso La Oroya y su ampliación 2019-2022", por lo que dicha garantía de no repetición resulta innecesaria, y
l) que los representantes no habrían justificado el modo en que la medida de reparación dirigida a la fiscalización de las actividades del CMLO en caso de que reiniciaran sus actividades incidiría en la restitución de los derechos de las presuntas víctimas**.**

345. La ***Corte*** toma nota de las medidas legislativas y de política pública las cuales el Estado informó haber realizado en materia de protección del medio ambiente[556], atención

[556] En su escrito de contestación, el Estado informó *inter alia* que mediante Decreto Supremo No. 058-2006-EM de 4 de octubre de 2006 se creó la empresa "Activos Mineros S.A.C." la cual conduce el "Proyecto de Remediación de las Áreas de Suelos Afectados por las Emisiones del Complejo Metalúrgico La Oroya (CMLO)". Asimismo indicó que mediante los Decretos Supremos No. 002-2013-MINAM y 002-2014-MINAM el Ministerio del Ambiente aprobó la norma de los Estándares de Calidad Ambiental de suelos y disposiciones complementarias. También indicó que mediante la Resolución Suprema N° 034-2020-PCM, se creó la Comisión Multisectorial Temporal para el Abordaje Integral e Integrado a favor de la Población Expuesta a Metales

a la salud[557], y acceso a la información y participación política[558]. Sin perjuicio de ello, la Corte advierte la ausencia de material probatorio que le permita determinar cómo dichas medidas permiten evitar la repetición de hechos como los ocurridos en el presente caso. En ese sentido, ante la imposibilidad de verificar el alcance o impacto de dichas acciones del Estado, y tomando en consideración las violaciones ocurridas en el presente caso, y las obligaciones establecidas en el presente Fallo, el Tribunal considera pertinente ordenar tanto medidas de reparación como garantías de no repetición. Lo anterior no impide que el Estado, en la supervisión de cumplimiento de sentencia, demuestre que las acciones que ya han sido adoptadas contribuyen al cumplimiento de las medidas que a continuación se señalan.

346. Primero, la Corte considera que el Estado debe compatibilizar la normativa que define los estándares de calidad del aire, de forma tal que los valores máximos permisibles en el aire para plomo, dióxido de azufre, cadmio, arsénico, material particulado y mercurio no sobrepasen los máximos necesarios para la protección del medio ambiente y salud de las personas. En la determinación de dichos valores el Estado deberá tomar en cuenta los criterios más recientes establecidos por la Organización Mundial de la Salud, y la información científica disponible. En el cumplimiento de esta medida, el Estado deberá actuar conforme a su obligación de no regresividad del derecho

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Pesados. En materia de estándares de calidad del aire y límites máximos permitidos, el Estado informó que mediante el Plan de Estándares de Calidad Ambiental y Límites Máximos Permisibles 2021-2023 se dispuso a establecer nuevos parámetros para el cadmio, arsénico y cromo con base en los estándares internacionales adoptados por la OMS en materia de calidad del aire y límites máximos permitidos. Respecto de las medidas adoptadas para poner en marcha los sistemas de alerta de emergencia, el Estado informó que DIGESA realizó catorce monitoreos puntuales de calidad de aire entre 2006 y 2019, los cuales son publicados a través del portal web de DIGESA. También indicó que mediante el Decreto del Consejo Directivo del CONAM No. 015-007-CONAM-CD se aprobó el Plan de Contingencia para Estados de Alerta por Contaminación del Aire de la Cuenca Atmosférica de La Oroya. Al respecto ver: Escrito de contestación del Estado, de 20 de julio de 2022, párrs. 598 a 637 (expediente de fondo, folios 746 a 757).

[557] En su escrito de contestación, el Estado informó *inter alia* que viene ejecutando acciones tendientes a resguardar la salud física y mental de las presuntas víctimas mediante la creación del "Plan de Acción de Salud para los beneficiarios de la Medida Cautelar Nro. 271-05- Caso La Oroya y su ampliación, 2019-2002". En el marco de este plan se ha realizado la "toma de muestras para dosaje de metales pesados" de 38 beneficiarios, y la "atención integral" de 28 beneficiarios de la Medida Cautelar Nro. 271-05-. Asimismo informó sobre distintos documentos técnicos emitidos por el MINSA dirigidos a brindar cobertura de salud de personas afectadas por contaminación minera, a saber: i) la Guía de Práctica Clínica para el diagnóstico y tratamiento de la intoxicación por mercurio; ii) la Directiva Sanitaria que establece el procedimiento para el abordaje integral de la población expuesta a metales pesados, metaloides, y otras sustancias químicas y iii) Resolución Ministerial No. 1023-2020/MINSA de 14 de diciembre de 2020. Aunado a lo anterior indicó que la Ley No. 27408 establece mecanismo de atención preferente para mujeres embarazadas, niñas, niños, personas adultas mayores y personas con discapacidad. Al respecto ver: Escrito de contestación del Estado, de 20 de julio de 2022, párrs. 547 a 561 (expediente de fondo, folios 724 a 732).

[558] En su escrito de contestación, el Estado informó *inter alia* que existe normativa destinada a la protección del derecho de acceso a la información. En concreto refirió a la Ley de la Transparencia y Acceso a la Información Pública e indicó que el Ministerio de Energía y Minas dispone de un Sistema de Evaluación en Línea, mediante el cual pueden consultarse los estudios de impacto ambiental vigentes. También señaló que en Perú existe el Sistema Nacional de Información Ambiental (SINIA), una red de integración institucional que "facilita la sistematización, acceso y distribución de la información ambiental". Asimismo indicó que mediante Decreto Legislativo No. 1353 se creó en 2017 la Autoridad Nacional de Transparencia y Acceso a la Información Pública (ANTAIP) como "órgano gestor de la política de transparencia". Respecto de los esfuerzos para garantizar la participación política en temas ambientales, el Estado informó que mediante la Ley No. 29968 se creó el Servicio Nacional de Certificación Ambiental para las Inversiones Sostenibles (SENACE) el cual revisa y aprueba los Estudios de Impacto Ambiental (EIA). En los procesos de evaluación de los estudios ambientales del SENACE se desarrollaron mecanismos de difusión y participación previstos en el Plan de Participación Ciudadana correspondiente a cada proyecto de inversión en particular. Indicaron que, en particular, en el sector de la minería, se cuenta con el Decreto Supremo No. 028-2008-EM y la Resolución Ministerial No. 304-2008-MEM/DM. Al respecto ver: Escrito de contestación del Estado, de 20 de julio de 2022, párrs. 672 a 697 (expediente de fondo, folios 769 a 774).

al medio ambiente sano y la salud. El Estado cuenta con el plazo de dos años, contados a partir de la notificación de la presente Sentencia, para la implementación de la presente medida.

347. Segundo, el Estado deberá garantizar la efectividad del sistema de estados de alerta en La Oroya. En este mismo sentido, el Estado deberá desarrollar un sistema de monitoreo de la calidad del aire, suelo y agua en La Oroya que permita determinar con precisión el estado de la contaminación atmosférica, y mecanismos adecuados para que las personas tengan acceso a dicho monitoreo. De esta forma, el Estado deberá adoptar medidas para que la población tenga acceso rápido y adecuado a la información sobre la declaratoria o suspensión de los estados de alerta, así como de las consecuencias de dichas declaratorias. Asimismo, el Estado deberá dictar medidas normativas orientas a asegurar que los funcionarios públicos adopten las decisiones necesarias para prevenir daños al medio ambiente y la salud cuando se active el estado de alerta, de conformidad con la normativa interna aplicable.

348. Tercero, el Estado deberá garantizar de forma inmediata que los habitantes de La Oroya que sufran síntomas y enfermedades relacionadas con la exposición a contaminantes producto de la actividad minero-metalúrgica cuenten con una atención médica especializada a través de instituciones públicas, con acceso a personal de salud que incluya el tratamiento médico, psicológico y psiquiátrico requerido. Además, el Estado deberá lograr la existencia de un sistema de salud en La Oroya que cuente con las condiciones adecuadas para la atención médica que cumpla con los estándares de disponibilidad, accesibilidad, aceptabilidad y calidad de los servicios de salud (*supra* párr. 120). Asimismo, en el cumplimiento de esta medida, el Estado deberá adoptar acciones diferenciadas de atención para niños, niñas, personas gestantes y personas mayores, y deberá garantizar que todos los pobladores de La Oroya tengan acceso al sistema de salud pública. Se deberá contar con medios adecuados para la atención médica de aquellos pacientes de La Oroya que padezcan de enfermedades relacionadas con la exposición a contaminantes producidos por la actividad del CMLO. Cuando los pacientes no puedan ser atendidos en La Oroya, la prestación de servicios médicos deberá tener lugar en el sitio más cercano dónde se pueda prestar dicha atención. El Estado cuenta con el plazo de un año, contado a partir de la notificación de la presente Sentencia, para la implementación de la presente medida.

349. En relación con lo anterior, la Corte estima apropiado ordenar la creación de un Fondo de Asistencia para sufragar los costos derivados del traslado, hospedaje y alimentación de las personas que requieran trasladarse fuera de la ciudad de La Oroya para recibir tratamiento médico. El Estado deberá adoptar todas las medidas administrativas, legislativas, financieras, de recursos humanos y de cualquier otra índole necesarias para la constitución oportuna de este Fondo, de modo que el dinero asignado al mismo pueda invertirse en forma efectiva. La administración del Fondo estará a cargo de un Comité que se creará al efecto, que estará integrado por una persona designada por los habitantes de La Oroya, por medio de un proceso de consulta público y transparente, una persona designada por el Estado, y una tercera persona designada de común acuerdo por las dos primeras. El Comité indicado debe quedar constituido en el plazo de seis meses a partir de la notificación de la presente Sentencia. Para el Fondo indicado, el Estado deberá destinar como mínimo la cantidad de USD $200.000,00 (doscientos mil dólares de los Estados Unidos de América), la cual será invertida de acuerdo con los objetivos propuestos, en un período fijado no mayor a cuatro años a partir de la notificación de la presente Sentencia. El Fondo no podrá tener menos de los USD $200.000,00 en momento alguno posterior a su constitución. En la determinación del monto asignado al Fondo, la Corte tiene en cuenta la necesidad de que el mismo

resulte razonable para cumplir con la finalidad de la medida y también el resto de las medidas dispuestas y la complejidad y costos que conllevan. El Estado deberá informar sobre las atenciones médicas brindadas a los habitantes de La Oroya, así como sobre la gestión del Fondo, dentro del plazo de un año de acuerdo con lo dispuesto en el Punto Resolutivo 25 de esta Sentencia.

350. Cuarto, el Estado deberá adoptar y ejecutar medidas para garantizar que las operaciones del CMLO se realicen conforme a los estándares ambientales internacionales, previniendo y mitigando daños al ambiente y a la salud de los habitantes de La Oroya. En este sentido, deberá supervisar y fiscalizar el cumplimiento de los compromisos ambientales y sociales derivados de los instrumentos de gestión ambiental aplicables al CMLO y los estándares internacionales establecidos en la presente Sentencia. Asimismo, el Estado deberá asegurar que el otorgamiento de permisos administrativos para la operación y, en su caso, el cierre del CMLO, se confieran en consonancia con la regulación nacional aplicable y los estándares internacionales en materia de protección al medio ambiente sano.

351. Adicionalmente, el Estado deberá diseñar e implementar un plan de compensación ambiental aplicable al ecosistema altoandino de La Oroya a efectos de que las operaciones del CMLO incluyan un compromiso ambiental de recuperación integral del ecosistema. El Estado deberá asegurar que el plan de compensación ambiental aplicable al CMLO incorpore, como mínimo: a) un análisis que permita una pérdida neta cero de biodiversidad, consiguiendo cuanto menos un balance neto neutro; b) una identificación de equivalencia ecológica a partir de un análisis de los servicios ecosistémicos, y c) la búsqueda de una "adicionalidad" en la compensación ambiental. El Estado se encargará de supervisar y fiscalizar la ejecución del plan de compensación ambiental hasta su cumplimiento final, el cual conlleva la recuperación integral del ecosistema del área de La Oroya, con independencia de la implementación de las medidas relacionadas con el cierre progresivo y final del CMLO.

352. En el mismo sentido, el Estado deberá garantizar que los titulares mineros ejecuten operaciones mineras o metalúrgicas atendiendo a los Principios Rectores sobre Empresas y Derechos Humanos de Naciones Unidas (*supra* párr. 110) y los Principios Marco sobre Derechos Humanos y el Medio Ambiente (*supra* párr. 117). De esta forma, el Estado deberá exigir que los titulares mineros sean quienes hagan frente a las consecuencias y resarcimiento de daños ambientales ocasionados por sus operaciones en atención al principio rector denominado "quien contamina paga", también conocido como "contaminador-pagador". En el mismo sentido, el Estado deberá realizar las acciones necesarias para que la aprobación de instrumentos de gestión ambiental aplicables a proyectos mineros incorpore como un compromiso ambiental explicito, la protección de derechos humanos, incluyendo el derecho a un medio ambiente sano.

353. Quinto, el Tribunal estima necesario que el Estado diseñe e implemente un programa de capacitación permanente en materia ambiental para funcionarios judiciales y administrativos, que laboren en el Poder Judicial y en las entidades con competencias en el sector de la gran y mediana minería en el Perú, con énfasis en poblaciones de áreas de influencia directa e indirecta de proyectos extractivos vigentes. Las capacitaciones deberán versar sobre los estándares internacionales y la legislación nacional en materia de protección al medio ambiente, salud, acceso a la información y participación política, particularmente respecto a las obligaciones de debida diligencia en materia ambiental, los cuales han sido señalados en la presente Sentencia. Estas capacitaciones deberán incluir información acerca de los principios en materia de protección al medio ambiente, las obligaciones de los Estados de prevenir violaciones a los derechos humanos de las

empresas extractivas, y los derechos de las personas en contextos de contaminación ambiental. Asimismo, el Estado deberá crear un sistema de indicadores que permitan medir la efectividad de los programas de capacitación y comprobar el impacto y efectividad de los mismos. El Estado cuenta con el plazo de un año, contado a partir de la notificación de la presente Sentencia, para la implementación de la presente medida.

354. Sexto, el Estado deberá diseñar e implementar un sistema de información que contenga datos sobre la calidad del aire y agua en las zonas del Perú donde exista mayor actividad minero-metalúrgica. Este sistema deberá contener información para la población sobre los riesgos para la salud derivados de la exposición a la contaminación del aire y el agua, el contenido de los derechos de la población a gozar a un medio ambiente sano y a la salud, y los medios para su protección, así como los mecanismos existentes para solicitar información y para garantizar la participación política en materia ambiental. Asimismo, el sistema de información debe poseer un medio para que las personas que así lo deseen sean informadas en tiempo real, a través de medios electrónicos, cuando los datos sobre la calidad del aire y el agua de una alguna de las zonas del Perú donde exista mayor actividad minero-metalúrgica reflejen niveles de contaminación que constituyan un riesgo para la salud. El Estado deberá garantizar que esta información se encuentre accesible y deberá informar a la población sobre su existencia. Esta información deberá ser actualizada permanentemente hasta el cumplimiento pleno del presente Fallo. El Estado cuenta con el plazo de un año, contado a partir de la notificación de la presente Sentencia, para la implementación de la presente medida.

355. Por otra parte, el Estado deberá elaborar un plan para la reubicación de aquellos habitantes de La Oroya que deseen ser reubicados en otra ciudad. Para ello, el Estado deberá elaborar un Plan en el que: a) realice un estudio de las condiciones políticas, económicas, ambientales y sociales para la reubicación, priorizando el traslado de las personas más afectadas; b) identifique los lugares para la reubicación; c) consulte a la ciudadanía para elegir la mejor opción; d) realice un estudio de factibilidad de la opción aprobada; e) diseñe una estrategia de financiamiento; f) ejecute el traslado; y g) realice acciones de monitoreo y vigilancia. El Estado cuenta con un año, contado a partir de la notificación de la presente Sentencia, para realizar el plan antes mencionado, el cual será valorado por este Tribunal.

G. Otras medidas solicitadas

356. Adicionalmente, la ***Comisión*** solicitó a la Corte que ordenara al Estado: a) crear e implementar, con la participación de las víctimas, un plan destinado a generar oportunidades y alternativas de desarrollo sostenible en la localidad de La Oroya, y b) disponer de medidas vinculantes que exijan, promuevan y orienten a las empresas que desarrollan actividades de minería y metalurgia a realizar la debida diligencia en materia de derechos humanos dentro de sus procesos u operaciones respecto a los derechos al medio ambiente sano y la salud, las cuales deben comprender indicadores que permitan verificar su cumplimiento.

357. Por su parte, los ***representantes*** solicitaron que se ordene las siguientes medidas de reparación adicionales: a) la creación de un fondo para la atención en salud y mejoramiento de las condiciones de vida de las víctimas; b) la adecuación de infraestructura para garantizar la prestación de servicios de salud para las víctimas ; c) la creación de una cátedra de derecho ambiental y derechos humanos "La Oroya" y programas de salud ambiental y de salud pública , y d) ordenar que se incluya en los instrumentos de gestión ambiental la debida consideración de los impactos en el corto,

mediano y largo plazo, así como acumulativos, que las actividades, obras o proyectos podrían tener en la salud de las personas y comunidades, e incorporar las medidas y acciones para prevenir, monitorear y mitigar los riesgos considerando las mejores prácticas**.**

358. Respecto de dichas solicitudes, el ***Estado*** señaló lo siguiente: a) que la medida de rehabilitación dirigida a la creación de un fondo para la atención en salud y para el mejoramiento de las condiciones de vida de las víctimas no encuentra justificación en las violaciones alegadas en el caso; b) que las medidas de satisfacción solicitadas por los representantes, más allá de la publicación de la sentencia, resultan "excesivas" y no constituyen medidas necesarias; c) que ya se ha trazado una línea de acción para mejorar la empleabilidad de las familias de la comunidad de la Oroya , y d) que existen disposiciones normativas vinculantes que exigen al titular minero desarrollar su actividad con la debida diligencia respecto al impacto al medio ambiente y que se encuentra en implementación el Plan Nacional de Acción sobre empresas y Derechos Humanos**.**

359. En relación con las solicitudes de la Comisión y los representantes antes mencionadas, la ***Corte*** considera que las solicitudes de los representantes de ordenar la creación de un fondo para la atención en salud y mejoramiento de condiciones de vida de las víctimas, y de adecuar la infraestructura para garantizar la prestación de servicios de salud para las víctimas, ya han sido abordadas en las medidas de rehabilitación y las garantías de no repetición previamente ordenadas y que se encuentran relacionadas con la atención de la salud de las víctimas y las órdenes dirigidas a mejorar la atención médica en La Oroya.

360. Finalmente, la Corte estima que la emisión de la presente Sentencia, así como las demás medidas ordenadas, resultan suficientes y adecuadas para remediar las violaciones sufridas por las víctimas, por lo que no considera necesario ordenar las medidas adicionales solicitadas por las víctimas.

H. Indemnizaciones compensatorias

H.1. Daño material

H.1.1 Alegatos de la Comisión y de las partes

361. La ***Comisión*** solicitó que se repararan integralmente las violaciones de derechos humanos declaradas en el Informe de Fondo, incluyendo las medidas de compensación y satisfacción necesarias respecto del daño material e inmaterial que padecieron las presuntas víctimas.

362. En relación con el daño emergente, los ***representantes*** indicaron que las presuntas víctimas han asumido una serie de gastos relacionados con: a) los exámenes y tratamientos médicos particulares ante los impactos derivados de la contaminación; b) los traslados de sitio de habitación provocados por las afectaciones en salud y el contexto de hostigamiento, y c) el acceso a la justicia. A manera de ejemplo, indicaron que María 3, 13, 15, 16, 34 y 36 han tenido que recurrir a atención médica privada para tratar sus padecimientos. Asimismo, señalaron que cuatro grupos familiares han tenido que desplazarse debido a la situación médica de alguno de sus integrantes, o en razón de los hostigamientos sufridos. Finalmente, en relación con los gastos vinculados a la búsqueda de justicia, observaron que las víctimas han tenido que desplazarse a reuniones, comunicarse telefónicamente, coordinar con sus representaciones legales, y desplazarse para recibir atención producto de las medidas cautelares dictadas en el

presente caso. En vista de lo anterior, solicitaron que se otorgue una suma de USD $15,000.00 por concepto de daño emergente para cada una de las víctimas del presente caso, o a los causahabientes de las víctimas que han fallecido en el trámite del presente caso ante el Sistema Interamericano.

363. En relación con el lucro cesante, los representantes señalaron que las víctimas del caso han sufrido de una pérdida de ingresos a raíz de las violaciones sufridas. En concreto indicaron que, con ocasión a los hechos del presente caso: a) Juan 4, 9, 11, 15, 25, y 30, y María 17 y 20 fueron cesados de sus actividades laborales o dejaron de percibir algún ingreso; b) María 1, 2, 5, 7, 10, 11, 12, 19, 27, 29, 30, 31, 33, 36, 37, 38, y Juan 6 y 30 perdieron ingresos por las labores de cuidado no remuneradas asumidas a raíz de las violaciones sufridas, y c) María 29, 35 y 37, y Juan 5, 26, 30 y 42 perdieron ingresos como resultado de los cambios forzados de residencia. En vista de lo anterior, solicitaron que se ordene al Estado el pago de una suma de USD $15.000,00 (quince mil dólares de los Estados Unidos de América) a cada una de las víctimas por concepto de lucro cesante, o a los causahabientes de las víctimas que han fallecido en el trámite del presente caso ante el Sistema Interamericano.

364. Aunado a lo anterior, los representantes realizaron valoraciones específicas en relación con el cálculo del daño material en los casos de María 14 y Juan 5. En concreto, argumentaron que, tanto María 14 y Juan 5, como su grupo familiar, "incurrieron en diversos gastos destinados a atención en salud, y gastos funerarios. Respecto del lucro cesante señalaron, que María 14, tenía diecisiete años cuando falleció como consecuencia de un "deterioro a su salud" que "podrí[a] ser atribuibl[e] a la contaminación a la que estuvo expuesta toda su vida". Señalaron que, si bien María 14 no desarrollaba ninguna actividad remunerada, ya adelantaba estudios de bachillerato. Argumentaron que, conforme a la legislación peruana, corresponde fijar el lucro cesante con base en el salario mínimo, teniendo en cuenta la esperanza de vida media, lo que, en el caso concreto, correspondería a una suma de USD $423.579,00 (cuatrocientos veintitrés mil quinientos setenta y nueve dólares de los Estados Unidos de América). En cuanto a Juan 5, quien al momento de su muerte tenía 47 años y se desempeñaba como conductor de taxi, solicitaron que, teniendo en cuenta la esperanza de vida media, se ordene al Estado el pago de una suma de USD $73.943,00 (setenta y tres mil novecientos cuarenta y tres dólares de los Estados Unidos de América) por concepto de lucro cesante. Sobre la base de lo anterior, solicitaron que se ordene al Estado el pago de una suma de USD $150.000,00 (ciento cincuenta mil dólares de los Estados Unidos de América) atribuible a "ambas víctimas" por concepto de daño material.

365. Por su parte, el ***Estado*** argumentó que no se apreciaba sustento probatorio alguno que justificara la cuantía reclamada por los representantes. Respecto a la suma estimada por concepto de daño emergente en los casos de María 13 y Juan 5, el Estado arguyó que los representantes "no han presentado pruebas de los gastos incurridos y/o alguna justificación para no presentarlos", por lo que concluyeron que no sería procedente fijar un monto sobre este concepto. En lo que refiere a la suma calculada en relación con María 14, por lucro cesante, el Estado indicó que esta "no realizaba actividad comercial alguna", y que los representantes no aportaron "elementos probatorios que demostraran los estudios de bachillerato que señal[aron]" los representantes. En cuanto a la suma estimada en relación con Juan 5 por concepto de lucro cesante, argumentaron que los representantes "tampoco adjuntaron sustento probatorio alguno".

H.1.2. Consideraciones de la Corte

366. La ***Corte*** ha desarrollado en su jurisprudencia que el daño material supone la

pérdida o detrimento de los ingresos de las víctimas, los gastos efectuados con motivo de los hechos y las consecuencias de carácter pecuniario que tengan un nexo causal con los hechos del caso[559].

367. En el presente caso, la Corte observa que, a falta de respaldo probatorio, no puede cuantificar con precisión los montos que las víctimas habrían erogado con motivo de los hechos, o bien los ingresos dejados de percibir. No obstante, este Tribunal considera que, con base en las violaciones declaradas, resulta razonable concluir que las víctimas han incurrido en diversos gastos y pérdida de ingresos vinculados con el tratamiento médico y cuidados producto de las afectaciones a su salud[560], así como con los desplazamientos derivados de la situación de hostigamiento y acoso[561]. Considerando lo anterior, la Corte fija, en equidad, la suma de USD $15.000,00 (quince mil dólares de los Estados Unidos de América), por concepto de daño material, para cada una de las víctimas directas señaladas en el Anexo 2 de la presente Sentencia, con excepción de María 14 y Juan 5.

368. En relación con lo anterior, la Corte considera que María 14 y Juan 5, quienes fallecieron como resultado de las enfermedades adquiridas con motivo de su exposición a la contaminación ambiental de La Oroya, y considerando los gastos incurridos debido a este hecho, y los ingresos dejados de percibir, la Corte fija, en equidad, la suma de USD $35.000,00 (treinta y cinco mil dólares de los Estados Unidos de América) como reparación por daño material para cada uno de ellos.

369. En el caso de las víctimas María 14, María 38, Juan 5, Juan 12, Juan 19 y Juan 40, quienes fallecieron, la suma por daño material deberá ser entregada a sus

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559 *Cfr. Caso Bámaca Velásquez Vs. Guatemala. Reparaciones y Costas. Sentencia de 22 de febrero de 2002*. Serie C No. 91, párr. 43, y *Caso Baptiste y otros Vs. Haití, supra,* párr. 122.

560 Al respecto se pueden consultar, con fines ilustrativos, las declaraciones de Juan 1, 6, 15 y María 25, 32, y 33. En su declaración Juan 1. Señaló que "[p]or la falta de atención médica de calidad, constantemente viaja[ba] a Lima para consumir medicamentos preparados o vitaminas" las cuales compraba "dos veces al año" gastando "como 600-700 soles al año". Por su parte, Juan 6 declaró que le "tocó pagar muchas medicinas, tratamientos y médicos de forma particular", lo cual "afectó [su] economía". Juan 15 declaró que ha tenido "que acudir a médicos privados e incurrir en gastos" médicos, por ejemplo, indicó que "para tratar los problemas estomacales ha pagado 3800 soles, a parte de los pasajes". También señaló que tuvo que operar "de emergencia [a su hijo] en la clínica de Huancayo, donde "le hicieron una cirugía" y tuvo que "pagar 5.000 soles". María 25 declaró que "[l]a contaminación junto con la falta de atención médica afectó mucho a la economía de [su] familia" debido a que sus padres se vieron en necesidad de llevarla "con doctores privados, [y] compra[rle] la medicina" lo cual implicó "muchos gastos". María 32 declaró que "siempre [l]e ha tocado acudir a consultorios privados y cubrir los altos costos de las atenciones médicas". María 33 declaró que ella "no tenía un seguro de salud [en esa época]" y que "[s]i no [se] ten[ía] dinero no te atendían [en los centros de salud]". *Cfr.* Declaraciones de Juan 1, 6, 15 y María 25, 32, y 33 (expediente de prueba, folios 28954, 28974, 29009, 29079, 29087, y 29085).

561 Al respecto se pueden consultar, con fines ilustrativos, las declaraciones de Juan 1, Juan 2, Juan 6, Juan 18, Juan 25 y María 37. Juan 1 quien era integrante de la MOSAO, declaró que su esposa "hacía tejidos artesanales", pero que "no podía salir a vender[los] porque le decían estos son los que quieren cerrar nuestra empresa". Juan 2 declaró que, luego de haber expresado su oposición a las actividades del Complejo, "empezó la estigmatización en [su] contra", lo cual "afectó [su] economía, por cuanto [él] tenía [su] restaurante y [su] sauna" pero los trabajadores de la empresa "dejaron de venir" pues lo "veían como enemigo". Juan 6 declaró que "la comunidad también ha cambiado mucho" y que "[m]uchas personas se tuvieron que ir de la provincia" porque "ya no t[enían] trabajo y necesita[ban] de qué vivir". Juan 18 declaró que "t[enía] tres hijos lisiados por el humo que actualmente no trabajan" por lo que él ha "deb[ido] sostenerlos económicamente". Juan 25 declaró que "[e]l impacto [de la contaminación] ha sido enorme" provocando "desocupación, despoblamiento, [y] desplazamiento". María 37 declaró que, "en el 2007 ya notaba que [sus] hijos tenían escamas y sufrían desmayos" por lo que "se v[io] en la necesidad de escapar del pueblo". *Cfr.* Declaraciones de Juan 1, 2, 6, 18 y 25 y María 37 (expediente de prueba, folios 28955, 28962, 28974, 29016, 29026, y 29105).

derechohabientes en los términos previstos por el régimen legal de sucesiones vigente en Perú.

H.2. Daño inmaterial

H.2.1. Alegatos de la Comisión de las partes

370. La ***Comisión*** solicitó que se repararan integralmente las violaciones de derechos humanos declaradas en el Informe de Fondo, incluyendo las medidas de compensación y satisfacción necesarias respecto del daño material e inmaterial que padecieron las presuntas víctimas.

371. En relación con el daño inmaterial, los ***representantes*** argumentaron que las presuntas víctimas del presente caso han sufrido de daños morales derivados de los "sufrimientos y aflicciones ocasionados por vivir en una de las ciudades más contaminadas del mundo", así como de la "búsqueda de justicia y la situación de hostigamiento y señalamientos que han enfrentado [las] personas defensoras por proteger sus derechos". Además, los representantes señalaron que las violaciones alegadas en el presente caso habrían provocado un daño al proyecto de vida de las presuntas víctimas. Asimismo, los representantes señalaron que el Estado debe indemnizar los daños inmateriales ocasionados por el derecho a la vida de María 14 y Juan 5.

372. Por su parte, el ***Estado*** señaló que los representantes no habrían aportado elementos probatorios que sustenten la suma reclamada. En vista de lo anterior consideraron que la Corte "no debe fijar un monto por este concepto".

H.2.2. Consideraciones de la Corte

373. La ***Corte*** ha establecido en su jurisprudencia que el daño inmaterial "puede comprender tanto los sufrimientos y las aflicciones causados por la violación como el menoscabo de valores muy significativos para las personas y cualquier alteración, de carácter no pecuniario, en las condiciones de existencia de las víctimas". Por otra parte, dado que no es posible asignar al daño inmaterial un equivalente monetario preciso, sólo puede ser objeto de compensación, para los fines de la reparación integral a la víctima, mediante el pago de una cantidad de dinero o la entrega de bienes o servicios apreciables en dinero, que el Tribunal determine en aplicación razonable del arbitrio judicial y en términos de equidad[562].

374. Asimismo, esta Corte recuerda que en su jurisprudencia ha especificado que el daño al proyecto de vida corresponde a una noción distinta del lucro cesante y del daño emergente[563]. Así, el daño al proyecto de vida atiende a la realización integral de la persona afectada, considerando su vocación, aptitudes, circunstancias, potencialidades y aspiraciones, que le permiten fijarse, razonablemente, determinadas expectativas y acceder a ellas[564]. Por tanto, el proyecto de vida se expresa en las expectativas de

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[562] *Cfr. Caso de los "Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala*. *Reparaciones y Costas, supra,* párr. 84, y *Caso Rodríguez Pacheco y otra Vs. Venezuela, supra,* párr. 186.

[563] *Cfr. Caso Loayza Tamayo Vs. Perú,, supra*, párr. 147, y *Caso Aguinaga Aillón Vs. Ecuador, supra,* párr. 134.

[564] *Cfr*. *Caso Loayza Tamayo Vs. Perú, supra*, párr. 147, y *Caso Baptiste y otros Vs. Haití, supra,* párr. 68.

desarrollo personal, profesional y familiar, posibles en condiciones normales[565]. También ha señalado que el daño al proyecto de vida implica la pérdida o el grave menoscabo de oportunidades de desarrollo personal, en forma irreparable o muy difícilmente reparable[566]. Entre otras medidas, también ha ordenado en casos particulares una compensación relativa a este tipo de daño[567].

375. En el presente caso, la Corte estima que es razonable considerar que las violaciones declaradas a la salud, la vida digna e integridad personal alteraron su proyecto de vida. En particular, la Corte considera que el análisis de las violaciones a los derechos humanos permite concluir que la contaminación ambiental produjo afectaciones a las víctimas que tuvieron un impacto en distintos ámbitos de sus vidas, los cuales implicaron no haber podido realizar un proyecto de vida en circunstancias normales. La afectación en ese sentido impactó el desarrollo personal, familiar y profesional de las víctimas, lo que amerita una calificación diferenciada al daño producido exclusivamente por los sufrimientos que pudieron ser producidos por las violaciones a la integridad personal y la salud.

376. Por ello, considerando circunstancias del presente caso, las violaciones cometidas en los términos señalados en la presente Sentencia, los sufrimientos ocasionados y experimentados en diferentes grados, las afectaciones al proyecto de vida, y el tiempo transcurrido, la Corte estima fijar, en equidad, la suma de USD $15.000,00 (quince mil dólares de los Estados Unidos de América), por concepto de daño inmaterial, para cada una de las víctimas directas señaladas en el Anexo 2 de la presente Sentencia, con excepción de aquellas que eran niños o niñas, mujeres o personas mayores durante el tiempo en que produjeron las violaciones declaradas en la presente Sentencia, y los casos de María 13 y Juan 5.

377. En relación con lo anterior, la Corte considera que las víctimas que eran niños, niñas, mujeres o personas mayores, con fundamento en lo establecido en los párrafos 232 a 235 y 246, y de conformidad con lo señalado en el Anexo 2, se les deberá pagar la suma de USD $25.000,00 (veinticinco mil dólares de los Estados Unidos de América) debido a su especial condición de vulnerabilidad, y las afectaciones diferenciadas provocadas por ello. En ese mismo sentido, en el caso de María 14 y Juan 5, quienes padecieron por las enfermedades adquiridas con motivo de su exposición a la contaminación ambiental, lo que derivó en su muerte, se les deberá pagar la suma de USD $30.000,00 (treinta mil dólares de los Estados Unidos de América) a cada uno de ellos.

378. En el caso de las víctimas María 14, María 38, Juan 5, Juan 12, Juan 19 y Juan 40, quienes fallecieron, la suma por daño inmaterial deberá ser entregada a sus derechohabientes en los términos previstos por el régimen legal de sucesiones vigente en Perú.

I. Costas y gastos

379. Los ***representantes*** indicaron que la organización sin ánimo de lucro *AIDA* ha

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[565] *Cfr*. *Caso Tibi Vs. Ecuador.* Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 7 de septiembre de 2004, Serie C, No. 114, párr. 245, y *Caso Baptiste y otros Vs. Haití, supra,* párr. 68.

[566] *Cfr*. *Caso Loayza Tamayo Vs. Perú,* supra, párr. 150, y *Caso Aguinaga Aillón Vs. Ecuador, supra,* párr. 134. .

[567] *Cfr*. *Caso de la Masacre de Las Dos Erres Vs. Guatemala*, supra, párr. 293 y *Caso Aguinaga Aillón Vs. Ecuador, supra,* párr. 134.

actuado como representante de las presuntas víctimas desde el inicio del procedimiento ante el Sistema Interamericano. Señalaron que, en el marco de dicha representación, han incurrido en gastos relacionados con el pago de honorarios del equipo jurídico, apoyo científico, coordinación con actores locales, así como viajes hacia y desde La Oroya a Lima y a Washington para atender diligencias que el trámite del caso habría requerido. Según estimaciones de *AIDA*, las erogaciones antes descritas se elevan a una suma de USD $577.000,00. Asimismo, los representantes señalaron que la organización *APRODEH* ha apoyado en el trámite del caso desde hace once años, lo que ha generado gastos vinculados con el "constante e ininterrumpido" desplazamiento de su personal a La Oroya y otras zonas del departamento de Junín. En función de ello, solicitaron que la Corte fije en equidad el monto que el Estado debe pagar por este concepto y que dicha suma sea reintegrada a *APRODEH*.

380. El ***Estado*** señaló que los gastos reportaros por *AIDA* no se encuentran debidamente comprobados. En relación con la suma correspondiente a los gastos profesionales, indicó que no está sustentada en comprobantes de pago.

381. La ***Corte*** reitera que, conforme a su jurisprudencia[568], las costas y gastos hacen parte del concepto de reparación, toda vez que la actividad desplegada por las víctimas con el fin de obtener justicia, tanto a nivel nacional como internacional, implica erogaciones que deben ser compensadas cuando la responsabilidad internacional del Estado es declarada mediante una sentencia condenatoria. En cuanto al reembolso de las costas y gastos, corresponde al Tribunal apreciar prudentemente su alcance, el cual comprende los gastos generados ante las autoridades de la jurisdicción interna, así como los generados en el curso del proceso ante el Sistema Interamericano, teniendo en cuenta las circunstancias del caso concreto y la naturaleza de la jurisdicción internacional de protección de los derechos humanos. Esta apreciación puede ser realizada con base en el principio de equidad y tomando en cuenta los gastos señalados por las partes, siempre que su *quantum* sea razonable[569].

382. Tomando en cuenta los montos solicitados por cada una de las organizaciones y los comprobantes de gastos presentados la Corte dispone fijar, en equidad, el pago de un monto total de USD $80.000,00 (ochenta mil dólares de los Estados Unidos de América) por concepto de costas y gastos a favor de *AIDA*, así como un monto total de USD $20.000,00 (veinte mil dólares de los Estados Unidos de América) por el mismo concepto a favor de *APRODEH*. Dichas cantidades deberán ser entregadas directamente a dichas organizaciones. En la etapa de supervisión del cumplimiento de la presente Sentencia, la Corte podrá disponer que el Estado reembolse a las víctimas o sus representantes los gastos razonables en que incurran en dicha etapa procesal.

J. Reintegro de los gastos al Fondo de Asistencia Legal de Víctimas de la Corte Interamericana

383. En el 2008 la Asamblea General de la Organización de Estados Americanos creó el Fondo de Asistencia Legal del Sistema Interamericano de Derechos Humanos, con el "objeto [de] facilitar acceso al sistema interamericano de derechos humanos a aquellas personas que actualmente no tienen los recursos necesarios para llevar su caso al

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568 *Cfr. Caso Garrido y Baigorria Vs. Argentina. Reparaciones y Costas.* Sentencia de 27 de agosto de 1998. Serie C No. 39, párr. 82, y *Caso Córdoba Vs. Paraguay, supra,* párr. 155.

569 *Cfr. Caso Garrido y Baigorria Vs. Argentina, supra,* párr. 82, y *Caso Córdoba Vs. Paraguay, supra,* párr. 155.

sistema"[570].

384. Mediante nota de Secretaría de la Corte de 1 de agosto de 2023 se remitió un informe al Estado sobre las erogaciones efectuadas en aplicación del Fondo de Asistencia Legal de Víctimas en el presente caso, las cuales ascendieron a la suma de USD $7.862,20 (siete mil ochocientos sesenta y dos dólares con veinte centavos de los Estados Unidos de América) y, según lo dispuesto en el artículo 5 del Reglamento de la Corte sobre el Funcionamiento del referido Fondo, se otorgó un plazo para que Perú presentara las observaciones que estimara pertinentes. El 10 de agosto de 2023 el Estado presentó un escrito en el cual manifestó que únicamente se presentaron comprobantes relacionados con los gastos por concepto de pasajes aéreos y hospedaje, mientras que no se remitió ningún comprobante en relación con los gastos de pasajes internos, alimentación e incidentales erogados para asistir a la audiencia pública relativa al presente caso celebrada en la ciudad de Montevideo, Uruguay, los días 12 y 13 de octubre de 2022. A este respecto, tal y como se señaló en el referido informe de 1 de agosto de 2023, la Corte destaca que los gastos viáticos y terminales se determinaron según una tabla de viáticos de la Organización de los Estados Americanos aplicable a la ciudad de Montevideo, Uruguay, vigente en agosto de 2022. En consecuencia, no resultaba necesario remitir ningún tipo de comprobante adicional en relación con dichos gastos.

385. Asimismo, el Estado observó que en el presente caso la conversión de soles a dólares utilizada para el cálculo de la suma a pagar por concepto de las declaraciones ante fedatario público (*affidávits*) tomó como referencia el tipo de cambio establecido por el Banco Central de Reserva del Perú para los días 5 y 6 de octubre de 2022. Sobre este punto, el Estado solicitó que la Corte utilice el tipo de cambio establecido por la Superintendencia de Banca, Seguros y Administradoras Privadas de Fondos de Pensiones. Al respecto, la Corte constata que la práctica oficial para estimar la conversión de las divisas en los Informes del Fondo de Asistencia Legal de Víctimas ha sido utilizar como referencia oficial la información publicada por los respectivos Bancos Centrales. El Tribunal considera que en el presente caso el Estado no ha proporcionado información que permita desvirtuar la pertinencia de establecer estimaciones en materia de conversión de divisas usando como parámetro lo establecido por el Banco Central de Reserva del Perú. En vista de lo anterior, la Corte desestima la solicitud del Estado.

386. A la luz del artículo 5 del Reglamento del Fondo, en razón de las violaciones declaradas en la presente Sentencia, y que se cumplió con los requisitos para acogerse al Fondo, la Corte ordena al Estado el reintegro a dicho Fondo de la cantidad de USD $7.862,20 (siete mil ochocientos sesenta y dos dólares con veinte centavos de los Estados Unidos de América) por concepto de los gastos necesarios realizados. Dicha cantidad deberá ser reintegrada en el plazo de seis meses, contados a partir de la notificación del presente Fallo.

K. Modalidad de cumplimiento de los pagos ordenados

387. El Estado deberá efectuar el pago de la indemnización por concepto de daño material, inmaterial, y el reintegro de costas y gastos establecidos en la presente

[570] AG/RES. 2426 (XXXVIII-O/08), Resolución adoptada por la Asamblea General de la OEA durante la celebración del XXXVIII Período Ordinario de Sesiones de la OEA, en la cuarta sesión plenaria, celebrada el 3 de junio de 2008, "*Creación del Fondo de Asistencia Legal del Sistema Interamericano de Derechos Humanos*", Punto Resolutivo 2.a), y CP/RES. 963 (1728/09), Resolución adoptada el 11 de noviembre de 2009 por el Consejo Permanente de la OEA, "*Reglamento para el Funcionamiento del Fondo de Asistencia* Legal *del Sistema Interamericano de Derechos Humanos*", artículo 1.1.

Sentencia directamente a las personas indicadas en la misma, dentro del plazo de un año contado a partir de la notificación de la presente Sentencia, sin perjuicio de que pueda adelantar el pago completo en un plazo menor, en los términos de los siguientes párrafos.

388. En caso de que el beneficiario haya fallecido o fallezca antes de que le sea entregada la cantidad respectiva, esta se entregará directamente a sus derechohabientes, conforme al derecho interno aplicable.

389. El Estado deberá cumplir con las obligaciones monetarias mediante el pago en dólares de los Estados Unidos de América o su equivalente en moneda nacional, utilizando para el cálculo respectivo el tipo de cambio de mercado publicado o calculado por una autoridad bancaria o financiera pertinente en la fecha más cercana al día del pago.

390. Si por causas atribuibles a los beneficiarios de las indemnizaciones o a sus derechohabientes no fuese posible el pago de las cantidades determinadas dentro del plazo indicado, el Estado consignará dichos montos a su favor en una cuenta o certificado de depósito en una institución financiera peruana solvente, en dólares de los Estados Unidos de América, y en las condiciones financieras más favorables que permitan la legislación y la práctica bancaria. Si no se reclama la indemnización correspondiente una vez transcurridos diez años, las cantidades serán devueltas al Estado con los intereses devengados.

391. Las cantidades asignadas en la presente Sentencia en concepto de indemnización por daño material e inmaterial deberán ser entregadas a las personas indicadas en forma íntegra, conforme a lo establecido en esta Sentencia, sin reducciones derivadas de eventuales cargas fiscales.

392. En caso de que el Estado incurriera en mora, incluyendo en el reintegro de los gastos al Fondo de Asistencia Legal de Víctimas, deberá pagar un interés sobre la cantidad adeudada correspondiente al interés bancario moratorio en Perú.

X
PUNTOS RESOLUTIVOS

393. Por tanto,

LA CORTE

DECIDE,

Por cinco votos a favor y dos en contra,

1. Desestimar la excepción preliminar en razón de la materia respecto de la competencia de la Corte para pronunciarse sobre violaciones al artículo 26 de la Convención Americana sobre Derechos Humanos, y en razón del tiempo de conformidad con los párrafos 24 a 28 de la presente Sentencia.

Disienten el Juez Humberto Antonio Sierra Porto y la Jueza Patricia Pérez Goldberg.

Por unanimidad,

2. Desestimar la excepción preliminar por falta de agotamiento de los recursos internos, de conformidad con los párrafos 32 a 43 de la presente Sentencia.

DECLARA,

Por cinco votos a favor y dos en contra, que:

3. El Estado es responsable por la violación del derecho al medio ambiente sano, contenido en el artículo 26 de la Convención Americana sobre Derechos Humanos, tanto en su dimensión de exigibilidad inmediata, como de prohibición de regresividad, y en su dimensión individual y colectiva, en relación con los artículos 1.1 y 2 del mismo instrumento, en perjuicio de las personas señaladas en el Anexo 2, en los términos de los párrafos 107 a 129, 153 a 187 y 266 de la presente Sentencia.

Disienten el Juez Humberto Antonio Sierra Porto y la Jueza Patricia Pérez Goldberg.

Por cinco votos a favor y dos en contra, que:

4. El Estado es responsable por la violación del derecho a la salud, contenido en el artículo 26 de la Convención Americana sobre Derechos Humanos, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de las personas señaladas en el Anexo 2, en los términos de los párrafos 130 a 134, 188 a 214, y 266 de la presente Sentencia.

Disienten el Juez Humberto Antonio Sierra Porto y la Jueza Patricia Pérez Goldberg.

Por unanimidad, que:

5. El Estado es responsable por la violación del derecho a la vida, contenido en el artículo 4.1 de la Convención Americana sobre Derechos Humanos, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de Juan 5 y María 14, en los términos de los párrafos 135 a 138, 215 a 219 y 266 de la presente Sentencia.

6. El Estado es responsable por la violación de los derechos a la vida digna y la integridad personal, contenidos en los artículos 4.1 y 5 de la Convención Americana sobre Derechos Humanos, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de las personas señaladas en el Anexo 2, en los términos de los párrafos 136 a 138, 220 a 234 y 266 de la presente Sentencia.

7. El Estado es responsable por la violación de los derechos de la niñez, contenidos en el artículo 19 de la Convención Americana sobre Derechos Humanos, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de 57 personas, en los términos de los párrafos 139 a 143, 235 a 245 y 266 de la presente Sentencia.

8. El Estado es responsable por la violación de los derechos al acceso a la información y la participación política, contenidos en los artículos 13 y 23 de la Convención Americana sobre Derechos Humanos, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de las personas señaladas en el Anexo 2, en los términos de los párrafos 144 a 152, 246 a 261 y 266 de la presente Sentencia.

9. El Estado es responsable por la violación del derecho a un recurso judicial efectivo, contenido en el artículo 25.2.c) de la Convención Americana sobre Derechos Humanos, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de las personas señaladas en el Anexo 2, en los términos de los párrafos 270 a 302 de la presente

Sentencia.

10. El Estado es responsable por el incumplimiento de su deber de investigar, en violación a los derechos contenidos en los artículos 8.1 y 25 de la Convención Americana sobre Derechos Humanos, en relación con el artículo 1.1 del mismo instrumento, en perjuicio de María 1, María 11, María 13, Juan 2, Juan 7, Juan 12, Juan 13, Juan 17, y Juan 19, en los términos de los párrafos 303 a 319 de la presente Sentencia.

Y DISPONE:

Por unanimidad, que:

11. Esta Sentencia constituye, por sí misma, una forma de reparación.

12. El Estado promoverá y continuará las investigaciones respecto de los actos de amenazas y hostigamientos a las víctimas del presente caso, y respecto de la contaminación ambiental en La Oroya, de conformidad con lo establecido en los párrafos 327 y 328 de la presente Sentencia.

13. El Estado realizará un diagnóstico de línea base y un plan de acción para remediar los daños ambientales en La Oroya, de conformidad con lo establecido en los párrafos 333 y 334 de la presente Sentencia.

14. El Estado brindará gratuitamente y por el tiempo necesario el tratamiento médico, psicológico y psiquiátrico, en caso de ser requerido, de las víctimas de violaciones al derecho a la salud, integridad personal y vida digna, de conformidad con lo establecido en el párrafo 338 de la presente Sentencia.

15. El Estado realizará las publicaciones indicadas en el párrafo 340 de la presente Sentencia, y realizará un acto público de reconocimiento de responsabilidad internacional, de conformidad con lo establecido en el párrafo 341 de la presente Sentencia.

16. El Estado compatibilizará la legislación que define los estándares de calidad del aire para la protección del medio ambiente y salud de las personas, en los términos del párrafo 346 de la presente Sentencia.

17. El Estado garantizará la efectividad del sistema de estados de alerta en La Oroya, en los términos del párrafo 347 de la presente Sentencia.

18. El Estado garantizará que los habitantes de La Oroya que sufran síntomas o enfermedades relacionadas con la exposición a contaminantes cuenten con un sistema de atención médica especializada y que se logre la existencia de un sistema de salud para brindar una atención médica adecuada, en los términos de los párrafos 348 y 349 de la presente Sentencia.

19. El Estado adoptara y ejecutara medidas para garantizar que las operaciones del Complejo Metalúrgico de La Oroya se realicen conforme a los estándares ambientales internacionales, y de conformidad con la legislación nacional, realizará medidas de compensación ambiental y garantizará que los titulares mineros ejecuten sus actividades atendiendo a los Principios Rectores sobre Empresas y Derechos Humanos y los Principios Marco sobre Derechos Humanos y Medio Ambiente, en los términos de los párrafos 350, 351 y 352 de la presente Sentencia.

20. El Estado implementará un programa de capacitación para funcionarios judiciales y administrativos que laboren en el Poder Judicial y en las entidades con competencias en el sector de la gran y mediana minería en el Perú, en los términos del párrafo 353 de la presente Sentencia.

21. El Estado diseñará un sistema de información que contenga datos sobre la calidad del aire y agua en las zonas del Perú donde exista mayor actividad minero-metalúrgica, en los términos del párrafo 354 de la presente Sentencia.

22. El Estado elaborará un plan para la reubicación de aquellos habitantes de La Oroya que deseen ser reubicados, en los términos del párrafo 355 de la presente Sentencia.

23. El Estado pagará las cantidades fijadas en los párrafos 367, 368, 369, 376, 377, y 378 de la presente Sentencia por concepto de indemnización por daño material e inmaterial, y por el reintegro de costas y gastos en los términos del párrafo 382 de la presente Sentencia.

24. El Estado reintegrará al Fondo de Asistencia Legal de Víctimas de la Corte Interamericana de Derechos Humanos la cantidad erogada durante la tramitación del presente caso, en los términos del párrafo 386 de la presente Sentencia.

25. El Estado, dentro del plazo de un año contado a partir de la notificación de esta Sentencia, rendirá al Tribunal un informe sobre las medidas adoptadas para cumplir con la misma.

26. La Corte supervisará el cumplimiento íntegro de esta Sentencia, en ejercicio de sus atribuciones establecidas en la Convención Americana sobre Derechos Humanos, y dará por concluido el presente caso una vez que el Estado haya dado total cumplimiento a lo dispuesto en la misma.

Los Jueces Ricardo C. Pérez Manrique, Eduardo Ferrer Mac-Gregor Poisot, y Rodrigo Mudrovitsch dieron a conocer sus votos individuales concurrentes, el Juez Humberto Antonio Sierra Porto y la Jueza Patricia Pérez Goldberg dieron a conocer sus votos parcialmente disidentes.

Redactada en español en San José, Costa Rica, el 27 de noviembre de 2023.

Corte IDH. *Caso Habitantes de La Oroya Vs. Perú*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 27 de noviembre de 2023.

Ricardo C. Pérez Manrique
Presidente

Eduardo Ferrer Mac-Gregor Poisot

Humberto Antonio Sierra Porto

Nancy Hernández López

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo Mudrovitsch

Pablo Saavedra Alessandri
Secretario

Comuníquese y ejecútese,

Ricardo C. Pérez Manrique
Presidente

Pablo Saavedra Alessandri
Secretario

ANEXO 1
Presuntas víctimas identificadas por la Comisión Interamericana de Derechos Humanos

No.	Nombre[1]	Menor de edad al presentar la petición
1	**María 1**	**No**
2	**María 2**	**No**
3	**María 3**	**No**
4	**María 4**	**Sí**
5	**María 5**	**No**
6	**María 6**	**No**
7	**María 7**	**No**
8	**María 8**	**Sí**
9	**María 9**	**No**
10	**María 10**	**No**
11	**María 11**	**No**
12	**María 12**	**No**
13	**María 13**	**No**
14	**María 14**	**Sí**
15	**María 15**	**Sí**
16	**María 16**	**Sí**
17	**María 17**	**No**
18	**María 18**	**Sí**
19	**María 19**	**No**
20	**María 20**	**No**
21	**María 21**	**Sí**
22	**María 22**	**Sí**
23	**María 23**	**No**
24	**María 24**	**No**
25	**María 25**	**Sí**
26	**María 26**	**No**
27	**María 27**	**No**
28	**María 28**	**No**
29	**María 29**	**No**
30	**María 30**	**No**
31	**María 31**	**No**
32	**María 32**	**No**
33	**María 33**	**No**
34	**María 34**	**No**
35	**María 35**	**No**
36	**María 36**	**No**
37	**María 37**	**No**
38	**María 38**	**No**
39	**Juan 1**	**No**
40	**Juan 2**	**No**
41	**Juan 3**	**Sí**
42	**Juan 4**	**No**

[1] Los nombres reales de las personas identificadas en este documento como "María" y "Juan" se encuentran referidos en el trámite ante la Comisión Interamericana y han sido puestos en conocimiento del Estado.

43	**Juan 5**	**No**
44	**Juan 6**	**No**
45	**Juan 7**	**No**
46	**Juan 8**	**Sí**
47	**Juan 9**	**Sí**
48	**Juan 10**	**Sí**
49	**Juan 11**	**No**
50	**Juan 12**	**No**
51	**Juan 13**	**No**
52	**Juan 14**	**Sí**
53	**Juan 15**	**No**
54	**Juan 16**	**No**
55	**Juan 17**	**No**
56	**Juan 18**	**No**
57	**Juan 19**	**No**
58	**Juan 20**	**No**
59	**Juan 21**	**Sí**
60	**Juan 22**	**No**
61	**Juan 23**	**Sí**
62	**Juan 24**	**No**
63	**Juan 25**	**No**
64	**Juan 26**	**No**
65	**Juan 27**	**Sí**
66	**Juan 28**	**Sí**
67	**Juan 29**	**No**
68	**Juan 30**	**No**
69	**Juan 31**	**Sí**
70	**Juan 32**	**No**
71	**Juan 33**	**No**
72	**Juan 34**	**Sí**
73	**Juan 35**	**Sí**
74	**Juan 36**	**No**
75	**Juan 37**	**Sí**
76	**Juan 38**	**No**
77	**Juan 39**	**No**
78	**Juan 40**	**Sí**
79	**Juan 41**	**No**
80	**Juan 42**	**No**

ANEXO 2
Víctimas identificadas por la Corte Interamericana de Derechos Humanos

No.	Nombre[1]	Mujer / hombre	Niños, Niñas y Adolescentes	Con vida o fallecido/a	Personas Mayores
1	**María 1**	**Mujer**	**No**	**Con vida**	**Sí**
2	**María 2**	**Mujer**	**No**	**Con vida**	**Sí**
3	**María 3**	**Mujer**	**Sí**	**Con vida**	**No**
4	**María 4**	**Mujer**	**Sí**	**Con vida**	**No**
5	**María 5**	**Mujer**	**Sí**	**Con vida**	**No**
6	**María 6**	**Mujer**	**Sí**	**Con vida**	**No**
7	**María 7**	**Mujer**	**No**	**Con vida**	**Sí**
8	**María 8**	**Mujer**	**Sí**	**Con vida**	**No**
9	**María 9**	**Mujer**	**Sí**	**Con vida**	**No**
10	**María 10**	**Mujer**	**Sí**	**Con vida**	**No**
11	**María 11**	**Mujer**	**No**	**Con vida**	**Sí**
12	**María 12**	**Mujer**	**Sí**	**Con vida**	**No**
13	**María 13**	**Mujer**	**No**	**Con vida**	**Sí**
14	**María 14**	**Mujer**	**Sí**	**Fallecida**	**No**
15	**María 15**	**Mujer**	**Sí**	**Con vida**	**No**
16	**María 16**	**Mujer**	**Sí**	**Con vida**	**No**
17	**María 17**	**Mujer**	**Sí**	**Con vida**	**No**
18	**María 18**	**Mujer**	**Sí**	**Con vida**	**No**
19	**María 19**	**Mujer**	**Sí**	**Con vida**	**No**
20	**María 20**	**Mujer**	**No**	**Con vida**	**Sí**
21	**María 21**	**Mujer**	**Sí**	**Con vida**	**No**
22	**María 22**	**Mujer**	**Sí**	**Con vida**	**No**
23	**María 23**	**Mujer**	**Sí**	**Con vida**	**No**
24	**María 24**	**Mujer**	**Sí**	**Con vida**	**No**
25	**María 25**	**Mujer**	**Sí**	**Con vida**	**No**
26	**María 26**	**Mujer**	**Sí**	**Con vida**	**No**
27	**María 27**	**Mujer**	**Sí**	**Con vida**	**No**
28	**María 28**	**Mujer**	**Sí**	**Con vida**	**No**

[1] Los nombres reales de las personas identificadas en este documento como "María" y "Juan" se encuentran en conocimiento de las partes y la Comisión.

29	**María 29**	**Mujer**	**Sí**	**Con vida**	**No**
30	**María 30**	**Mujer**	**No**	**Con vida**	**Sí**
31	**María 31**	**Mujer**	**No**	**Con vida**	**Sí**
32	**María 32**	**Mujer**	**Sí**	**Con vida**	**No**
33	**María 33**	**Mujer**	**Sí**	**Con vida**	**No**
34	**María 34**	**Mujer**	**Sí**	**Con vida**	**No**
35	**María 35**	**Mujer**	**Sí**	**Con vida**	**No**
36	**María 36**	**Mujer**	**No**	**Con vida**	**Sí**
37	**María 37**	**Mujer**	**Sí**	**Con vida**	**No**
38	**María 38**	**Mujer**	**No**	**Fallecida**	**Sí**
39	**Juan 1**	**Hombre**	**No**	**Con vida**	**Sí**
40	**Juan 2**	**Hombre**	**Sí**	**Con vida**	**No**
41	**Juan 3**	**Hombre**	**Sí**	**Con vida**	**No**
42	**Juan 4**	**Hombre**	**Sí**	**Con vida**	**No**
43	**Juan 5**	**Hombre**	**No**	**Fallecido**	**No**
44	**Juan 6**	**Hombre**	**Sí**	**Con vida**	**No**
45	**Juan 7**	**Hombre**	**No**	**Con vida**	**Sí**
46	**Juan 8**	**Hombre**	**Sí**	**Con vida**	**No**
47	**Juan 9**	**Hombre**	**Sí**	**Con vida**	**No**
48	**Juan 10**	**Hombre**	**Sí**	**Con vida**	**No**
49	**Juan 11**	**Hombre**	**No**	**Con vida**	**Sí**
50	**Juan 12**	**Hombre**	**No**	**Fallecido**	**Sí**
51	**Juan 13**	**Hombre**	**No**	**Con vida**	**Sí**
52	**Juan 14**	**Hombre**	**Sí**	**Con vida**	**No**
53	**Juan 15**	**Hombre**	**No**	**Con vida**	**Sí**
54	**Juan 16**	**Hombre**	**Sí**	**Con vida**	**No**
55	**Juan 17**	**Hombre**	**No**	**Con vida**	**Sí**
56	**Juan 18**	**Hombre**	**No**	**Con vida**	**Sí**
57	**Juan 19**	**Hombre**	**No**	**Fallecido**	**No**
58	**Juan 20**	**Hombre**	**Sí**	**Con vida**	**No**
59	**Juan 21**	**Hombre**	**Sí**	**Con vida**	**No**
60	**Juan 22**	**Hombre**	**Sí**	**Con vida**	**No**
61	**Juan 23**	**Hombre**	**Sí**	**Con vida**	**No**
62	**Juan 24**	**Hombre**	**Sí**	**Con vida**	**No**

63	**Juan 25**	**Hombre**	**No**	**Con vida**	**Sí**
64	**Juan 26**	**Hombre**	**Sí**	**Con vida**	**No**
65	**Juan 27**	**Hombre**	**Sí**	**Con vida**	**No**
66	**Juan 28**	**Hombre**	**Sí**	**Con vida**	**No**
67	**Juan 29**	**Hombre**	**No**	**Con vida**	**Sí**
68	**Juan 30**	**Hombre**	**Sí**	**Con vida**	**No**
69	**Juan 31**	**Hombre**	**Sí**	**Con vida**	**No**
70	**Juan 32**	**Hombre**	**Sí**	**Con vida**	**No**
71	**Juan 33**	**Hombre**	**Sí**	**Con vida**	**No**
72	**Juan 34**	**Hombre**	**Sí**	**Con vida**	**No**
73	**Juan 35**	**Hombre**	**Sí**	**Con vida**	**No**
74	**Juan 36**	**Hombre**	**Sí**	**Con vida**	**No**
75	**Juan 37**	**Hombre**	**Sí**	**Con vida**	**No**
76	**Juan 38**	**Hombre**	**Sí**	**Con vida**	**No**
77	**Juan 39**	**Hombre**	**Sí**	**Con vida**	**No**
78	**Juan 40**	**Hombre**	**Sí**	**Fallecido**	**No**
79	**Juan 41**	**Hombre**	**No**	**Con vida**	**Sí**
80	**Juan 42**	**Hombre**	**Sí**	**Con vida**	**No**

ANEXO 3
Hechos probados respecto al análisis de los padecimientos y tratamiento médico otorgado a las víctimas

Grupos Familiares

A. Familia 1: María 1 y Juan 11, y sus hijos Juan 9 y Juan 10.

1. **María 1** nació el 18 de diciembre de 1948 y vivía en La Oroya Antigua, a 100 metros del Complejo Metalúrgico de La Oroya (en adelante "el Complejo Metalúrgico o el CMLO")[1]. Actualmente vive en Acolla - Jauja[2]. Ha padecido de "dolores de estómago y gastritis crónica", "cólicos", "dolor de cabeza", "tos asfixiante", "ardor en los ojos", "picazón en la nariz y en la garganta", "sueño", "cansancio permanente", y dolores en las articulaciones y en el bajo vientre[3]. Los representantes informaron que en el 2021 padecía de "arritmia", "osteoartritis severa" y "grave dificultad al caminar"[4]. Asimismo, María 1 declaró haber sufrido de hostigamientos como resultado de las actividades que realizaba en el Movimiento por la Salud en La Oroya (en adelante "el MOSAO"). En concreto, señaló que en las marchas y los mítines que se celebraban en la Oroya, las personas gritaban "muerte al MOSAO"[5]. Además, indicó que se tuvo que retirar de La Oroya luego de que el presidente de una junta vecinal le advirtiera que los trabajadores de la empresa les iban a "pegar", y a "quemar su casa"[6].

2. **Juan 11** nació el 22 de julio de 1943 en Acolla - Jauja[7]. Vivió aproximadamente 49 años en La Oroya, antes de retornar a su lugar de nacimiento en Acolla – Jauja[8]. Afirma que fue operado por un tumor en la próstata[9]. Ha padecido de "faringitis crónica, tos frecuente, pérdida de sueño, dolores de cabeza, disminución de la fuerza en los

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[1] *Cfr*. Expediente médico de María 1 (expediente de prueba, folios 24640 a 24646); Escrito de solicitudes, argumentos y pruebas de 4 de febrero de 2022, pág. 94 (expediente de prueba, folio 212), y Declaración rendida en la audiencia pública del caso celebrada en el 153º Periodo Ordinario de Sesiones en Montevideo, Uruguay.

[2] *Cfr*. Expediente médico de María 1 (expediente de prueba, folios 24640 a 24646); Escrito de solicitudes, argumentos y pruebas de 4 de febrero de 2022, pág. 94 (expediente de prueba, folio 212), y Declaración rendida en la audiencia pública del caso celebrada en el 153º Periodo Ordinario de Sesiones en Montevideo, Uruguay.

[3] *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57); Expediente médico de María 1 (expediente de prueba, folios 24640 a 24646), y Escrito de observaciones de los peticionarios, de 2 de diciembre de 2011, (expediente de prueba, folio 25714).

[4] *Cfr*. Escrito de solicitudes, argumentos y pruebas de 4 de febrero de 2022, pág. 94 (expediente de fondo, folio 212).

[5] *Cfr*. Declaración testimonial rendida en la audiencia pública del caso celebrada en el 153º Periodo Ordinario de Sesiones en Montevideo, Uruguay.

[6] *Cfr*. Declaración testimonial rendida en la audiencia pública del caso celebrada en el 153º Periodo Ordinario de Sesiones en Montevideo, Uruguay.

[7] *Cfr*. Expediente médico de Juan 11 (expediente de prueba, folios 24341 a 24345), y Escrito de solicitudes, argumentos y pruebas de 4 de febrero de 2022, pág. 94 (expediente de fondo, folio 212).

[8] *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 94 (expediente de fondo, folio 212).

[9] *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57), y Expediente médico de Juan 11 (expediente de prueba, folios 24341 a 24345).

miembros, problemas de sueño, irritabilidad y problemas respiratorios"[10]. Asimismo ha sufrido de "afectaciones a la piel" provocadas por una "alergia [al] humo", "erupciones", "manchas en la cara", "ronchas en los brazos y piernas", y debilitamiento de uñas"[11]. De acuerdo con una prueba de sangre realizada en 2011, Juan 11 evidenció niveles de plomo en sangre de 12,37 µg/dL, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg /dL[12]. Los representantes informaron que padece de "afectaciones en salud mental, sordera y enfermedad renal, hígado graso (hepatomegalia), microlitiasis renal bilateral y quiste simple en [el] riñón derecho"[13].

3. **Juan 9** nació el 7 de diciembre de 1994[14] y vivió su infancia en La Oroya, a 100 metros del CMLO, antes de mudarse a Lima. A los 12 años, fue diagnosticado con "hipoacusia severa irreversible" (sordera bilateral)[15]. También ha padecido de dolores de la cabeza, irritabilidad, falta de apetito y diarreas frecuentes[16]. **Juan 10** nació el 18 de diciembre de 1993 en La Oroya, a 100 metros del Complejo Metalúrgico[17]. Ha padecido de problemas auditivos, cansancio permanente, dolores de cabeza, estómago, sueño y agotamiento[18]. En su infancia sufrió de "gastritis, cólicos severos, dolores de hueso, [y] problemas en la piel"[19].

B. Familia 2: María 2 y Juan 17.

4. **María 2** vive en La Oroya Antigua, a 200 metros del Complejo Metalúrgico[20]. Ha padecido de dolores en el cuerpo, problemas en las vías respiratorias, tos, dolor de amígdalas, dolor de cabeza, anemia, ansiedad y depresión leve y problemas en el sistema nervioso[21]. Un dosaje de metales pesados realizado a María 2 ,concluyó que presentaba "intoxicación crónica" por cadmio y por plomo, "sin sintomatología

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10 *Cfr*. Expediente médico de Juan 11 (expediente de prueba, folios 24341 a 24345).

11 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57). Expediente médico de Juan 11 (expediente de prueba, folios 24341 a 24345), y Escrito de solicitudes, argumentos y pruebas, pág. 94 (expediente de fondo, folio 212).

12 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57), y Expediente médico de Juan 11 (expediente de prueba, folio 24345).

13 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 94 (expediente de fondo, folio 212).

14 *Cfr*. Expediente médico de Juan 9 (expediente de prueba, folio 24327).

15 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 52 a 53), y Expediente médico de Juan 9 (expediente de prueba, folio 24328).

16 *Cfr*. Expediente médico de Juan 9 (expediente de prueba, folio 24333).

17 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57), y Expediente médico de Juan 10 (expediente de prueba, folios 24338 a 24339).

18 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folio 052), y Expediente médico de Juan 10 (expediente de prueba, folios 24338 a 24339).

19 *Cfr*. Expediente médico de Juan 10 (expediente de prueba, folios 24338 a 24339).

20 *Cfr*. Expediente médico de María 2 (expediente de prueba, folios 24648 a 24657), y Escrito de solicitudes, argumentos y pruebas, pág. 95 (expediente de fondo, folio 213).

21 *Cfr*. Expediente médico de María 2 (expediente de prueba, folios 24648 a 24657) y Escrito de solicitudes, argumentos y pruebas, pág. 95 (expediente de fondo, folio 213).

específica"[22]. Una prueba de sangre realizada en 2011 reflejó que tenía un nivel de plomo en sangre de 7,59 µg/dL, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg/dL[23]. **Juan 17,** expareja de María 2, nació el 16 de marzo de 1960 y vive en La Oroya Antigua[24]. Ha padecido de "hinchazón del estómago", continuos gases, "dolores de cabeza", "neumoconiosis", alteraciones en el estado de ánimo y "problemas respiratorios"[25]. Un dosaje de metales pesados publicado en 2009 concluyó que Juan 17 presentaba "intoxicación crónica" por cadmio y por plomo "sin sintomatología específica"[26]. La misma evaluación señaló que sufría de "caries dental y gingivitis con sarro dental", "parasitosis intestinal", "cefalea crónica EAD", "gastritis crónica", "ansiedad" y "depresión leve con tratamiento", y "estrés post traumático"[27]. Una prueba de sangre realizada en 2011 reflejó que tenía un nivel de plomo en sangre de 14,85 µg /dL, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg /dL[28]. Los representantes informaron que María 2 padece de "cefalea crónica tensional, cuadros de estrés y cambio de carácter, mareos y vómitos casi diarios, úlcera duodenal […] [y] pérdida de dentadura"[29].

C. Familia 3: María 6 y Juan 6, y sus hijos Juan 3, Juan 4, Juan 24, y Juan 40.

5. **María 6** nació el 21 de diciembre de 1957, y vivió desde 1997 en La Oroya Antigua, frente al Complejo Metalúrgico[30]. Posteriormente se mudó junto con su familia a una zona cerca de La Oroya Antigua[31]. Ha padecido de dolores de cabeza y cólicos[32]. Asimismo ha sufrido de "irritabilidad constante, disminución de fuerza en los miembros, falta de apetito, tos frecuente, e hipertensión"[33]. Los representantes informaron que padece de síntomas médicos como cefalea, afectación en conducta, ansiedad, "constante hinchazón" y dolor en las piernas y articulaciones, caries y pérdida de dientes así como "afectaciones en su conducta y ansiedad"[34]. Asimismo, los representantes indicaron que el 13 de junio de 2012 María 6 fue "agredida por un trabajador de la empresa Doe Run" quien "le empezó a insultar y le dio empujones y una bofetada", al haberla identificado como "una persona defensora de la salud en la ciudad de La Oroya"[35].

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22 *Cfr*. Expediente médico de María 2 (expediente de prueba, folios 24649).

23 *Cfr*. Expediente médico de María 2 (expediente de prueba, folios 24648 a 24657).

24 *Cfr*. Expediente médico de Juan 17 (expediente de prueba, folios 24382), y Escrito de solicitudes, argumentos y pruebas, pág. 95 (expediente de fondo, folio 213).

25 *Cfr*. Expediente médico de Juan 17 (expediente de prueba, folios 24379 a 24386), y Escrito de observaciones de los peticionarios, de 2 de diciembre de 2011(expediente de prueba, folio 25719).

26 *Cfr*. Expediente médico de Juan 17 (expediente de prueba, folios 24379 a 24386).

27 *Cfr*. Expediente médico de Juan 17 (expediente de prueba, folios 24379 a 24386).

28 *Cfr*. Expediente médico de Juan 17 (expediente de prueba, folio 24386).

29 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 95 (expediente de fondo, folio 213).

30 *Cfr*. Expediente médico de María 6 (expediente de prueba, folios 24679), y Escrito de solicitudes, argumentos y pruebas, pág. 95 (expediente de fondo, folio 213).

31 *Cfr*. Expediente médico de María 6 (expediente de prueba, folios 24679), y Escrito de solicitudes, argumentos y pruebas, pág. 95 (expediente de fondo, folio 213).

32 *Cfr*. Expediente médico de María 6 (expediente de prueba, folios 24679).

33 *Cfr*. Expediente médico de María 6 (expediente de prueba, folios 24680).

34 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 95 (expediente de fondo, folio 213).

35 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 95 (expediente de fondo, folio 213).

6. **Juan 6** nació el 24 de febrero de 1965[36]. Ha padecido de dolores de cabeza y del cuerpo, irritabilidad, tos frecuente y cólicos abdominales[37]. Los representantes informaron que en el 2021 Juan 6 padecía de "sinusitis crónica, asma bronquial, cefalea y mareos en las noches, de manera esporádica, dolencia en los riñones" así como "dolor de huesos y espalda"[38]. **Juan 3** nació el 13 de mayo de 2000 y vivió desde su nacimiento en La Oroya, antes de desplazarse a Lima, donde vive actualmente[39]. Ha padecido de dolores de cabeza constante, deposiciones diarréicas, "adormecimiento del cuerpo", "dolor en los pies", tos frecuente, asma y "cólicos abdominales"[40]. Los representantes informaron que padece de "cardiopatía, problemas del corazón, nervios, alteración en la conducta, problemas de atención, y cansancio mental"[41]. **Juan 4** nació el 7 de marzo de 1995 en La Oroya y ha vivido frente al CMLO, desde su nacimiento[42]. Ha padecido de "asma", "dolores de cabeza constantes", "falta de apetito", "adormecimiento del cuerpo", "dolores en los pies", "problemas de sueño", tos frecuente y cólicos[43]. Los representantes informaron que sufre de "cefalea y problemas de audición"[44].

7. **Juan 24** ha vivido en La Oroya Antigua desde que nació[45]. Ha padecido de "problemas respiratorios"[46]. Los representantes informaron que en el 2021 presentaba "trastornos del lenguaje, bajo nivel de [rendimiento] académico y cefalea"[47]. **Juan 40** nació el 4 de agosto de 2008 y vivía en La Oroya[48]. Desde su nacimiento, padeció de "bronquitis y tos frecuente", y además ha sufrido de "infección estomacal constante", "bajo apetito", y "erupciones de granos en su piel"[49]. El 18 de febrero de 2016, a los siete años, falleció al caer al río Mantaro[50].

D. Familia 4: María 17 y su hija María 18.

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[36] *Cfr*. Expediente médico de Juan 6 (expediente de prueba, folio 24314).

[37] *Cfr*. Expediente médico de Juan 6 (expediente de prueba, folios 24314 y 24316) y Declaración de Juan 6 (expediente de prueba, folios 28970 a 28979).

[38] *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 96 (expediente de fondo, folio 214).

[39] *Cfr*. Expediente médico de Juan 3 (expediente de prueba, folio 24286), y Escrito de solicitudes, argumentos y pruebas, pág. 96 (expediente de fondo, folio 214).

[40] *Cfr*. Expediente médico de Juan 3 (expediente de prueba, folio 24286) y Escrito de solicitudes, argumentos y pruebas, pág. 96 (expediente de fondo, folio 214).

[41] *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 96 (expediente de fondo, folio 214).

[42] *Cfr*. Expediente médico de Juan 4 (expediente de prueba, folio 24288 a 24389), y Escrito de solicitudes, argumentos y pruebas, pág. 96 (expediente de fondo, folio 214).

[43] *Cfr*. Expediente médico de Juan 4 (expediente de prueba, folio 24288 a 24389).

[44] *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57), y Expediente médico de Juan 10 (expediente de prueba, folios 214).

[45] *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 96 (expediente de fondo, folio 214).

[46] *Cfr*. Expediente médico de Juan 24 (expediente de prueba, folio 24474).

[47] *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 96 (expediente de fondo, folio 214).

[48] *Cfr*. Expediente médico de Juan 40 (expediente de prueba, folios 24604 a 24616), y Escrito de solicitudes, argumentos y pruebas, pág. 96 (expediente de fondo, folio 214).

[49] *Cfr*. Expediente médico de Juan 24 (expediente de prueba, folio 24288 a 24389).

[50] *Cfr*. Certificado de defunción de Juan 40 expedido por la División médico legal de Yauli de 23 de febrero de 2016 (expediente de prueba, folios .778 a .780).

8. **María 17** vivía en La Oroya Antigua, y posteriormente se mudó a La Oroya Nueva[51]. Ha padecido de un "quiste en el hígado", "hiperémesis" (falta de hambre) durante su embarazo, "dolor del hombro", "tos seca", "dolor de amígdalas", "dolor de cabeza", "nariz tupida", y "malestar del cuerpo"[52]. Una prueba de sangre realizada en 2011 reflejó que tenía un nivel de plomo en sangre menor a 5,0 µg /dL[53]. Los representantes señalaron que en 2021 padecía de "rinofaringitis aguda", "estrés post traumático", túnel carpiano, "dolor de cabeza esporádico", "cansancio y sueño", y se encuentra en necesidad de una operación por "cervicitis crónica"[54].

9. **María 18**, hija de María 17, ha vivido durante toda su vida en La Oroya Antigua[55]. Tiene sueño de forma constante y ha padecido de "apatía", "daños crónicos al sistema digestivo", "náuseas permanentes", articulaciones débiles, "caries", "diarreas", "desnutrición", "dolor de amígdalas", "estornudos" y "nariz congestionada"[56]. Una prueba de sangre realizada en 2011 reflejó que tenía un nivel de plomo en sangre de 8,89 µg/dL, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg/dL[57]. Los representantes informaron que presenta síntomas de "caries dental[es], ametropía [y] problemas auditivos", así como "dolores en las piernas"[58].

E. Familia 5: María 7 y Juan 15, y sus hijos Juan 14 y Juan 16.

10. **María 7** nació el 6 de abril de 1961 y vive a las afueras de La Oroya[59]. Ha padecido de "dolores muy fuertes de cabeza", mareos, "pérdida de fuerza en los miembros", "problemas de sueño", falta de apetito, "adormecimiento del cuerpo", "problemas gastrointestinales", "dolor en el brazo derecho", y "tos con flema"[60]. Los representantes indicaron que actualmente adolece de rinofaringitis crónica, ansiedad, depresión, dolor de las articulaciones, caries dental y "pérdida de dientes"[61].

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51 *Cfr*. Expediente médico de María 17 (expediente de prueba, folios 24758 a 24761), y Escrito de solicitudes, argumentos y pruebas, págs. 96 y 97 (expediente de fondo, folios 214 y 215).

52 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57), y Expediente médico de María 17 (expediente de prueba, folios 24758 a 24761).

53 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57), y Expediente médico de María 17 (expediente de prueba, folios 24758 a 24761).

54 *Cfr*. Escrito de solicitudes, argumentos y pruebas, págs. 96 y 97 (expediente de fondo, folios 214 y 215).

55 *Cfr*. Expediente médico de María 18 (expediente de prueba, folios 24763 a 24767), y Escrito de solicitudes, argumentos y pruebas, págs. 96 y 97 (expediente de fondo, folios 214 y 215).

56 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57), y Expediente médico de María 18 (expediente de prueba, folios 24763 a 24767).

57 *Cfr*. Petición presentada ante la Comisión Interamericana de Derechos Humanos por AIDA, CEDHA y Earthjustice, de diciembre de 2006 (expediente de prueba, folios 46 a 57), y Expediente médico de María 18 (expediente de prueba, folios 24763 a 24767).

58 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 96 y 97 (expediente de fondo, folios 214 y 215).

59 *Cfr*. Expediente médico de María 7 (expediente de prueba, folios 24683 a 24685), y Escrito de solicitudes, argumentos y pruebas, pág. 97 (expediente de fondo, folio 215).

60 *Cfr*. Expediente médico de María 7 (expediente de prueba, folios 24683 a 24685).

61 *Cfr*. Escrito de solicitudes, argumentos y pruebas de, pág. 97 (expediente de fondo, folio 215).

11. **Juan 15** nació el 11 de abril de 1952 en La Oroya y vivía en Huaynacancha, a quince minutos del Complejo Metalúrgico[62]. Posteriormente vivió en Lima, y actualmente vive en Jauja-Junín[63]. Ha padecido de constantes dolores de cabeza y problemas respiratorios"[64]. Los representantes informaron que en 2021 padecía de "caries crónica[s]",gingivitis, "atrición oclusal", fuertes dolores en las articulaciones, "pérdida de visión [en] un ojo", "miopía o glaucoma", presión alta y "liquen simple crónico"[65].

12. **Juan 14** ha vivido en Huaynacancha y ha trabajado frente al Complejo Metalúrgico[66]. Ha padecido de "agitación constante", "congestión nasal permanente", "problemas para respirar", y "falta de apetito"[67]. Los representantes informaron que en 2021 presentaba un "absceso periapical con fistula, caries de la dentina, hipoplasia del esmalte, gingivitis, dolor y molestia en las articulaciones […] y problemas en la vista"[68]. **Juan 16** nació el 11 de marzo de 1985 y vivió en La Oroya hasta 2005, cuando se mudó a Huancayo[69]. Ha padecido de "hemorragias nasales", "tos constante" y "problemas de respiración"[70]. Los representantes informaron que en 2021 presenta "hernia inguinal derecha, caries dental[es], ansiedad y depresión leve, acidez estomacal, y nauseas […]"[71].

F. Familia 6: María 11 y Juan 7, y sus hijos María 8, María 9 y Juan 8.

13. **María 11** nació el 11 de agosto de 1958, y vive en La Oroya Antigua, frente al CMLO[72]. Ha padecido de dolores de espalda, cabeza, en sus huesos y en la planta de los pies, cansancio, mareos, así como de "punzadas en el brazo derecho"[73]. Unas pruebas de sangre y orina realizadas en 2009 reflejaron que tenía los siguientes niveles de metales pesados: 14,75 µg/dL de plomo en sangre, 5,39 µg/L de cadmio en orina, y 17,37 µg/L de arsénico en orina[74]. Una prueba de sangre realizada en 2011 reflejó que tenía niveles de plomo de 8,14 µg /dL, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg /dL[75]. Los representantes informaron que en el 2021

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62 *Cfr*. Expediente médico de Juan 15 (expediente de prueba, folios 24372 a 24374), y Escrito de solicitudes, argumentos y pruebas de, pág. 97 (expediente de fondo, folio 215).

63 *Cfr*. Expediente médico de Juan 15 (expediente de prueba, folios 24372 a 24374), y Escrito de solicitudes, argumentos y pruebas de, pág. 97 (expediente de fondo, folio 215).

64 *Cfr*. Expediente médico de Juan 15 (expediente de fondo, folios 24372 a 24374), y Declaración de Juan 15 (expediente de prueba, folios 29004 a 29013).

65 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 97 (expediente de fondo, folio 215). Al respecto ver también:Declaración de Juan 15 (expediente de prueba, folios 29004 a 29013).

66 *Cfr*. Expediente médico de Juan 14 (expediente de prueba, folio 24370).

67 *Cfr*. Expediente médico de Juan 14 (expediente de prueba, folio 24370).

68 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 97 (expediente de fondo, folio 215).

69 *Cfr*. Expediente médico de Juan 16 (expediente de prueba, folios 24376 a 24377), y Escrito de solicitudes, argumentos y pruebas de, pág. 97 (expediente de fondo, folio 215).

70 *Cfr*. Expediente médico de Juan 16 (expediente de prueba, folios 24376 a 24377).

71 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 97 (expediente de fondo, folio 215).

72 *Cfr*. Expediente médico de María 11 (expediente de prueba, folios 24704 a 24708), y Escrito de solicitudes, argumentos y pruebas, págs. 98 y 99 (expediente de fondo, folios 216 y 217).

73 *Cfr*. Expediente médico de María 11 (expediente de prueba, folios 24704 a 24708), y Escrito de observaciones de los peticionarios, de 23 de enero de 2014 (expediente de prueba, folio 25715).

74 *Cfr*. Expediente médico de María 11 (expediente de prueba, folios 24704 a 24708).

75 *Cfr*. Expediente médico de María 11 (expediente de prueba, folios 24704 a 24708).

padecía de "enfermedades cardiovascular[es]", tales como "[l]itiasis biliar, arritmia cardiaca y várices", así como "artrosis en [las] articulaciones"[76].

14. **Juan 7** nació el 6 de julio de 1957 y ha vivido en La Oroya Antigua, frente al Complejo Metalúrgico, desde aproximadamente 1988[77]. Ha padecido de "dolores de cabeza y en los huesos, faringitis y problemas pulmonares, además de ardor en los ojos y la garganta", así como "tifoidea, asma y faringitis"[78]. Asimismo, ha padecido de "[d]iarrea y ardor del estómago"[79]. Unas pruebas de sangre y orina realizadas en 2009 reflejaron que tenía los siguientes niveles de metales pesados: 17,55 µg/dL de plomo en sangre, 4,50 µg/L de cadmio en orina, y 40,30 µg/L de arsénico en orina. Un dosaje de metales pesados realizado en 2011 reflejó que tenía niveles de plomo en sangre de 5,80 µg/dL, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg. /dL[80]. Los representantes señalaron que en el 2021 padecía de "artrosis [en la] rodilla, hombro, cadera, y afectaciones en el sistema respiratorio y digestivo"[81].

15. María 11 presentó una denuncia ante la Subprefactura de la Provincia de Yauli en junio de 2019 mediante la cual efectuó una petición de garantías personales, aduciendo que el locutor del programa de Radio Karisma, utilizaba el referido programa para "pro[palar] e incita[r] a la población" en contra de su esposo, Juan 7, haciendo uso de una serie de "expresiones difamatorias y amenazas" vinculadas a su rol de activista[82]. Asimismo, indicó que en una publicación de la red social *Facebook* de Radio Karisma se habían realizado distintos comentarios "incitando [a] la violencia" en contra de Juan 7[83]. El 22 de julio de 2019, la citada entidad estatal concedió la solicitud de garantías personales y dispuso que el locutor de Redio Karisma cesara los actos de "amenaza, coacción [y] hostigamiento", indicando además que este debía "absten[erse] de realizar cualquier acto que p[usiera] en riesgo la integridad, la paz y la tranquilidad de la solicitante, y [su] esposo"[84].

16. **María 8** nació el 9 de septiembre de 2003 en La Oroya y vivió su niñez y adolescencia allí antes de mudarse a Lima[85]. Ha padecido de "poco apetito", "dolor de huesos", "sangrado nasal", "erupciones en la piel", "gripe", "molestias respiratorias" y

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[76] *Cfr*. Escrito de solicitudes, argumentos y pruebas, págs. 98 y 99 (expediente de fondo, folios 216 y 217).

[77] *Cfr*. Expediente médico de Juan 7 (expediente de prueba, folios 24318 a 24321), y Escrito de solicitudes, argumentos y pruebas, págs. 98 y 99 (expediente de fondo, folios 216 y 217).

[78] *Cfr*. Expediente médico de Juan 7 (expediente de prueba, folios 24318 a 24321).

[79] *Cfr*. Escrito de observaciones de los peticionarios, de 23 de enero de 2014 (expediente de prueba, folio 25718).

[80] *Cfr*. Expediente médico de Juan 7 (expediente de prueba, folios 24318 a 24321).

[81] *Cfr*. Escrito de solicitudes, argumentos y pruebas, págs. 98 y 99 (expediente de fondo, folios 216 y 217).

[82] *Cfr*. Subprefectura provincia de Yauli-La Oroya, Resolución N°60-2019-VOI/DGIN/SPROV, de 22 de julio de 2019 (expediente de prueba, folios .1418 a.1420).

[83] *Cfr*. Subprefectura provincia de Yauli-La Oroya, Resolución N°60-2019-VOI/DGIN/SPROV, de 22 de julio de 2019 (expediente de prueba, folios .1418 a.1420).

[84] *Cfr*. Subprefectura provincia de Yauli-La Oroya, Resolución N°60-2019-VOI/DGIN/SPROV, de 22 de julio de 2019 (expediente de prueba, folio .1420).

[85] *Cfr*. Expediente médico de María 8 (expediente de prueba, folios 24687 a 24690), y Escrito de solicitudes, argumentos y pruebas, págs. 98 y 99 (expediente de fondo, folios 216 y 217).

"dolores de estómago"[86]. Asimismo fue sometida a una hospitalización de dos días por "bronconeumonía"[87]. Unas pruebas de sangre y orina realizadas en 2009 reflejaron que tenía los siguientes niveles de metales pesados: 24,34 µg/dL de plomo en sangre, 4,37 µg/L de cadmio en orina, y 67,88 µg/L de arsénico en orina[88]. Un dosaje de metales pesados realizado en 2011 reflejó que tenía niveles de plomo en sangre de 15,31 µg /dL, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg /dL[89]. Los representantes informaron que en el 2021 padecía de "cólicos abdominales crónicos"[90].

17. **María 9** nació el 22 de agosto de 1989 en La Oroya y se mudó a Lima en 2006[91]. Ha padecido de "dolores de cabeza, problemas en la piel (ronchas y erupciones), problemas respiratorios, dolor de estómago, problemas de visión, sueño, y cansancio"[92]. María 9 y sus familiares habrían sufrido de hostigamientos como resultado de las denuncias efectuadas en relación con la contaminación ambiental derivada de las actividades del Complejo Metalúrgico[93]. Una prueba realizada en marzo de 2005 reflejó que tenía niveles de 23,2 µg/dL de plomo en sangre[94]. Los representantes informaron que en el 2021 padecía de una "enfermedad autoinmune y asma"[95].

18. **Juan 8** nació el 22 de septiembre de 1992 en La Oroya[96]. Ha padecido de hemorragias nasales, enrojecimiento de los ojos, "bronconeumonía [y] hemorragias nasales repetidas, dolor de oído, diarreas, y dolores constantes de estómago"[97]. Los representantes informaron que en el 2021 padecía de "hígado graso (hepatomegalia), microlitiasis renal bilateral y quiste simple en su riñón derecho"[98].

G. Familia 7: María 12 y Juan 2, y sus hijos María 5, María 24, y Juan 36.

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86 *Cfr*. Expediente médico de María 8 (expediente de prueba, folios 24687 a 24690) y Escrito de observaciones de los peticionarios, de 23 de enero de 2014 (expediente de prueba, folio 25715).

87 *Cfr*. Expediente médico de María 8 (expediente de prueba, folios 24687 a 24690).

88 *Cfr*. Expediente médico de María 8 (expediente de prueba, folios 24687 a 24690).

89 *Cfr*. Expediente médico de María 8 (expediente de prueba, folios 24687 a 24690).

90 *Cfr*. Escrito de solicitudes, argumentos y pruebas, págs. 98 y 99 (expediente de fondo, folios 216 y 217).

91 *Cfr*. Expediente médico de María 9 (expediente de prueba, folios 24692 a 24694), y Escrito de solicitudes, argumentos y pruebas, págs. 98 y 99 (expediente de fondo, folios 216 y 217).

92 *Cfr*. Expediente médico de María 9 (expediente de prueba, folios 24692 a 24694), y Declaración de María 9 (expediente de prueba, folios 29049 a 29059).

93 *Cfr*. Expediente médico de María 9 (expediente de prueba, folios 24692 a 24694), y Declaración de María 9 (expediente de prueba, folios 29049 a 29059).

94 *Cfr*. Expediente médico de María 9 (expediente de prueba, folios 24692).

95 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 98 y 99 (expediente de fondo, folios 216 y 217).

96 *Cfr*. Expediente médico de Juan 8 (expediente de prueba, folios 24323 a 24325), y Escrito de solicitudes, argumentos y pruebas, págs. 98 y 99 (expediente de fondo, folios 216 y 217).

97 *Cfr*. Expediente médico de Juan 8 (expediente de prueba, folios 24323 a 24325).

98 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 98 y 99 (expediente de fondo, folios 216 y 217).

19. **María 12** vive en La Oroya Antigua[99]. Ha padecido de "dolores de cabeza", "ardor de garganta" y "dolor [en los] huesos de las manos"[100]. Una prueba de plomo en sangre realizada a María 12 reflejó que tenía niveles de plomo en sangre 27,69 µg/dL. El estudio realizado también concluyó que María 12 presentaba "reumatismo", "cefalea tensional" y "necrosis pulpar"[101]. Los representantes señalaron que actualmente padece de "reumatismo extraarticular" y "dolor en los ovarios"[102]. **Juan 2** ha vivido en La Oroya Antigua y reside actualmente en Jauja-Junín[103]. Ha padecido de "[d]olores de cabeza, ardor de garganta y de ojos", así como "alergias" y "congestión nasal"[104]. Juan 2 declaró que "en varias ocasiones" había "denunci[ado] los hostigamientos hacia [su] persona"[105]. Los representantes informaron que en 2021 padecía de "rinitis alérgica crónica y otitis media crónica"[106].

20. **María 5** solía vivir en La Oroya Antigua, a 250 metros del Complejo Metalúrgico[107]. Desde antes de los cuatro años presentaba convulsiones y estuvo hospitalizada por 10 días. Ha padecido de "resfríos continuos", "problemas respiratorios", y "dolores de cabeza"[108]. Un dosaje de metales pesados realizado a María 5 concluyó que esta presentaba "intoxicación crónica por cadmio" sin "sintomatología específica"[109]. Asimismo, una prueba de plomo en sangre realizada en marzo de 2005 arrojó un resultado de 20,00 µg/dL[110]. Los representantes informaron que actualmente sufre de "dolores abdominales" y "hemorragias por ovario quístico"[111].

21. **María 24** vive desde su nacimiento en La Oroya Antigua, a 250 metros del Complejo Metalúrgico[112]. Ha padecido de dolores de cabeza y ardor en la garganta[113]. Ha presentado "dolor lumbar", "verruga vulgaris", "sequedad de piel" e "hipoplasia y caries dental[es]"[114]. Asimismo concluyó que María 24 presentaba "intoxicación crónica"

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99 *Cfr*. Expediente médico de María 12 (expediente de prueba, folios 24710 a 24711), y Escrito de solicitudes, argumentos y pruebas, pág. 99 (expediente de fondo, folio 217).

100 *Cfr*. Expediente médico de María 12 (expediente de prueba, folios 24710 a 24711), y Escrito de observaciones de los peticionarios, de 2 de diciembre de 2011 (expediente de prueba, folio 25715).

101 *Cfr*. Expediente médico de María 12 (expediente de prueba, folios 24711).

102 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 98 y 99 (expediente de fondo, folios 216 y 217).

103 *Cfr*. Expediente médico de Juan 2 (expediente de prueba, folios 24281 a 24283), y Escrito de solicitudes, argumentos y pruebas, pág. 99 (expediente de fondo, folio 217).

104 *Cfr*. Expediente médico de Juan 2 (expediente de prueba, folios 24281 a 24283), Declaración de Juan 2 (expediente de prueba, folios 28961 28969) y Escrito de observaciones de los peticionarios, de 2 de diciembre de 2011(expediente de prueba, folio 25717).

105 *Cfr*. Declaración de Juan 2 ante fedatario público (expediente de prueba, folios 28961 28969)

106 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 99 (expediente de fondo, folio 217).

107 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 99 (expediente de fondo, folio 217).

108 *Cfr*. Expediente médico de María 5 (expediente de prueba, folios 24675 a 24677).

109 *Cfr*. Expediente médico de María 5 (expediente de prueba, folios 24675 a 24677).

110 *Cfr*. Expediente médico de María 5 (expediente de prueba, folios 24675 a 24677).

111 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 99 (expediente de fondo, folio 217).

112 *Cfr*. Declaración de María 24 ante fedatario público (expediente de prueba, folios 29067 a 29076), y Escrito de solicitudes, argumentos y pruebas, pág. 99 (expediente de fondo, folio 217).

113 *Cfr*. Expediente médico de María 24 (expediente de prueba, folios 24798 a 24799), y Declaración de María 24 (expediente de prueba, folios 29067 a 29076).

114 *Cfr*. Declaración de María 24 (expediente de prueba, folios 29067 a 29076).

por cadmio y por plomo, sin "sintomatología específica"[115]. Los representantes señalaron que actualmente, presenta "dolor lumbar" y "sequedad en la piel"[116].

22. **Juan 36** vive desde su nacimiento en La Oroya Antigua[117]. Ha padecido de una "verruga vulgaris", "caries dental[es]", y "trastorno ansioso depresivo"[118]. Una evaluación realizada a Juan 36 concluyó que este presentaba una "intoxicación crónica" por cadmio, plomo, y arsénico, "sin sintomatología específica"[119].

H. Familia 8: María 37 y Juan 26, y sus hijas María 15, María 16, María 23, y María 27.

23. La familia vivió en La Oroya hasta el año 2007, a 100 metros del Complejo Metalúrgico[120]. De acuerdo con lo relatado por María 37, la familia se trasladó a Huancayo, Chupaca, donde viven actualmente, con la "esperanza de que [sus] hijos no estuvieran más enfermos"[121]. **María 37** ha sufrido de inflamación de las amígdalas, irritabilidad, "dolor de cabeza, pérdida de la memoria [y] dolor en los pies"[122]. Asimismo, ha indicado que padece de "una enfermedad muy grande que no soport[a] en [su] seno, [le] duelen los ovarios, , [sus] pies, [y su] cabeza"[123]. También indicó que, desde el 2000, padece de neuropatía en los brazos y las piernas, la gastritis crónica, dermatitis, y manchas en la piel[124]. **Juan 26** ha padecido de constante tos, dolores de cabeza, sueño, náuseas y dolores de riñones, dolor lumbar, problemas motrices como rigidez en el cuerpo y dificultades al caminar y problemas auditivos, desnutrición, caries dentales, gingivitis generalizada, faringitis crónica, pérdida de dientes, problemas de memoria, atención, y capacidad intelectual, dificultades pulmonares, agitación, problemas visuales, y presión alta[125].

24. María 37 y Juan 26 tienen cuatro hijas: María 15, María 16, María 23, y María 27. En relación con la situación de salud de sus hijas, María 37 señaló que "[ellas] tenían distintos malestares. [María 27] sufría de muchos cólicos, [y María 15] sufría de sus huesos, de la cabeza; parálisis del cuerpo, ojos rojos […]"[126]. **María 15** ha padecido de anemia, dolor de cabeza, dolor de huesos, alergias a la piel, dolores en la boca del estómago, y cólicos e hinchazón del estómago[127]. Los representantes informaron que

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115 *Cfr*. Expediente médico de María 24 (expediente de prueba, folios 24798 a 24799), y Declaración de María 24 (expediente de prueba, folios 29067 a 29076).

116 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 99 (expediente de fondo, folio 217).

117 *Cfr*. Expediente médico de Juan 36 (expediente de prueba, folios 24577 a 24578), y Escrito de solicitudes, argumentos y pruebas, pág. 99 (expediente de fondo, folio 217).

118 *Cfr*. Expediente médico de Juan 36 (expediente de prueba, folios 24577 a 24578).

119 *Cfr*. Expediente médico de Juan 36 (expediente de prueba, folios 24577 a 24578).

120 *Cfr.* Declaración ante fedatario público de María 37 (expediente de prueba, folios 29105 a 29112), y Escrito de solicitudes, argumentos y pruebas, pág. 100 (expediente de fondo, folio 218).

121 *Cfr.* Declaración de María 37 (expediente de prueba, folios 29105 a 29112).

122 *Cfr.* Declaración de María 37 (expediente de prueba, folios 29105 a 29112).

123 *Cfr.* Declaración de María 37 (expediente de prueba, folios 29105 a 29112).

124 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 100 (expediente de fondo, folio 218).

125 *Cfr*. Expediente médico de Juan 26 (expediente de prueba, folios 24483 a 24487), y Escrito de solicitudes, argumentos y pruebas, págs. 99 y 100 (expediente de fondo, folios 217 y 218).

126 *Cfr.* Declaración de María 37 (expediente de prueba, folios 29105 a 29112).

127 *Cfr*. Expediente médico de María 15 (expediente de prueba, folios 24743 a 24750).

padece de "caries dental[es] múltiples", "dolor de las articulaciones", y "ametropía", especialmente en el ojo derecho[128]. **María 16** ha padecido de alergias a la piel, hinchazón de labios, dolor de estómago, dolor de cabeza, dolor de huesos, sueño, cansancio, anemia y bajo rendimiento académico[129]. **María 23** ha padecido de problemas respiratorios, ardor en la garganta y tos constante, problemas gastrointestinales, incluyendo cólicos y diarreas, así como dolores de cabeza y de los huesos. Asimismo ha presentado problemas cutáneos, como "granitos en las manos, brazos, quijada, alergias a la piel" "problemas intestinales esporádicos", "sinusitis e hipertrofia adenoidea", "síndrome alérgico", "caries dental[es]", "dolor de cabeza", y "cansancio y bajo rendimiento académico"[130]. De niña presentaba cuadros de nerviosismo y apatía, problemas respiratorios y gastrointestinales[131]. **María 27** ha padecido de dolor de estómago y de cabeza[132]. Los representantes informaron que padece de "cansancio intelectual", "dolor de cabeza", "problemas de vista", "mareos", "dolor de huesos y articulaciones", "desviación de la columna", "cálculos biliares", "caries", y "pérdida de dientes"[133].

I. Familia 9: María 20 y sus hijos María 21, María 22, María 26, y Juan 35.

25. **María 20** ha vivido toda su vida en La Oroya Antigua, en un rango de 100 metros del CMLO. Ha padecido de "molestias generales en el cuerpo", tos, dolores de cabeza, cansancio, dolor del estómago, y ardor en la nariz y garganta[134]. Los representantes informaron que en el 2021 padecía de "anemia", "anquilosis en su rodilla derecha", "estrés", "inflamación del estómago y cólicos", "gingivitis", "hipotiroidismo", "dolor en las articulaciones", "cabeza", "columna", y "riñones", y sufre de "constante fatiga, agitación y acné"[135]. Asimismo, María 20 ha "sufrido depresión y ansiedad" debido a las "amenazas" que ha recibido con ocasión de las actividades desempeñadas dentro del "Comité de Defensa de La Oroya"[136].

26. Los hijos de María 20 han vivido en La Oroya Antigua desde que nacieron[137]. **María 21** ha padecido de "desnutrición crónica", bronquitis, "agitación", "principios de asma", "dolores en la espalda, el pecho, y la cabeza", "tos frecuente" y dificultades en sus estudios[138]. Los representantes informaron que padece de "rinitis alérgica", "bronquitis crónica" y "sangrado al toser"[139]. **María 22** ha padecido de "desnutrición crónica", una enfermedad bronquial, agitación continua, "principios de asma", "tos

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128 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 100 (expediente de fondo, folio 218).

129 *Cfr*. Expediente médico de María 16 (expediente de prueba, folios 24752 a 24756).

130 *Cfr*. Expediente médico de María 23 (expediente de prueba, folios 24784 a 24796).

131 *Cfr*. Expediente médico de María 23 (expediente de prueba, folios 24784 a 24796).

132 *Cfr*. Expediente médico de María 27 (expediente de prueba, folios 24808 a 24811).

133 *Cfr*. Expediente médico de María 27 (expediente de prueba, folios 24808 a 24811), y Escrito de solicitudes, argumentos y pruebas, pág. 100 (expediente de fondo, folio 218).

134 *Cfr*. Expediente médico de María 20 (expediente de prueba, folios 24774 a 24775).

135 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 101 (expediente de fondo, folio 219).

136 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 101 (expediente de fondo, folio 219).

137 *Cfr*. Expediente médico de María 20 (expediente de prueba, folios 24774 a 24775).

138 *Cfr*. Expediente médico de María 21 (expediente de prueba, folios 24777 a 24778).

139 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 101 (expediente de fondo, folio 219).

frecuente", dolor de cabeza, pecho y espalda, y "peso bajo"[140]. También ha presentado dificultades en sus estudios, así como "depresión y ansiedad"[141]. Los representantes indicaron que actualmente María 22 padece actualmente de dolor "constante" en el pecho y "agitación"[142].

27. Por su parte, **María 26** ha padecido de dolores de cabeza, y "cólicos intensos"[143]. Una prueba de sangre realizada en 2011 reflejó que tenía un nivel de plomo en sangre de 6,44 µg /dL, el cual era superior al Límite de Cuantificación del Método (LMC) establecido al momento de los hechos de 5,00 µg /dL[144]. Los representantes informaron queen el 2021 María 26 padecía de "caries dental[es]" y sufría de "ansiedad reactiva, estrés, y depresión"[145]. **Juan 35** ha padecido de bronquitis, "desnutrición crónica", "falta de peso y talla para su edad", e "irritación de ojos"[146]. Los representantes señalaron que padece de "dolor de riñones, talla corta por problemas [asociados con] la desnutrición y pérdida de peso, leucopenia, caries, gingivitis, maloclusión e hipo mineralización, además de ametropía, y anemia"[147].

J. Familia 10: María 28 y Juan 38, su hija María 25, y María 38 (madre de Juan 38).

28. **María 28** vive en La Oroya Antigua. Ha padecido de tos, ardor en los ojos y en la garganta[148]. Una prueba de sangre realizada en 2011 reflejó que tenía niveles de plomo en sangre de 5,00 µg /dL[149]. En 2014 registró "ardor en los ojos al sentir la contaminación", "ardor en la garganta" y que "al toser escup[ía] flema negra"[150]. **Juan 38** vive en La Oroya Antigua. Ha padecido de ampollas en los pies, así como ardor y lagrimeo en los ojos[151]. Una prueba de sangre realizada en 2011 reflejó que tenía niveles de plomo en sangre de 5,21 µg /dL[152]. Los representantes informaron que Juan 38 adolecía desde el 2014 de "ampollas en ambos pies que al reventar le producen heridas muy dolorosas", así como "ardor y lagrimeo en los ojos"[153].

29. **María 25**, hija de María 28 y Juan 38, ha vivido desde su nacimiento en La Oroya Antigua. Ha padecido de fuertes convulsiones, ardor en los ojos, "dolor de garganta", "desesperación", , gripes constantes, "desnutrición crónica", inflamación del labio, y

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140 *Cfr*. Expediente médico de María 22 (expediente de prueba, folios a 24780 a 24782), y Escrito de solicitudes, argumentos y pruebas, pág. 101 (expediente de fondo, folio 219).

141 *Cfr*. Expediente médico de María 22 (expediente de prueba, folios a 24780 a 24782), y Escrito de solicitudes, argumentos y pruebas, pág. 101 (expediente de fondo, folio 219).

142 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 101 (expediente de fondo, folio 219).

143 *Cfr*. Expediente médico de María 26 (expediente de prueba, folios a 24805 a 24806).

144 *Cfr*. Expediente médico de María 26 (expediente de prueba, folios a 24805 a 24806).

145 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 101 (expediente de fondo, folio 219).

146 *Cfr*. Expediente médico de Juan 35 (expediente de prueba, folios 24572 a 24575).

147 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 101 (expediente de fondo, folio 219).

148 *Cfr*. Expediente médico de María 28 (expediente de prueba, folios 24813 a 24814).

149 *Cfr*. Expediente médico de María 28 (expediente de prueba, folios 24813 a 24814).

150 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 102 (expediente de fondo, folio 220).

151 *Cfr*. Expediente médico de Juan 38 (expediente de prueba, folios 24587 a 24588).

152 *Cfr*. Expediente médico de Juan 38 (expediente de prueba, folios 24587 a 24588).

153 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 102 (expediente de fondo, folio 220).

puntos blancos en la boca[154]. Una prueba realizada en 2011 reflejó que tenía niveles de plomo en sangre de 8,48 µg /dL el cual era superior al Límite de Cuantificación del Método (LMC) establecido al momento de los hechos de 5,00 µg/dL [155]. De acuerdo con María 25, los efectos de la actividad del Complejo Metalúrgico han afectado su salud "psicológicamente y físicamente"[156]. Los representantes observaron que actualmente padece de "afectaciones respiratorias"[157].

30. **María 38**, madre de Juan 38, nació el 20 de enero de 1943 y vive en La Oroya desde los 17 años[158]. Ha padecido de cansancio, tos, problemas respiratorios, dolor de cabeza y en sus huesos, manos, y pecho, calambres, mareos, bajo apetito, problemas de sueño, irritabilidad, hipertensión, y "nerviosismo"[159]. De acuerdo con lo señalado por los representantes, antes del cierre del Complejo Metalúrgico, María 38 padeció de malestares que le obligaron a estar incapacitada por hasta por diez meses[160]. El 5 de diciembre de 2022 falleció, días después de ser operada a causa de una fractura en su pierna[161].

K. Familia 11: María 35 y Juan 42, y su hijo Juan 28, y los hijos de María 35: Juan 20, Juan 27, y Juan 39.

31. La familia vivió durante 10 años en La Oroya Nueva, a un kilómetro del Complejo Metalúrgico, antes de mudarse a Lima[162]. **María 35** ha padecido de dolores de cabeza, en los huesos, y la cintura, tos frecuente, "adormecimiento del cuerpo", mareos, dolor de garganta, bajo apetito, problemas de sueño, "irritaciones" y "granitos" en las manos, problemas respiratorios, hipertensión, y problemas gastrointestinales[163]. **Juan 42** ha padecido de dolores de la garganta, cólicos y problemas gastrointestinales, vértigo, bajo apetito, problemas de sueño y de la piel, dolores de los huesos, la cintura, y las rodillas[164]. Los representantes informaron que padece de "cólicos y dolores gastrointestinales frecuentes, leve dolencia en los huesos, dolor e inflamaciones de los riñones"[165].

32. **Juan 28** ha padecido de cólicos, diarreas, náuseas constantes, hiperactividad y agresividad, problemas respiratorios, "bajo de peso", sangre en la orina, problemas auditivos, problemas en la piel, "déficit de atención", "granitos", náuseas y

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154 *Cfr*. Expediente médico de María 25 (expediente de prueba, folios 24801 a 24803), y Declaración de María 25 (expediente de prueba, folios 29077 a 29084).

155 *Cfr*. Expediente médico de María 25 (expediente de prueba, folios 24801 a 24803), y Declaración de María 25 (expediente de prueba, folios 29077 a 29084).

156 *Cfr*. Declaración de María 25 (expediente de prueba, folios 29077 a 29084).

157 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 102 (expediente de fondo, folio 220), y Declaración de María 25 (expediente de prueba, folios 29077 a 29084).

158 *Cfr*. Expediente médico de María 38 (expediente de prueba, folios 24922 a 24928).

159 *Cfr*. Expediente médico de María 38 (expediente de prueba, folios 24922 a 24928).

160 *Cfr*. Escrito de solicitudes, argumentos y pruebas , pág. 102 (expediente de fondo, folio 220).

161 *Cfr*. Acta de defunción de María 38 (expediente de prueba, folio 30232).

162 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 103 (expediente de fondo, folio 220).

163 *Cfr*. Expediente médico de María 35 (expediente de prueba, folios 24896 a 24902).

164 *Cfr*. Expediente médico de Juan 42 (expediente de prueba, folios 24627 a 24638).

165 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 103 (expediente de fondo, folio 221).

"adormecimiento de pies"[166]. También, ha presentado "giardiasis", "desnutrición crónica", "rinofaringitis aguda", y dolor de huesos y de cabeza[167].

33. **Juan 20** vivió en La Oroya durante su niñez y ha presentado síntomas médicos relacionados con "problemas gástricos"[168]. **Juan 27** nació el 28 de diciembre de 1996 y ha vivido cerca del CMLO[169]. Ha padecido de cansancio, anemia, dolor de huesos, cólicos, diarreas, "tos severa", "flema", hiperactividad, problemas en el oído derecho, "granos en la cara", adormecimiento e hinchazón de los pies y manos, y déficit de atención"[170]. En 2010 Juan 27 presentó "gingivitis marginal", "bocio", "caries dental[es]", y "pigmentación extrínseca"[171]. **Juan 39** nació el 15 de abril de 1992 y vivió en La Oroya, a un kilómetro del Complejo Metalúrgico, hasta 2010, cuando se mudó a Lima[172]. Desde la niñez ha sufrido de dolores de cabeza y musculares, mareos, cólicos, problemas gastrointestinales, "bajo apetito" y tos frecuente[173]. Asimismo, Juan 39 padeció de anemia a los siete años, pero no recibió tratamiento fuera de los medicamentos que compraba de manera particular[174]. Los representantes señalaron que en 2008 y 2009 padeció de "intensos cólicos, diarrea, dolores musculares y dolor de cabeza"[175].

L. Familia 12: María 29 y Juan 30, y sus hijos Juan 21, Juan 22, Juan 23, y Juan 31.

34. **María 29** nació el 2 de octubre de 1970 y ha vivido en la Oroya Antigua[176]. Ha padecido de dolores de cabeza, náuseas, mareos, vómitos, diarrea, "ardor en la garganta", "tos frecuente", "irritación de los ojos", "problemas de sueño", "adormecimiento del cuerpo", "disminución de fuerza en sus miembros", problemas gastrointestinales y cólicos. De acuerdo con los señalado por los representantes, los síntomas de María 29 han sido "menos frecuentes" desde que el Complejo Metalúrgico suspendió sus operaciones en 2009[177]. Los representantes informaron que padece del "síndrome de reflujo gastroesofágico, gastritis crónica, parasitosis intestinal, intestino irritable, estreñimiento crónico y dispepsia, hiperlipidemia (colesterol y triglicéridos), falta de memoria y caries dental"[178].

35. **Juan 30** nació el 23 de abril de 1967. Vivió en La Oroya desde los siete a los doce años, y volvió desde 1984 a 2007, antes de salir por sus preocupaciones sobre la

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166 *Cfr*. Expediente médico de Juan 28 (expediente de prueba, folios 24509 a 24520).

167 *Cfr*. Expediente médico de Juan 28 (expediente de prueba, folios 24509 a 24520).

168 *Cfr*. Expediente médico de Juan 20 (expediente de prueba, folios 24407 a 24409).

169 *Cfr*. Expediente médico de Juan 27 (expediente de prueba, folios 24499 a 24507).

170 *Cfr*. Expediente médico de Juan 27 (expediente de prueba, folios 24499 a 24507), y Escrito de solicitudes, argumentos y pruebas, pág. 103 (expediente de fondo, folio 221).

171 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 103 (expediente de fondo, folio 221).

172 *Cfr*. Expediente médico de Juan 39 (expediente de prueba, folios 24590 a 24602).

173 *Cfr*. Expediente médico de Juan 39 (expediente de prueba, folios 24590 a 24602).

174 *Cfr*. Expediente médico de Juan 39 (expediente de prueba, folios 24590 a 24602), y Escrito de solicitudes, argumentos y pruebas, pág. 103 (expediente de fondo, folio 221).

175 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 103 (expediente de prueba, folio 221).

176 *Cfr*. Expediente médico de María 29 (expediente de prueba, folios 24816 a 24822).

177 *Cfr*. Expediente médico de María 29 (expediente de prueba, folios 24816 a 24822).

178 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 104 (expediente de fondo, folio 222).

salud de sus hijos. Ha padecido de tos, problemas respiratorios y en la piel, bronquitis, "flemas con partículas de color negro", "dolores pulmonares", ataques de asma, alergias y "ronchas" en la piel, deficiencia auditiva, rosácea cutánea, "infección aguda de [las] vías respiratorias altas", "necrosis pulpar", caries dentales, gingivitis, ametropía, y "ojo seco"[179]. Una prueba realizada en 2011 reflejó que tenía niveles de plomo en sangre de 5,02 µg /dL el cual era superior al Límite de Cuantificación del Método (LMC) establecido al momento de los hechos de 5,00 µg/dL[180]. De acuerdo con lo señalado por los representantes, Juan 30 y María 29 habrían sido amenazados y hostigados por sus vecinos tras denunciar la situación de contaminación en La Oroya[181].

36. Juan 30 señaló que el Estado "nunca [les] dijo que había contaminación y que eso podía afectar [su] salud"[182]. Además, indicó que la única acción tomada por Doe Run Perú en relación con la contaminación eran "jornadas de limpieza", para las cuales hacían que las madres "limpiaran y firmaban listas, a cambio de leche para sus hijos"[183]. En cuanto a atención médica, afirma que el Ministerio de Salud del Perú le realizó dosajes y "otros exámenes médicos", pero que solo les "dieron resultados del grado de metales en [su] sangre, pero no [les] dijeron nada acerca del estado de salud de cada uno"[184]. También, afirmó que "no [ha] recibido tratamiento realmente"[185]. En relación con la situación de salud de sus familiares Juan 30 señaló que sus "hijos y esposa, también han sufrido mucho". En concreto, refirió que [sus] hijos han presentado vómitos, malestar estomacal, úlceras […] [t]ambién [han padecido] de visión borrosa y pérdida de peso"[186]. En 2014 Juan 30 registró "tos frecuente con flema", "alergia en la piel, en la nariz, caries y pérdida de dientes", "indigestión" y "calambres"[187].

37. **Juan 21** nació el 14 de abril de 2005[188]. Ha padecido de trastorno del sueño, "talla baja", anemia, rinofaringitis aguda, otitis media, dermatosis facial, caries dentales, "hipomineralización" y pigmentación intrínseca", disminución del apetito, así como afectaciones en su rendimiento académico[189]. Una prueba realizada en 2011 reflejó que tenía niveles de plomo en sangre de 13,67 µg /dL, el cual era superior al Límite de Cuantificación del Método (LMC) establecido al momento de los hechos de 5,00 µg/dL[190]. **Juan 22** nació el 24 de julio de 2006 en la Oroya[191]. Ha padecido de una "exposición

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179 *Cfr*. Expediente médico de Juan 30 (expediente de prueba, folios 24529 a 24535,); Declaración de Juan 30 rendida (expediente de prueba, folios 29033 a 29040), y Escrito de solicitudes, argumentos y pruebas, pág. 104 (expediente de fondo, folio 222).

180 *Cfr*. Expediente médico de Juan 30 (expediente de prueba, folios 24529 a 24535,) y Declaración de Juan 30 (expediente de prueba, folios 29033 a 29040).

181 *Cfr*. Escrito de solicitudes, argumentos y pruebas de 4 de febrero de 2022, pág. 104 (expediente de fondo, folio 222).

182 *Cfr*. Declaración de Juan 30 rendida ante fedatario público (expediente de prueba, folio 29034).

183 *Cfr*. Declaración de Juan 30 rendida ante fedatario público (expediente de prueba, folio 29034).

184 *Cfr*. Declaración de Juan 30 (expediente de prueba, folios 29034).

185 *Cfr*. Declaración de Juan 30 (expediente de prueba, folio 29035).

186 *Cfr*. Declaración de Juan 30 (expediente de prueba, folio 29035).

187 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 104 (expediente de fondo, folio 222).

188 *Cfr*. Expediente médico de Juan 21 (expediente de prueba, folios 24411 a 24428)

189 *Cfr*. Expediente médico de Juan 21 (expediente de prueba, folios 24411 a 24428) y Escrito de solicitudes, argumentos y pruebas, pág. 104 (expediente de fondo, folio 222).

190 *Cfr*. Expediente médico de Juan 21 (expediente de prueba, folios 24411 a 24428).

191 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 104 (expediente de fondo, folio 222).

crónica a metales pesados y metaloides", "dermatitis folicular", "xerosis", "hemangioma congénito", anemia, "queratitis", gingivitis, caries dentales, "pigmentación extrínseca" y trastornos de conducta[192]. Los representantes informaron que en 2021 Juan 21 presentó "caries dental[es], ansiedad, estrés, y problemas gastrointestinales"[193].

38. **Juan 23** ha padecido de "cansancio crónico", "bronquitis crónica", "diarreas", caries dentales, "parestesias", calambres, "bajo peso", déficit de atención, anemia, ametropia, y cefalea. En 2010 fue diagnosticado con caries dentales, "necrosis pulpar", "Pitiriasis Alba" y "desnutrición crónica"[194]. Una prueba de sangre realizada en 2011 reflejó que tenía niveles de plomo en sangre de 9,84 µg /dL, el cual era superior al Límite de Cuantificación del Método (LMC) establecido al momento de los hechos de 5,00 µg /dL[195].Los representantes informaron que padece de "caries", "problemas de visión", y "bronquios recurrentes"[196].

39. **Juan 31** nació el 24 de noviembre de 1999. Ha presentado convulsiones, "dermatitis folicular", "trastornos de conducta alimentaria", "queratosis", "cicatriz queloide", parasitosis intestinal, anemia, gingivitis, caries, bronquitis, rinitis, trastornos de las emociones, dolor de cabeza, e "irritación de ojo"[197]. Evaluaciones de sangre realizadas a Juan 31 reflejaron que tenía niveles de plomo en sangre de 36,70 µg/dL en enero 2005; 34,00 µg/dL en diciembre de 2005, y 13,55 µg /dL en 2011[198]. Los representantes informaron que padece de "sangrado de la nariz en las mañanas, náuseas[,] vómitos, bajo de peso, caries, malformación dentaria, [y] alergia respiratoria"[199].

M. Familia 13: María 30, Juan 41, María 32, María 33 y María 3 y María 34.

40. **María 30** nació el 8 de junio de 1958 y ha vivido en La Oroya la mayor parte de su vida[200]. Desde el 2003 ha presentado bronquitis continua y tos frecuente, irritabilidad, dolor de la garganta, dolores de cabeza, dolores en sus huesos y articulaciones, cólicos y "diarrea"[201]. En 2005 estuvo hospitalizada por "hipertiroidismo", estadía en la cual fue diagnosticada también con "taquicardia y osteoporosis" [202]. Estuvo incapacitada durante la mayoría del 2005, tiempo durante el cual sufrió de "baja fuerza en los pies y los brazos, caída de cabello, dolores gastrointestinales, y bajo peso", llegando a pesar hasta 34 kilos, siendo una mujer adulta[203]. Desde el 2008 ha registrado problemas

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192 *Cfr*. Expediente médico de Juan 22 (expediente de prueba, folios 24449 a 24461) y Escrito de solicitudes, argumentos y pruebas, págs. 104 y 105 (expediente de fondo, folios 222 a 223).

193 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 105 (expediente de fondo, folio 223).

194 *Cfr*. Expediente médico de Juan 23 (expediente de prueba, folios 24463 a 24472), y Escrito de solicitudes, argumentos y pruebas, pág. 105 (expediente de fondo, folio 223).

195 *Cfr*. Expediente médico de Juan 23 (expediente de prueba, folios 24463 a 24472).

196 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 105 (expediente de fondo, folio 223).

197 *Cfr*. Expediente médico de Juan 31 (expediente de prueba, folios 24537 a 24556).

198 *Cfr*. Expediente médico de Juan 31 (expediente de prueba, folios 24537 a 24556).

199 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 104 (expediente de fondo, folio 222).

200 *Cfr*. Expediente médico de María 30 (expediente de prueba, folios 24824 a 24859), y Escrito de solicitudes, argumentos y pruebas, pág. 105 (expediente de fondo, folio 223).

201 *Cfr*. Expediente médico de María 30 (expediente de prueba, folios 24824 a 24859).

202 *Cfr*. Expediente médico de María 30 (expediente de prueba, folios 24824 a 24859).

203 *Cfr*. Expediente médico de María 30 (expediente de prueba, folios 24824 a 24859).

respiratorios, amigdalitis, faringitis, tos seca, cansancio, agitación, dolor intenso de los huesos, diarreas cada 15 días y neumonía[204]. En 2010 estuvo nuevamente hospitalizada por neumonía[205]. El 5 de mayo del 2010 fue diagnosticada con una arritmia cardiaca leve, "policitemia" y osteoporosis. Los representantes informaron que presenta "hiperreactividad bronquial, D/C asma bronquial, neuropatía basal izquierda, lumbalgia y osteoporosis, hiperlipidemia, gastritis crónica e intestino irritable"[206]. Asimismo sufre de "dolores en la muñeca izquierda, sangrando de la nariz "3 veces a la semana", hipertiroidismo y "problemas respiratorios"[207].

41. **Juan 41** nació el 16 de diciembre de 1953 y vive en La Oroya desde 1968[208]. Ha sufrido de "padecimientos crónicos", incluyendo "dolores de espalda, los huesos, la cabeza y el estómago"[209]. Además, ha presentado dolores de la garganta, "acumulación de flema", ardor en los ojos, dificultades para respirar, mareos, problemas de sueño e hipertensión, síntomas que empezaron cuando llegó a La Oroya y que incrementaron "particularmente en los últimos 16 años"[210]. En 1970, fue incapacitado por tres meses por "problemas bronquiales" y le diagnosticaron "alergia al frío"[211]. Asimismo fue hospitalizado por 25 días por alergias a la piel[212]. En 2014 registró "dolores de cintura"[213]. De acuerdo con lo informado por los representantes presenta el "síndrome metabólico, triglicéridos y el colesterol alto, problemas de visión, lumbalgia y posible infección urinaria"[214].

42. **María 32** nació el 4 de septiembre de 1985, y vivió en La Oroya desde que nació hasta 2009, cuando salió de la ciudad "para trabajar en el peaje en la carretera Ambo-Huánuco"[215]. Desde el 2000 ha sufrido de "alergias, estornudos, ronchas en todo el cuerpo y granos en la cara, dolores de cabeza, dolores de la garganta, mareos y problemas gastrointestinales"[216]. Estos síntomas se han atenuado desde que salió de La Oroya, pero vuelvan a presentarse cuando va a visitar su familia cada quince días[217]. En 2010 María 32 fue diagnosticada con "alergia al frío"[218]. En 2014 también fue

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204 *Cfr*. Expediente médico de María 30 (expediente de prueba, folios 24824 a 24859).

205 *Cfr*. Expediente médico de María 30 (expediente de prueba, folios 24824 a 24859).

206 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 105 (expediente de fondo, folio 223).

207 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 105 (expediente de fondo, folio 223).

208 *Cfr*. Expediente médico de Juan 41 (expediente de prueba, folios 24618 a 24625), y Escrito de solicitudes, argumentos y pruebas, pág. 105 (expediente de fondo, folio 223).

209 *Cfr*. Expediente médico de Juan 41 (expediente de prueba, folios 24618 a 24625).

210 *Cfr*. Expediente médico de Juan 41 (expediente de prueba, folios 24618 a 24625).

211 *Cfr*. Expediente médico de Juan 41 (expediente de prueba, folios 24618 a 24625).

212 *Cfr*. Expediente médico de Juan 41 (expediente de prueba, folios 24618 a 24625).

213 *Cfr*. Expediente médico de Juan 41 (expediente de prueba, folios 24618 a 24625).

214 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 106 (expediente de fondo, folio 224).

215 *Cfr*. Expediente médico de María 32 (expediente de prueba, folios 24869 a 24876), y Declaración de María 32 (expediente de prueba, folios 29086 a 29092).

216 *Cfr*. Expediente médico de María 32 (expediente de prueba, folios 24869 a 24876), y Declaración de María 32 (expediente de prueba, folios 29086 a 29092).

217 *Cfr*. Expediente médico de María 32 (expediente de prueba, folios 24869 a 24876), y Declaración de María 32 (expediente de prueba, folios 29086 a 29092).

218 *Cfr*. Expediente médico de María 32 (expediente de prueba, folios 24869 a 24876), y Declaración de María 32 (expediente de prueba, folios 29086 a 29092).

diagnosticada con "inflamación de amígdalas"[219]. Actualmente "se enferma de la garganta", y sufre de "alergia en la piel", "caída de cabello", "problemas dentales" y "ovario poliquístico" [220].

43. **María 33** nació el 27 de febrero de 1981 y ha vivido desde que nació a un kilómetro del CMLO[221]. Ha tenido algunos malestares desde la niñez, que se agravaron de una forma significativa a partir de 1998. Desde entonces ha sido diagnosticada con "asma crónica", y sufre de "síntomas crónicos como cansancio, dolor de cabeza, dificultades para respirar, tos frecuente, irritación de la vista, ardor de la nariz, náuseas, embotamiento del estómago, agitación, mareos, adormecimiento del cuerpo, e irritaciones como ampollas en los dedos y despellejamiento de la piel de sus palmas"[222]. Debido a sus condiciones de asma, bronquitis y neumonía, ha sido incapacitada varias veces por duraciones de entre quince días hasta un mes[223]. En 2010, le diagnosticaron "faringoamigdalitis supurada"[224]. En 2014 padecía de "hinchazón del estómago", cólicos, náuseas, "mucha tos", dolor de amígdalas, fiebre, dolor de los brazos, punzadas en el brazo derecho, un ardor dentro del brazo izquierdo y adormecimiento de ambos brazos"[225]. Asimismo los representantes informaron que María 33 presenta asma ("hiperreactividad bronquial"), "gastritis crónica" con tratamiento, "reflujo gastroesofágico", así como de dolores de cabeza "muy intensos" y con sangrado de la nariz[226]. También padece de "dolor del ojo izquierdo, inflamación e incluso rotura de vena"[227].

44. María 33 ha indicado haber recibido "hostigamientos" por hablar sobre sus problemas de salud y de la situación de contaminación en La Oroya[228]. En concreto señaló que "[c]uando había eventos sí venían a atacar[les] los trabajadores [del Complejo Metalúrgico], decían que no éramos bien recibidos en La Oroya"[229].

45. **María 3** nació el 21 de agosto de 1979 en La Oroya[230]. Ha padecido de "[r]esfríos constantes, tos, dolores de cabeza, cansancio, dolor de estómago y de cintura, ardor en la nariz y garganta, molestia en los riñones, mucha sed, y fiebre", así como anemia, cefalea, dolor de estómago y adormecimiento de la cara[231]. También, ha padecido de "xerosis", ansiedad y depresión "leve", "estrés post-traumático", "necrosis pulpar",

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219 *Cfr*. Expediente médico de María 32 (expediente de prueba, folios 24869 a 24876), y Declaración de María 32 (expediente de prueba, folios 29086 a 29092).

220 *Cfr*. Declaración de María 32 (expediente de prueba, folios 29093 a 29103).

221 *Cfr*. Expediente médico de María 33 (expediente de prueba, folios 24878 a 24887), y Escrito de solicitudes, argumentos y pruebas, pág. 106 (expediente de fondo, folio 224).

222 *Cfr*. Expediente médico de María 33 (expediente de prueba, folios 24878 a 24887).

223 *Cfr*. Expediente médico de María 33 (expediente de prueba, folios 24878 a 24887).

224 *Cfr*. Expediente médico de María 33 (expediente de prueba, folios 24878 a 24887).

225 *Cfr*. Expediente médico de María 33 (expediente de prueba, folios 24878 a 24887).

226 *Cfr*. Escrito de solicitudes, argumentos y pruebas de 4 de febrero de 2022, pág. 106 (expediente de fondo, folio 224).

227 *Cfr*. Escrito de solicitudes, argumentos y pruebas de 4 de febrero de 2022, pág. 106 (expediente de fondo, folio 224).

228 Declaración de María 33 (expediente de prueba, folios 29093 a 29103).

229 Declaración de María 33 (expediente de prueba, folios 29093 a 29103).

230 *Cfr*. Expediente médico de María 3 (expediente de prueba, folios 24659 a 24666).

231 *Cfr*. Expediente médico de María 3 (expediente de prueba, folios 24659 a 24666).

caries dentales, gingivitis[es]", y "gastritis crónica nodular"[232]. Una prueba de sangre realizada en 2011 reflejó que tenía niveles de plomo en sangre de menos de 5,0 µg /dL[233]. De acuerdo con lo señalado por María 3, en La Oroya "no ha[bía] especialistas ni ningún apoyo del gobierno central en el centro médico para una atención real e integral"[234].

46. **María 34** nació el 23 de diciembre de 2000 y vivió en La Oroya Nueva durante toda su vida, en la actualidad vive a "las afueras de esta ciudad"[235]. Desde que nació, ha experimentado "malestares respiratorios", requiriendo de hospitalización por una neumonía a los dieciocho días de nacida[236]. Desde entonces, ha padecido de irritación de la garganta y ha tenido "problemas respiratorios", tales como el asma o bronquitis[237]. En 2008, estuvo incapacitada por quince días debido a estos síntomas. Ha sido diagnosticada con "neumonía y hepatitis" y ha presentado "irritabilidad", "dolores de cabeza, dolor de los huesos del pie, sobreproducción de lágrimas en los ojos, disminución de fuerz[a] en los miembros y bajo apetito", así como "problemas gastrointestinales constantes[238]. En el 2014 registró "dolor de todo el cuerpo", "fiebre", "dolor de cabeza", "congestión nasal", "tos" y "amígdalas inflamadas"[239]. Los representantes informaron que padece de "hiperreactividad bronquial constante", "dolores en la columna" y "dispepsia", así como de "hipertrigliceridemia, cefalea, agotamiento y estrés, problemas de la vista y cólicos menstruales"[240].

N. Familia 14: María 31 y Juan 1.

47. **María 31** nació el 10 de marzo de 1956 y vive en La Oroya Antigua, frente al Complejo Metalúrgico[241]. En 1988, fue diagnosticada con un "cálculo biliar" que fue operado[242]. Ha padecido de problemas de sueño, irritabilidad, alergias, dolor de estómago, gastritis, "bajo apetito", ardor en los ojos, ronchas en todo el cuerpo, dolor de cabeza y huesos, artritis, bronquitis, asma, tos frecuente, dolores de garganta, y amigdalitis aguda[243]. Afirma que, en 2006, tuvo que quedarse en la casa más de una semana debido a la "irritación de los ojos"[244]. Los representantes informaron que ha presentado "problemas respiratorios" (dolor de amígdalas), "dolor de las articulaciones y espalda", "descalcificación de huesos", y "hemorragias nasales"[245].

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232 *Cfr*. Expediente médico de María 3 (expediente de prueba, folios 24659 a 24666).

233 *Cfr*. Expediente médico de María 3 (expediente de prueba, folios 24659 a 24666).

234 *Cfr*. Declaración de María 3 (expediente de prueba, folios 29041 a 29048).

235 *Cfr*. Expediente médico de María 34 (expediente de prueba, folios 24888 a 24894), y Escrito de solicitudes, argumentos y pruebas, pág. 107 (expediente de fondo, folio 225).

236 *Cfr*. Expediente médico de María 34 (expediente de prueba, folios 24888 a 24894).

237 *Cfr*. Expediente médico de María 34 (expediente de prueba, folios 24888 a 24894).

238 *Cfr*. Expediente médico de María 34 (expediente de prueba, folios 24888 a 24894).

239 *Cfr*. Expediente médico de María 34 (expediente de prueba, folios 24888 a 24894).

240 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 107 (expediente de fondo, folio 225).

241 *Cfr*. Expediente médico de María 31 (expediente de prueba, folios 24861 a 24867), y Escrito de solicitudes, argumentos y pruebas, pág. 107 (expediente de fondo, folio 225).

242 *Cfr*. Expediente médico de María 31 (expediente de prueba, folios 24861 a 24867).

243 *Cfr*. Expediente médico de María 31 (expediente de prueba, folios 24861 a 24867).

244 *Cfr*. Expediente médico de María 31 (expediente de prueba, folios 24861 a 24867).

245 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 107 (expediente de fondo, folio 225).

48. **Juan 1** nació el 17 de junio de 1954, y ha vivido en La Oroya Antigua desde que tenía doce años[246]. Una prueba realizada en 2005 reflejó que tenía niveles de plomo en sangre de 33 µg/dL, cuando los valores referenciales establecidos eran de 10 µg/dL[247]. Ha padecido de tos con flema, amígdalas inflamadas, fiebre, dolor de cabeza, "nariz tupida", y "estornudos frecuentes"[248]. Juan 1 declaró que el Estado y la empresa minera "no han dado información suficiente sobre los impactos de salud" centrándose más bien en "información sobre cuidado" vinculada a la noción de "alimentarse mejor, con verduras, leche y frutas"[249]. Asimismo, señaló haber poseído síntomas médicos correspondientes con los padecimientos de "amigdalitis crónica", "dolor de articulaciones [y] huesos" y afectaciones a "la visión y el oído"[250]. A pesar de lo anterior, señaló que "nunca h[a] recibido atención de salud de calidad"[251].

49. Por otro lado, Juan 1 afirmó que, tanto él como María 31 han sufrido de hostigamientos por denunciar la contaminación y por sus acciones con el Movimiento por la Salud en La Oroya (MOSAO). En concreto señaló que "[c]on las denuncias fu[eron] perseguidos por la empresa", acusándolos de ser "anti mineros"[252]. Asimismo indicó que la población los "satanizaba" diciendo que ellos buscaban "el cierre de la empresa"[253]. Señaló que en 2004 se habría celebrado una reunión con el sindicato, la municipalidad y la empresa a donde llegaron obreros a "atacar[les] a varios dirigentes sociales" [254]. Según declaró Juan 1, a diversos compañeros "los dejaron con hematomas y los golpearon por orden de la empresa"[255].

O. Familia 15: María 36 y Juan 25.

50. **María 36** nació el 1 de noviembre de 1960 y ha vivido en La Oroya desde 1974[256]. Ha padecido de "infección urinaria", "cólicos, diarrea, [y] problemas gastrointestinales". Además, ha sufrido de "dolores de la cabeza, mareos, tos, dolores de garganta, problemas de sueño, dolor [en] los huesos [y] en los brazos, hinchazón en los pies, granos en la cara y pelvis, hipertensión, [e] infecciones urinarias"[257]. También señaló que ha padecido de "dolor de los intestinos", "hincha[zón] del estómago", "presión en la

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246 *Cfr*. Expediente médico de Juan 1 (expediente de prueba, folio 24279), y Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

247 *Cfr*. Expediente médico de Juan 1 (expediente de prueba, folio 24279), y Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

248 *Cfr*. Expediente médico de Juan 1 (expediente de prueba, folio 24279), y Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

249 *Cfr*. Expediente médico de Juan 1 (expediente de prueba, folio 24279), y Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

250 *Cfr*. Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

251 *Cfr*. Expediente médico de Juan 1 (expediente de prueba, folio 24279), y Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

252 *Cfr*. Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

253 *Cfr*. Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

254 *Cfr*. Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

255 *Cfr*. Declaración de Juan 1 (expediente de prueba, folios 28950 a 28960).

256 *Cfr*. Expediente médico de María 36 (expediente de prueba, folios 24904 a 24912).

257 *Cfr*. Expediente médico de María 36 (expediente de prueba, folios 24904 a 24912).

cabeza" y "gastritis crónica"[258]. Los representantes informaron que padece de "fuerte cólico debido a cálculos en los riñones"[259].

51. **Juan 25** nació el 11 de enero de 1955[260]. Desde 1978 hasta 1999, vivió en La Oroya Antigua, en una casa cerca del Complejo Metalúrgico, antes de mudarse a La Oroya Nueva[261]. Juan 25 trabajó en el Complejo Metalúrgico desde 1979 hasta el 2002, en el molino[262]. Señaló que "las herramientas que us[a]ba[n] para trabajar o para proteger[se] no eran buenas"[263]. Juan 25 señaló haber sido sometido a hostigamientos en virtud de las denuncias realizadas sobre la contaminación en La Oroya. Al respecto afirmó que "fu[e] excluido por [sus] compañeros de trabajo" y acusado de "haber promovido el cierre del complejo"[264]. Asimismo, indicó que la compañía habría cesado a varios trabajadores que laburaban en la compañía para "desquitarse de los trabajadores que luchaba[n] por la justicia [y] por nuestra salud"[265].

52. Ha padecido de dificultades de memoria semántica y visual, "migraña", "bronquitis crónica", "ansiedad", "depresión leve a moderada", "estrés post traumático", "caries dental[es]", "atricción de piezas dentales", "gingivitis anteroinferior", "bradicardia sinusal no sintomática", "dislipidemia", "onicomicosis", "dermatitis de contacto" e "intoxicación crónica por metales pesados"[266]. Juan 25 declaró que también ha sufrido de "trombosis pulmonar", "problemas en la columna y en las extremidades", así como "gastritis"[267]. Los representantes señalaron que Juan 25 también ha padecido de "silicosis pulmonar", así como "dolores musculares, gases, acidez, manchas negras en los brazos, no escucha por el oído izquierdo y además [ha tenido] problemas de vista"[268].

53. De acuerdo con Juan 25 los médicos le habrían realizado diversos dosajes a lo largo de cuatro años, cuyos resultados pusieron en evidencia la existencia de "niveles altos de plomo, de arsénico, [y] de cadmio"[269]. A pesar de ello, indicó que "los médicos solo hicieron los dosajes, pero nunca [le] trataron, ni [le] hablaron sobre los efectos de

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258 *Cfr*. Expediente médico de María 36 (expediente de prueba, folios 24904 a 24912).

259 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 108 (expediente de fondo, folio 226).

260 *Cfr*. Expediente médico de Juan 25 (expediente de prueba, folios 24476 a 24481), y Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

261 *Cfr*. Expediente médico de Juan 25 (expediente de prueba, folios 24476 a 24481), y Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

262 *Cfr*. Expediente médico de Juan 25 (expediente de prueba, folios 24476 a 24481), y Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

263 *Cfr*. Expediente médico de Juan 25 (expediente de prueba, folios 24476 a 24481), y Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

264 *Cfr*. Expediente médico de Juan 25 (expediente de prueba, folios 24476 a 24481), y Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

265 *Cfr*. Expediente médico de Juan 25 (expediente de prueba, folios 24476 a 24481), y Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

266 *Cfr*. Expediente médico de Juan 25 (expediente de prueba, folios 24476 a 24481), y Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

267 *Cfr*. Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

268 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 108 (expediente de fondo, folio 226).

269 *Cfr*. Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

la presencia de estos metales y lo que podrían hacer en [su] salud"[270]. Finalmente, afirmó que, con ocasión a los hechos del presente caso, su "salud mental" sufrió mucho", especialmente después de que fuera cesado de su puesto en la empresa metalúrgica[271].

P. Familia 16: María 10 y Juan 5, y sus hijas María 4 y María 14.

54. **María 10** nació el 24 de septiembre de 1966, vivió 25 años en La Oroya Antigua y actualmente reside en La Oroya[272]. Ha padecido de pérdida de audición, "problemas respiratorios", "bronquitis", "anemia", "dolores de columna", "constantes cólicos", "dolores de cabeza y en los huesos", y estuvo internada en el año 2000 y 2003 por "cólicos, estrés y dolores en el pecho"[273]. Los representantes informaron que padece de "dolencias de carácter ginecológico"[274]. Asimismo, los representantes indicaron que María 10, y su esposo, Juan 5, han "denunciado que las enfermedades sufridas por sus hijos se [debían] a la contaminación", razón por la cual "se han enfrentado a hostigamiento y amenazas de diferentes tipos"[275].

55. **María 4,** quien es hija de María 10 y Juan 5, nació el 6 de febrero de 1994 y vivió en La Oroya Antigua antes de mudarse a Lima[276]. Ha padecido de bronquitis desde los dos años y de "inflamación de los riñones", desde los ocho años[277]. Asímismo, ha sufrido de dolores de cabeza y de cuerpo, "problemas cutáneos" en los dedos de las manos y el rostro, ardor y adormecimiento en los pies, "dolores en el oído izquierdo", y "problemas gastrointestinales"[278]. Los representantes informaron que padece de "dolencias de carácter ginecológico"[279].

56. **Juan 5**, esposo de María 10, nació el 12 de diciembre de 1959 en La Oroya[280]. Sufrió de "insuficiencia cardiaca" y falleció el 19 de septiembre de 2009, a los 49 años, debido a una hemorragia en razón de una "anticoagulación por warfarina"[281]. Asimismo, ha padecido de cansancio, ansiedad y depresión, "problemas con la vesícula", "complicaciones en el oído derecho", "inflamación del hígado", adormecimiento del cuerpo, "problemas respiratorios en los bronquios", tos, "problemas gastrointestinales" e hipertensión[282]. **María 14** nació el 16 de septiembre de 1988. Tenía "problemas en la

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270 *Cfr*. Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

271 *Cfr*. Declaración de Juan 25 (expediente de prueba, folios 29023 a 29028).

272 *Cfr*. Expediente médico de María 10 (expediente de prueba, folios 24696 a 24702), y Escrito de solicitudes, argumentos y pruebas, pág. 109 (expediente de fondo, folio 227).

273 *Cfr*. Expediente médico de María 10 (expediente de prueba, folios 24696 a 24702).

274 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 109 (expediente de fondo, 227).

275 *Cfr*. Expediente médico de María 10 (expediente de prueba, folios 24696 a 24702), y Escrito de solicitudes, argumentos y pruebas, pág. 109 (expediente de fondo, folio 227).

276 *Cfr*. Expediente médico de María 4 (expediente de prueba, folios 24668 a 24673), y Escrito de solicitudes, argumentos y pruebas, pág. 109 (expediente de fondo, folio 227).

277 *Cfr*. Expediente médico de María 4 (expediente de prueba, folios 24668 a 24673).

278 *Cfr*. Expediente médico de María 4 (expediente de prueba, folios 24668 a 24673).

279 *Cfr*. Expediente médico de María 4 (expediente de prueba, folios 24668 a 24673), y Escrito de solicitudes, argumentos y pruebas, pág. 109 (expediente de fondo, folio 227).

280 *Cfr*. Expediente médico de Juan 5 (expediente de prueba, folios 24309 a 24312).

281 *Cfr*. Expediente médico de Juan 5 (expediente de prueba, folios 24309 a 24312).

282 *Cfr*. Expediente médico de Juan 5 (expediente de prueba, folios 24309 a 24312).

piel" y fue diagnosticada con "linfoma cutáneo de células" cuando tenía 14 años. Falleció el 4 de abril de 2006, a los 17 años[283].

Q. Familia 17 : María 19 y Juan 32, y sus hijos Juan 33, Juan 34, y Juan 37.

57. **María 19** nació el 22 de octubre de 1971 y vive en La Oroya Antigua[284]. Ha padecido de "infecciones respiratorias, intestinales e hipersensibilidad a los fármacos", dolor en el lado izquierdo de la cabeza, y "ardor" y "lagrimeo" en los ojos[285]. Muestras de sangre y orina de María 19 tomadas en 2008 y 2009 reflejaron los siguientes dosajes de metales pesados: 12,3 µg/dL y 16,29 µg/dL de plomo en sangre en junio de 2008 y febrero de 2009, respectivamente; 80,7 µg/L de arsénico en orina de 24 horas, y 2,73 µg/L de cadmio en orina de 24 horas[286]. Estos niveles resultaron en la conclusión diagnóstica de "intoxicación crónica" por plomo, cadmio, y arsénico, "sin sintomatología específica"[287]. En esta misma evaluación, se concluyó que María 19 presentaba "anemia leve", "gingivitis bacteriana generalizada", y "caries dental[es]"[288].

58. **Juan 32** nació el 10 de noviembre de 1968 y ha vivido en La Oroya Antigua[289]. Muestras de sangre y orina tomadas en 2008 y 2009 reflejaron los siguientes dosajes de metales pesados: 17,63 µg/dL de plomo en sangre, 97,08 µg/L de arsénico en orina de 24 horas, y 1,85 µg/L en de cadmio en orina de 24 horas[290]. Estos niveles resultaron en la conclusión diagnóstica de "intoxicación crónica" por plomo, cadmio, y arsénico "sin sintomatología específica"[291]. En esta misma evaluación se concluyó que Juan 32 padecía de "caries dental[es]", "hiperactividad bronquial", "ansiedad y depresión leve con tratamiento" y estrés "post traumático"[292]. También ha presentado amigdalitis, faringitis, bronquitis, e "infecciones respiratorias e intestinales"[293].

59. **Juan 33** ha vivido en La Oroya Antigua desde que nació[294]. Ha padecido de "amigdalitis, faringitis, bronquitis, tos frecuente, dificultades para respirar, [y] exceso de flema", así como "cólicos", "diarrea", "dolores abdominales", "descoloración del esmalte de los dientes", "dolor de cabeza", e "irritación en los ojos"[295]. **Juan 34** nació

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283 *Cfr*. Expediente médico de María 14 (expediente de prueba, folios 24720 a 24741).

284 *Cfr*. Expediente médico de María 19 (expediente de prueba, folios 24769 a 24772), y Escrito de solicitudes, argumentos y pruebas, pág. 109 (expediente de fondo, folio 227).

285 *Cfr*. Expediente médico de María 19 (expediente de prueba, folios 24769 a 24772).

286 *Cfr*. Expediente médico de María 19 (expediente de prueba, folios 24769 a 24772).

287 *Cfr*. Expediente médico de María 19 (expediente de prueba, folios 24769 a 24772).

288 *Cfr*. Expediente médico de María 19 (expediente de prueba, folios 24769 a 24772).

289 *Cfr*. Expediente médico de Juan 32 (expediente de prueba, folios 24558 a 24563), y Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

290 *Cfr*. Expediente médico de Juan 32 (expediente de prueba, folios 24558 a 24563).

291 *Cfr*. Expediente médico de Juan 32 (expediente de prueba, folios 24558 a 24563).

292 *Cfr*. Expediente médico de Juan 32 (expediente de prueba, folios 24558 a 24563).

293 *Cfr*. Expediente médico de Juan 32 (expediente de prueba, folios 24558 a 24563).

294 *Cfr*. Expediente médico de Juan 33 (expediente de prueba, folio 24565), y Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

295 *Cfr*. Expediente médico de Juan 33 (expediente de prueba, folio 24565).

el 11 de octubre de 2006 y ha vivido en La Oroya Antigua desde que nació[296]. Ha presentado "descoloración en los dientes", "problemas gastrointestinales", y "diarrea"[297]. Muestras de sangre y orina tomadas en 2008 y 2009 reflejaron los siguientes dosajes de metales pesados: 44,42 µg/dL de plomo en sangre, 291,1 µg/L de arsénico en orina de 24 horas, y 2,04 µg/L de cadmio en orina de 24 horas[298]. Estos niveles resultaron en la conclusión diagnóstica de "intoxicación crónica" por plomo, cadmio, y arsénico "sin sintomatología específica"[299]. En esta misma evaluación, se concluyó que Juan 34 presentaba "anemia severa", "diarrea persistente", y "bronquitis crónica"[300].

60. **Juan 37** nació el 17 de julio de 1991 y vivió en La Oroya Antigua desde que nació, hasta salir de la ciudad por motivos del trabajo[301]. Ha padecido de "infecciones intestinales y respiratorias"[302]. Muestras de sangre y orina tomadas en 2008 y 2009 reflejaron los siguientes dosajes de metales pesados: 16,6 µg/dL y 22,21 µg/dL de plomo en sangre, en junio de 2008 y febrero de 2009, respectivamente; 26,26 µg/L de arsénico en orina de 24 horas, y 2,85 µg/L en 24 horas de cadmio en orina de 24 horas[303]. Estos niveles resultaron en la conclusión diagnóstica de "intoxicación crónica" por plomo y cadmio, "sin sintomatología específica"[304]. En esta misma evaluación se concluyó que Juan 37 presentaba "adolescencia tardía" y que había padecido de un "episodio depresivo grave con síntomas psicóticos"[305].

R. Individuos

61. **María 13** nació el 1 de marzo de 1959[306]. Vivió en La Oroya Antigua y posteriormente en "Villa el Sol", en las afueras de La Oroya[307]. Ha padecido de "dolores de cabeza intensos y mareos", "irritabilidad", "adormecimiento del cuerpo", "tos frecuente", "problemas en la piel", "convulsiones", "anemia leve", caries dentales, "rinofaringitis aguda", asma, "migraña", "cefalea tensional", "túnel carpal", "SMF crural", "lumbalgia", "pulpitis reversible" "hipoacusia EAD", tinnitus, "ansiedad", "depresión leve", y "estrés post traumático"[308]. Una prueba de sangre realizada en 2011 reflejó que tenía un nivel de 7,34 µg /dL de plomo en sangre, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg. /dL[309]. Los representantes informaron que

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296 *Cfr*. Expediente médico de Juan 34 (expediente de prueba, folios 24567 a 24570), y Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

297 *Cfr*. Expediente médico de Juan 34 (expediente de prueba, folios 24567 a 24570).

298 *Cfr*. Expediente médico de Juan 34 (expediente de prueba, folios 24567 a 24570).

299 *Cfr*. Expediente médico de Juan 34 (expediente de prueba, folios 24567 a 24570).

300 *Cfr*. Expediente médico de Juan 34 (expediente de prueba, folios 24567 a 24570).

301 *Cfr*. Expediente médico de Juan 37 (expediente de prueba, folios 24580 a 24585), y Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

302 *Cfr*. Expediente médico de Juan 37 (expediente de prueba, folios 24580 a 24585).

303 *Cfr*. Expediente médico de Juan 37 (expediente de prueba, folios 24580 a 24585).

304 *Cfr*. Expediente médico de Juan 37 (expediente de prueba, folios 24580 a 24585).

305 *Cfr*. Expediente médico de Juan 37 (expediente de prueba, folios 24580 a 24585).

306 *Cfr*. Expediente médico de María 13 (expediente de prueba, folios 24713 a 24718), y Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

307 *Cfr*. Expediente médico de María 13 (expediente de prueba, folios 24713 a 24718), y Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

308 *Cfr*. Expediente médico de María 13 (expediente de prueba, folios 24713 a 24718).

309 *Cfr*. Expediente médico de María 13 (expediente de prueba, folios 24713 a 24718).

padece de "elevad[os] [niveles de] glucosa", "rinofaringitis aguda", "inflamación de las encías (pulpitis reversible múltiple)", "hipoacusia – tinnitus", dolor lumbar o de espalda y "dolores en los ojos y carnosidad en ojo izquierdo"[310]. Asimismo, indicaron que fue "victima de hostilidades por parte de trabajadores [de Doe Run Perú]", lo que "le produjo ansiedad, depresión leve, [y] estrés post traumático"[311].

62. **Juan 13** ha vivido en La Oroya a 30 minutos del Complejo Metalúrgico. Ha padecido de "problemas respiratorios" y "dolores de cabeza"[312]. Una prueba de sangre realizada en 2011 reflejó que tenía un nivel de 5,33 µg /dL de plomo en sangre, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg. Los representantes informaron que presenta "arritmia cardiaca" e "hipertensión arterial alta"[313].

63. **Juan 18** nació el 18 de junio de 1930 en La Oroya y ha vivido la mayoría de su vida en La Oroya Antigua[314]. Ha padecido de "dolores de cabeza constantes, disminución de fuerza de miembros, mareos, adormecimiento del cuerpo, irritabilidad, tos frecuente y saturnismo"[315]. Muestras de sangre y orina realizadas en 2009 reflejaron un nivel de 10,51 µg/dL de plomo en sangre, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg/dL. Asimismo, el dosaje evidenció niveles de 2,37 µg/L de cadmio en orina[316]. Estos niveles resultaron en la conclusión diagnóstica de "intoxicación crónica" por plomo y cadmio "sin sintomatología específica"[317]. En esta misma evaluación se concluyó que Juan 18 presentaba "síndrome obstructivo bronquial", "bronquitis crónica", y "degeneración macular relacionad[a] con la edad"[318]. También ha padecido de anemia leve, uremia, dolores de cabeza, disminución de fuerza en los miembros, mareos, irritabilidad, tos frecuentes y saturnismo[319]. Juan 18 declaró que "las autoridades nunca prestaron atención a la población" y que "no rec[ordaba] haber recibido información de la operación del complejo metalúrgico de La Oroya por parte del Estado"[320].

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310 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

311 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

312 *Cfr*. Expediente médico de Juan 13 (expediente de prueba, folios 24365 a 24368).

313 *Cfr*. Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

314 *Cfr*. Expediente médico de Juan 18 (expediente de prueba, folios 24388 a 24396), y Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

315 *Cfr*. Expediente médico de Juan 18 (expediente de prueba, folios 24388 a 24396), y Declaración de Juan 18 (expediente de prueba, folios 29015 a 29016).

316 *Cfr*. Expediente médico de Juan 18 (expediente de prueba, folios 24388 a 24396), y Declaración de Juan 18 (expediente de prueba, folios 29015 a 29016).

317 *Cfr*. Expediente médico de Juan 18 (expediente de prueba, folios 24388 a 24396), y Declaración de Juan 18 (expediente de prueba, folios 29015 a 29016).

318 *Cfr*. Expediente médico de Juan 18 (expediente de prueba, folios 24388 a 24396), y Declaración de Juan 18 (expediente de prueba, folios 29015 a 29016).

319 *Cfr*. Expediente médico de Juan 18 (expediente de prueba, folios 24388 a 24396), y Escrito de solicitudes, argumentos y pruebas, pág. 110 (expediente de fondo, folio 228).

320 *Cfr*. Expediente médico de Juan 18 (expediente de prueba, folios 24388 a 24396), y Declaración de Juan 18 (expediente de prueba, folios 29015 a 29016).

64. **Juan 12** nació el 28 de agosto de 1948 y laboró en La Oroya desde 1972 hasta 2003[321]. Juan 12 presentó síntomas de parestesias, cansancio, disminución de fuerza en la mano izquierda, y disminución de la agudeza visual y auditiva[322]. En una evaluación médica realizada en 2008 se concluyó que Juan 12 presentaba gingivitis y caries dentales, ansiedad y depresión leve, parasitosis intestinal, y neumoconiosis grado I[323]. En 2009 padeció de "gastritis crónica superficial", "Neumoconiosis Clase II" y problemas de audición[324]. Una prueba de sangre realizada en 2011 reflejó que tenía un nivel de 5,03 µg /dL de plomo en sangre, cuando el Límite de Cuantificación del Método (LCM) se encontraba en 5,00 µg /dL [325]. Falleció el 24 de junio de 2020 a causa de Covid-19[326]. Su hijo, C.A.M.H., declaró que cuando Juan 12 "estuvo en política y denunció el tema de la contaminación, fue amenazado y amedrantado"[327]. Además, indicó que Juan 12 tuvo "artrosis", "dos pre infartos", "graves problemas dermatológicos y articulares", y "artrosis en ambas rodillas"[328].

65. **Juan 19** nació el 17 de junio de 1956[329]. Ha padecido de "insomnio", "constantes resfríos", "irritabilidad", "dolor de cabeza", "pérdida de audición", "erupciones en la piel y amargura en la boca"[330]. De acuerdo con los dosajes realizados entre el 2008 y 2009 por el Ministro de Salud, presentaba una "intoxicación crónica" por cadmio "sin sintomatología específica", así como "probable intoxicación" por arsénico[331]. Dicha evaluación concluyó que padecía además de "hipertensión arterial", "hernia umbilical", "necrosis pulpar", "caries", "gingivitis", "hiperplasia benigna de próstata", "nevus rubí", "queratosis solares", "xerosis", "onicomicosis", "queratodermia plantar", "dermatitis de contacto", "ansiedad y depresión leve a moderada", y estrés "post traumático"[332]. El 25 de septiembre de 2011 falleció por causa de un accidente cerebro vascular[333].

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321 *Cfr*. Expediente médico de Juan 12 (expediente de prueba, folios 24347 a 24363), y Declaración del hijo de Juan 12 (expediente de prueba, folios 29023 a 29028).

322 *Cfr*. Expediente médico de Juan 12 (expediente de prueba, folios 24347 a 24363).

323 *Cfr*. Expediente médico de Juan 12 (expediente de prueba, folios 24347 a 24363).

324 *Cfr*. Expediente médico de Juan 12 (expediente de prueba, folios 24347 a 24363), y Declaración del hijo de Juan 12 (expediente de prueba, folios 29023 a 29028).

325 *Cfr*. Expediente médico de Juan 12 (expediente de prueba, folios 24347 a 24363), y Declaración del hijo de Juan 12 (expediente de prueba, folios 29023 a 29028).

326 *Cfr*. Certificado de muerte de Juan 12 expedido por la División médico legal de La Molina, en Lima, de 23 de junio de 2020 (expediente de prueba, folio 17906).

327 *Cfr*. Expediente médico de Juan 12 (expediente de prueba, folios 24347 a 24363), y Declaración del hijo de Juan 12 (expediente de prueba, folios 29023 a 29028).

328 *Cfr*. Expediente médico de Juan 12 (expediente de prueba, folios 24347 a 24363), y Declaración del hijo de Juan 12 (expediente de prueba, folios 29023 a 29028).

329 *Cfr*. Expediente médico de Juan 19 (expediente de prueba, folios 24397 a 24405).

330 *Cfr*. Expediente médico de Juan 19 (expediente de prueba, folios 24397 a 24405).

331 *Cfr*. Expediente médico de Juan 19 (expediente de prueba, folios 24397 a 24405).

332 *Cfr*. Ministerio de Salud, Informe No. 019-2009-DGSP-ESNP/MINSA, Conclusión diagnóstica de los beneficiarios de la medida cautelar No. 271-05, de 16 de marzo de 2009 (expediente de prueba, folios 24400 a 24405).

333 *Cfr*. Certificado de defunción de Juan 19 expedido por la División médico legal de Yauli de 25 de septiembre de 2011 (expediente de prueba, folio .773).

66. **Juan 29** ha vivido en La Oroya desde 1976 y solía trabajar en el Complejo Metalúrgico como mecánico de producción desde de 1980[334]. Ha padecido de "neumoconiosis" e "hipoacusia neurosensorial severa"[335]. Asimismo, ha padecido de "sueño", "fatiga", "tos frecuente", y "agitación y vómitos constantes", y, debido a problemas pulmonares, "expulsa flema gris"[336].

[334] *Cfr*. Expediente médico de Juan 29 (expediente de prueba, folios 24522 a 24527), y Escrito de solicitudes, argumentos y pruebas, pág. 111 (expediente de fondo, folio 229).

[335] *Cfr*. Expediente médico de Juan 29 (expediente de prueba, folios 24522 a 24527).

[336] *Cfr*. Expediente médico de Juan 29 (expediente de prueba, folios 24522 a 24527).

VOTO CONCURRENTE DE LOS JUECES

RICARDO C. PÉREZ MANRIQUE,

EDUARDO FERRER MAC-GREGOR POISOT

Y RODRIGO MUDROVITSCH

CASO HABITANTES DE LA OROYA VS. PERÚ

SENTENCIA DE 27 DE NOVIEMBRE DE 2023
(Excepciones Preliminares, Fondo, Reparaciones y Costas)

INTRODUCCIÓN

1. No es la primera vez que la Corte Interamericana de Derechos Humanos (en adelante "la Corte IDH" o "el Tribunal") se pronuncia sobre el derecho al medio ambiente. Estimamos, sin embargo, la pertinencia de emitir este voto concurrente para resaltar como, paulatinamente, este derecho se hace cada vez más latente en el ámbito interamericano, especialmente desde la Opinión Consultiva No. 23 de 2017[1].

2. El reconocimiento del derecho al medio ambiente ha llegado de forma tardía en todas las latitudes, como recientemente lo ha realizado la Organización de las Naciones Unidas (ONU) en 2022[2], pero el ritmo acelerado de su proyección a nivel internacional hace que sea necesario visibilizar su importancia, tanto para las generaciones actuales como para las futuras.

3. En el caso *Habitantes de La Oroya Vs. Perú,* la Corte IDH puso en el centro de gravedad de la sentencia al derecho al medio ambiente y su vinculación con otros derechos que estimó violados. Se declaró la responsabilidad internacional del Estado por la vulneración de los derechos al medio ambiente, salud, vida, vida digna, integridad personal, niñez, acceso a la información, participación política, incumplimiento del deber de investigar y recurso judicial efectivo contenidos en los artículos 26, 4.1, 5, 13, 23, 8.1 y 25, en relación con las obligaciones generales de los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos (en adelante "la Convención Americana" o "Pacto de San José"), en perjuicio de 80 habitantes de La Oroya[3], teniendo dichas violaciones, por su naturaleza, un "alcance colectivo"[4]. En el caso, la Corte IDH declaró violados todos estos derechos ya que se habían afectado como consecuencia de los altos niveles de contaminación derivados del Complejo Metalúrgico de La Oroya[5], que implicó más de cien años de violaciones con riesgos de irreversibilidad. En su sentencia, el Tribunal dio por probado la referida contaminación

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[1] *Cfr. Medio ambiente y derechos humanos (obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal - interpretación y alcance de los artículos 4.1 y 5.1, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos)*. Opinión Consultiva OC-23/17 de 15 de noviembre de 2017. Serie A No. 23.

[2] Asamblea General de las Naciones Unidas, "Promoción y protección de los derechos humanos: cuestiones de derechos humanos, incluidos otros medios de mejorar el goce efectivo de los derechos humanos y las libertades fundamentales", Resolución A/76/L.75, de 26 de julio de 2022.

[3] Véanse Anexo 2 (80 víctimas identificadas) y Anexo 3 (hechos probados respecto de los padecimientos y tratamiento médico a las víctimas de la sentencia).

[4] Véanse párrafos 179 y 324, así como Resolutivo 3 de la sentencia.

[5] La Corte IDH consideró que las actividades metalúrgicas de este Complejo son la causa principal de la contaminación ambiental por plomo, arsénico, cadmio, dióxido de azufre y otros metales en el aire, el suelo y el agua en La Oroya. Véanse párrafos 158, 159 y 263 de la sentencia.

y que el Estado conocía esta situación que constituía un riesgo significativo para el ambiente y la salud de las personas[6].

4. A nuestro juicio, este caso pone de relieve y cristaliza de manera contundente el impacto que tiene la no garantía de los derechos sociales —como el medio ambiente y la salud— en las personas, especialmente cuando se trata de afectaciones que se prolongan en el tiempo sin que se adopten las medidas que son adecuadas y efectivas (con base a las obligaciones ambientales). En particular, deseamos poner de manifiesto cómo la jurisprudencia y normativa interamericana se ha ido transformando, evolucionando y ampliando, de manera gradual, al grado de identificar que el derecho al medio ambiente es un derecho autónomo tutelado por el artículo 26 de la Convención Americana —en su dimensión individual y colectiva—, y que en los últimos años se ha puesto en el centro de la jurisprudencia interamericana.

5. De ahí que estimamos pertinente desarrollar en el presente voto cinco ámbitos relacionados con el derecho al medio ambiente y su impacto en las generaciones presentes y futuras. Por una parte, (i) visibilizar cómo este fallo se inserta en un contexto que hemos denominado "verde" en el derecho internacional de los derechos humanos (*infra párrs. 6 a 15*). En segundo lugar, (ii) la evolución de la jurisprudencia interamericana sobre medio ambiente (*infra párrs. 16 a 37*). En tercer término, (iii) destacar algunos aspectos en materia de medio ambiente que se abordan en la sentencia (*infra párrs. 38 a 45*). En cuarto lugar, (iv) visibilizar la dimensión colectiva de este derecho y su relevancia en materia de reparaciones colectivas y de no repetición (*infra párrs. 46 a 70*). En quinto término, (v) destacar el carácter *de jus cogens* de la protección del medio ambiente y profundizar en el principio de equidad intergeneracional (*infra párrs. 71 a 160*). Finalmente, se expondrán unas conclusiones generales (*infra párrs. 161 a 177*).

I. "UN CONTEXTO VERDE": UNA RADIOGRAFIA DE LOS SISTEMAS INTERNACIONALES DE PROTECCIÓN DE DERECHOS HUMANOS SOBRE EL MEDIO AMBIENTE Y EL CAMBIO CLIMÁTICO

6. Durante los últimos años el derecho nacional y el derecho internacional de los derechos humanos han centrado su atención en una problemática que ya no solo se queda aislada en un espacio geográfico de nuestro planeta: las afectaciones al medio ambiente y su impacto en el cambio climático. Al realizar una radiografía del derecho internacional actual, podemos constatar la existencia de un derecho que podemos denominar "verde".

I.1. Sistema de Naciones Unidas

7. En el caso del Sistema Universal de Derechos Humanos, un punto de inflexión ocurrió en el año 2022 cuando la Asamblea General de las Naciones Unidas reconoció "el derecho a un medio ambiente limpio, saludable y sostenible como un derecho humano"[7].

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[6] Véanse párrafos 158, 159 y 263 de la sentencia.

[7] Asamblea General de las Naciones Unidas, Resolución A/76/L.75, "Promoción y protección de los derechos humanos: cuestiones de derechos humanos, incluidos otros medios de mejorar el goce efectivo de los derechos humanos y las libertades fundamentales", de 26 de julio de 2022.

8. Este paso no fue en aislado, sino que cristalizó la paulatina evolución de este derecho y que, en diferentes jurisdicciones regionales internacionales de derechos humanos se había avanzado en la materia. Por ejemplo, en el mismo seno de Naciones Unidas el Comité de los Derechos del Niño, aunque no ha entrado en el fondo del asunto sobre la materia, sí ha dejado entrever que el derecho al medio ambiente puede ser potencialmente analizado desde la Convención sobre los derechos de la niñez[8]. De igual forma, el Comité de Derechos Humanos ha tenido recientes pronunciamientos que dan cuenta, de forma indirecta, que las afectaciones al medio ambiente podrían tener un impacto en derechos protegidos por el Pacto Internacional de Derechos Civiles y Políticos[9].

9. Por otro lado, se debe poner especial atención a la Observación General No. 26 (2022) del Comité de Derechos Económicos, Sociales y Culturales relativa a los derechos sobre la tierra y los derechos económicos, sociales y culturales, en la cual se indicó que "el uso sostenible de la tierra es esencial para garantizar el derecho a un medio ambiente limpio, saludable y sostenible y para promover el derecho al desarrollo, entre otros derechos"[10]. De igual forma, el Comité de los Derechos del Niño, en su Observación General No. 26 (2023), ha señalado que "un medio ambiente limpio, saludable y sostenible es tanto un derecho humano per se cómo una condición necesaria para el pleno disfrute de un amplio abanico de derechos"[11].

10. Tampoco podemos olvidar el mandato y los diversos informes que ha emitido el Relator Especial de Naciones Unidas sobre los derechos humanos y el medio ambiente, así como el mandato y los diversos informes proferidos por el Relator Especial sobre el cambio climático[12].

11. Finalmente, la importancia de la temática a nivel global se advierte con el paso trascendental que ha dado el Consejo General de Naciones Unidas al solicitarle a la Corte Internacional de Justicia una Opinión Consultiva sobre las obligaciones de los Estados con respecto al cambio climático[13].

I.2. Sistema Europeo de Derechos Humanos.

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[8] Véase Chiara Sacchi y otros (representados por los abogados Scott Gilmore y otros, de Hausfeld LLP, y Ramin Pejan y otros, de Earthjustice), CRC/C/88/D/104/2019, 11 de noviembre de 2019, párr. 10.7.

[9] Véase, al respecto, los casos Portillo Cáceres Vs. Paraguay, CCPR/C/126/D/2751/2016, 20 de septiembre de 2019 y Daniel Billy y otros Vs. Australia, CCPR/C/135/D/3624/2019, 22 de septiembre de 2022.

[10] Observación general núm. 26 (2022), relativa a los derechos sobre la tierra y los derechos económicos, sociales y culturales, E/C.12/GC/26, 24 de enero de 2023.

[11] Observación general núm. 26 (2023), relativa a los derechos del niño y el medio ambiente, con particular atención al cambio climático, CRC/C/GC/26, 22 de agosto de 2023.

[12] Para consultar el mandato del Relator de Naciones Unidas sobre los derechos humanos y el medio ambiente puede verse en: https://www.ohchr.org/es/special-procedures/sr-environment. Y en el caso del Relator de Naciones Unidas sobre el cambio climático puede consultarse: https://www.ohchr.org/es/specialprocedures/sr-climate-change.

[13] Las preguntas que planteó fueron: a) ¿Cuáles son las obligaciones que tienen los Estados en virtud del derecho internacional de garantizar la protección del sistema climático y otros elementos del medio ambiente frente a las emisiones antropógenas de gases de efecto invernadero en favor de los Estados y de las generaciones presentes y futuras?; b) ¿Cuáles son las consecuencias jurídicas que se derivan de esas obligaciones para los Estados que, por sus actos y omisiones, hayan causado daños significativos al sistema climático y a otros elementos del medio ambiente, con respecto a: i) Los Estados, incluidos, en particular, los pequeños Estados insulares en desarrollo, que, debido a sus circunstancias geográficas y a su nivel de desarrollo, se ven perjudicados o especialmente afectados por los efectos adversos del cambio climático o son particularmente vulnerables a ellos; ii) Los pueblos y las personas de las generaciones presentes y futuras afectados por los efectos adversos del cambio climático?". Resolución A/77/L.58,Solicitud de una opinión consultiva a la Corte Internacional de Justicia sobre las obligaciones de los Estados con respecto al cambio climático, de 1 de marzo de 2023.

12. Ni el Convenio Europeo de Derechos Humanos ni la Carta Social Europea de Derechos Humanos han reconocido el derecho al medio ambiente sano de manera expresa. En el caso del Tribunal Europeo, se debe precisar que el reconocimiento del medio ambiente se ha realizado mediante lo que se ha denominado "justiciabilidad indirecta" como dan cuenta diversos asuntos. Sin embargo, lo relevante, en este momento, en la sede de ese Tribunal, es que existen algunos pronunciamientos pendientes que involucran de manera frontal las obligaciones en materia de medio ambiente y cambio climático de los países que integran el Consejo de Europa[14].

13. Por otro lado, quizá el aspecto más innovador lo ha realizado el Comité Europeo de Derechos Sociales, el cual se encarga de la supervisión y aplicación de la Carta Social Europea. Si bien la Carta de Turín no contempla "un derecho al medio ambiente" el referido Comité ha indicado que este derecho se encuentra subsumido en el derecho a la salud protegido por el artículo 11 de la Carta de Turín[15].

I.3. Sistema Africano de Derechos Humanos

14. Finalmente, en el caso de este Sistema, la Carta Africana de Derechos Humanos y de los Pueblos indica que: *"Todos los pueblos tendrán derecho a un medio ambiente general satisfactorio y favorable a su desarrollo".* Al respecto, la Comisión Africana de Derechos Humanos y de los Pueblos, ha señalado que el "derecho al medio ambiente" se encuentra garantizado por lo contemplado en el artículo 24. Con base en ello, ha precisado que el derecho al medio ambiente se encuentra estrechamente relacionado con los derechos económicos, sociales y culturales, en la medida que el medio ambiente afecta la calidad de vida y la seguridad de los individuos[16].

15. Así, el artículo 24 impone a los Estado obligaciones claras, lo que se debe traducir en medidas razonables para prevenir la contaminación y la degradación ecológica, promover la conservación y asegurar el desarrollo y uso ecológicamente sostenible de los recursos naturales. Además, se impone a los Estados que se deben ordenar o al menos permitir un seguimiento científico independiente de los entornos amenazados, exigir y publicar estudios de impacto ambiental y social antes de cualquier desarrollo industrial importante; realizar un seguimiento adecuado y proporcionar información a aquellas comunidades expuestas a materiales y actividades peligrosos y brindando oportunidades significativas para que las personas sean escuchadas y participen en las decisiones de desarrollo que afectan a sus comunidades[17].

II. EL DERECHO AL MEDIO AMBIENTE SANO EN LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA

1. El medio ambiente en la jurisprudencia por la vía de la conexidad con los derechos civiles y políticos

[14] Al respecto, pueden consultarse los *fast feech* publicados por la Corte Europea de Derechos Humanos sobre medio ambiente y cambio climático disponibles en: https://www.echr.coe.int/documents/d/echr/FS_Climate_change_ENG y https://www.echr.coe.int/documents/d/echr/FS_Environment_ENG.

[15] Comité Europeo de Derechos Sociales, Marangopoulos Foundation for Human Rights (MFHR)v. Greece, Complaint No. 30/2005, 6 de diciembre de 2006, párrs. 195 a 198.

[16] Comisión Africana de Derechos Humanos y de los Pueblos, Caso Ogoni Vs. Nigeria, 27 de octubre de 2001, párr. 51.

[17] Comisión Africana de Derechos Humanos y de los Pueblos, Caso Ogoni Vs. Nigeria, 27 de octubre de 2001, párrs. 52 y 53.

16. El derecho al medio ambiente sano ha sido protegido de manera indirecta través del artículo 21 (mediante la propiedad colectiva de los pueblos indígenas y tribales), artículo 23 (mediante la participación efectiva de consulta) y el artículo 13 (mediante el acceso a la información).

17. La protección al medio ambiente ha tenido mayor presencia en la jurisprudencia interamericana en lo relativo a la propiedad colectiva de los pueblos y comunidades indígenas y tribales, que ha protegido principalmente el Tribunal Interamericano mediante el artículo 21 de la Convención Americana. La Corte IDH ha resaltado la importancia de la protección, preservación y mejoramiento del medio ambiente contenido en el artículo 11 del Protocolo de San Salvador[18], como un derecho humano esencial relacionado con el derecho a la vida digna derivado del artículo 4 del Pacto de San José; a la luz del *corpus iuris* internacional existente sobre la protección especial que requieren los miembros de las comunidades indígenas "en relación con el deber general de garantía contenido en el artículo 1.1 y con el deber de desarrollo progresivo contenido en el artículo 26 de la misma"[19].

18. La Corte IDH ha reconocido que las comunidades sufren de la desposesión de los territorios indígenas y tribales, daños que se le ocasionan al mismo territorio y que, además, los pueblos indígenas y tribales *tienen derecho a la conservación y protección de su medio ambiente* y de la capacidad productiva de sus territorios y recursos naturales[20]. De esta manera, podemos advertir dos vertientes de garantías de protección: a) la consulta —en específico los estudios de impacto ambiental y social— y b) la compatibilidad de las reservas naturales con los derechos tradicionales indígenas.

19. Sobre la consulta indígena y la falta de estudios de impacto ambiental y social como garantía de protección al ambiente, en el caso del *Pueblo Saramaka Vs. Surinam,* ante la ausencia de: a) un proceso de consulta previa, libre, informada y de buena fe, b) beneficios compartidos y c) estudios de impacto ambiental y social; el Tribunal Interamericano consideró que las concesiones madereras otorgadas por el Estado sobre el territorio Saramaka *dañó el ambiente* y el deterioro tuvo un impacto negativo sobre las tierras y los recursos naturales que los miembros del pueblo habían utilizado tradicionalmente, los que se encuentran, en todo o en parte, dentro de los límites del territorio sobre el cual tenían un derecho a la propiedad comunal. Además, el Estado no había llevado a cabo la supervisión de estudios ambientales y sociales previos ni puso en práctica garantías o mecanismos a fin de asegurar que estas concesiones madereras no causaran un daño mayor al territorio y comunidades del clan Saramaka. En suma, concluyó que se configuraba una violación al derecho de propiedad de los

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[18] *Protocolo adicional a la Convención Americana sobre Derechos Humanos en materia de derechos economicos, sociales y culturales, Protocolo de San Salvador*, OEA/Ser.A/44, aprobado el 17 de noviembre de 1988.

[19] *Cfr. Caso Pueblos Kaliña y Lokono Vs. Surinam. Fondo, Reparaciones y Costas*. Sentencia de 25 de noviembre de 2015. Serie C No. 309, párr. 172, *Caso Comunidad Indígena Yakye Axa Vs. Paraguay. Fondo Reparaciones y Costas.* Sentencia 17 de junio de 2005. Serie C No. 125, párr. 163, y *Caso Comunidad Indígena Xákmok Kásek Vs. Paraguay. Fondo, Reparaciones y Costas*. Sentencia de 24 de agosto de 2010. Serie C No. 214, párr. 187.

[20] *Cfr. Caso Comunidad Garífuna Triunfo de la Cruz y sus miembros Vs. Honduras. Fondo, Reparaciones y Costas*. Sentencia de 08 de octubre de 2015. Serie C No. 305, párr. 293, y *Caso Comunidad Garífuna de Punta Piedra y sus miembros Vs. Honduras. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 08 de octubre de 2015. Serie C No. 304, párr. 346.

integrantes del pueblo Saramaka reconocido en el artículo 21 del Pacto de San José, en relación con el artículo 1.1 de dicho instrumento[21].

20. En el caso del *Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador*, sobre la obligación de llevar a cabo estudios de impacto ambiental, la Corte IDH se refirió por primera vez al Convenio 169 de la Organización Internacional del Trabajo y consideró que los gobiernos deberían velar para que se efectúen los estudios de impacto ambiental y social, en cooperación con los pueblos interesados, a fin de evaluar la incidencia social, espiritual y cultural y sobre el medio ambiente que las actividades de desarrollo previstas puedan tener sobre esos pueblos. Los resultados de los estudios de impacto ambiental y social deberán ser considerados como criterios fundamentales para la ejecución de las actividades mencionadas[22].

21. De esta forma, tanto en los casos *Saramaka* y *Sarayaku,* el Tribunal Interamericano consolidó el criterio consistente en que la realización de tales estudios constituye una de las salvaguardas para garantizar que las restricciones impuestas a las comunidades indígenas o tribales respecto del derecho a la propiedad por la emisión de concesiones dentro de su territorio no impliquen una denegación de su subsistencia como pueblo. En ese sentido, la Corte IDH estableció que los Estados deben garantizar que no se emitirá ninguna concesión dentro del territorio de una comunidad indígena hasta que entidades independientes y técnicamente capaces, bajo la supervisión del Estado, realicen un estudio previo de impacto social y ambiental.

22. Además, la Corte IDH determinó que los Estudios de Impacto Ambiental "sirven para *evaluar el posible daño o impacto* que un proyecto de desarrollo o inversión puede tener sobre la propiedad y comunidad en cuestión. El objetivo de [los mismos] no es [únicamente] tener alguna medida objetiva del posible impacto sobre la tierra y las personas, sino también [...] asegurar que los miembros del pueblo [...] tengan conocimiento de los posibles riesgos, incluidos los riesgos ambientales y de salubridad", para que puedan evaluar si aceptan el plan de desarrollo o inversión propuesto, "con conocimiento y de forma voluntaria"[23].

23. Respecto al segundo punto mencionado, relativo a la compatibilidad de las reservas naturales con los derechos tradicionales indígenas, la Corte IDH también ha reconocido que la protección al medio ambiente puede ser una causa de utilidad pública, lo cual puede justificar el motivo y el fin de una expropiación, en relación con la privación del derecho a la propiedad privada[24]. Respecto al establecimiento de las áreas

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[21] *Cfr. Caso del Pueblo Saramaka Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 54.

[22] *Cfr. Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador. Fondo y reparaciones*. Sentencia de 27 de junio de 2012. Serie C No. 245, párr. 204.

[23] Por otro lado, la Corte IDH ha establecido que "los Estudios de Impacto Ambiental deben realizarse conforme a los estándares internacionales y buenas prácticas al respecto; respetar las tradiciones y cultura de los pueblos indígenas; y ser concluidos de manera previa al otorgamiento de la concesión, ya que uno de los objetivos de la exigencia de dichos estudios es garantizar el derecho del pueblo indígena a ser informado acerca de todos los proyectos propuestos en su territorio. Por lo tanto, la obligación del Estado de supervisar los Estudios de Impacto Ambiental coincide con su deber de garantizar la efectiva participación del pueblo indígena' en el proceso de otorgamiento de concesiones. Además, el Tribunal agregó que uno de los puntos sobre el cual debiera tratar el estudio de impacto social y ambiental es el impacto acumulado que han generado los proyectos existentes y los que vayan a generar los proyectos que hayan sido propuestos". *Cfr. Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador, supra*, párrs. 204 y 206 y *Caso del Pueblo Saramaka Vs. Surinam. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 12 de agosto de 2008. Serie C No. 185, párr. 40.

[24] *Cfr. Caso Salvador Chiriboga Vs. Ecuador. Excepción Preliminar y Fondo*. Sentencia de 6 de mayo de 2008. Serie C No. 179, párr. 76.

protegidas que causan limitaciones a los derechos territoriales de los pueblos indígenas, en el caso *Xákmok Kásek Vs. Paraguay*, el Tribunal determinó que "[...] el Estado deb[ía] adoptar las medidas necesarias para que [su legislación interna relativa a un área protegida] no [fuera] un obstáculo para la devolución de las tierras tradicionales a los miembros de la Comunidad"[25]. Complementando lo anterior, en el caso *Kaliña y Lokono Vs. Surinam*, la Corte IDH precisó que:

> 173. La Corte considera relevante hacer referencia a la necesidad de compatibilizar la protección de las áreas protegidas con el adecuado uso y goce de los territorios tradicionales de los pueblos indígenas. En este sentido, la Corte estima que un área protegida, consiste no solamente en la dimensión biológica, sino también en la sociocultural y que, por tanto, incorpora un enfoque interdisciplinario y participativo. En este sentido, los pueblos indígenas, por lo general, pueden desempeñar un rol relevante en la conservación de la naturaleza, dado que ciertos usos tradicionales conllevan prácticas de sustentabilidad y se consideran fundamentales para la eficacia de las estrategias de conservación. Por ello, el respeto de los derechos de los pueblos indígenas puede redundar positivamente en la conservación del medioambiente. Así, el derecho de los pueblos indígenas y las normas internacionales de medio ambiente deben comprenderse como derechos complementarios y no excluyentes[26].

24. La Corte IDH ha sido de la idea de que, en principio, existe una compatibilidad entre las áreas naturales protegidas y el derecho de los pueblos indígenas y tribales en la protección de los recursos naturales sobre sus territorios, destacando que los pueblos indígenas y tribales, por su interrelación con la naturaleza y formas de vida, pueden contribuir de manera relevante en dicha conservación. En este sentido, los criterios de a) participación efectiva, b) acceso y uso de sus territorios tradicionales y c) de recibir beneficios de la conservación —todos ellos, siempre y cuando sean compatibles con la protección y utilización sostenible— resultan elementos fundamentales para alcanzar dicha compatibilidad[27].

25. En suma, este Tribunal Interamericano ha estimado que los Estados vulneran los derechos a la propiedad colectiva, identidad cultural y participación en asuntos públicos de las víctimas, principalmente al impedir la participación efectiva y el acceso a parte de su territorio tradicional y recursos naturales, así como al no garantizar de manera efectiva el territorio tradicional de las comunidades afectadas por la degradación del medio ambiente, lo cual configura una violación de los artículos 21 y 23 de la Convención Americana[28].

26. Respecto al derecho a buscar y recibir información, protegido por el artículo 13 de la Convención Americana, en el caso *Claude Reyes y otros Vs. Chile,* ante una negativa del Estado de brindar a las víctimas toda la información que requerían del Comité de Inversiones Extranjeras, en relación con la empresa forestal Trillium y el Proyecto Río Cóndor; el cual era un proyecto de deforestación que se llevaría a cabo en la décimo segunda región de Chile y podía ser perjudicial para el medio ambiente e impedir el desarrollo sostenible de Chile, la Corte IDH estimó que el artículo 13 del Pacto de San José, al estipular expresamente los derechos a "buscar" y a "recibir" "informaciones", protege el derecho que tiene toda persona a solicitar el acceso a la información bajo el control del Estado, con las salvedades permitidas bajo el régimen

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25 *Cfr. Caso Comunidad Indígena Xákmok Kásek Vs. Paraguay, supra*, párr. 313.
26 *Cfr. Caso Pueblos Kaliña y Lokono Vs. Surinam*, *supra*, párr. 173.
27 *Cfr. Caso Pueblos Kaliña y Lokono Vs. Surinam*, *supra*, párr. 181.
28 *Cfr. Caso Pueblos Kaliña y Lokono Vs. Surinam*, *supra*, párr. 198.

de restricciones de la Convención Americana. Consecuentemente, a criterio el Tribunal Interamericano, "dicho artículo ampara el derecho de las personas a recibir dicha información y la obligación positiva del Estado de suministrarla, de tal forma que la persona pueda tener acceso a conocer esa información o reciba una respuesta fundamentada cuando por algún motivo permitido por la Convención el Estado pueda limitar el acceso a la misma para el caso concreto. Dicha información debe ser entregada sin necesidad de acreditar un interés directo para su obtención o una afectación personal, salvo en los casos en que se aplique una legítima restricción. Su entrega a una persona puede permitir a su vez que ésta circule en la sociedad de manera que pueda conocerla, acceder a ella y valorarla"[29].

2. El derecho al medio ambiente y su justiciabilidad directa

27. En el caso de la justiciabilidad directa, antes de la presente sentencia, el Tribunal Interamericano se pronunció en dos ocasiones: por un lado, en la Opinión Consultiva No. 23 sobre las obligaciones de los Estados en materia de medio ambiente relacionadas con el derecho a la vida y la integridad personal (2017); y, por el otro, en el caso *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina* (2020).

2.1. La Opinión Consultiva No. 23

28. En la OC-23, la Corte IDH precisó que es importante resaltar que el derecho al medio ambiente sano como derecho autónomo, a diferencia de otros derechos, protege los componentes del medio ambiente, tales como bosques, ríos, mares y otros, como intereses jurídicos en sí mismos, aún en ausencia de certeza o evidencia sobre el riesgo a las personas individuales. Se trata de proteger la naturaleza y el medio ambiente no solamente por su conexidad con una utilidad para el ser humano o por los efectos que su degradación podría causar en otros derechos de las personas, como la salud, la vida o la integridad personal, sino por su importancia para los demás organismos vivos con quienes se comparte el planeta, también merecedores de protección en sí mismos[30].

29. En términos generales, la Opinión puede seccionarse en tres grandes bloques: i) la jurisdicción en materia ambiental, ii) la relación de otros derechos humanos con el derecho al medio ambiente y iii) las obligaciones en materia ambiental que deben observarse.

30. En cuanto al primer punto, la Corte IDH hace una distinción entre territorio y jurisdicción. El Tribunal precisa que es el segundo termino el que debe de prevalecer en el caso de determinar quién es el Estado al cual potencialmente se le puede imputar la responsabilidad internacional. La OC identifica que a partir del concepto "Estado de origen" se puede identificar quién o quiénes serían sobre los que recaería la responsabilidad internacional. La Corte IDH considera que el Estado de origen es aquel que dentro de su jurisdicción permite o bien tolera que se desarrollen potenciales agentes contaminantes (en el incumplimiento de sus obligaciones en materia ambiental. Véase cuadro del párrafo 33 del voto)[31].

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[29] *Cfr. Caso Claude Reyes y otros Vs. Chile. Fondo, Reparaciones y Costas*. Sentencia de 19 de septiembre de 2006. Serie C No. 151, párr. 77.

[30] *Cfr.* Opinión Consultiva OC-23/17, *supra*, párr. 62.

[31] *Cfr.* Opinión Consultiva OC-23/17, *supra*, párrs. 72 a 82

31. Otro concepto que es de especial relevancia en este apartado es el de "conductas extraterritoriales en materia ambiental". La Corte IDH es consiente que la violación al medio ambiente no respeta fronteras por lo que muchas veces los agentes contaminantes que se generen en el Estado de origen tendrán un impacto en el territorio/jurisdicción de Estados terceros. Bajo este panorama, la Corte IDH considera que será el Estado de origen el que tendrá la posible responsabilidad internacional por violaciones al medio ambiente que se generen en Estados terceros, está conclusión la Corte IDH la realiza en el entendimiento que es el Estado de origen el que ejerce una especie de *control efectivo* dentro de la jurisdicción de otros Estados[32]. La noción de control efectivo ha sido desarrollada principalmente en situaciones de conflicto armado internacional, pero de manera reciente que se ha empezado a aplicar en la protección del derecho al medio ambiente[33].

32. En el segundo apartado, la Corte IDH indicó que se aplicaban las obligaciones de respeto, garantía y no discriminación en cuanto al contenido de este derecho. Precisó que dada la relación que tiene el derecho al medio ambiente sano con otros derechos existen derechos que pueden ser susceptibles a ser "vulnerables por la degradación ambiental" —como el derecho a la vida, integridad personal o salud— o derechos que pueden servir como un "instrumento" para garantizar el derecho en cuestión (como el de acceso a la información o el derecho a la participación política)[34].

33. La Corte IDH hizo un importante desarrollo respecto de las obligaciones en materia ambiental, el cual puede ser resumido de la siguiente forma:

- **I. Prevención**
  - 1.- Ámbito de aplicación
  - 2.- Tipo de daño
  - 3.- Medidas especiales
    - a) Deber de regulación
    - b) Obligación de supervisar y fiscalizar
    - c) Requerir y aprobar estudios de impacto ambiental
      1. Llevarse a cabo antes de la realización de la actividad
      2. Realizado por entidades independientes bajo la supervisión del Estado
      3. Abarcar el impacto acumulado
      4. Respetar tradiciones y cultura de los pueblos indígenas
    - d) Establecer un plan de contingencia
    - e) Deber de mitigar en casos de ocurrencia de daño ambiental
- **II Precaución**
- **III Cooperación**
  - 1.- Deber de notificación
  - 2.- Deber de consultar y negociar con los Estados potencialmente afectados

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32 *Cfr.* Opinión Consultiva OC-23/17, *supra*, párr. 101.

33 Por ejemplo, en la inadmisibilidad de la comunicación presentada por un grupo de niños en contra de 5 Estados, el Comité de los Derechos del Niño acogió el conceto de jurisdicción adoptado por la Corte Interamericana en el OC-23. Al respecto el Comité señaló: "el Comité considera que el criterio apropiado para determinar la jurisdicción en el presente caso es el aplicado por la Corte Interamericana de Derechos Humanos en su opinión consultiva sobre el medio ambiente y los derechos humanos". Véase: Chiara Sacchi y otros (representados por los abogados Scott Gilmore y otros, de Hausfeld LLP, y Ramin Pejan y otros, de Earthjustice), CRC/C/88/D/104/2019, 11 de noviembre de 2019, párr. 10.7.

34 *Cfr.* Opinión Consultiva OC-23/17, *supra*,, párrs. 80 a 82

3.- Intercambio de información

IV Procesales

1.- Acceso a la información
2.- Participación política
3.– Acceso a la justicia

34. En cuanto a las obligaciones hay dos cuestiones que deben destacarse: la obligación de prevención y la obligación de protección —mejor conocido como principio precautorio—. La Corte IDH identifica que la diferencia entre ambas es que mientras que en la primera existe una certeza científica sobre cuáles serían las consecuencias ambientales (frente a las que operan las sub-obligaciones como regular, fiscalizar, estudios de impacto ambiental, etc.); en el caso de la segunda obligación, opera cuando *no exista certeza científica* sobre las consecuencias ambientales, pero ello no exime que el Estado tome medidas para hacer frente a los posibles daños ambientales. Finalmente, la Corte IDH refiere que estas obligaciones tienen que materializarse observando una "debida diligencia", la cual no es definida por la Corte ya que únicamente refiere que ésta debe surtir efectos siempre que existan posibles "daños significativos al derecho a la vida o a la integridad" de las personas[35].

2.2. El caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina

35. En el caso de las *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, el Estado fue declarado responsable internacionalmente debido a que las poblaciones criollas introdujeron ganado en el territorio ancestral indígena, el cual consumía plantas que las comunidades indígenas usaban para su alimentación tradicional, así como sus fuentes de agua tradicional (las cuales se encontraban contaminadas con heces de ganado). Adicionalmente, existía un problema de tala ilegal. Todo lo anterior también vulneró el derecho a participar en la vida cultural debido a que el no disfrutar de los derechos anteriormente descritos, también impactaba en la continuidad de sus prácticas culturales.

36. En el caso, la Corte IDH declaró, por primera vez en un caso contencioso, la vulneración del derecho al medio ambiente contenido en el artículo 26 de la Convención Americana, ya que en el territorio indígena de dicha comunidad se habían realizado actividades de tala y extracción ilegal de madera y otros recursos naturales, y que tales actividades habían sido puestas en conocimiento de las autoridades estatales[36].

37. Aunque este caso constituye un gran precedente en el contexto de la justiciabilidad de los DESCA, específicamente para el derecho al medio ambiente, en el contexto de pueblos indígenas, se debe puntualizar que la Corte IDH no desarrolló estándares relativos a este derecho ya que la cuestión analizada en el asunto únicamente se circunscribió a la falta de adopción de medidas para evitar la tala de árboles dentro del territorio ancestral.

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35 *Cfr*. Opinión Consultiva OC-23/17, *supra*,, párrs. 174 y 175.

36 *Cfr. Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina. Fondo, Reparaciones y Costas*. Sentencia de 6 de febrero de 2020. Serie C No. 400, párr. 264.

III. VULNERACIÓN DEL DERECHO AL MEDIO AMBIENTE EN EL CASO HABITANTES DE LA OROYA

38. Como se describió en el apartado I, el presente caso se inserta en un contexto en el que el derecho internacional de los derechos humanos ha puesto en el centro de su atención las afectaciones al medio ambiente y el cambio climático como uno de los focos centrales en el análisis de los derechos humanos de las personas en todo el mundo.

39. En particular, el caso que analizó la Corte IDH presenta ciertos avances inclusive frente a la Opinión Consultiva No. 23, que en su momento constituyó (y lo sigue siendo) un instrumento de vanguardia en la materia cuando fue emitida por este Tribunal internacional.

40. En primer lugar, constituye el primer precedente en el que el Tribunal Interamericano hace un pronunciamiento sobre cómo "la contaminación" —en este caso del aire, agua y suelo— tiene afectaciones directas en derechos convencionalizados (como el medio ambiente). Además, a nuestro criterio, constituye de particular relevancia que este Tribunal catalogue que todas y todos tienen un "derecho a respirar un aire cuyos niveles de contaminación no constituyan un riesgo significativo al goce de sus derechos humanos"[37]. Este pronunciamiento está en sintonía con lo que ha indicado el Comité Europeo de Derechos Sociales en relación con las obligaciones de los Estados para la protección del aire[38].

41. En segundo lugar, el Tribunal Interamericano hace una especial puntualización respecto de cómo se debe considerar "el agua" como elemento dentro del derecho al medio ambiente. Así, el Tribunal Interamericano identifica, por un lado, "una faceta sustantiva" del agua como un elemento que tiene un valor en sí mismo —por ejemplo, cuando se ha reconocido a los ríos como sujetos de derecho—; y la segunda, cuando se refiere al agua como derecho autónomo, es decir, cuando el Tribunal se vea llamado a determinar si el acceso o no al agua vulnera derechos de los individuos que protege la Convención Americana[39]. En suma, esta importante distinción que realiza la Corte IDH es de vital importancia porque lo que está detrás de esta clasificación es poner sobre relieve aquellos casos que deberán ser analizados desde el contenido del derecho al medio ambiente, de aquellos otros casos que las violaciones se deban observar desde el contenido del derecho al agua, como derecho autónomo, protegido también por el artículo 26 del Pacto de San José.

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37 Véase párrafo 120 de la sentencia.

38 Al respecto, el Comité ha señalado lo siguiente: "203. Por lo tanto, para cumplir sus obligaciones en materia de protección del derecho al medio ambiente y la calidad del aire, las autoridades nacionales deben: i) desarrollar y actualizar periódicamente legislación y reglamentos ambientales suficientemente completos; ii) tomar medidas específicas, como modificar los equipos, introducir valores umbral para las emisiones y medir la calidad del aire, para prevenir la contaminación del aire a nivel local y ayudar a reducirla a escala; iii) garantizar que las normas y estándares medioambientales se apliquen adecuadamente, a través de mecanismos de supervisión adecuados; iv) informar y educar al público, incluidos los alumnos y estudiantes de la escuela, sobre los problemas medioambientales generales y locales y v) evaluar los riesgos para la salud mediante el seguimiento epidemiológico de los grupos afectados". Además, ha señalado que: "204. Es cierto que superar la contaminación es un objetivo que sólo puede alcanzarse gradualmente. Sin embargo, los Estados partes deben esforzarse por alcanzar este objetivo en un plazo razonable, mostrando progresos mensurables y haciendo el mejor uso posible de los recursos a su disposición". Comité Europeo de Derechos Sociales, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, 6 de diciembre de 2006.

39 Véase párrafo 124 de la sentencia.

42. En tercer lugar, el Tribunal Interamericano refiere la importancia del principio de "equidad intergeneracional"[40]. La mención de este principio en esta sentencia no es aislada, ya que a diferencia de muchos derechos humanos que protege la Convención Americana, el contenido del derecho al medio ambiente no puede reducirse a medidas de reparación —o políticas que se adopten desde esa perspectiva— bajo la lógica que únicamente tendrán impacto en un periodo de tiempo corto (y por tanto impactando a un grupo de personas en una generación). Por el contrario, las medidas que se adopten desde la perspectiva del medio ambiente no tienen que perder de vista que la salvaguarda de los bienes ambientales (por ejemplo, en este caso, aire, agua y suelo) ineludiblemente tendrán un impacto en generaciones futuras a corto y largo plazo. También implica reconocer la responsabilidad que tiene la Corte IDH en esta época con las siguientes generaciones.

43. En cuarto lugar, la Corte IDH deja un mensaje muy contundente sobre la importancia de que la comunidad internacional reconozca progresivamente la prohibición de conductas que lesionen al medio ambiente como una norma imperativa de derecho internacional (*ius cogens*)[41]. Al respecto, debemos recordar que la base de este tipo de normas parte del núcleo que no se admite una "justificación" por parte de las autoridades de los Estados para transgredir los bienes que se protegen. Es decir, por ejemplo, no existe una razón válida y justificable para torturar, desaparecer forzadamente o someter a esclavitud a una persona. Ese es el mismo razonamiento que se encuentra detrás del pronunciamiento de la Corte IDH en este caso: la comunidad internacional debe reconocer que el Derecho Internacional no admite una justificación y una permisión para que todos los bienes que integran el medio ambiente sean vulnerados. Esta razón cobra mayor congruencia con el propio *principio de equidad intergeneracional*, ya que, a nosotros en este momento, nos corresponde salvaguardar lo que en todo caso deberán disfrutar las generaciones futuras. Estas dimensiones serán desarrolladas y profundizadas en el epígrafe quinto del presente voto.

44. En quinto lugar, debe destacarse la dimensión colectiva del derecho al medio ambiente y las reparaciones también colectivas y de no repetición que, en el caso de la Comunidad de La Oroya, reflejan una justa compensación por más de cien años de violaciones con riesgos de irreversibilidad. El establecimiento de garantías colectivas de no repetición permite reparar a la comunidad afectada por los daños ambientales y prevenir los riesgos para las generaciones futuras. Esta dimensión colectiva se desarrollará en el cuarto apartado de este voto.

45. Finalmente, no debe pasar inadvertido que la Corte IDH sigue consolidando la capacidad de diferenciar el contenido de derechos donde tradicionalmente subsumía el contenido del medio ambiente (por ejemplo, la vida o la integridad personal). Es de vital importancia que cada derecho del Pacto de San José tenga un espectro de protección diferenciado y específico. De lo contrario, no permite delinear de manera adecuada su contenido, impidiendo en ocasiones que no se pueda desdoblar un adecuado análisis de las violaciones a la Convención Americana y evita traslapes innecesarios entre derechos. Así, en este caso, lo relevante de abordar de manera diferenciada el derecho al medio ambiente, así como el derecho a la salud, es que la Corte IDH puede pronunciarse de manera directa sobre aspectos que deben ser evaluados conforme a obligaciones propias de los DESCA, como lo son las obligaciones de progresividad (o bien desde la prohibición de regresividad)[42]. De invisibilizarse los

[40] Véase párrafo 128 de la sentencia.
[41] Véase párrafo 130 de la sentencia.
[42] Véase párrafo 187 y Punto Resolutivo 3 de la sentencia.

derechos sociales mediante los derechos civiles y políticos, se corre el riesgo de que los análisis de hechos que configuren lesiones a las personas únicamente tengan un acercamiento limitado. Por supuesto, considerando en todo caso la universalidad, indivisibilidad, interdependencia e interrelación de todos los derechos, sean civiles, políticos, económicos, sociales, culturales o ambientales.

IV. LA DIMENSIÓN COLECTIVA DEL DERECHO AL MEDIO AMBIENTE Y SU RELEVANCIA EN MATERIA DE REPARACIONES COLECTIVAS Y DE NO REPETICIÓN

46. Después de examinar el estado del arte en relación con la protección del medio ambiente en el derecho internacional de los derechos humanos y la evolución jurisprudencial sobre la materia realizada por este Tribunal, así como resaltar algunos aspectos concretos relevantes en la sentencia, esta sección del voto se dedicará a la dimensión colectiva del derecho a un medio ambiente sano en este caso y a los impactos de este entendimiento sobre las reparaciones colectivas, especialmente las garantías de no repetición.

47. Este caso se destaca por la discusión de los impactos ambientales colectivos de las actividades extractivas. A partir de 1922, el *Complejo Metalúrgico de La Oroya* ("CMLO"), un complejo metalúrgico privado, nacionalizado en 1974, operado por el Estado hasta 1997, y posteriormente privatizado por la *empresa Doe Run*, comenzó a procesar minerales como plomo, cobre, zinc, plata, oro, cadmio, mercurio y arsénico en la ciudad de La Oroya[43]. Las actividades se suspendieron en 2009, pero se reanudaron parcialmente entre 2012 y 2014. Durante más de 100 años de actividad, la extracción de minerales ha expuesto históricamente a los residentes de la región a niveles nocivos de contaminación.

48. Según la sentencia, y en conformidad con los datos de la Organización Mundial de la Salud, cuatro de los diez metales que más amenazan la salud pública estaban presentes en la comunidad de La Oroya: plomo, cadmio, mercurio y arsénico[44]. La sumisión de los habitantes de la localidad por largos períodos de tiempo a estos agentes contaminantes ha llevado a las víctimas a relatar graves problemas de salud como cáncer, anemia, desnutrición, irritación gástrica, infecciones respiratorias y problemas cutáneos. No es de extrañar que se detectaran niveles de plata superiores a los permitidos en la sangre de las niñas y niños[45].

49. Al reconocer que el daño a la salud de las víctimas fue resultado de una violación colectiva al derecho a un medio ambiente sano[46], la Corte IDH puso en práctica, en su jurisdicción contenciosa, las consideraciones emitidas por el propio Tribunal cuando emitió la Opinión Consultiva No. 23 en 2017. En esa ocasión, la Corte IDH estableció que "el derecho humano a un medio ambiente sano se ha entendido como un derecho con connotaciones tanto individuales como colectivas. En su dimensión colectiva, el derecho a un medio ambiente sano constituye un interés universal, que se debe tanto a las generaciones presentes y futuras […]"[47]. La posibilidad de reconocer a la colectividad como principal afectada por los daños ambientales causados por la explotación de minerales refuerza también que la protección de la naturaleza no sólo

43 Véase párrafo 67 de la sentencia.
44 Véase párrafo 189 de la sentencia.
45 *Véase* párrafo 191 de la sentencia.
46 *Véase* párrafo 179 de la sentencia.
47 *Cfr.* Opinión Consultiva OC-23/17, *supra*, párr. 59.

se relaciona con el ser humano, sino también "por su importancia para los demás organismos vivos con quienes se comparte el planeta, también merecedores de protección en sí mismos", como postula la citada opinión consultiva[48].

50. El mismo documento también presenta conclusiones adicionales sobre la relación intrínseca entre los derechos al medio ambiente y a una vida digna, según las cuales la protección del medio ambiente es una de las condiciones para el disfrute de una vida digna a través del acceso a la salud, a la alimentación y a niveles aceptables de calidad del aire y del agua[49]. La contaminación del suelo, el agua y el aire, como ocurrió en la Comunidad de La Oroya, pone en peligro la salud de los residentes, ya que no se satisface plenamente el "estado de completo bienestar físico, mental y social, y no solamente la ausencia de afecciones o enfermedades"[50]. En la propia sentencia, el Tribunal reconoce que "las presuntas víctimas del caso se encontraron en una situación de riesgo significativo para su salud ante la exposición durante años a altos niveles de metales pesados y de contaminación ambiental en La Oroya"[51].

51. Además de que la contaminación ambiental representó un riesgo significativo para la salud de las víctimas expuestas en la comunidad de La Oroya, la sentencia también reconoce que la violación del deber de prevención por parte del Estado implicó que los pobladores de la región desconocieran el alcance y la nocividad de los riesgos de intoxicación[52]. La falta de información científica sobre los riesgos a los que estaban sometidas las personas —debido a la ausencia o insuficiencia de marcos legales, estudios de impacto ambiental y planes de contingencia— generó una situación de vulnerabilidad frente a las actividades de la empresa minera. El acceso a la información sobre el medio ambiente se considera una cuestión de interés público y debe garantizarse de manera accesible, efectiva y oportuna[53].

52. La vulnerabilidad de las víctimas debido a la falta de información sobre los riesgos ambientales de las actividades mineras es un factor central en el presente caso. En términos de daño ambiental, los pueblos indígenas, las niñas y niños, las personas que viven en extrema pobreza, las minorías y las personas con discapacidad son más susceptibles a los riesgos derivados de la explotación del medio ambiente, ya sea porque viven en zonas ambientalmente protegidas o porque dependen económicamente de los recursos naturales[54], o bien por sus condiciones personales de mayor vulnerabilidad. En el caso de la Comunidad de La Oroya, el Estado no presentó pruebas capaces de demostrar que no era responsable por la exposición y contaminación de los pobladores de la región, lo que se vio agravado por la falta de acceso a información sobre los riesgos reales a los que estaban expuestos los pobladores. En este caso, tanto el Estado como la empresa minera tenían responsabilidades en términos de regulación y supervisión de las actividades de riesgo[55].

53. Las obligaciones estatales se referían a abstenerse de contaminar ilícitamente el medio ambiente y a garantizar la adopción de medidas para proteger la vida digna

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48 *Cfr*. Opinión Consultiva OC-23/17, *supra*, párr. 62.
49 *Cfr*. Opinión Consultiva OC-23/17, *supra*, párr. 109.
50 *Cfr*. Opinión Consultiva OC-23/17, *supra*, párr. 110.
51 *Véase* parráfo 205 de la sentencia.
52 *Véase* parráfo 203 de la sentencia.
53 *Véase* parráfo 145 de la sentencia.
54 *Cfr*. Opinión Consultiva OC-23/17, *supra*, párr. 67.
55 *Véase* parráfo 114 de la sentencia.

de la población local[56]. En los términos de la Opinión Consultiva no. 23 de 2017, el deber de prevención se extiende a terceros que pongan en peligro bienes jurídicamente protegidos como la vida y la integridad personal. Tanto el párrafo 126 de la sentencia como los siguientes términos postulados por la Corte IDH en 2017, establecen que "en el marco de la protección del medio ambiente, la responsabilidad internacional del Estado derivada de la conducta de terceros puede resultar de la falta de regulación, supervisión o fiscalización de las actividades de estos terceros que causen un daño al medio ambiente"[57].

54. Tres elementos son esenciales para definir el alcance del deber de prevención del Estado en relación con los riesgos de daño ambiental significativo: el contexto, la naturaleza y la magnitud del proyecto[58]. En el caso de la Comunidad de La Oroya, han transcurrido alrededor de cien años de explotación minera. De 1922 hasta 1993 las actividades se desarrollaron sin ningún marco legal respecto a la contaminación del lugar y a los riesgos ambientales que implicaba la operación. A pesar de que la Evaluación de Impacto Ambiental (EIA) o el Programa de Adecuación y Manejo Ambiental se hicieron obligatorios tras la promulgación del *Reglamento para la Protección Ambiental en la Actividad Minero Metalúrgica* en 1993[59] resultaron insuficientes para la protección integral de los habitantes de la comunidad. Durante más de setenta años, la población local desconocía los riesgos ambientales específicos a los que estaba sometida, aun cuando sabían que los daños eran preocupantes porque La Oroya era considerada una de las diez ciudades con mayores niveles de contaminación atmosférica en el mundo[60].

55. El riesgo de irreversibilidad de la contaminación causada por las actividades del *Complejo Metalúrgico de La Oroya* impulsa el cumplimiento de obligaciones colectivas en relación con el principio de precaución y el principio de equidad intergeneracional. El primero se define como el "deber de los Estados de preservar el ambiente para permitir a las generaciones futuras oportunidades de desarrollo y de viabilidad de la vida humana" y el segundo se refiere a la obligación de los Estados de "coadyuvar activamente por medio de la generación de políticas ambientales orientadas a que las generaciones actuales dejen condiciones de estabilidad ambiental que permitan a las generaciones venideras similares oportunidades de desarrollo", conforme a lo enfatizado por la sentencia del caso[61].

56. Conscientes de más de cien años de violaciones con riesgos de irreversibilidad, es posible dar fe de la magnitud del daño ambiental causado a la comunidad de La Oroya. El término "zona de sacrificio", utilizado por el perito Marco Orellana y reforzado por la sentencia de la Corte IDH[62], cristaliza los efectos trascendentales causados por la exposición histórica a altos niveles de contaminación en la región de la localidad de La Oroya. En este sentido, la Corte IDH señaló:

> En ese sentido, este Tribunal considera que la gravedad y duración de la contaminación producida por el CMLO durante décadas permite presumir que La Oroya se constituyó como una "zona de sacrificio", pues se encontró durante años sujeta a altos niveles de contaminación ambiental que afectaron el aire, el agua y

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56 *Cfr*. *Opinión Consultiva OC-23/17, supra*,, párr. 117-118.
57 *Cfr*. Opinión Consultiva OC-23/17, *supra*, párr. 119.
58 *Cfr*. Opinión Consultiva OC-23/17, *supra*, párr. 135.
59 *Véase* párrafos 160-162 de la sentencia.
60 *Véase* párrafo 76 de la sentencia.
61 *Véase* párrafo 128 de la sentencia.
62 *Véase* párrafo 180 de la sentencia.

el suelo, y en esa medida pusieron en riesgo la salud, integridad y la vida de sus habitantes[63].

57. Desde esta perspectiva de la Comunidad de La Oroya como "zona de sacrificio", Sultana afirma que "algunas vidas y ecosistemas se vuelven desechables y sacrificables, siendo alimentados por fuerzas estructurales, tanto históricas como contemporáneas"[64]. El caso de La Oroya no es aislado en la jurisprudencia interamericana en materia de violaciones ambientales, ya que el *caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina (2020)* fue paradigmático al declarar la autonomía de este derecho en el ámbito contencioso.

58. Al reconocer la dimensión colectiva de una violación, el Tribunal no se limita a atribuir un calificativo a la conducta estatal. Se trata de una declaración que tiene consecuencias directas sobre las medidas adoptadas por la Corte IDH, especialmente en materia de reparaciones. El *corpus iuris* interamericano ha permitido el desarrollo de instrumentos jurídicos capaces de hacer frente a violaciones de esta naturaleza, con dos mecanismos principales que se analizarán a continuación. El primero radica en la posibilidad de abrir la lista de víctimas prescrita en el artículo 35.2 del Reglamento de la Corte IDH. El segundo, enfoque de esta sección, se refiere al desarrollo de la jurisprudencia sobre medidas de reparación colectivas, especialmente en la forma de garantías de no repetición.

59. En cuanto a la identificación de las víctimas, el artículo 35.1 del Reglamento de la Corte IDH establece que la Comisión deberá someter el caso a la Corte IDH con la debida identificación de las presuntas víctimas en el momento procesal oportuno. Por regla general, las víctimas deben ser identificadas en el Informe de Fondo y, si posteriormente se añaden nuevas víctimas, el derecho de defensa del Estado quedará debidamente salvaguardado. A su vez, el artículo 35.2 del Reglamento de la Corte IDH establece que "[c]uando se justificare que no fue posible identificar a alguna o algunas presuntas víctimas de los hechos del caso por tratarse de casos de violaciones masivas o colectivas, el Tribunal decidirá en su oportunidad si las considera víctimas".

60. La consolidada jurisprudencia de la Corte IDH ya ha postulado determinadas hipótesis como susceptibles de aplicación del artículo 35.2 del Reglamento de la Corte IDH, tales como la ocurrencia de conflictos armados, el desplazamiento forzado o la destrucción de los cuerpos de las víctimas, la desaparición de familias enteras, la dificultad de acceso a las zonas donde se han producido violaciones de los derechos humanos, la falta de registro de los habitantes del lugar debido al tiempo, las características particulares de las víctimas, la migración, las omisiones investigativas por parte del Estado que contribuyen a la identificación incompleta de las víctimas, la esclavitud[65], y, más recientemente, la práctica de actividades de inteligencia

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63 *Véase* párrafo 180 de la sentencia.

64 "*Some lives and ecosystems are rendered disposable and sacrificial, whereby structural forces, both historical and contemporary, fuel it*" (Original). *Cfr*. SULTANA, Farhana. The unbearable heaviness of climate coloniality. Political Geography, v. 99, p. 102638, 2022. Ver también: ANDREUCCI, Diego; ZOGRAFOS, Christos. *Between improvement and sacrifice: Othering and the (bio) political ecology of climate change. Political Geography*, v. 92, 2022 (nuestra traducción).

65 *Cfr*. *Caso Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal Vs. Guatemala. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 30 de noviembre de 2016. Serie C No. 328, párr. 64.

clandestinas[66]. La lista de ejemplos de casos en los que se aplica el artículo 35.2 del Reglamento de la Corte IDH confirma el amplio alcance de la disposición, impidiendo que la delimitación de las víctimas se vea comprometida por un formalismo excesivo, como se señala en el caso *Masacres de Rio Negro vs. Guatemala*[67].

61. Aunque el presente caso ante la Corte IDH no implicaba la aplicación del artículo 35.2, la trayectoria jurisprudencial ha mostrado una comprensión cada vez más clara de las medidas que pueden adoptarse en caso de daño colectivo. Las respuestas dadas por la Corte IDH al daño colectivo causado por el impacto ambiental de las actividades metalúrgicas en la Comunidad de La Oroya permiten reajustar el alcance de las medidas de reparación y sus efectos de no repetición para preservar la vida de las generaciones actuales y futuras. En este sentido, los siguientes párrafos estarán dedicados al examen de este relevante mecanismo adoptado por la Corte IDH para tratar de las afectaciones colectivas de derechos humanos, a saber, las reparaciones colectivas.

62. La adopción de remedios de impacto difuso es una práctica ya consolidada en la jurisprudencia de la Corte IDH, especialmente en situaciones en las que el Tribunal se ha enfrentado a violaciones cuya magnitud y alcance son difíciles de medir y que afectan la vida y la memoria de las comunidades en las que ocurrieron. Tales medidas pueden identificarse, por ejemplo, en el caso *Masacre Plan de Sánchez vs. Guatemala* (2004). En esa ocasión, la intervención del Ejército guatemalteco causó la muerte de 268 personas del Pueblo indígena Maya Achí en el territorio de la Aldea Plan de Sánchez, lo que llevó a la Corte IDH a establecer la suma de US$25,000.00 para "despertar la conciencia pública, para evitar la repetición de hechos como los ocurridos en el presente caso, y para conservar viva la memoria de las personas fallecidas"[68]. La Corte IDH también definió mecanismos colectivos para mejorar la salud, la educación y la infraestructura de la comunidad, a saber: estudio y difusión de la cultura indígena maya Achí, mejoras en el sistema de alcantarillado y de suministro de agua potable, y el establecimiento de centros de salud y educación en la comunidad con capacitación intercultural[69].

63. En situaciones relativas a grupos de mayor vulnerabilidad, como violaciones ocurridas en comunidades indígenas, la Corte IDH ha prestado especial atención a la implementación de programas de salud, vivienda y educación para los habitantes de la comunidad, como sucedió a los casos *Comunidad Moiwana Vs. Surinam* (2005)[70], *Comunidad Indígena Yakye Axa Vs. Paraguay* (2005)[71] y *Comunidad Indígena Sawhoyamaxa Vs. Paraguay* (2006)[72]. Ya en otras situaciones como en el caso *Comunidad Indígena Xákmok Kásek Vs. Paraguay* (2010), la Corte IDH ha determinado el desarrollo de estudios especializados sobre el suministro de agua, la gestión de la

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66 *Cfr. Caso Corporación Colectivo de Abogados José Alvear Restrepo (CAJAR) vs. Colombia. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 18 de octubre de 2023. Serie C. No. 506.

67 *Cfr. Caso Masacres de Río Negro Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 4 de septiembre de 2012, párr. 49 y *Caso Masacres de El Mozote y lugares aledaños Vs. El Salvador. Fondo, Reparaciones y Costas*. Sentencia de 25 de octubre de 2012. Serie C No. 252, párr. 54.

68 *Cfr. Caso Masacre Plan de Sánchez Vs. Guatemala. Reparaciones*. Sentencia de 19 de noviembre de 2004. Serie C No. 116, párr. 104.

69 *Cfr. Caso Masacre Plan de Sánchez Vs. Guatemala, supra*, párr. 110.

70 *Cfr. Caso de la Comunidad Moiwana Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 15 de junio de 2005. Serie C No. 124, párrs. 214-215.

71 Cfr. *Caso Comunidad Indígena Yakye Axa Vs. Paraguay, supra*, párr. 221.

72 *Cfr. Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay. Fondo, Reparaciones y Costas*. Sentencia de 29 de marzo de 2006. Serie C No. 146, párr. 230.

higiene y la prestación de servicios médicos y educativos a la comunidad[73]. También se han ordenado programas de recuperación y preservación de la cultura de los pueblos indígenas, de acuerdo con su identidad cultural y cosmovisión, como en el caso *Masacres de Río Negro Vs. Guatemala* (2021)[74].

64. Los impactos colectivos de las violaciones de derechos humanos son especialmente sensibles en relación con el territorio indígena. En el caso *Comunidad Indígena Xákmok Kásek Vs. Paraguay* (2010)*,* por ejemplo, la creación de un Fondo de Desarrollo Comunitario tuvo como objetivo no sólo la reparación del daño causado, sino también la preservación cultural de las tradiciones indígenas para las generaciones futuras, tal y como establece la Corte IDH en los siguientes términos:

> 321. Este Tribunal valorará al momento de fijar el daño inmaterial la significación especial que la tierra tiene para los pueblos indígenas en general, y para los miembros de la Comunidad Xákmok Kásek en particular (supra párr. 107, 149 y 174 a 182), lo que implica que toda denegación al goce o ejercicio de los derechos territoriales acarrea el menoscabo de valores muy representativos para los miembros de dichos pueblos, quienes corren el peligro de perder o sufrir daños irreparables en su vida e identidad y en el patrimonio cultural por transmitirse a las futuras generaciones.
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> 323. Tomando en cuenta lo anterior y como lo ha hecho en casos anteriores, la Corte considera procedente ordenar en equidad que el Estado cree un fondo de desarrollo comunitario como compensación por el daño inmaterial que los miembros de la Comunidad han sufrido. […] respecto del cual se deben destinar recursos, entre otras cosas, para la implementación de proyectos educacionales, habitacionales, de seguridad alimentaria y de salud, así como de suministro de agua potable y la construcción de infraestructura sanitaria, en beneficio de los miembros de la Comunidad[75].

65. El alcance de las medidas de no repetición en el caso de la Comunidad de La Oroya se suma a la cadena de precedentes de la Corte IDH sobre reparaciones en casos en los que las actividades extractivas causan daños ambientales intergeneracionales. En el caso *Pueblos Kaliña y Lokono Vs. Surinam* (2015), el contexto fáctico de las violaciones involucra actividades de extracción de mineral en el territorio de una reserva ambiental[76]. Las medidas de no repetición, a su vez, estaban dirigidas a desarrollar un plan de rehabilitación de la zona, la evaluación integral actualizada del territorio afectado, las medidas para eliminar los daños causados y un mecanismo de supervisión y vigilancia del plan de rehabilitación de la comunidad[77].

66. En el caso de La Oroya, las medidas de reparación establecidas por la sentencia también se comprometen a garantizar el máximo alcance debido a la magnitud de las violaciones. Cabe recordar que, durante la fase escrita del proceso, los representantes realizaron observaciones sobre el número total de personas afectadas por la contaminación. El principal reclamo de la representación se refería a la incompatibilidad entre el número de víctimas identificadas por el Informe de Fondo elaborado por la Comisión Interamericana y el verdadero número de personas afectadas por la contaminación en la Comunidad de La Oroya, ya que los daños causados por los

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73 *Cfr. Caso Comunidad Indígena Xákmok Kásek Vs. Paraguay, supra*, párr. 303.

74 *Cfr. Caso Masacres de Río Negro Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 4 de septiembre de 2012. Serie C No. 250, párr. 285.

75 *Cfr. Caso Comunidad Indígena Xákmok Kásek Vs. Paraguay, supra,*, párr. 321 e 323.

76 *Cfr. Caso Pueblos Kaliña y Lokono Vs. Surinam, supra,*, párrs. 90-93.

77 *Cfr. Caso Pueblos Kaliña y Lokono Vs. Surinam, supra,* párr. 290.

impactos ambientales afectan no sólo a ciertos habitantes de la zona, sino a la comunidad en su conjunto[78]. Por ello, exigieron que las medidas de reparación establecidas por la Corte IDH consideren las afectaciones de manera colectiva.

67. En este sentido, las medidas otorgadas incluyen un diagnóstico del estado de contaminación del aire, del agua y del suelo en la ciudad de La Oroya y un plan de acción para contener los daños en las zonas afectadas[79]. También incluyen la creación de mecanismos de participación efectiva para conocer e impugnar el plan de acción antes, durante y después de su ejecución[80]. Como medidas de no repetición se establecieron los siguientes protocolos (i) el Estado debe compatibilizar la normativa existente con los estándares de calidad del aire[81]; (ii) el Estado debe garantizar el correcto funcionamiento de los sistemas de alerta en la ciudad de La Oroya, así como desarrollar un sistema de monitoreo de la calidad del aire, agua y suelo;[82] (iii) también se establece la atención médica inmediata y especializada para los habitantes de La Oroya que sufran síntomas o enfermedades derivadas de la contaminación, y (iv) la creación de un Fondo de Asistencia para tratamientos médicos fuera de la ciudad de La Oroya[83].

68. En cuanto a las actividades de CMLO, las medidas de no repetición estipulan que las operaciones de la empresa deben cumplir los parámetros medioambientales internacionales y estar supervisadas por un plan de compensación medioambiental en vista de los daños ya causados[84]. En cuanto a la administración pública, la sentencia prevé un plan de formación permanente para las autoridades públicas[85] y un sistema de información con datos actualizados sobre la calidad del aire y las zonas contaminadas[86]. Por último, el Tribunal establece un plan de reubicación para los habitantes de La Oroya que deseen abandonar la ciudad debido a los riesgos medioambientales derivados de la contaminación[87]. El impacto colectivo de las medidas de reparación es proporcional a la magnitud de la irreversibilidad de los daños causados por las actividades del CMLO durante más de cien años.

69. El establecimiento de medidas de no repetición de alcance colectivo en relación con los habitantes de La Oroya permite asegurar la efectividad del principio de precaución y del principio de equidad intergeneracional. Así, se crearon mecanismos para contener los daños existentes y trazar el alcance de los riesgos futuros. Según el Informe de Fondo de la Comisión Interamericana, alrededor de 23 de las víctimas eran niños, que se vieron afectados por enfermedades o alteraciones de la salud[88]. Una de ellas tenía 14 años cuando se le diagnosticó cáncer como consecuencia de la contaminación ambiental y falleció. El impacto agravado en la vida de las niñas, niños y adolescentes hace que las medidas de no repetición deban ser preventivas y no meramente paliativas de los daños ya causados.

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78 *Cfr.* Informe de Fondo Nº 330/20, de 19 de febrero de 2009, párr. 15.
79 Véase parráfo 333 de la sentencia.
80 Véase parráfo 334 de la sentencia.
81 Véase parráfo 346 de la sentencia.
82 Véase parráfo 347 de la sentencia.
83 Véase párrafo 349 de la sentencia.
84 Véase párrafos 351-352 de la sentencia.
85 Véase párrafo 353 de la sentencia.
86 Véase párrafo 354 de la sentencia.
87 Véase párrafo 355 de la sentencia.
88 *Cfr.* Informe de Fondo Nº 330/20, de 19 de febrero de 2009, párr. 211.

70. Los fundamentos que guían la sentencia tienen en cuenta el impacto colectivo de los daños ambientales y establecen medidas de no repetición capaces de reducir los riesgos para las generaciones futuras. En este sentido, en la actual etapa de desarrollo jurisprudencial sobre derechos económicos, sociales, culturales y ambientales, el caso *Habitantes de La Oroya vs. Perú* es una importante fuente de estándares para los Estados en relación con sus obligaciones de asegurar condiciones equitativas de desarrollo frente al cambio climático.

V. EL CARÁCTER DE *JUS COGENS* DE LA PROTECCIÓN DEL MEDIO AMBIENTE Y EL PRINCIPIO DE EQUIDAD INTERGENERACIONAL

i) La protección del medio ambiente como norma imperativa de derecho internacional (*jus cogens*)

71. La sentencia reconoce la trascendencia de la obligación internacional de protección del medio ambiente contra actos que causen "daños graves, extensos, duraderos e irreversibles al medio ambiente en un escenario de crisis climática que atenta contra la supervivencia de las especies"[89] y, en este sentido, refiere a su reconocimiento progresivo como una norma imperativa de derecho internacional (*jus cogens*) por parte de la comunidad internacional; teniendo en cuenta tanto el interés de las generaciones presentes y futuras, así como su importancia para la supervivencia de la humanidad. Estimamos importante ahondar en la consideración de la obligación de protección del medio ambiente como una norma de *jus cogens*, en tanto éste constituye uno de los primeros pronunciamientos jurisprudenciales en este sentido. Profundizaremos en esta afirmación que consideramos de gran trascendencia, en la medida que a nuestro criterio en el estado actual de evolución del Derecho Internacional la protección del medio ambiente y la obligación de no dañar al mismo tiene el carácter de *jus cogens*, sin perjuicio de ser un proceso en desarrollo permanente por su propia naturaleza.

72. La Corte IDH ya se ha referido al *jus cogens* señalando que "se presenta como la expresión jurídica de la propia comunidad internacional como un todo que, a raíz de su superior valor universal, constituye un conjunto de normas indispensables para la existencia de la comunidad internacional y para garantizar valores esenciales o fundamentales de la persona humana. Esto es, aquellos valores que se relacionan con la vida y la dignidad humana, la paz y la seguridad"[90]; de forma tal que cristalizan y protegen derechos fundamentales así como valores universales sin los cuales la sociedad no prosperaría.

73. De esta manera, las normas de *jus cogens* encarnan o cristalizan intereses y valores generales o universales de la comunidad de Estados y no de los Estados en particular, tal como lo ha indicado la Corte Internacional de Justicia: "los Estados contratantes no tienen intereses propios; sólo tienen, todos y cada uno, un interés común, a saber, la realización de esos altos fines que son la razón de ser de la convención"[91].

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[89] Véase párrafo 129 de la sentencia.

[90] *Cfr. La denuncia de la Convención Americana sobre derechos humanos y de la Carta de la Organización de los Estados Americanos y sus efectos sobre las obligaciones estatales en materia de derechos humanos (Interpretación y alcance de los artículos 1, 2, 27, 29, 30, 31, 32, 33 a 65 y 78 de la Convención Americana sobre Derechos Humanos y 3.l), 17, 45, 53, 106 y 143 de la Carta de la Organización de los Estados Americanos)*. Opinión Consultiva OC-26/20 de 9 de noviembre de 2020. Serie A No. 26, párr. 105.

[91] Corte Internacional de Justicia. Reservas a la Convención para la Prevención y la Sanción del Delito de Genocidio. Opinión Consultiva de 28 de mayo de 1951.

74. Como consecuencia de lo anterior, se limita la libertad convencional de los Estados, así como tampoco les es posible negar el carácter de *jus cogens* para sustraerse individualmente de su cumplimiento; toda vez que son normas que se encuentran firmemente arraigadas en la convicción jurídica de las naciones y porque son indispensables para la existencia misma de la comunidad internacional. De ahí que, con su reconocimiento, se está protegiendo a la comunidad internacional en su conjunto contra actos, hechos u omisiones de un Estado que atenten contra el bien jurídico universal que es el medio ambiente.

75. La Comisión de Derecho Internacional ha definido a la norma imperativa de derecho internacional como "una norma aceptada y reconocida por la comunidad internacional de Estados en su conjunto como norma que no admite acuerdo en contrario y que solo puede ser modificada por una norma ulterior de derecho internacional general que tenga el mismo carácter"[92]; destacando, a su vez, que reflejan y protegen valores fundamentales de la comunidad internacional, son jerárquicamente superiores a otras normas de derecho internacional y universalmente aplicables[93].

76. El estado actual del medio ambiente y su impacto en cada uno de sus componentes —dentro de los que se encuentra la especie humana— impone una mayor reflexión sobre las obligaciones estatales en este punto. Nunca como ahora las actividades desarrolladas en el planeta por el ser humano han causado tanta degradación ambiental y, de no desplegar los mecanismos jurídicos necesarios y adecuar la conducta a esos estándares, los pronósticos no parecen augurar una situación mejor. En este sentido, este tribunal interamericano está llamado a proteger y garantizar los intereses de las generaciones presentes y futuras, en virtud del principio de equidad intergeneracional como se desarrollará más adelante en el presente voto.

77. De la protección del medio ambiente depende la supervivencia de la especie humana y, por extensión, de la comunidad internacional en su conjunto. La dimensión colectiva del derecho a vivir en un medio ambiente limpio, sano y sostenible se proyecta no solo entre las personas, sino también en la comunidad de Estados, dada la particularidad de que los ecosistemas, la contaminación y todo el fenómeno ambiental van más allá de las fronteras nacionales, tal como ha sido sostenido por este tribunal. En oportunidad de la Opinión Consultiva No. 23 se indicó que: "[m]uchas afectaciones al medio ambiente entrañan daños transfronterizos. La contaminación de un país puede convertirse en el problema de derechos ambientales y humanos de otro, en particular cuando los medios contaminantes, como el aire y el agua, cruzan fácilmente las fronteras"[94].

78. De ahí que la obligación de protección del medio ambiente como norma de *jus cogens* cristaliza o recoge el valor fundamental de la comunidad internacional de reconocer al medio ambiente como soporte de los Estados y condición *sine qua non* para su existencia. Asimismo, de la protección al medio ambiente depende también la seguridad internacional, erigida como valor recogido en el Preámbulo de la Carta de las

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92 Naciones Unidas. Comisión de Derecho Internacional. Normas imperativas de derecho internacional general (ius cogens) A/CN.4/L.967. 11 de mayo de 2022. Conclusión 3 [2].

93 Naciones Unidas. Comisión de Derecho Internacional. Normas imperativas de derecho internacional general (ius cogens) A/CN.4/L.967. 11 de mayo de 2022. Conclusión 2 [3].

94 *Cfr*. Opinión Consultiva OC-23/17, *supra*, párr. 96.

Naciones Unidas y en el artículo 2 de la Carta de la Organización de los Estados Americanos.

79. Las normas de *jus cogens* protegen lo que se considera intolerable por la comunidad internacional porque entraña una amenaza a la subsistencia de la comunidad misma, de los pueblos o de los valores fundamentales. En este sentido, el objeto de las normas imperativas de derecho internacional está dado por valores sociales trascendentes, fruto de cierto grado de desarrollo de la comunidad internacional y de sus sistemas jurídicos.[95] En similar sentido se ha pronunciado el juez Augusto Cançado Trindade en su voto concurrente en la Opinión Consultiva No. 18:

> En realidad, cuando reconocemos principios fundamentales que conforman el substratum del propio ordenamiento jurídico, ya nos adentramos en el dominio del *jus cogens*, del derecho imperativo […] [E]s perfectamente posible visualizar el derecho imperativo (*jus cogens*) como identificado con los principios generales del derecho de orden material, que son garantes del propio ordenamiento jurídico, de su unidad, integridad y cohesión. Tales principios son necesarios (el *jus necessarium*), son anteriores y superiores a la voluntad […] son consustanciales al propio orden jurídico internacional[96].

80. Como se ha venido señalando, no puede concebirse la existencia de un orden jurídico internacional —ni doméstico— si no existe un medio ambiente en condiciones suficientes de subsistencia, tanto para el ser humano como para los restantes componentes. Ello toda vez que el ambiente se erige como soporte de los elementos del Estado, por lo que su afectación pone en riesgo al Estado mismo y a la humanidad toda.

81. La Comisión de Derecho Internacional ha señalado que para la identificación de una norma de *jus cogens* se requiere establecer que cumpla con dos criterios. A saber, i) que se trate de una norma de derecho internacional general; y ii) que sea aceptada y reconocida por la comunidad internacional de Estados en su conjunto como una norma que no admite acuerdo en contrario y solo puede ser modificada por una norma ulterior que tenga el mismo carácter[97].

82. Consideramos que el estado actual de la cuestión permite concluir que la obligación de protección del medio ambiente reviste las notas de una norma de *jus cogens*.

83. El derecho internacional consuetudinario es la base más común de las normas de *jus cogens*. En este sentido, el artículo 38 del Estatuto de la Corte Internacional de Justicia refiere a la costumbre internacional "como prueba de una práctica generalmente aceptada como derecho". Existe consenso en que la costumbre se compone de dos elementos: un *usus, diurnitas* o elemento material y la *opinio iuris necessitatis* o elemento psicológico.

84. En cuanto al primer elemento, se manifiesta en la actuación positiva de órganos estatales, v.gr., el dictado de leyes, sentencias internas, instrucciones, prácticas en

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[95] Puceiro Ripoll, R. en Jiménez de Aréchaga, E. et. al. Derecho Internacional Público. Principios, normas y estructuras. Tomo I (2005) Ed. FCU, Montevideo. p. 376.

[96] Cançado Trindade, A., Voto Concurrente en la Opinión Consultiva OC-18/03*. Condición Jurídica y derechos de los migrantes indocumentados*. Serie A No. 18. 17 de septiembre de 2003, párr. 53.

[97] *Cfr.* Naciones Unidas. Comisión de Derecho Internacional. Normas imperativas de derecho internacional general (ius cogens) A/CN.4/L.967. 11 de mayo de 2022. conclusión 4.

organizaciones internacionales, entre otros. Pues bien, es posible sostener que existe una práctica generalizada en la comunidad internacional que entiende la relevancia de la protección del ambiente. Esta práctica internacional consiste en tomar numerosas medidas o acciones para revertir u ocuparse del cuidado, protección y promoción del ambiente y se cristaliza en los múltiples instrumentos de distinto carácter que la comunidad de Estados ha convenido. A modo enunciativo, destacan la Conferencia de Naciones Unidas sobre el Medio Ambiente de Estocolmo de 1972 donde participaron ciento trece Estados[98]; la Carta Mundial de la Naturaleza suscrita por ciento dieciocho Estados; la Conferencia de Naciones Unidas sobre Medio Ambiente y Desarrollo en Río con la participación de ciento diez Estados; la Cumbre Mundial sobre Desarrollo Sostenible en Johannesburgo de 2002[99] [100]. Ello también aparece recogido en la práctica interna de varios Estados de la región, al ser consagrado en normas constitucionales[101].

85. El segundo elemento de la costumbre internacional requiere la convicción de que se trata de una norma jurídicamente obligatoria. Así, la resolución de Naciones Unidas sobre el derecho humano al medio ambiente limpio, saludable y sostenible[102], fue

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98 En las actas figura la participación de: Afganistán, Argelia, Argentina, Australia, Austria, Bahrein, Bangladesh, Bélgica, Bolivia, Botswana, Brasil, Burundi, Camerún, Canadá, Ceilán, Colombia, Congo, Costa de Marfil, Costa Rica, Chad, Chile, China, Chipre, Dahomey, Dinamarca, Ecuador, Egipto, El Salvador, Emiratos Árabes Unidos, España, Estados Unidos de América, Etiopía, Fiji, Filipinas, Finlandia, Francia, Gabón, Ghana, Grecia, Guatemala, Guinea, Guyana, Haití, Honduras, India, Indonesia, Irak, Irán, Irlanda, Islandia, Israel, Italia, Jamaica, Japón, Jordania, Kenia, Kuwait, Lesotho, Líbano, Liberia, Liechtenstein, Luxemburgo, Madagascar, Malasia, Malawi, Malta, Marruecos, Mauricio, Mauritania, México, Mónaco, Nepal, Nicaragua, Níger, Nigeria, Noruega, Nueva Zelandia, Países Bajos, Pakistán, Panamá, Perú, Portugal, Reino Unido de Gran Bretaña e Irlanda del Norte, República Árabe Libia, República Árabe Siria, República Centroafricana, República de Corea, República Dominicana, República Federal de Alemania, República Unida de Tanzania, República de Viet-Nam, Rumania, San Marino, Santa Sede, Senegal, Singapur, Sudáfrica, Sudán, Suecia, Suiza, Swazilandia, Tailandia, Togo, Trinidad y Tobago, Túnez, Turquía, Uganda, Uruguay, Venezuela, Yemen, Yugoslavia, Zaire y Zambia.

99 En las actas figura la participación de: Afganistán, Chad, Albania, Chile, Alemania, China, Andorra, Chipre, Angola, Colombia, Antigua y Barbuda, Comoras, Arabia Saudita, Comunidad Europea, Argelia, Congo, Argentina, Costa Rica, Armenia, Côte d'Ivoire, Australia, Croacia, Austria, Cuba, Azerbaiyán, Dinamarca, Bahamas, Djibouti, Bahrein, Dominica, Bangladesh, Ecuador, Barbados, Egipto, Belarús, El Salvador, Bélgica, Emiratos Árabes Unidos, Belice, Eritrea, Benín, Eslovaquia, Bhután, Eslovenia, Bolivia, España, Bosnia y Herzegovina, Estados Unidos de América, Botswana, Estonia, Brasil, Etiopía, Brunéi, Darussalam, ex República Yugoslava de Macedonia, Bulgaria, Federación de Rusia, Burkina Faso, Fiji, Burundi, Filipinas, Cabo Verde, Finlandia, Camboya, Francia, Camerún, Gabón, Canadá, Gambia, Georgia, Mónaco, Ghana, Mongolia, Granada, Mozambique, Grecia, Myanmar, Guatemala, Namibia, Guinea, Nepal, Guinea-Bissau, Nicaragua, Guinea Ecuatorial, Níger, Guyana, Nigeria, Haití, Niue, Honduras, Noruega, Hungría, Nueva Zelandia, India, Omán, Indonesia, Países Bajos, Irán (República Islámica del), Pakistán, Iraq, Palau, Irlanda, Panamá, Islandia, Papúa Nueva Guinea, Islas Cook, Paraguay, Islas Marshall, Perú, Islas Salomón, Polonia, Israel, Portugal, Italia, Qatar, Jamahiriya Árabe, Libia, Jamaica, Reino Unido de Gran Bretaña e Irlanda del Norte, Japón, República Árabe, Siria, Jordania, República Centroafricana, Kazajstán, República Checa, Kenya, República de Corea, Kirguistán, República Democrática del Congo, Kiribati, República Democrática Popular Lao, Kuwait, República de Moldova, Lesotho, República Dominicana, Letonia, Líbano, República Popular Democrática de Corea, Liberia, República Unida de Tanzania, Liechtenstein, Rumania, Lituania, Rwanda, Luxemburgo, Saint Kitts y Nevis, Madagascar, Samoa, Malasia, Santa Lucía, Malawi, Santa Sede, Maldivas, Santo Tomé y Príncipe, Malí, San Vicente y las Granadinas, Mauricio, Senegal, Mauritania, Seychelles, Malta, Sierra Leona, Marruecos, Singapur, México, Somalia, Micronesia (Estados Federados de), Sri Lanka, Sudáfrica, Turquía, Sudán, Ucrania, Suecia, Uganda, Suiza. Uruguay, Suriname, Uzbekistán, Swazilandia, Vanuatu, Tailandia, Venezuela, Tayikistán, Viet Nam, Togo, Yemen, Tonga, Yugoslavia, Trinidad y Tobago, Zambia, Túnez, Zimbabwe y Tuvalu.

100 Asimismo, destacan otros instrumentos: el Tratado Antártico de 1959, el Protocolo al Tratado Antártico sobre Protección al Medio Ambiente de 1991, la Cumbre del Milenio del año 2000, la Conferencia de Naciones Unidas sobre el Desarrollo Sostenible ("Río +20") de 2012 con representantes de los 193 Estados de Naciones Unidas; el Acuerdo de París, de Escazú, entre otros.

101 Ver nota al pie 215 de la sentencia.

102 Asamblea General de Naciones Unidas. El derecho humano a un medio ambiente limpio, saludable y sostenible. Resolución A/RES/76/300. 28 de julio de 2022.

adoptada por ciento sesenta y un votos a favor y ocho, en contra. En este punto, es necesario recordar que se requiere que sea reconocida como tal por la generalidad de Estados, sin que sea preciso la unanimidad. Se colige entonces que la generalidad de Estados se pronunció a favor del reconocimiento como derecho humano, teniendo en cuenta que la resolución no crea ni consagra, sino que declara una realidad preexistente (el derecho humano al medio ambiente limpio, saludable y sostenible), que ya se estaba gestando en múltiples instrumentos internacionales como ha sido desarrollado precedentemente.

86. En similar sentido, con vocación o pretensión de universalidad se encuentra la Agenda 2030 de Naciones Unidas donde se ha señalado que: "Todos los países la aceptan y se aplica a todos ellos, aunque teniendo en cuenta las diferentes realidades, capacidades y niveles de desarrollo de cada uno […] [l]os presentes objetivos y metas son universales y afectan al mundo entero, tanto a los países desarrollados como a los países en desarrollo"[103].

87. La primera consecuencia del reconocimiento como derecho humano por la generalidad de Estados en el seno de Naciones Unidas radica en el correlativo deber de respeto y garantía que se pone de cargo de los Estados, que no solo entraña abstención de contaminar, sino medidas positivas de promoción, sobre todo, para evitar que estas disposiciones queden vacías de contenido a partir del proceder de aquellos mismos que contribuyen a su formación.

88. En tanto la Asamblea General de Naciones Unidas es el órgano más representativo de la comunidad internacional, aquellas decisiones de tono legislativo y sobre los intereses más elevados de la comunidad internacional —dentro de los que indudablemente se encuentra la protección del ambiente— son aptas para la prueba de la *opinio iuris necessitatis*. La declaración del órgano más representativo consagrando o reconociendo un derecho humano necesariamente debe incidir, debe tener aplicación práctica, dado que no consiste solamente en una declaración de intención.

89. La Corte Internacional de Justicia ha derivado la *opinio iuris necessitatis* de la conducta de las partes y de otros Estados frente a resoluciones y declaraciones internacionales. Referida a la prohibición del uso de la fuerza, en el *caso Nicaragua vs. Estados Unidos* señaló:

> [P]uede atribuirse semejante valor de opinio iuris al apoyo prestado a la resolución de la Sexta Conferencia Interamericana (18 de febrero de 1928) en que se condena la agresión […] [n]o menos significativa es su aceptación del principio de prohibición de la fuerza contenido en la Declaración sobre Principios que rigen las Relaciones Mutuas de los Estados participantes en la conferencia sobre Seguridad y Cooperación Europea […] La aceptación de tal fórmula confirma la existencia de una opinio iuris que prohíbe el empleo de la fuerza en las relaciones internacionales, atribuibles a los Estados participantes..
>
> Una prueba adicional de la validez, en cuanto derecho consuetudinario, del principio de la prohibición del uso de la fuerza […] se puede hallar en el hecho de que éste es frecuentemente mencionado en las declaraciones de los representantes de los Estados, no solo como principio de derecho internacional

[103] Asamblea General de Naciones Unidas. Resolución A/70/L.1. Transformar nuestro mundo: la Agenda 2030 para el Desarrollo Sostenible. 18 de septiembre de 2015. Párr. 5.

> consuetudinario, sino también como un principio fundamental o básico de este derecho[104].
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> […][p]ara determinar la norma jurídica que se aplica a estas últimas formas, la Corte puede recurrir nuevamente a las formulaciones contenidas en la Declaración sobre los principios de derecho internacional relativos a las relaciones de amistad y a la cooperación entre los Estados de conformidad con la Carta de las Naciones Unidas (resolución 2625 (XXV) de la Asamblea General antes mencionada). Como ya se ha observado, la adopción por los Estados de este texto ofrece una indicación de su opinio iuris en cuanto al derecho internacional consuetudinario sobre la cuestión. (Énfasis añadido)

90. En cuanto a la prueba sobre la aceptación y el reconocimiento, la Comisión de Derecho Internacional ha indicado que constituyen prueba, *inter alia*, las declaraciones públicas hechas en nombre de los Estados, las publicaciones oficiales, dictámenes gubernamentales, correspondencia diplomática, normas constitucionales, legislativas o administrativas, jurisprudencia nacional, resoluciones aprobadas por una organización internacional o conferencia intergubernamental[105]. Pues bien, el amplio catálogo de instrumentos internacionales de diversos foros, evidencia que la comunidad internacional ha convenido la aceptación y reconocimiento de la protección del medio ambiente como una obligación jurídica de los Estados.

91. La obligación internacional de protección del medio ambiente como norma de *jus cogens* deviene garante del orden jurídico internacional, condensa principios necesarios o consustanciales al orden jurídico internacional porque de su respeto depende, entre otras, de la seguridad internacional[106], así como la subsistencia de la especie humana y de la comunidad de Estados tal como la conocemos. Entonces, no se puede concebir, tolerar ni justificar racionalmente y de buena fe que se realicen actos que pongan en riesgo la integridad del medio ambiente, porque ello supone destruir el cimiento o la base sobre la que se desarrolla la vida humana y todas sus dimensiones.

92. Esta cristalización se aprecia también, como ya se ha señalado, en los múltiples instrumentos de protección del ambiente o de sus componentes en particular[107], los

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[104] Corte Internacional de Justicia. Caso relativo a actividades militares y paramilitares en y contra Nicaragua (Nicaragua vs. Estados Unidos). Fondo del asunto. 27 de junio de 1986. Párrs. 189-191.

[105] Naciones Unidas. Comisión de Derecho Internacional. Normas imperativas de derecho internacional general (ius cogens) A/CN.4/L.967. 11 de mayo de 2022. Conclusión 8.2.

[106] Inicialmente el concepto de seguridad internacional fue concebido en términos militares o de guerra; pero ha operado una evolución del término para comprender otros fenómenos que, al igual que aquellos, ponen en peligro la convivencia, la estabilidad y la continuidad de la comunidad de Estados y de las personas. En este sentido, el deterioro medioambiental acarrea consecuencias que ponen en peligro la seguridad internacional; a saber: migraciones forzadas, conflictos por el control de los recursos naturales, pérdida y deterioro de especies de flora y fauna como patrimonio natural de la humanidad, violaciones a derechos humanos, entre otros.

[107] En este sentido, se encuentra el Protocolo de San Salvador; Pacto Internacional de Derechos Económicos, Sociales y Culturales; Declaración de Estocolmo de 1972; Carta Mundial de la Naturaleza de 1982; Declaración de Río sobre el Medio Ambiente y Desarrollo de 1992; Convención Marco de las Naciones Unidas sobre Cambio Climático de 1992; Convenio sobre Diversidad Biológica de 1992; Cumbre Mundial sobre Desarrollo Sostenible de Johannesburgo de 2002; Conferencia Río +20 de 2012; Acuerdo de París de 2015; Protocolo de Kyoto de la Convención Marco de las Naciones Unidas sobre el Cambio Climático; Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe; la resolución A/RES/76/300 de 2022 de la Asamblea General de Naciones Unidas; Convención para la protección de la flora, de la fauna y de las bellezas escénicas naturales de los países de América; Convención sobre el Comercio Internacional de Especies Amenazadas de Fauna y Flora Silvestres de 1973; Convención sobre la Protección del Patrimonio Mundial, Cultural y Nacional de 1972; Convenio sobre la prevención de la contaminación del mar por vertimiento de desechos y otras materias de 1972; entre otros.

que además de evidenciar la preocupación internacional al respecto, reflejan el valor que la comunidad internacional ha dado al medio ambiente, conscientes de las drásticas consecuencias que su deterioro apareja para la continuidad de la vida tal como la conocemos.

93. En consecuencia, es necesario consignar que para la comunidad internacional no existen razones válidas para desconocer esta obligación de protección como norma de *jus cogens* y, por tanto, no se admitan actos, hechos u omisiones estatales que repercutan en la calidad y conservación del ambiente, máxime teniendo en cuenta que las generaciones presentes actúan como custodios que deben entregar este bien jurídico a las generaciones futuras en iguales o mejores condiciones de las que lo hemos recibido de nuestros predecesores.

94. El reconocimiento de la obligación de protección del medio ambiente como una norma de *jus cogens* implica varias consecuencias jurídicas para los Estados. En primer término, la norma consuetudinaria internacional de protección del ambiente, al devenir en una norma imperativa de derecho internacional (*jus cogens*) vuelve estéril la objeción persistente que algunos Estados pudieran haber realizado. De esta forma, no podrán eludir su cumplimiento alegando su oposición o discrepancia.

95. Asimismo, los Estados no podrán sustraerse mediante actos jurídicos, prácticas e incluso omisiones del cumplimiento de la norma de *jus cogens*. Esto implica un límite a la noción irrestricta de soberanía y autonomía de voluntad del Estado en cuanto a la protección de un valor supraestatal o universal que es el medio ambiente, como prerrequisito de la supervivencia de la propia humanidad y por ende de la comunidad de Estados. Opera, pues, una subordinación de los intereses particulares a los intereses fundamentales de la comunidad internacional.

96. La amplísima discreción que tradicionalmente se había otorgado a los Estados en materia ambiental y de explotación de los recursos naturales, ha sido reemplazada por una concepción global y solidaria (de familia humana), donde la gestión y cuidado de los recursos naturales queda a cargo de toda la humanidad. Por tanto, cualquier Estado está facultado, a partir de este reconocimiento, a reclamar a los demás el cumplimiento de la obligación internacional derivada de esta norma, así como de llamar a responsabilidad por los actos contrarios y los daños causados, dado que la violación por un Estado cualquiera afecta e incumbe a todos los demás.

97. En cuanto a los tratados vigentes que pudieran existir, es necesario recordar que aplican las reglas del artículo 64 de la Convención de Viena sobre Derecho de los Tratados de 1969, por lo que las disposiciones convencionales contrarias a la norma superviniente de *jus cogens* se anulan y los actos estatales que infrinjan estas normas agravan la responsabilidad internacional del Estado.

98. Además, se limita la autonomía de voluntad de los Estados al suscribir tratados en el futuro, dado que deberá ajustarse su contenido a esta nueva norma, so pena de nulidad conforme al artículo 53 de la Convención de Viena sobre Derecho de los Tratados de 1969. Pero es necesario recordar que este deber de ajustarse a la norma imperativa de derecho internacional no solo se dará en el ámbito convencional, sino que irradia sus efectos a todo el sistema del Derecho Internacional[108].

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[108] *Cfr.* Opinión Consultiva OC-26/20, *supra,* párr. 102.

ii) El desarrollo sostenible como derecho convencionalmente protegido y sus dimensiones

99. Esta Corte IDH ya se ha pronunciado respecto al desarrollo sostenible. Así, en la Opinión Consultiva No. 23 se refirió a la interrelación entre la protección al medio ambiente, el desarrollo sostenible y los derechos humanos; así como a la posibilidad de hacer uso de los principios, derechos y obligaciones del derecho ambiental internacional, en tanto parte del corpus iuris interamericano, para fijar el alcance de las obligaciones convencionales[109]. Asimismo, ha remarcado la contribución que pueden realizar los defensores de derechos humanos, directa o indirectamente, al desarrollo sostenible y la gobernabilidad y cómo ello redunda en beneficio del estado de derecho y la democracia[110].

100. En el presente caso, la Corte IDH ahonda en estas consideraciones y reafirma que constituye una obligación de los Estados el impulsar el desarrollo sostenible en beneficio de las personas y las comunidades a fin de alcanzar el bienestar económico, social, cultural y político; teniendo en cuenta los límites marcados por el respeto a los derechos humanos y, en particular, el derecho al medio ambiente sano. En esta línea, el desarrollo sostenible y la protección del medio ambiente resultan fundamentales, especialmente, para los niños y niñas dado que pueden verse afectados en forma desproporcionada por las consecuencias de la degradación ambiental[111].

101. En la sentencia se puso de manifiesto la tensión vivida por los habitantes de La Oroya, donde ciertos grupos percibían una tensión incompatible entre desarrollo y protección al medio ambiente y ello redundó en los actos de hostigamiento contra dichos grupos[112]. Es por ello, así como por la importancia que este tema reviste para la región, que concurrimos en este voto a desarrollar el concepto de desarrollo sostenible y sus implicancias.

102. La Asamblea General de Naciones Unidas destacó que el desarrollo consiste en un proceso global, económico, social, cultural y político que se orienta al bienestar de toda la población. En virtud de ello, se ha declarado que "[e]l derecho al desarrollo es un derecho inalienable en virtud del cual todo ser humano y todos los pueblos están facultados para participar en un desarrollo económico, social, cultural y político en el que puedan realizarse plenamente todos los derechos humanos y libertades fundamentales"[113].

103. La noción de desarrollo sostenible o duradero emerge como una alternativa frente a un modelo de producción y consumo que se había caracterizado por una despreocupación por la integridad del ambiente y la disponibilidad de los recursos. Muchas formas de desarrollo afectan de manera irreversible los recursos del medio ambiente en que se encuentran; simultáneamente, el deterioro del ambiente puede llevar, a su vez, a socavar el desarrollo económico y a condicionar el futuro de las personas que allí viven.

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109 *Cfr.* Opinión Consultiva OC-23/17, *supra,* párrs. 52-55.

110 *Cfr. Caso Acosta y otros Vs. Nicaragua. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 25 de marzo de 2017. Serie C No. 334, párr. 221.

111 Véase párrafo 243 de la sentencia.

112 Véase párrafos 93-101 de la sentencia.

113 Asamblea General de Naciones Unidas. Resolución 41/128 de 4 de diciembre de 1986. Declaración sobre el derecho al desarrollo. Artículo 3.

104. La sostenibilidad, en última instancia, refiere a obligaciones con las generaciones futuras; por lo que supone una necesaria conjugación entre desarrollo y equidad intergeneracional. El desarrollo sostenible consiste en asegurar "que se satisfagan las necesidades del presente sin comprometer la capacidad de las futuras generaciones de satisfacer las propias. El concepto de desarrollo duradero implica límites -no límites absolutos- sino limitaciones que imponen a los recursos del medio ambiente el estado actual de la tecnología y de la organización social y la capacidad de la biósfera de absorber los efectos de las actividades humanas"[114].

105. El derecho al desarrollo sostenible está consagrado en los artículos 30 a 34 de la Carta de la Organización de los Estados Americanos. El artículo 30 de la Carta de la OEA hace referencia a la justicia social en las relaciones entre los miembros, a fin de alcanzar el desarrollo integral como condición indispensable para la paz y la seguridad. En esta línea, dispone que "[e]l desarrollo integral abarca los campos económico, social, educacional, cultural, científico y tecnológico".

106. Los artículos 31 y 32 refieren a la cooperación interamericana para el desarrollo integral como "responsabilidad común y solidaria de los Estados miembros"; aspecto que permite inferir la consagración del principio de solidaridad internacional, el que deviene fundamental en la consecución del desarrollo sostenible como se desarrollará *infra*. La solidaridad es en consecuencia una obligación jurídica asumida por los Estados.

107. Finalmente, el artículo 33 consagra que el desarrollo -que es responsabilidad de cada Estado- debe propender "a la plena realización de la persona humana". Pues bien, como se desarrollará en este acápite, no se concibe la plena realización de la persona humana -como reza la norma- en un entorno ambientalmente degradado o en riesgo de estarlo por las actividades que se desarrollan.

108. Por tanto, si el desarrollo a que refiere la Carta de la OEA se debe orientar y contribuir a la plena realización de la persona, entonces es porque ese desarrollo debe ser sostenible, duradero, que se preocupe por la durabilidad y perdurabilidad de sí mismo, atendiendo a las necesidades de las generaciones presentes y futuras. Esto es: no hay plena realización de la persona humana en un entorno en riesgo o donde las perspectivas de supervivencia y bienestar no son seguras a mediano y largo plazo. He ahí el concepto de desarrollo sostenible[115].

109. De esta manera, la consagración del derecho al desarrollo sostenible no solo está dada por instrumentos de *soft law* ni depende de la buena voluntad de los Estados; sino que, en tanto derecho emergente de la Carta de la OEA, deriva su protección en virtud del artículo 26 de la Convención Americana, como derecho convencionalmente protegido.

110. El desarrollo sostenible es, en primer lugar, desarrollo; por lo que impone a los Estados inexorablemente la satisfacción de las necesidades y aspiraciones humanas básicas como principal objetivo, lo que incluye la erradicación de la pobreza, supresión de barreras de género e inclusión de todas las personas, acceso al agua potable, crecimiento económico equitativamente distribuido, vivienda y educación; sistemas democráticos donde se protejan los derechos humanos, entre otros.

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[114] Asamblea General de Naciones Unidas. Resolución A/42/427. Informe de la Comisión Mundial sobre el Medio Ambiente y el Desarrollo. 4 de agosto de 1987. Recapitulación de la Comisión Mundial sobre el Medio Ambiente y el Desarrollo. Párr. 27, p. 23.

[115] Esta conclusión se deriva de los artículos 45 literal a, d y f, así como el artículo 47.

111. Pero, en segundo lugar, es "sostenible" o "duradero", lo que requiere que los niveles de producción y consumo tengan en cuenta la durabilidad a largo plazo, el impacto en las generaciones venideras, la disponibilidad de recursos y su conservación en estándares de calidad, entre otras. Es así, que el desarrollo sustentable impone adoptar una perspectiva "verde", que atienda a la preservación de especies vegetales y animales, la conservación del suelo y de los ecosistemas. En este sentido, el "Informe Bruntland" señaló que "es un proceso de cambio en el cual la explotación de los recursos, la orientación de la evolución tecnológica y la modificación de las instituciones están acordes y acrecientan el potencial actual y futuro para satisfacer las necesidades y aspiraciones humanas"[116].

112. El desarrollo se erige como un derecho humano. Ahora bien, en tanto obligación estatal, presupone que se dé sobre la base de un sistema y estado ambiental en condiciones; dado que la sustentabilidad es condición necesaria para que exista verdadero desarrollo como derecho humano. Es posible afirmar que existe, pues, una relación de interdependencia e interconexión entre medio ambiente, sustentabilidad y desarrollo; por lo que cada decisión relacionada a la producción, el desarrollo o la sociedad debe ser tomada desde una perspectiva sustentable; debiendo armonizar y, en su caso, ponderar, por un lado, los beneficios actuales y, por el otro, las consecuencias presentes y proyecciones futuras, previendo el grado de afectación y beneficios en uno y otro caso. Es así que el "Informe Bruntland" señalaba que si bien todo crecimiento económico entraña un riesgo inherente de perjudicar al ambiente, "los responsables de las decisiones políticas, orientados por el concepto de desarrollo duradero, necesariamente trabajarán para asegurar que las economías en aumento continú[e]n firmemente arraigadas en sus raíces ecológicas y que estas raíces están protegidas y nutridas de manera que soporten el crecimiento durante el largo período"[117].

113. El desarrollo sustentable, en tanto obligación estatal, debe desarrollarse en tres áreas: (i) ecológica, lo que implica la elaboración de políticas de protección, conservación y recuperación del patrimonio natural y del medio ambiente, teniendo en cuenta la diversidad biológica y la capacidad de regeneración; (ii) económica, lo que supone la adaptación de los medios de producción y consumo; valoración de los recursos a corto y largo plazo, equidad intergeneracional e intrageneracional; y (iii) social, en tanto se requiere igualdad de oportunidades, integración, participación ciudadana en la toma de decisiones que afecten al ambiente, satisfacción de necesidades básicas, trabajo decente y erradicación de la pobreza. Esto es, el desarrollo sostenible tiene una triple dimensión que debe darse en forma equilibrada e integrada por tratarse de tres dimensiones del mismo fenómeno; a saber, económica, social y ambiental[118].

114. Una verdadera perspectiva de desarrollo sostenible requiere considerar el impacto que tienen las actuales formas de desarrollo sobre los grupos vulnerables; en especial, los niños y niñas, quienes pueden ver hipotecadas sus oportunidades de

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[116] Asamblea General de Naciones Unidas. Resolución A/42/427. Informe de la Comisión Mundial sobre el Medio Ambiente y el Desarrollo. Capítulo 2. Hacia un desarrollo duradero. 4 de agosto de 1987. Párr. 15, p. 63.

[117] Asamblea General de Naciones Unidas. Resolución 4/42/427. Informe de la Comisión Mundial sobre el Medio Ambiente y el Desarrollo. Capítulo 1. Un futuro amenazado. 4 de agosto de 1987. Párr. 50, p. 56.

[118] Asamblea General de Naciones Unidas. Resolución A/4/70/L.1. Transformar nuestro mundo: la Agenda 2030 para el Desarrollo Sostenible. 18 de septiembre de 2015, párr. 2.

desarrollo y bienestar a largo plazo si los recursos no son correctamente administrados y preservados en el tiempo presente. De igual manera, también debe considerarse la responsabilidad que recae sobre las generaciones presentes respecto de las generaciones futuras, toda vez que estamos llamados a entregar el ambiente en condiciones al menos iguales a aquellas en que lo recibimos.

115. En este sentido se ha pronunciado el Alto Comisionado de Derechos Humanos señalando la importancia que tiene para los Estados que: "al preparar sus políticas ambientales, tengan en cuenta el modo en que la degradación del medio ambiente puede afectar a todos los miembros de la sociedad y, en particular, a las mujeres, los niños, las poblaciones indígenas o los miembros de la sociedad en situación desventajosa, incluidas las personas o grupos de personas que son objeto del racismo"[119].

116. Es así que es preciso que los Estados tengan especialmente en cuenta la situación de las personas que se encuentran en la pobreza, desarrollando planes para erradicarla, dado que como se explica en la sentencia, los efectos de la contaminación y degradación del ambiente repercuten más fuertemente sobre ciertos grupos en situación de vulnerabilidad[120]. Sobre este punto, la Agenda 2030 prevé que "la erradicación de la pobreza en todas sus formas y dimensiones, incluida la pobreza extrema, es el mayor desafío a que se enfrenta el mundo y constituye un requisito indispensable para el desarrollo sostenible"[121].

117. El derecho al desarrollo —incluido el desarrollo económico— no puede conseguirse a toda costa, sin consideración de los costos y riesgos de la actividad. Por el contrario, es preciso que toda política al respecto se encuentre limitada o definida en relación al principio de equidad intergeneracional y el desarrollo sostenible. Es correcto afirmar que existe un deber estatal de emplear todas las energías para conseguir un desarrollo económico y social; pero ese desarrollo ha de ser sostenido, inclusivo (distribuido equitativamente) y sostenible. La sostenibilidad permite que el modelo genere desarrollo y se mantenga en el tiempo, sin detrimento de las condiciones ambientales, sociales y de cualquier otro orden. Es necesario hacer un llamado a revisar los modelos de producción, desarrollo y consumo que operan en los Estados a fin de que sean sostenibles a partir de la gestión sostenible y responsable de los recursos naturales.

118. Para ello es necesario que se conjuguen esfuerzos entre particulares, los Estados y las empresas; sin perjuicio de la obligación estatal de regulación, control y fiscalización a fin de respetar y garantizar el derecho a un medio ambiente sano, limpio y sostenible.

119. La Corte Constitucional de Colombia se ha pronunciado al respecto, señalando que: "[e]l desarrollo sostenible no es solamente un marco teórico sino que involucra un conjunto de instrumentos, entre ellos jurídicos, que hagan factible el progreso de las próximas generaciones en consonancia con un desarrollo armónico de la naturaleza […] desde esta perspectiva, el desarrollo económico y tecnológico en lugar de oponerse al

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119 Oficina del Alto Comisionado de Derechos Humanos. Los derechos humanos y el medio ambiente como parte del desarrollo sostenible. Resolución 2005/60. 20 de abril de 2005, párr. 4.

120 *Véase* párrafo 231 de la sentencia.

121 Asamblea General de Naciones Unidas. Resolución A/4/70/L.1. Transformar nuestro mundo: la Agenda 2030 para el Desarrollo Sostenible. 18 de septiembre de 2015, párr. 2.

mejoramiento ambiental, deben ser compatibles con la protección al medio ambiente y la preservación de los valores históricos y culturales"[122].

120. En el caso que motiva este voto, las actividades desarrolladas en el Complejo Metalúrgico de La Oroya no adoptaron una perspectiva sustentable; como señala la sentencia a esto contribuyó la deficiente regulación y fiscalización estatal. Respecto a la industria, innovación e infraestructura, los Objetivos de Desarrollo Sostenible requieren dentro de sus metas "la adopción de tecnologías y procesos industriales limpios y ambientalmente racionales y logrando que todos los países tomen medidas de acuerdo con sus capacidades respectivas"[123]. Esto cobra especial relevancia cuando, como en el caso, las actividades son desarrolladas por particulares, donde se hace necesaria una actitud proactiva y un enfoque sostenible del Estado en la adopción de medidas,regulación, incentivos, entre otros.

121. Las nociones de desarrollo, crecimiento y sustentabilidad no deben ser interpretadas como antagónicas, sino que, por el contrario, debe existir compatibilidad entre estos conceptos. El desarrollo no es posible sobre una base ambiental deteriorada ni el medio ambiente puede protegerse cuando el crecimiento económico no toma en cuenta su impacto ambiental; por lo que son aspectos que no deben tratarse aisladamente por los Estados, sino con una visión de conjunto que haga posible la perspectiva sostenible[124].

122. Por último, en este punto, quisiéramos recordar la importancia de vincular el desarrollo sostenible con el principio de solidaridad internacional, consagrado en la Carta de la OEA como deber de los Estados Parte. El desarrollo sostenible no es un estado fijo, sino un proceso de constante dinamismo y cambio en donde la explotación de los recursos, las inversiones, la investigación y el desarrollo de tecnología se ajusta a las necesidades presentes y a las futuras. Por ello es que se requiere aunar esfuerzos entre la comunidad internacional, las empresas y los particulares.

123. El Tribunal Constitucional Federal Alemán ha señalado, respecto de la necesaria cooperación internacional, en un caso referido al clima, pero perfectamente trasladable a la protección del medio ambiente en general, lo siguiente:

> Al exigir que también se protejan los fundamentos naturales de la vida para las generaciones futuras, el artículo 20 LF obliga a perseguir un objetivo que el legislador nacional, con respecto al clima, no es posible alcanzar por sí solo, sino que únicamente puede lograr mediante la cooperación internacional. Esto se debe a las condiciones reales del cambio climático y la protección del clima. El problema del calentamiento global y las actividades (en el ámbito legal) implicadas en su

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122 Corte Constitucional de Colombia. Sentencia C-339/02. 7 de mayo de 2002.

123 Asamblea General de Naciones Unidas. Resolución A/RES/70/1. Transformar nuestro mundo: La Agenda 2030 para el Desarrollo Sostenible. 21 de octubre de 2015, párr. 9.4.

124 Sobre este punto, se ha pronunciado el "Informe Bruntland" donde se señaló que: "Las cuestiones económicas y ecológicas no son forzosamente antagónicas. Por ejemplo, las políticas de conservación de la calidad de las tierras agrícolas y de protección forestal mejoran, a largo plazo, las perspectivas de desarrollo agrícola. Al utilizarse más eficientemente la energía y el material empleado se cumple con la finalidad ecológica y al mismo tiempo se reducen los costos. Pero la compatibilidad de los objetivos ambientales con los económicos a veces se pierde cuando se trata de conseguir ganancias individuales o colectivas y se otorga escasa consideración a sus consecuencias sobre los demás, con una fe ciega en la habilidad de la ciencia para encontrar soluciones e ignorancia de las consecuencias a largo plazo de las decisiones adoptadas en el momento. La rigidez de las instituciones se añade a esta miopía […]". Asamblea General de Naciones Unidas. Resolución A/42/427. Informe de la Comisión Mundial sobre el Medio Ambiente y el Desarrollo, párr. 73, pp. 84-85.

> prevención, son de naturaleza genuinamente global […] ningún Estado puede detener el calentamiento global por sí solo. Además, las emisiones de todos los Estados contribuyen al cambio climático de igual manera[125] [126].

124. Todo lo anterior no implica desconocer el derecho soberano de los Estados sobre la determinación de sus políticas y la disponibilidad de sus recursos conforme a las reglas del Derecho Internacional; sino que el actual enfoque sostenible exige que los Estados se relacionen entre sí por vínculos de solidaridad internacional y en aras de la solidaridad inter e intrageneracional a fin de aunar esfuerzos en la investigación, tecnología, precaución, planificación y contralor del medio ambiente. Lo que a continuación será analizado en profundidad.

iii) El principio de equidad intergeneracional

125. La sentencia también refiere a la vinculación entre el "principio de precaución" en materia ambiental y el "principio de equidad intergeneracional" que impone a los Estados la formulación de políticas ambientales orientadas a que las generaciones presentes dejen un ambiente en condiciones adecuadas a las generaciones venideras[127]. Asimismo, destaca la importancia que reviste respecto de niños, niñas y adolescentes, quienes constituyen un grupo especialmente vulnerable frente a la degradación ambiental[128]. Ello impone, *inter alia*, exigencias más estrictas[129] respecto de la diligencia debida y una obligación de vigilancia y fiscalización reforzada en aquellos casos en que la contaminación proviene de empresas que por sus actividades o su ámbito de funcionamiento pueden causar un daño al ambiente.

126. No es la primera vez que este tribunal se pronuncia al respecto; sino que ya había hecho mención de la protección de las generaciones futuras en la Opinión Consultiva No. 23[130]. Concurrimos con el presente voto a desarrollar este principio de equidad intergeneracional y su sustento normativo, habida cuenta de su especial vinculación con el derecho al desarrollo sostenible y con los derechos de los niños, niñas y adolescentes como grupo especialmente vulnerable al impacto de la contaminación. Las consideraciones a la equidad intergeneracional se harán teniendo en cuenta la perspectiva de protección del medio ambiente, sin perjuicio de que tiene otras dimensiones, v.gr., referidas a la deuda externa de los Estados, entre otras.

127. La Declaración Americana de los Derechos y Deberes del Hombre refiere en su preámbulo a que "[t]odos los hombres nacen libres e iguales en dignidad y derechos y, dotados como están por naturaleza de razón y conciencia, deben conducirse fraternalmente los unos con los otros". Así, se advierte que no hay mención que limite a "los hombres" (las personas) actuales, sino que refiere a "todos". Asimismo, la fraternidad que debe orientar las relaciones humanas no solo viene dada por una

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125 Tribunal Constitucional Federal Alemán. Beschluss vom 24. marzo 2021 - 1 BvR 2656/18 Sala Primera. 24 de marzo de 2021. Disponible en https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/ES/2021/03/rs20210324_1bvr265618es.html, párr. 200.

126 También el "Informe Bruntland" refería a esta cuestión, señalando que: "los aspectos sistemáticos no solo actúan al interior, sino también entre naciones. Los límites nacionales se han vuelto tan porosos que las distinciones tradicionales entre asuntos locales, nacionales e internacionales se han vuelto borrosos. Los ecosistemas no respetan los límites nacionales". En igual sentido se encuentran los Principios 5, 6 y 7 de la Declaración de Río y el Principio 24 de la Declaración de Estocolmo de 1972.

127 *Véase*, párrafo128 de la sentencia.

128 *Véase*, párrafo 141 de la sentencia.

129 *Véase*, párrafo 142 de la sentencia.

130 *Cfr.* Opinión Consultiva OC-23/17, *supra,* párr. 59.

dimensión intrageneracional -es decir, las actuales generaciones-, sino también intergeneracional, toda vez que el documento no lo distingue.

128. El artículo XXIX refiere al deber de toda persona de "convivir con las demás de manera de que todas y cada una pueda formar y desenvolver íntegramente su personalidad".

129. El artículo 30 de la Carta de la Organización de los Estados Americanos dispone que "[l]os Estados miembros, inspirados en los principios de solidaridad y cooperación interamericanas, se comprometen a aunar esfuerzos para lograr que impere la justicia social internacional en sus relaciones y para que sus pueblos alcancen un desarrollo integral, condiciones indispensables para la paz y la seguridad"; esto debe entenderse desde una perspectiva diacrónica y no solo referida al desarrollo actual o presente; sumado a que el artículo 33 refiere a que el desarrollo debe contribuir a la plena realización de la persona, como ya fuera referido *ut supra*.

130. En esta línea, el artículo 1.2 de la Convención Americana define a la "persona" como todo ser humano, sin distinciones de ningún tipo y esta ha de ser la consideración que guíe la lectura del artículo 1.1.

131. En consonancia con lo anterior, la Declaración Universal de Derechos Humanos reconoce en su preámbulo que "la libertad, la justicia y la paz en el mundo tienen por base el reconocimiento de la dignidad intrínseca y de los derechos iguales e inalienables de todos los miembros de la familia humana"; aspecto este último que debe entenderse como comprensivo incluso de aquellos miembros de la familia humana que aún no tienen existencia actual. El artículo 1 proclama que todos los seres humanos nacen libres e iguales en dignidad y derechos, así como el deber de comportarse "fraternalmente los unos con los otros"[131].

132. El Pacto de Derechos Económicos, Sociales y Culturales también refiere a la dignidad inherente a todos los miembros de la familia humana y todos sus derechos "iguales e inalienables" y a que "no puede realizarse el ideal del ser humano libre […] a menos que se creen condiciones que permitan a cada persona gozar de sus derechos económicos, sociales y culturales, tanto como de sus derechos civiles y políticos".

133. En el ámbito universal de protección se destaca la Declaración sobre las responsabilidades de las generaciones actuales para con las futuras[132], donde se dispone en su artículo 1 que las generaciones actuales tienen "la responsabilidad de garantizar la plena salvaguardia de las necesidades y los intereses de las generaciones presentes y futuras"; así como el artículo 3 que refiere al mantenimiento y perpetuación de la humanidad y el artículo 4 que impone "la responsabilidad de legar a las generaciones futuras un planeta que en un futuro no esté irreversiblemente dañado por la actividad del ser humano. Al recibir la Tierra en herencia temporal, cada generación debe procurar utilizar los recursos naturales razonablemente y atender a que no se comprometa la vida con modificaciones nocivas de los ecosistemas y a que el progreso científico y técnico en todos los ámbitos no cause perjuicios a la vida en la Tierra".

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131 En este sentido, Asamblea General de Naciones Unidas. Resolución A/68/322. La solidaridad intergeneracional y las necesidades de las generaciones futuras. Informe del Secretario General. 15 de agosto de 2013, párr. 13.

132 UNESCO. Declaración sobre las responsabilidades de las generaciones actuales para con las generaciones futuras. 12 de noviembre de 1997.

134. Recientemente, en los Principios de Maastricht sobre los Derechos Humanos de las Generaciones Futuras se reconoce que "[n]i la declaración Universal de Derechos Humanos ni ningún otro instrumento de derechos humanos contiene una restricción temporal o limita los derechos al presente. Los derechos humanos se extienden a todos los miembros de la familia humana, incluidas las generaciones presentes y futuras"[133]. El Principio 8 dispone que "[l]a humanidad es de la Tierra, de la que depende totalmente y con ella mantiene una relación de interdependencia. Cada generación vive en la Tierra y tiene una relación interconectada con la naturaleza y sus ecosistemas diversos. Durante su tiempo en la Tierra, cada generación debe desempeñar una función de tutela de la Tierra para las generaciones futuras. Esta tutela debe ejercerse en armonía con todos los seres vivos y la naturaleza".

135. A su vez, el Principio 10 recoge el mandato de solidaridad internacional según fuera desarrollado ut supra (párrafo 121), en tanto "todos los seres humanos, pertenezcan a las generaciones presentes o a las futuras, tienen derecho a un orden social e internacional en el que los derechos y las libertades puedan realizarse para todas las personas. Tal orden internacional únicamente es posible, ahora o en el futuro, si las personas, los grupos y los Estados adoptan el principio de la solidaridad internacional".

136. Existen otros instrumentos referidos a la equidad intergeneracional como la Declaración de Estocolmo en sus Principios 2 y 5[134]; la Convención sobre el Comercio Internacional de Especies Amenazadas de Fauna y Flora Silvestre de 1973[135]; la Convención sobre la Protección del Patrimonio Mundial, Cultural y Natural de 1972[136]; el Principio 3 de la Declaración de Río[137] y la Carta de Derechos y Deberes Económicos de los Estados[138].

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133 Principios de Maastricht sobre los derechos humanos de las generaciones futuras. Adoptados el 13 de julio de 2023. Disponible en https://drive.google.com/file/d/11PM0Wc8emhVG3y2lEfTqj7a-H4TVm0f0/view

134 El Principio 2 dispone que: "Los recursos naturales de la Tierra, incluidos el aire, el agua, la tierra, la flora y la fauna y especialmente muestras representativas de los ecosistemas naturales deben preservarse en beneficio de las generaciones presentes y futuras mediante una cuidadosa planificación u ordenación, según convenga"; así como el Principio 5 que prevé: "Los recursos no renovables de la Tierra deben emplearse de forma que se evite el peligro de su futuro agotamiento y se asegure que toda la humanidad comparte los beneficios de tal empleo".

135 En su preámbulo se lee: "Reconociendo que la fauna y flora silvestres, en sus numerosas, bellas y variadas formas constituyen un elemento irremplazable de los sistemas naturales de la tierra, tienen que ser protegidas para esta generación y las venideras".

136 Artículo 4: Cada uno de los Estados Partes en la presente Convención reconoce que la obligación de identificar, proteger, conservar, rehabilitar y transmitir a las generaciones futuras el patrimonio cultural y natural situado en su territorio, le incumbe primordialmente. Procurará actuar con ese objeto por su propio esfuerzo y hasta el máximo de los recursos de que disponga, y llegado el caso, mediante la asistencia y la cooperación internacionales de que se pueda beneficiar, sobre todo en los aspectos financiero, artístico, científico y técnico.

137 Artículo 3: El derecho al desarrollo debe ejercerse en forma tal que responda equitativamente a las necesidades de desarrollo y ambientales de las generaciones presentes y futuras.

138 Asamblea General de Naciones Unidas. Resolución 3281 (XXIX) de 12 de diciembre de 1974. Carta de Derechos y Deberes Económicos de los Estados. Artículo 30: "La protección, la preservación y el mejoramiento del medio ambiente para las generaciones presentes y futuras y es responsabilidad de todos los estados. Todos los estados deben tratar de establecer sus propias políticas ambientales y de desarrollo de conformidad con esa responsabilidad. Las políticas ambientales de todos los estados deben promover y no afectar adversamente y la actual y futuro potencial de desarrollo de los países en desarrollo. Todos los Estados tienen la responsabilidad de valer porque los actividades realizadas dentro de su jurisdicción o bajo su control no causen daños al medio ambiente de otros estados o de las zonas situadas fuera de los límites de la jurisdicción nacional. Todos los estados deben cooperar en la elaboración de normas y reglamentaciones internacionales en la esfera del medio ambiente".

137. Ello evidencia que tanto en el ámbito interamericano como en otros sistemas, el principio de equidad intergeneracional aparece recogido como un deber impuesto a las generaciones presentes y respecto de las próximas[139]. El Tribunal Constitucional Federal Alemán ha referido al punto, señalando además la vinculación con las actuales generaciones jóvenes, al evaluar la constitucionalidad de los valores de CO2 permitidos hasta 2030, analizando su vinculación con el cambio climático, señaló que:

> […] Las restricciones a la libertad que llegarán a ser necesarias en el futuro ya están concebidas en la generosa legislación actual sobre protección del clima. Las medidas de protección climática que hoy no se han tomado por respeto a la libertad actual, tendrán que tomarse en el futuro en condiciones posiblemente incluso más desfavorables, y que luego restringirán exactamente las mismas necesidades de, y derechos a, la libertad de una forma mucho más drástica[140].
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> […] parece al menos posible que los derechos fundamentales consagrados en la ley fundamental, como garantías de libertad sin límites temporales, brinden protección contra disposiciones que permitan tal consumo sin tener suficientemente en cuenta la libertad en el futuro que termina puesta en peligro (sobre los derechos subjetivos en relación con la libertad, curso ejercicio debe distribuirse a lo largo del tiempo y entre generaciones […]
>
> La libertad en el futuro podría resultar específicamente afectada después del año 2030 por el hecho de que, como alegan los recurrentes, las cantidades de emisiones de CO2 permitidas hasta el 2030 por la Ley Federal de protección del clima resultan ser demasiado generosas; podrían faltar medidas cautelares suficientes para la conservación de la libertad en el futuro[141].
>
> [...] En la medida en que esto provoque el agotamiento del presupuesto de CO2 restante, el efecto es irreversible porque tal como están las cosas actualmente no resulta posible eliminar a gran escala las emisiones de CO2 de la atmósfera terrestre. Dado que una afectación a los derechos fundamentales que se ponga en marcha hoy tiene un carácter potencialmente irreversible y en tanto la interposición posterior de un recurso de amparo para impugnar las consiguientes restricciones a la libertad podría ser inútil en el momento en que hayan surgido tales afectaciones, los recurrentes ya tienen legitimación para interponer el recurso de amparo[142].
>
> Los recurrentes se encuentran afectados en su propia libertad. Ellos pueden experimentar por sí mismos las medidas requeridas para reducir las emisiones de CO2 después del año 2030. El hecho de que las restricciones lleguen a afectar prácticamente a todas las personas que vivan para ese entonces en Alemania, no excluye a los recurrentes de encontrarse afectados individualmente[143].
>
> El deber de protección del Estado derivado del artículo dos primeras frase LF no solo tiene aplicación después de que las violaciones ya se hayan producido, sino que también se proyecta hacia el futuro […] del deber de brindar protección contra

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139 Por ejemplo, el Consejo Constitucional de Francia hace referencia a las generaciones futuras en la sentencia de 12 de agosto de 2022 (sentencia no. 2022-843 DC), sobre la Ley de presupuestos rectificativa para 2022.

140 Tribunal Constitucional Federal Alemán Beschluss vom 24. marzo 2021 - 1 BvR 2656/18 Sala Primera. 24 de marzo de 2021. Disponible en: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/ES/2021/03/rs20210324_1bvr265618es.html, párr. 120.

141 *Ibídem*, párr. 123.

142 *Ibídem*, párr. 130.

143 *Ibídem*, párr. 131.

> los riesgos para la vida y la salud también se puede derivar una obligación de protección frente a las generaciones futuras […] hoy esto es aún más válido cuando están en juego procesos irreversibles. Sin embargo, este deber de brindar protección intergeneracional tiene una naturaleza exclusivamente objetiva porque las generaciones futuras aún no tienen en el presente la capacidad jurídica para ser titulares de derechos fundamentales ni en su conjunto ni como la suma de personas que aún no han nacido[144].
>
> Del principio de proporcionalidad se desprende que no es posible permitir que una generación consuma una gran parte del presupuesto de CO2 con una carga de reducción comparativamente leve, si esto al mismo tiempo significa que las siguientes generaciones se les impondrá una carga de reducción radical, exponiendo sus vidas a una pérdida considerable de su libertad, algo que los recurrentes describen como un "frenazo total" […] [D]ebido a que el curso de las cargas futuras sobre la libertad ya viene siendo determinado por las disposiciones que actualmente definen las cantidades de emisiones permitidas, los impactos sobre la libertad en el futuro deben ser proporcionales desde la perspectiva actual, mientras todavía sea posible cambiar de rumbo[145].

138. En la región, la Corte Constitucional de Colombia se ha pronunciado respecto de la equidad intergeneracional como consideración de las generaciones futuras[146]:

> Para esta Sala de Revisión, la protección al ambiente no es un "amor platónico a la madre naturaleza", sino la respuesta a un problema que de seguirse agravando al ritmo presente, acabaría planteando una auténtica cuestión de vida o muerte: la contaminación de los ríos y mares, la progresiva desaparición de la fauna y flora, la conversión en irrespirable de la atmosfera de muchas grandes ciudades por la polución, la desaparición de la capa de ozono, el efecto invernadero, el ruido, la deforestación, el aumento de la erosión, el uso de productos químicos, los desechos industriales, la lluvia acida, los melones nucleares (sic), el empobrecimiento de los bancos genéticos del planeta, etcétera, son cuestiones tan vitales que merecen una decisión firme y unánime de la población mundial. Al fin y al cabo, el patrimonio natural de un país, al igual que ocurre con el histórico-artístico, pertenece a las personas que en él viven, pero también a las generaciones venideras, puesto que estamos en la obligación y el desafío de entregar el legado que hemos recibido en condiciones óptimas a nuestros descendientes.

139. También la Corte Suprema de Justicia colombiana ha explicado el fundamento de la equidad intergeneracional. Ha señalado que:

> Lo anterior significa que todos los individuos de la especie humana debemos dejar de pensar exclusivamente en el interés propio. Estamos obligados a considerar cómo nuestras obras y conducta diaria incide también en la sociedad y en la naturaleza.
>
> […] Como se anotó, el ámbito de protección de los preceptos iusfundamentales es cada persona, pero también el "otro". El "prójimo" es alteridad, su esencia, las demás personas que habitan el planeta, abarcando también a las otras especies animales y vegetales.

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144 *Ibídem*, párr. 146.
145 *Ibídem*, párr. 192.
146 Corte Constitucional de Colombia. Sentencia No. T-411/92 (acción de tutela) Ponente: Alejandro Martínez Caballero.

> Pero, además, incluye a los sujetos aun no nacidos, quienes merecen disfrutar de las mismas condiciones medioambientales vividas por nosotros.
>
> […] Los derechos medioambientales de las futuras generaciones se cimientan en (i) el deber ético de solidaridad de la especie y (ii) en el valor intrínseco de la naturaleza.
>
> El primero se explica por cuanto los bienes naturales se comparten por todos los habitantes del planeta tierra, y por los descendientes o generaciones venideras que aún no los tienen materialmente, pero que son tributarios, destinatarios y titulares de ellos; sin embargo, contradictoriamente, cada vez más insuficientes y limitados. De tal forma que sin la existencia actual de un criterio equitativo y prudente de consumo, la especie humana podrá verse comprometida en el futuro por la escasez de recursos imprescindibles para la vida. De esta forma, solidaridad y ambientalismo "se relacionan hasta convertirse en lo mismo".
>
> […] Lo planteado, entonces, formula una relación jurídica obligatoria de los derechos ambientales de las generaciones futuras, como la prestación de "no hacer" cuyo efecto se traduce en una limitación de la libertad de acción de las generaciones presentes, al tiempo que esta exigencia implícitamente les atribuye nuevas cargas de compromiso ambiental, a tal punto que asuman una actitud de cuidado y custodia de los bienes naturales y del mundo futuro.[147]

140. En todas las culturas existe una preocupación por las generaciones futuras. Así como recibimos y gozamos de lo que nos ha sido legado por las generaciones precedentes, también hay una preocupación por nuestros hijos y nietos. La equidad intergeneracional impone un deber de uso y goce apropiado del ambiente a fin de que se entregue a las generaciones futuras un mundo que les brinde iguales o mayores oportunidades de desarrollo que aquellas en que nos fue entregado a nosotros. En última instancia, se erige como tutela de la libertad de las próximas generaciones, dado que las actuales no podemos coartar las opciones y oportunidades de satisfacer las necesidades que se originarán más adelante.

141. En un contexto de desarrollo sostenible, la equidad intergeneracional trasciende a los vivos y abarca a quienes no tienen aún existencia actual; tal como se ha señalado en el sistema universal: "la humanidad en su totalidad forma una comunidad intergeneracional en la que todos los miembros se respetan mutuamente y cuidan unos de otros, alcanzando así el objetivo común de la supervivencia de la especie humana".[148]

142. En esta línea, los Estados no podrán excusarse de su cumplimiento alegando la falta de personalidad o de legitimación de las generaciones futuras, dado que, como se ha señalado en el ámbito universal, la conexión entre derechos y deberes en estos aspectos no es férrea, por lo que las personas pueden estar sujetas a obligaciones sin necesidad estricta de que exista el titular de los derechos correspondientes.[149]

143. En el ámbito de Naciones Unidas se lo ha definido en los siguientes términos: "[e]n general, por solidaridad intergeneracional se entiende la cohesión social entre

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147 Corte Suprema de Justicia de Colombia. Sala de Casación Civil. Sentencia STC 4360-2018. Ponente: Luis Armando Tolosa Villabona. 5 de abril de 2018.

148 Asamblea General de Naciones Unidas. Resolución A/68/322. La solidaridad intergeneracional y las necesidades de las generaciones futuras. Informe del Secretario General. 15 de agosto de 2013. Párr. 8.

149 Asamblea General de Naciones Unidas. Resolución A/68/322. La solidaridad intergeneracional y las necesidades de las generaciones futuras. Informe del Secretario General. 15 de agosto de 2013. Párr. 21

generaciones […]. Cada vez más, el ámbito de las políticas relacionadas con la solidaridad intergeneracional se ha ido ampliando y ha pasado de centrarse en las familias con niños pequeños a la inclusión de todas las generaciones"[150]. No solo se trata de responsabilidad entre generaciones, sino que se parte de un concepto de patrimonio común de la humanidad en virtud del cual la especie humana y los recursos deben considerarse en forma global y gestionarse en favor de la humanidad como un todo. Se requiere, pues, considerar al menos tres intereses: los de los seres humanos actuales, los de las generaciones futuras y los de las entidades naturales[151]; teniendo presente las nociones de patrimonio común de la humanidad y el impacto de la irreversibilidad.

144. El principio de equidad intergeneracional, vinculado con el deber de desarrollo sostenible, impone un uso racional de los recursos para preservar el ambiente y asumir una concepción que posibilite la satisfacción de las necesidades actuales sin comprometer la calidad del ambiente para las próximas generaciones ni su posibilidad de satisfacer las necesidades que oportunamente surjan. Asimismo, el ambiente habrá de entenderse como un conjunto de relaciones y no meramente como un cúmulo de componentes; que contiene al hombre, pero también conjuga otros seres vivos, ecosistemas, recursos naturales, etc.

145. Es así que aparece como una fórmula de ponderación entre dos grandes bienes: por un lado, los Estados en virtud de su obligación de respeto y garantía deben posibilitar el mayor grado de bienestar y desarrollo para las generaciones actuales. Pero, a su vez, este deber debe armonizarse con el deber de conservar el ambiente de forma tal que su calidad no se vea deteriorada ni se amenace la supervivencia o el bienestar de las generaciones venideras. La esencia de la equidad intergeneracional es lograr la armonización entre interés presente y futuro; entre porvenir y actualidad; entre necesidades y proyecciones.

146. En esta tesitura, se impone a los Estados en toda toma de decisiones, el deber de ponderar y apreciar las consecuencias presentes y futuras de las acciones a emprender. Asimismo, impone obligaciones activas no solo ya de evaluación, sino también de estudios y evaluaciones constantes, nuevos sistemas de prevención, investigación, etc., en un contexto de solidaridad internacional, dado que la equidad intergeneracional refiere a todos los miembros de la familia humana y no se circunscribe a los nacionales de un Estado o los habitantes de una región.

147. El informe del Secretario General de Naciones Unidas sobre solidaridad intergeneracional y necesidades de las generaciones futuras refiere, en este sentido a que "en modo alguno supone que las necesidades de las generaciones actuales tengan siempre prioridad sobre las generaciones futuras; al menos no se debería exigir a los más pobres y vulnerables que hicieran sacrificios por el bien de la humanidad a largo plazo". Frente a ello, "las necesidades de las generaciones futuras se han de señalar y articular de la manera más precisa posible; las generaciones actuales no deben renunciar a beneficios, salvo que razonablemente se pueda prever que ello va a suponer una diferencia. Al mismo tiempo, no se deben buscar pequeños beneficios para las

[150] Asamblea General de Naciones Unidas. Resolución A/68/322. La solidaridad intergeneracional y las necesidades de las generaciones futuras. Informe del Secretario General. 15 de agosto de 2013. Párr. 6.
[151] Djemni-Wagner, S., *Droit(s) des générations futures*, Instiut des Études et de la Recherche sur le Droit et la Justice, París, 2023, pp. 45-46.

generaciones actuales si las acciones necesarias para obtenerlos tienen muchas probabilidades de suponer grandes pérdidas para las generaciones futuras"[152].

148. Las generaciones presentes son custodias de un ambiente que no les pertenece, sino que solamente deben administrar y explotar dentro de ciertos límites. La Corte IDH se ha pronunciado respecto de dos principios de relevancia en el derecho ambiental: el principio de precaución y de prevención[153], los que aparecen desarrollados también en la sentencia del presente caso. Estimamos que, en el juicio de armonización que impone la equidad intergeneracional también cobra relevancia la regla *in dubio pro natura*. Ésta impone que las incertidumbres interpretativas y los vacíos normativos se resuelvan en el sentido de dar mayor protección o conservación a la naturaleza, teniendo por norte el mandato de equidad intergeneracional y como extensión del principio *pro persona*. Esta interpretación ha sido recogida por varios tribunales nacionales de la región[154].

149. Como explica Bryner, esta pauta hermenéutica implica "una preferencia por las tomas de decisiones que favorecen una mayor protección de, o un menor impacto sobre la diversidad, hábitat, procesos de los ecosistemas, calidad del aire y el agua y así sucesivamente. Para la interpretación judicial en asuntos complejos, da peso hacia la interpretación de las disposiciones constitucionales, leyes, políticas y normas a favor de lo que dará una mayor protección al ambiente"[155].

150. Esta regla interpretativa se suma a las anteriores e implica para la autoridad judicial o administrativa el deber de que, en caso de duda en la interpretación de una norma o vacío, deben optar por la solución más protectora o conservacionista del ambiente, en pro de la equidad intergeneracional. El principio *in dubio pro natura* no es más que una derivación del desarrollo sostenible, en tanto se entienden los valores ambientales como soporte de la vida humana y la necesidad de armonizar el desarrollo social, económico y ecológico.

151. El deber de equidad intergeneracional no supone ir en detrimento de las obligaciones actuales, dado que la distribución justa y equitativa de oportunidades y recursos hoy, redundará en mejores oportunidades y resultados en el futuro. Los Estados deben tener presente que la tutela o preservación del ambiente impuesta por el principio de equidad intergeneracional deriva de que, a modo de un fideicomiso, nuestra responsabilidad es la de gestionar o conservar este ambiente para ser entregado a las generaciones futuras, como beneficiarias. Las generaciones presentes han recibido de las predecesoras un ambiente para que sea transmitido, a su vez, a las futuras en iguales o mejores condiciones de aquellas en que les fuera entregado. Así, cada decisión de desarrollo que comprometa la subsistencia, oportunidades o calidad de vida de las generaciones venideras es insolidaria y, por tanto, contraria a este deber.

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[152] Asamblea General de Naciones Unidas. Resolución A/68/322. La solidaridad intergeneracional y las necesidades de las generaciones futuras. Informe del Secretario General. 15 de agosto de 2013. Párr. 16-17.

[153] *Cfr.* Opinión Consultiva OC-23/17, *supra,* párrs. 175-186.

[154] Corte Suprema de Justicia de Costa Rica. Sala Constitucional. Sentencia 5893 de 27 de octubre de 1995; Corte Suprema de Justicia de la Nación Argentina. Sentencia de 11 de julio de 2019 "Majul, Julio Jesús c/Municipalidad de Pueblo General Belgrano y otros s/ acción de amparo ambiental". 714/2016/RH1; Corte Constitucional de Colombia, Sentencia C-449 de 2015; entre otros.

[155] Bryner, N., "Aplicación del principio 'In dubio pro natura' para la aplicación y cumplimiento de la legislación ambiental", en *Congreso Interamericano sobre Estado de Derecho en Materia Ambiental*, OEA, 2015, pp. 175-176.

152. En primer término, la equidad intergeneracional tiene su razón de ser en un deber de moralidad de la especie, dado que resulta imprescindible para la supervivencia de la humanidad misma.

153. Pero, en segundo lugar, también se justifica porque la naturaleza como tal—de la que el ser humano es solo uno de sus múltiples componentes— tiene un valor intrínseco. En este sentido, en la Opinión Consultiva No. 23 este tribunal ha indicado que: "el derecho al medio ambiente sano como derecho autónomo, a diferencia de otros derechos, protege los componentes del medio ambiente tales como bosques, ríos, mares y otros, como intereses jurídicos en sí mismos […] no solamente por su conexidad con una utilidad para el ser humano o por los efectos que su degradación podría causar en otros derechos de las personas"[156].

154. En la consideración de este principio no puede perderse de vista que el ambiente es un bien colectivo e intergeneracional, su carácter diacrónico implica que se extiende a lo largo de las generaciones humanas en el tiempo y por ello mismo es que surge el deber de sustentabilidad vinculado al de solidaridad. Así, las generaciones actuales tienen una limitación en su libertad: la relación con la naturaleza ya no puede basarse en una irresponsabilidad sin medida o sin consideración de las próximas generaciones; sino de mayor responsabilidad.

155. Esto se ve acrecentado por la asimetría existente entre generaciones presentes y futuras, ya que solo aquellas pueden incidir sobre la realidad de éstas y no viceversa: con sus decisiones, la generación presente afecta e incide en las generaciones futuras, quienes se ven obligadas a padecer los efectos de decisiones en las que no han participado y que muchas veces son irreversibles. Las generaciones futuras no tienen poder político y sus intereses solo están representados por la preocupación que las generaciones actuales tienen por ellos[157]. Es por ello importante que los Estados garanticen la legitimación de las generaciones futuras para reclamos por la tutela del ambiente, sea a través de las generaciones presentes (niños y jóvenes), defensores de derechos humanos o mediante la figura del *ombudperson* u otras afines.

156. Por ello, es que la equidad intergeneracional impone a los Estados tres deberes que deben orientar las políticas de desarrollo, los que implican tanto obligaciones negativas, como positivas para su consecución.

157. En primer lugar, conservación de opciones. Cada generación está obligada a conservar y restaurar la diversidad de recursos naturales, ecosistemas y especies a fin de no coartar indebidamente la disponibilidad para las próximas, en la satisfacción de sus necesidades.

158. En segundo término, deberá propenderse a la conservación de la calidad: no es lícito dejar un ambiente en condiciones peores de aquellas en las que fue recibido. Así, el medio ambiente y sus componentes no habrán de explotarse irrestrictamente: si bien no impide la explotación del ambiente, ésta habrá de hacerse dentro de parámetros de sustentabilidad.

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156 *Cfr*. Opinión Consultiva OC-23/17, *supra,* párr. 62. Véase también *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina, supra*, párr. 203.

157 Asamblea General de Naciones Unidas. Resolución A/68/322. La solidaridad intergeneracional y las necesidades de las generaciones futuras. Informe del Secretario General. 15 de agosto de 2013, párr. 5

159. Finalmente, requiere la conservación de acceso, entendida como el acceso sin discriminación por parte de los miembros de la generación presente, siempre que se respeten los derechos de las próximas generaciones. Es decir, implica la conjugación entre la equidad intrageneracional e intergeneracional.

160. En su cometido de lograr estas tres metas, los Estados deben tener presente que la división entre generaciones presentes y futuras es menos drástica de lo que se piensa y que las consecuencias nocivas al ambiente y las demás generaciones no necesariamente ocurrirán en un futuro distante o muy lejano, sino que pueden tener impacto en personas que ya tienen existencia actual: "[l]as inquietudes por las generaciones futuras y el desarrollo sostenible a menudo se centran en la situación del ambiente en años concretos del futuro, como el año 2030 o el 2100. Muchas personas que vivirán en 2100 todavía no han nacido […] [s]in embargo, muchas personas que vivirán entonces ya están vivas hoy día […]. Además, la línea que separa las generaciones futuras de los niños actuales se desplaza cada vez que llega al mundo otro bebé. Por tanto, es fundamental que en los debates sobre las generaciones futuras se tengan en cuenta los derechos de los niños que constantemente llegan o ya han llegado a este planeta […] las personas cuya vida futura se verá afectada por nuestras acciones de hoy: ya están entre nosotros"[158]. De ahí que, en la evaluación de las decisiones vinculadas al desarrollo o que de alguna forma supongan una explotación del ambiente, deben estar enmarcadas, además, por el principio de interés superior de la niñez.

VI. CONCLUSIONES

161. El caso *Habitantes de La Oroya vs. Perú* se inserta en un contexto en el que podemos denominar "verde", ya que el derecho internacional de los derechos humanos (tanto en Naciones Unidas, Europa y África) ponen en el centro de atención el derecho al medio ambiente y los temas relacionados con el cambio climático.

162. Tal como hemos puesto de manifiesto, consideramos que el presente caso constituye un punto de inflexión en la jurisprudencia interamericana, debido a que la Corte IDH pone como eje central de su decisión el derecho al medio ambiente y los componentes que deben ser protegidos —como el aire limpio y el agua—. El caso va en la dirección de la consolidación de la línea jurisprudencial sobre la justiciabilidad directa de los derechos económicos, sociales, culturales y ambientales (DESCA) desde el artículo 26 de la Convención Americana. Además de establecer cómo el contenido que protege el derecho al medio ambiente es diferente al de otros derechos civiles y políticos (como la vida o la integridad personal), la sentencia tiene un especial impacto colectivo de los daños ambientales y establecen medidas de no repetición dirigidas a reducir los riesgos para las generaciones futuras, lo que constituye una importante fuente de estándares para los Estados en relación con sus obligaciones de asegurar condiciones equitativas de desarrollo frente al cambio climático.

163. Consideramos que el deber de protección del ambiente se erige actualmente como una norma de *jus cogens* ante la amenaza que su inobservancia implica para la supervivencia de los pueblos y de los valores humanos más fundamentales. En el estado actual, es posible afirmar la existencia de una norma consuetudinaria internacional

[158] Asamblea General de Naciones Unidas. Consejo de Derechos Humanos. Informe del Relator Especial sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible. Resolución A/HRC/37/58. 24 de enero de 2018, párr. 68.

ampliamente reconocida por la generalidad de Estados en el sentido de otorgar relevancia a la protección del medio ambiente —tal como surge del amplio catálogo del *corpus iuris* en la materia— y que ha derivado en una norma imperativa de derecho internacional (*jus cogens*). A su vez, la convicción de su obligatoriedad deriva, *inter alia*, de la reciente declaración del derecho humano al medio ambiente de Naciones Unidas en 2022, donde una amplia mayoría se pronunció a su favor.

164. Asimismo, ningún Estado puede seriamente consentir ni tolerar actos que impliquen deterioro o menoscabo del medio ambiente o de sus componentes porque en su protección y cuidado está interesada la comunidad internacional en su conjunto, dado que es allí donde se contienen los elementos del Estado y porque de su tutela depende, entre otras, la seguridad internacional. Consiste en una norma que encarna valores supremos de la comunidad de Estados, dado que de la integridad del ambiente depende el soporte y la continuidad de la comunidad internacional tal como la conocemos.

165. Por tanto, la obligación de protección del ambiente cumple con las características propias de las normas de *jus cogens*, irradiando sus efectos a todo el sistema del Derecho Internacional. Cada Estado puede reclamar el cumplimiento y llamar a responsabilidad, en su caso, a cualquier otro Estado, dado que todos están igualmente interesados y son igualmente titulares del ambiente como patrimonio común de la humanidad.

166. En segundo término, proyecta sus consecuencias en el Derecho de los Tratados, tanto de los ya vigentes, así como de los futuros, los que deberán ajustar su contenido a esta norma.

167. En tercer lugar, cada Estado deberá ajustar su conducta y abstenerse de cualquier práctica, acto u omisión que infrinja esta norma; de lo contrario, incurrirá en responsabilidad internacional frente al resto de la comunidad de Estados y sin que le sea posible invocar su calidad de objetor persistente.

168. Existe un derecho al desarrollo sustentable consagrado en los artículos 31 a 34 de la Carta de la Organización de los Estados Americanos y que recibe protección convencional en virtud del artículo 26 de la Convención Americana; lo que se suma a la declaración del derecho humano al desarrollo de 1986.

169. El desarrollo sostenible como obligación estatal impone, en primer lugar, adaptar los modelos de producción, explotación y consumo de forma tal que estén diseñados para asegurar su continuidad en el tiempo, sin menoscabo de la calidad del ambiente para las generaciones futuras. Por tanto, es importante recordar su íntima relación con el principio de equidad intergeneracional. No supone una negación al desarrollo de los Estados, sino que impone adoptar una perspectiva "verde" a partir de la armonización entre necesidades presentes y proyecciones futuras.

170. Los Estados deben tener presente que el desarrollo sostenible impone la consideración de tres áreas: ecológica, social y económica; las que deben promoverse de forma integral y no aislada. Asimismo, habrán de tener en cuenta los grupos especialmente vulnerables, entre los que se encuentran los niños, niñas, mujeres y personas con discapacidad, pueblos indígenas, entre otros.

171. La consideración del ambiente como patrimonio común de la humanidad y su vinculación con una norma de *jus cogens*, imponen a los Estados un deber de colaboración o solidaridad internacional —derivado también de la Carta de la OEA— en la formulación de políticas, investigación, control y promoción del ambiente. Es necesario, además, conjugar esfuerzos entre particulares, empresas y Estados para lograr una verdadera perspectiva de desarrollo sustentable.

172. Una de las dimensiones del principio de equidad intergeneracional refiere a su vinculación con el ambiente. En este orden, supone el deber de las generaciones presentes de administrar y gestionar el ambiente de forma tal de entregar a las generaciones venideras un entorno al menos en las mismas condiciones en que nos fuera entregado por las generaciones que nos precedieron. Se asemeja a la administración de un fideicomiso cuyos beneficiarios son las próximas generaciones y tiene su justificación en la tutela autónoma de los componentes del ambiente, así como en un deber de solidaridad de la especie, como familia humana.

173. La equidad intergeneracional busca preservar, en última instancia, la libertad de las generaciones futuras y puede sintetizarse como una cuestión de armonización entre dos extremos: por un lado, el deber estatal de procurar el máximo bienestar a la población; pero limitado o contrarrestado por el deber de no amenazar indebida o desproporcionadamente el bienestar y la supervivencia de las próximas generaciones. Así, cualquier medida que, aunque suponga beneficios actuales, ponga en riesgo la integridad del ambiente en alguna de sus vertientes, debería ser calificada de insolidaria y contraria a este principio.

174. La equidad intergeneracional en materia ambiental impone a los Estados tres deberes concretos: conservación de opciones; conservación de calidad y conservación de acceso. En estas consideraciones, es preciso, además, tener en cuenta el impacto que la gestión actual del ambiente tiene también respecto de niñas y niños, como grupo especialmente sensible a la degradación ambiental.

175. En la evaluación entre necesidades actuales y proyecciones futuras, los Estados deben tener en cuenta, no solo los principios de precaución y prevención; sino también la regla *in dubio pro natura*, como pauta hermenéutica dirigida a la autoridad administrativa o judicial y que, ante casos de vacíos normativos o de dudas interpretativas, impone optar por aquella solución más tuitiva del ambiente.

176. Dada la particularidad que supone la tutela de las generaciones futuras, los Estados deben asegurar legitimación en procesos judiciales y reclamos por la tutela ambiental, sea a organizaciones o personas defensoras de derechos humanos, generaciones presentes o al *ombudsperson* o instituciones semejantes.

177. En suma, el caso *Habitantes de La Oroya* se inserta en una decisión más en la era jurisprudencial de la justiciabilidad directa de los DESCA ante el Tribunal Interamericano —en un momento de especial preocupación global por el futuro de la humanidad—, lo que seguramente se verá complementado por la Corte IDH en la reciente solicitud de Opinión Consultiva presentada por Colombia y Chile, sobre *Emergencia Climática y Derechos Humanos*, en el Sistema Interamericano.

Ricardo C. Pérez Manrique
Juez

Eduardo Ferrer Mac-Gregor
Juez

Rodrigo Mudrovitsch
Juez

Pablo Saavedra Alessandri
Secretario

VOTO PARCIALMENTE DISIDENTE

DEL JUEZ HUMBERTO SIERRA PORTO Y DE LA JUEZA PATRICIA PÉREZ GOLDBERG

CORTE INTERAMERICANA DE DERECHOS HUMANOS

CASO HABITANTES DE LA OROYA VS. PERÚ

SENTENCIA DE 27 DE NOVIEMBRE DE 2023
(Excepciones Preliminares, Fondo, Reparaciones y Costas)

1. Con el habitual respeto ante la decisión mayoritaria de la Corte Interamericana de Derechos Humanos (en adelante "Corte Interamericana", "Corte" o "Tribunal"), emitimos este voto[1] con el propósito de expresar las razones por las que discrepamos respecto de distintas cuestiones analizadas y resueltas en la *Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas* dictada en el caso «*Habitantes de la Oroya Vs. Perú».*

2. Para efectos de exponer nuestras consideraciones, nuestra argumentación se organiza en torno a los siguientes aspectos.

I. En cuanto a la declaración de responsabilidad del Estado por la violación del derecho al medio ambiente sano, con base en lo dispuesto en el artículo 26 de la Convención Americana

3. En la Opinión Consultiva sobre medio ambiente[2], este Tribunal tuvo ocasión de expedirse sobre el derecho a un medio ambiente sano, indicando tres elementos centrales. En primer lugar, la relación que ha establecido esta Corte entre tal derecho y otros derechos humanos en el marco de su jurisprudencia sobre derechos territoriales de pueblos indígenas y tribales. En efecto, el Tribunal ha considerado que el derecho a la propiedad colectiva de dichos pueblos está vinculado con la protección y acceso a los recursos que se encuentran en sus territorios, pues estos recursos naturales son necesarios para la propia supervivencia, desarrollo y continuidad del estilo de vida de los pueblos, reconociendo también la estrecha vinculación del derecho a una vida digna con la protección del territorio ancestral y los recursos naturales.

4. Asimismo, ha relevado que -como consecuencia de la estrecha conexión entre la protección del medio ambiente, el desarrollo sostenible y los derechos humanos- múltiples sistemas de protección de derechos humanos, entre los que se cuenta el Sistema Interamericano de Derechos Humanos, reconocen el derecho al medio ambiente sano como un derecho en sí mismo.

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[1] Artículo 65.2 del Reglamento de la Corte IDH: "Todo Juez que haya participado en el examen de un caso tiene derecho a unir a la sentencia su voto concurrente o disidente que deberá ser razonado. Estos votos deberán ser presentados dentro del plazo fijado por la Presidencia, de modo que puedan ser conocidos por los Jueces antes de la notificación de la sentencia. Dichos votos sólo podrán referirse a lo tratado en las sentencias".

[2] *Medio ambiente y derechos humanos (obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal - interpretación y alcance de los artículos 4.1 y 5.1, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos)*. Opinión Consultiva OC-23/17 de 15 de noviembre de 2017. Serie A No. 23.

5. Adicionalmente, ha sostenido que el derecho humano a un medio ambiente sano se ha entendido como un derecho con connotaciones tanto individuales como colectivas. En su dimensión colectiva, el derecho a un medio ambiente sano constituye un interés universal, que se debe tanto a las generaciones presentes y futuras. En su dimensión individual, resulta patente que su vulneración puede tener repercusiones directas o indirectas sobre las personas, debido a su conexidad con otros derechos, tales como el derecho a la salud, la integridad personal o la vida, entre otros. En síntesis, la degradación del medio ambiente puede causar daños irreparables en los seres humanos, por lo cual un medio ambiente sano es un derecho fundamental para la existencia de la humanidad.

6. Por cierto que estamos de acuerdo en que el derecho al medio ambiente sano es un derecho en sí mismo y debe ser protegido. Dicha tutela debe serle brindada tanto en el nivel de las jurisdicciones nacionales (por medio de los mecanismos previstos en los respectivos ordenamientos jurídicos internos), como en el ámbito de la jurisdicción internacional que posee esta Corte (mediante la interpretación conexa de tal derecho con los establecidos explícitamente en la Convención, como el derecho a la vida, a la integridad personal y a la dignidad humana).

7. Sin embargo, de la circunstancia de que este derecho exista y sea merecedor de protección, no se sigue que se trate de un derecho cuya justiciabilidad se desprenda de lo establecido en el artículo 26 de la Convención Americana.

8. Huelga reiterar acá los argumentos que en nuestros respectivos votos[3] hemos planteado para refutar el cambio jurisprudencial operado a partir de la sentencia

[3] El juez Humberto Sierra Porto ha expresado su posición sobre el artículo 26 de la Convención Americana en los siguientes casos: *Caso Trabajadores Cesados de Petroperú y otros Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 23 de noviembre de 2017. Serie C No. 344; *Caso San Miguel Sosa y otras Vs. Venezuela. Fondo, Reparaciones y Costas*. Sentencia de 8 de febrero de 2018. Serie C No. 348; *Caso Muelle Flores Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 6 de marzo de 2019. Serie C No. 375; Caso Hernández Vs. Argentina. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 22 de noviembre de 2019. Serie C No. 395; *Caso Asociación Nacional de Cesantes y Jubilados de la Superintendencia Nacional de Administración Tributaria (ANCEJUB-SUNAT) Vs. Perú*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 21 de noviembre de 2019. Serie C No. 394; *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina. Fondo, Reparaciones y Costas*. Sentencia de 6 de febrero de 2020. Serie C No. 400; *Caso de los Empleados de la Fábrica de Fuegos de Santo Antônio de Jesus Vs. Brasil*. *Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 15 de julio de 2020. Serie C No. 407; Caso Casa Nina Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2020. Serie C No. 419; *Caso Guachalá Chimbo y otros Vs. Ecuador. Fondo, Reparaciones y Costas*. Sentencia de 26 de marzo de 2021. Serie C No. 423; *Caso Federación Nacional de Trabajadores Marítimos y Portuarios (FEMAPOR) Vs. Perú. Excepciones Preliminares, Fondo y Reparaciones*. Sentencia de 1 de febrero de 2022. Serie C No. 448; *Caso Guevara Díaz Vs. Costa Rica. Fondo, Reparaciones y Costas*. Sentencia de 22 de junio de 2022. Serie C No. 453; *Caso Mina Cuero Vs. Ecuador. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 7 de septiembre de 2022. Serie C No. 464; *Caso Valencia Campos y otros Vs. Bolivia. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 18 de octubre de 2022. Serie C No. 469; *Caso Brítez Arce Vs. Argentina. Fondo, Reparaciones y Costas.* Sentencia de 16 de noviembre de 2022. Serie C No. 474; *Caso Nissen Pessolani Vs. Paraguay.* Fondo, Reparaciones y Costas. Sentencia de 21 de noviembre de 2022. Serie C No. 477; *Caso Aguinaga Aillón Vs. Ecuador. Fondo, Reparaciones y Costas*. Sentencia de 30 de enero de 2023. Serie C No. 483; *Caso Gonzales Lluy y otros Vs. Ecuador. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 1 de septiembre de 2015. Serie C No. 298; *Caso Poblete Vilches y otros Vs. Chile. Fondo, Reparaciones y Costas*. Sentencia de 8 de marzo de 2018. Serie C No. 349; *Caso Cuscul Pivaral y otros Vs. Guatemala. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 23 de agosto de 2018. Serie C No. 359; *Caso de los Buzos Miskitos (Lemoth Morris y otros) Vs. Honduras*. Sentencia de 31 de agosto de 2021. Serie C No. 432; *Caso Vera Rojas y otros vs. Chile. Excepciones preliminares, fondo, reparaciones y costas*. Sentencia de 1 de septiembre de 2021. Serie C No. 439; *Caso Manuela y otros Vs. El Salvador. Excepciones preliminares, Fondo, Reparaciones y Costas.* Sentencia de 2 de noviembre de 2021. Serie C No. 441; *Caso Extrabajadores del Organismo Judicial Vs. Guatemala. Excepciones Preliminares, Fondo y Reparaciones.* Sentencia de 17 de noviembre de 2021. Serie C No. 445; *Caso Palacio Urrutia y otros Vs. Ecuador. Fondo, Reparaciones y Costas*. Sentencia de 24 de noviembre de 2021. Serie C No. 446; *Caso Pavez Pavez Vs. Chile. Fondo, Reparaciones y Costas*. Sentencia de 4 de febrero de 2022. Serie C No. 449; *Caso Rodríguez Pacheco y otra Vs. Venezuela. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 1 de septiembre de 2023. Serie C No. 504. Por su parte, la jueza Patricia Pérez Goldberg ha manifestado su

dictada en el *Caso Lagos del Campo Vs. Perú,* momento a partir del cual se empezó a considerar que los derechos económicos, sociales, culturales y ambientales eran directamente justiciables ante la Corte, ignorando por completo lo establecido por el Protocolo de San Salvador, conforme a cuyo artículo Nº 19.6 solo son susceptibles de ser litigados ante este Tribunal el derecho a la educación y el derecho a la asociación sindical.

II. En cuanto a la declaración de responsabilidad del Estado por la violación del derecho a la salud, con base en lo dispuesto en el artículo 26 de la Convención Americana

9. Disentimos también de esta decisión, en cuanto a que la sana doctrina en materia de interpretación del Tratado (integrado tanto por la Convención Americana como por su Protocolo Adicional), exige valorar las afectaciones al derecho a la salud en conexión con los derechos a la vida o integridad personal que hayan sufrido detrimento producto de una acción u omisión del Estado en el caso concreto.

10. Abona nuestra conclusión el examen que se hace en la sentencia, respecto a la vulneración del derecho a la integridad personal de las víctimas.

11. Los dos párrafos que se dedican al derecho a la integridad personal rezan del siguiente modo:

> 138. En cuanto el derecho a la integridad personal, la Corte reitera que la violación del derecho a la integridad física y psíquica de las personas tiene diversas connotaciones de grado y que abarca desde la tortura hasta otro tipo de vejámenes o tratos crueles, inhumanos o degradantes, cuyas secuelas físicas y psíquicas varían de intensidad según factores endógenos y exógenos (duración de los tratos, edad, sexo, salud, contexto, vulnerabilidad, entre otros) que deberán ser analizados en cada situación concreta.
>
> 139. Ahora bien, la Corte ha señalado que, si bien cada uno de los derechos contenidos en la Convención tiene su ámbito, sentido y alcance propios, existe una estrecha relación entre el derecho a la vida y el derecho a la integridad personal. En este sentido, existen ocasiones en que la falta de acceso a las condiciones que garantizan una vida digna también constituye una violación al derecho a la integridad personal, por ejemplo, en casos vinculados con la salud humana. Asimismo, la Corte ha reconocido que determinados proyectos o intervenciones en el medio ambiente pueden representar un riesgo a la vida y a la integridad personal de las personas.

12. Si se observa la cuestión planteada con atención, es posible constatar que no se explica de qué modo las afectaciones a la salud son vulneraciones distintas y separadas de las afectaciones a la integridad personal de las víctimas. Ello ocurre precisamente porque no se hace lo debido, esto es, valorar las afectaciones del derecho a la salud en conexión y en el marco del análisis del derecho a la integridad personal. Esta forma de proceder, según se ha explicado, además de incorrecta, perjudica la interpretación del derecho a la integridad personal, el que, como resultado de esta práctica, resulta irremediablemente despojado de contenido.

13. Además, el caso ofrecía una vía alternativa de análisis de las afectaciones a la salud y al medio ambiente sin que la Corte actuara por fuera de su competencia

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postura sobre el mismo asunto en los siguientes casos: *Caso Guevara Díaz Vs. Costa Rica. Fondo, Reparaciones y Costas*. Sentencia de 22 de junio de 2022. Serie C No. 453; *Caso Mina Cuero Vs. Ecuador. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 7 de septiembre de 2022. Serie C No. 464; *Caso Benites Cabrera y otros Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 4 de octubre de 2022. Serie C No. 465; *Caso Valencia Campos y otros Vs. Bolivia. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 18 de octubre de 2022. Serie C No. 469; *Caso Brítez Arce y otros Vs. Argentina. Fondo, Reparaciones y Costas.* Sentencia de 16 de noviembre de 2022. Serie C No. 474; *Caso Nissen Pessolani Vs. Paraguay. Fondo, Reparaciones y Costas*. Sentencia de 21 de noviembre de 2022. Serie C No. 477; *Caso Aguinaga Aillón Vs. Ecuador. Fondo, Reparaciones y Costas*. Sentencia de 30 de enero de 2023. Serie C No. 483; *Caso Rodríguez Pacheco y otra Vs. Venezuela. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 1 de septiembre de 2023. Serie C No. 504.

material. El Tribunal Constitucional emitió una sentencia el 12 de mayo de 2006, en la que ordenó una serie de medidas para la protección de la salud y el medio ambiente saludable ante la contaminación producida por la industria metalúrgica en La Oroya. El cumplimiento de estas órdenes resultaba un mecanismo idóneo para la protección constitucional de los habitantes de La Oroya, y el Estado, al no cumplir con estas órdenes, incumplió a su vez con la obligación de garantizar un recurso judicial efectivo para la protección de los derechos humanos de las víctimas en términos del artículo 25.2.c de la Convención Americana.

14. Analizar el presente caso, por conexidad entre los derechos a un recurso judicial efectivo y los derechos a la salud y al medio ambiente, habría ofrecido vías argumentativas adicionales a las ya mencionadas. Habría permitido vincular la protección constitucional a los derechos al medio ambiente y la salud, y la protección internacional, sin que esto conllevara un exceso en el ejercicio de las competencias de la Corte. Esto es así porque el artículo 25 de la Convención reconoce el derecho de las personas a un recurso que las ampare contra actos que violen sus derechos fundamentales reconocidos por la Constitución y las leyes o la Convención. El derecho a la salud y al medio ambiente sano son derechos protegidos por la Constitución peruana, y la Corte pudo haber analizado las consecuencias para los derechos en juego que resultaron del incumplimiento de la sentencia del TC.

Humberto A. Sierra Porto
Juez

Patricia Pérez Goldberg
Jueza

Pablo Saavedra Alessandri
Secretario

Annex 624

Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 1 May 2000

WORLD TRADE ORGANIZATION

WT/DS163/R
1 May 2000

(00-1679)

Original: English

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Report of the Panel

The report of the Panel on *Korea – Measures Affecting Government Procurement* is being circulated to all Parties to the Government Procurement Agreement, pursuant to the DSU. The report is being circulated as an unrestricted document from 1 May 2000 pursuant to the Procedures for the Circulation and Derestriction of GPA Documents (GPA/1/Add.2). Parties to the GPA are reminded that in accordance with the DSU only parties to the dispute may appeal a Panel report, an appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel, and that there shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. PROCEDURAL BACKGROUND

1.1 On 16 February 1999, the United States requested Korea to hold consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXII of the Agreement on Government Procurement (WT/DS163/1 and GPA/D4/1) regarding certain procurement practices of entities concerned with the procurement of airport construction for Inchon International Airport ("IIA") in Korea. The European Communities requested to join in the consultations on 8 March 1999 (WT/DS163/2) and Japan made the same request on 9 March 1999 (WT/DS163/3). Korea accepted neither of these requests.

1.2 A mutually satisfactory solution was not reached during the consultations held between the United States and Korea on 17 March 1999. In a communication dated 11 May 1999, the United States requested the Dispute Settlement Body (DSB) to establish a panel to examine the matter.[1]

1.3 At its meeting on 16 June 1999, the Dispute Settlement Body agreed to establish a panel in accordance with the provisions of Article 6 of the DSU and Article XXII of the GPA, with the following standard terms of reference pursuant to Article XXII:4 GPA:

> "To examine, in the light of the relevant provisions of the Agreement on Government Procurement, the matter referred to the DSB by the United States in document WT/DS163/4, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that Agreement."[2]

1.4 The European Communities and Japan reserved third party rights.

1.5 The Panel was composed on 30 August 1999 (WT/DS163/5). The composition of the Panel was as follows:

Chairman	:	Mr. Michael D. Cartland
Panelists	:	Ms. Marie-Gabrielle Ineichen-Fleisch
		Mr. Peter-Armin Trepte

1.6 The Panel heard the parties to the dispute on 19 October 1999 and 11 November 1999. The interim report was issued to the parties on 3 March 2000.

[1] WT/DS163/4 reproduced in Annex 1 to this report.
[2] WT/DSB/M/64.

II. FACTUAL ASPECTS[3]

A. INTRODUCTION

2.1 This dispute relates to the Inchon International Airport (IIA) project, which is being constructed in the Republic of Korea. At issue is whether the entities that have had procurement responsibility for the project since its inception are "covered entities" under the Agreement on Government Procurement. The United States also raised the issue of whether the procurement practices of these entities are or have been inconsistent with Korea's obligations under the Agreement on Government Procurement and whether they nullify or impair benefits accruing to the United States under that Agreement.

B. THE AGREEMENT ON GOVERNMENT PROCUREMENT

1. Uruguay Round Negotiations of the GPA

2.2 The original Agreement on Government Procurement was negotiated during the Tokyo Round of trade negotiations and was done in Geneva on 12 April 1979 ("Tokyo Round Agreement"). This Agreement was amended following negotiations in pursuance of Article IX:6(b) through a Protocol which entered into force on 14 February 1988. During the Uruguay Round of Trade Negotiations, Parties to the Tokyo Round Agreement held further negotiations in the context of an Informal Working Group[4], which involved the broadening of entity coverage, expansion of the coverage to services and construction services and further improvements of the text of the Agreement.

2.3 Coverage negotiations were initiated through a bilateral request/offer process in September 1990. These negotiations involved the tabling of offers and the submission of requests by interested Parties to their trading partners.

2.4 Following the bilateral negotiations for improvement and the finalization of specific offers which occurred in 1993, the final text of the Agreement with the attached draft schedule of parties was issued on 15 December 1993. On that date, the Informal Working Group adopted a Decision concluding negotiations and agreeing that the text entitled Agreement on Government Procurement, together with Annexes 1-5 of Appendix I of each of the participants embodied the results of their negotiations as at that date.[5] The Decision further specified procedures relating to outstanding work to be completed prior to the entry into force of the Agreement.[6]

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[3] All Korean legislation referred to in this report was translated into English by the Government of the Republic of Korea.

[4] The Informal Working Group on Negotiations was originally established in May 1985 to improve the text of the Tokyo Round Agreement.

[5] GPR/SPEC/77.

[6] Specifically, paragraph 4 of the Decision stated:

Participants will submit to the Secretariat by 31 January 1994 the texts of their Annexes in final form for circulation to all participants. Those Annexes will be considered accepted by participants as corresponding to what had been negotiated and agreed, unless the Secretariat is notified to the contrary prior to 28 February 1994. In the event of problems, consultations will be held to resolve the matter.

Further, paragraph 6 of the Decision stated:

> Proposed modifications of the Annexes to Appendix I of participants that expand the coverage of the Agreement and that result from further negotiations between now and the date of signature of the Agreement will be deemed part of the agreed results of the negotiations provided that no participant objects to such modifications. To enable all participants to examine any such modifications in advance of the date of signature, modifications should be notified to other participants through the Secretariat by 31 March 1994.

2.5 Further, a decision of the Informal Working Group on negotiations, dated 17 January 1994, entitled "Modifications of the Annexes to Appendix I to the Agreement on Government Procurement before its Entry into Force on 1 January 1996", set out procedures for the incorporation into the Agreement of modifications expanding coverage that were agreed and resulted from negotiations between the date of signature of the Agreement and the date of its entry into force.

2.6 The Agreement on Government Procurement (1994) (the GPA) was signed in Marrakesh on 15 April 1994. The GPA entered into force on 1 January 1996.

2. Overview of the Scope and Coverage of the GPA

2.7 The GPA establishes an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations, procedures and practices in the area of government procurement.

2.8 The obligations under the Agreement apply to procurement:

(a) by procuring entities that each Party has listed in Annexes 1 to 3 of Appendix I relating respectively to "central government entities," "sub-central government entities" and "other entities";

(b) of all products; and

(c) of services and construction services that are specified in lists found respectively in Annexes 4 and 5 of Appendix I.

2.9 Furthermore, GPA coverage under each of the Annexes is contingent upon certain threshold values being exceeded. These threshold values are expressed in terms of Special Drawing Rights (SDRs). GPA coverage under each of the Annexes is also contingent upon the various notes found in the Annexes.

C. KOREA'S ACCESSION TO THE AGREEMENT ON GOVERNMENT PROCUREMENT

1. Korea's Application for Accession

2.10 Korea was not a Party to the Tokyo Round Agreement. However, in a communication dated 25 June 1990, the Government of the Republic of Korea indicated its interest in exploring the possibility of acceding to the GPA. Attached to this communication was a note containing a list of purchasing entities and products for which coverage was proposed together with explanatory notes.[7]

2.11 Further, in a communication dated 20 September 1991[8], the Government of the Republic of Korea indicated that following submission of its initial offer to the Committee on Government Procurement on 25 June 1990, it had held bilateral consultations with the Parties in relation to its offer list. The communication also requested permission to participate in the Uruguay Round negotiations. This request was acceded to.[9]

[7] Letter from the Permanent Mission of the Republic of Korea to the Director-General, GATT, dated 25 June 1990.

[8] Communication from the Delegation of the Republic of Korea, Document GPR/W/109, dated 20 September 1991.

[9] GPR/M/50 indicates that the Republic of Korea was a full participant in the Uruguay Round negotiations.

2.12 Leading up to its accession to the GPA on 15 April 1994, Korea submitted to the Committee on Government Procurement, a series of offers concerning its commitments under the GPA upon accession.[10]

2. Korea's Accession Offers

(a) Offer of 25 June 1990

2.13 In its initial offer[11], Korea listed the purchasing entities for which GPA coverage would be provided without categorizing those entities. The offer did not contain thresholds above which the GPA would apply.

(i) Coverage of Entities

2.14 Korea's initial offer included primarily government ministries.[12] However, the offer also proposed coverage of a number of boards[13], agencies[14], offices[15] and administration bodies.[16] It also proposed coverage of one corporation (the Korea National Housing Corporation) and one authority (the Korea Telecommunication Authority).

2.15 Relevantly, Korea's offer proposed coverage of the Ministry of Construction, the Ministry of Transportation and the Office of Supply. The offer specified that the Office of Supply was only covered in relation to purchases made by the Office of Supply in its capacity as a central purchasing entity on behalf of entities referred to elsewhere on Korea's proposed list of covered entities.[17]

(ii) Coverage of Products and Services

2.16 By implication, the initial offer applied to all products. However, a limited list of products specified in Annex A applied to the Korea Telecommunication Authority.[18]

(iii) Explanations and Qualifications

2.17 Notes appeared at the end of the list of covered entities. Note 1 to the offer stated that:

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[10] The original offer was attached to a communication to the Director-General, dated 25 June 1990. Subsequent offers were submitted on 14 August 1992 in document GPR/Spec/73 and on 14 December 1993.

[11] Document accompanying Korea's letter to the GATT, dated 25 June 1990.

[12] Specifically, of the 37 entities that were proposed to be covered by Korea in its initial offer, 19 were ministries. *Ibid.* pp. 2-3.

[13] The Board of Audit and Inspection, the Economic Planning Board and the National Unification Board.

[14] The Government Legislation Agency and the Patriots and Veterans Affairs Agency.

[15] The Office of Supply, the Supreme Public Prosecutors Office and the Korea Industrial Property Office.

[16] The National Tax Administration, the Customs Administration, the Military Manpower Administration, the Rural Development Administration, the Forestry Administration, the Fisheries Administration, the Industrial Advancement Administration and the Korea Maritime and Port Administration.

[17] Footnote 3 of document accompanying Korea's letter to the GATT, dated 25 June 1990.

[18] The listed products were vehicles, clothing, paper and stationery, tools, poles, conduits, cable splicing materials, line distributing materials, wire (except cables), power supplies and accessories, air conditioning and control equipment, circuit protective devices, test and measuring instruments, telegraph or telephone-type terminals (except for public terminals), other miscellaneous machinery, appliances and materials, computers (off-line or stand-alone use) and peripherals for off-line computer systems, data terminal equipment and modems, word processors and keyboard printers.

> "Purchasing entities include all their subordinate linear organizations, special local administrative organs and attached organs as prescribed in the Government Organization Act of the Republic of Korea."

2.18 Note 2 stated that:

> "This Agreement shall not apply to the procurements with regard to which special procurement procedures are required and/or permitted in accordance with the laws and regulations of the Republic of Korea which are effective at the time of entry into force of this Agreement for the Republic of Korea."

2.19 The initial offer also contained four footnotes that qualified the scope of coverage in respect of some of the listed entities. Footnote 1 excluded coverage of procurement by the Ministry of Home Affairs for the purpose of maintaining public order. Footnote 2 excluded coverage of procurement by the Ministry of Agriculture, Forestry and Fisheries for the purposes of stabilizing the demand and supply situation of agricultural products and ensuring provision of basic national foodstuffs. Footnote 3 stated that procurement by the Office of Supply was only covered when the Office of Supply was acting for a listed centralized purchasing entity. Footnote 4 noted that the Korea Telecommunication Authority was covered only in relation to the goods listed in Annex A except for goods procured by the local branch offices of that Authority.

(b) *Supplementary Explanation* of Offer of 25 June 1990

2.20 By a communication, dated 28 February 1991, which was circulated at least to the United States[19] and the European Communities[20], Korea provided a S*upplementary Explanation* of its initial offer of 25 June 1990.[21]

(i) Entities

2.21 This *Supplementary Explanation* identified entities that had not been specifically listed in the initial offer but were proposed to be covered under the entities that had been listed in that offer. The *Supplementary Explanation* listed the following entities for which coverage was proposed under the Ministry of Transportation[22]: Regional Aviation Bureaus (2); CHEJU Regional Aviation Office; Flight Inspection Office; VOR-TAC Stations (5); and Marine Accident Inquiry Office (5).

2.22 The following entities were proposed to be covered under the Ministry of Construction[23]: National Construction Research Institute; Central Equipment Management Office; Regional Construction and Management Institutes; District Construction Offices; Cheju-do Development Construction Office; Flood Control Offices; Construction Officials Training Institute; and the National Geography Institute.

2.23 The following entities were proposed to be covered under the Ministry of Communications[24]: Regional Communications Offices; Post Offices; Communications Officials Training Institute; Postal Service Research Institute; Radio Research Laboratory; Postal Money Order and Giro Center; Central Radio Monitoring Office; and the Supply and Construction Office.

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[19] Questions 9, 10 and 14 of the United States' questions, entitled "Questions Relating to Korea's Request to Accede to the Agreement on Government Procurement," sent to Korea on 1 May 1991 indicate that the United States received a copy of this communication. (US Exhibit 4)

[20] Annex II to the European Communities' Answers to the Panel's Questions, dated 3 November 1999.

[21] Supplementary Explanation of the Note by the Republic of Korea, dated 29 June 1990, relating to the Agreement on Government Procurement, dated February 1991. (Exhibit Kor-117)

[22] *Ibid.* p. 11.

[23] *Ibid.* p. 10.

[24] *Ibid.* p. 11.

2.24 The following entities were proposed to be covered under the Office Supply[25]: Central Supply Office; and Regional Supply Offices (10).

(ii) Notes

2.25 The *Supplementary Explanation* also elaborated on the notes to Korea's initial offer.[26] Specifically, the explanation stated the following in relation to Note 1:

> "Note 1 is established to clarify the coverage of central government organs, which come under 35 of 37 purchasing entities.
>
> The meaning and categories of subordinate linear organizations, special local administrative organs and attached organs are prescribed in the Government Organization Act of Korea as follows:
>
> - Subordinate linear organizations: office of the minister, vice-minister, assistant minister, director general, director etc.
>
> - Special local administrative organs: the organs established in local regions by central government organs when necessary, for example, local tax offices by the National Tax Administration and local post offices by the Ministry of Communication.
>
> - Attached organs: the organs established by central government organs for the purpose of R&D, training and education, culture, medical care, and consulting. These include the Central Officials Training Institute by the Ministry of Government Administration and the National Film Production Center by the Ministry of Information."

(c) Offer of 14 August 1992

2.26 The second offer made by Korea was first circulated informally to members of the Informal Working Group on 12 May 1992 and then formally to the Committee on Government Procurement on 14 August 1992 in document GPR/Spec/73. The offer was stated to be made in substitution for the initial offer made on 25 June 1990.[27] Korea further stated that it reserved the right to withdraw, amend or supplement its offer in the future taking into account the offers made by other Parties and the progress made during negotiations on the expansion of the Agreement.[28]

2.27 The offer listed the purchasing entities for which GPA coverage would be provided and specified the GPA Annexes under which coverage would be provided for those entities. The offer did not specify the products that would be covered by Korea's offer but, by implication, the offer applied to all products. The offer specified the services that would be covered in Annex 4 and construction services that would be covered in Annex 5. The offer also contained thresholds in Annexes 1, 2 and 3 above which the GPA would apply for all products and for the services and construction services referred to in Annexes 4 and 5.

[25] *Ibid.*
[26] *Ibid.* pp. 26 –28.
[27] Document GPR/Spec/73, p. 2.
[28] *Ibid.*

(i) Coverage of Entities

2.28 The entities that were proposed to be covered under Annex 1 in Korea's offer of 14 August 1992 were substantially the same as the entities for which Korea proposed coverage in its initial offer. As in the case of the initial offer, Korea proposed coverage under Annex 1 of the Ministry of Construction, Ministry of Communication and the Ministry of Transportation. It also continued to propose coverage of the Office of Supply subject to the same limitation that was expressed in Korea's initial offer, namely that procurement by the Office of Supply was only covered in relation to purchasing undertaken on behalf of entities listed in Annex 1.

2.29 Korea also proposed coverage of entities at the sub-central level that had not been included in its initial offer. Specifically, Korea proposed coverage under Annex 2 of the Seoul Metropolitan Government, City of Pusan, City of Taegu, City of Inchon, City of Kwangju and City of Taejon.[29] The offer indicated that the Offices of Subway Construction were not covered under Annex 2.

2.30 Finally, Korea proposed coverage under Annex 3 of the Office of Waterworks, Seoul Metropolitan Government; Office of Waterworks, City of Pusan; Office of Waterworks, City of Taegu; Office of Waterworks, City of Inchon; Office of Waterworks, City of Kwangju; Office of Waterworks, City of Taejon. It also proposed coverage of Korea Telecom, Korea National Railroad, Korea Container Terminal Authority, Korea Development Bank, Korea National Housing Corporation and Agricultural and Fishery Marketing Corporation under Annex 3.[30]

(ii) Coverage of Products and Services

2.31 Korea's offer of 14 August 1992 applied to all products except for goods referred to in parentheses next to the names of some of the listed entities. Further, unlike the initial offer, the offer of 14 August 1992 did propose coverage of services. It proposed coverage of a list of services specified in Annex 4. The offer also proposed coverage of construction services listed in Annex 5.

(iii) Explanations and Qualifications

2.32 Note 1, which appeared at the end of Korea's initial offer and stated that listed purchasing entities include "subordinate linear organizations, special local administrative organs and attached organs as prescribed in the *Government Organization Act*," was repeated in identical terms in Korea's offer of 14 August 1992. However, in the case of the later offer, the qualification appeared as a preface to the list of entities contained in Annex 1 and purported to relate exclusively to "central government entities."[31] Note 2, which concerned procurements that were subject to special procurement procedures and qualified Korea's initial offer, appeared in similar terms in the offer of 14 August 1992 but only applied to Annex 5.[32]

2.33 In the offer of 14 August 1992, Annexes 4 and 5 were made subject to a new qualification which provided that the exceptions and restrictions contained in the Revised Conditional Offer of the Republic of Korea Concerning Initial Commitments on Trade in Services[33] would apply to services listed in those Annexes and that the Korean Government may impose restrictions on qualification, registration, licensing and/or other authorization requirements on service providers according to domestics laws and regulations.[34]

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[29] *Ibid.* p. 5.
[30] *Ibid.* p. 6.
[31] *Ibid.* p. 3.
[32] *Ibid.* p. 8.
[33] MTN.TNC/W/61/Rev.1, dated 19 February 1992.
[34] Document GPR/Spec/73, pp. 7-8.

2.34 The qualifications that had appeared in footnotes 1 and 2 in the initial offer did not appear in the offer of 14 August 1992. However, other qualifications appeared in the later offer in parentheses next to the names of some listed entities.

(d) Offer of 14 December 1993

2.35 Korea made its final formal offer prior to accession on 14 December 1993.[35] The offer again stated that Korea reserved the right to make technical changes to the offer and to correct any errors, omissions or inaccuracies prior to 15 April 1994[36], being the date by which the Agreement on Government Procurement (1994) and the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations were scheduled to be signed.

2.36 The structure of Korea's final offer was largely the same as for Korea's offer dated 14 August 1992. Specifically, the offer again listed the purchasing entities for which GPA coverage would be provided and specified the GPA Annexes under which coverage would be provided for those entities. The offer purported to apply to all products. Further, it specified the services that would be covered in Annex 4 and construction services in Annex 5. The offer again contained thresholds in Annexes 1, 2, 3 and 4 and specified in Annex 5, a threshold for construction services of 5,000,000 SDR for Annex 1 entities, 15,000,000 SDR for Annex 2 entities and 15,000,000 SDR for Annex 3 entities.

(i) Coverage of Entities

2.37 Korea's final offer and its previous offer of 14 August 1992 were the same in all relevant respects in respect of coverage under Annex 1. However, the lists of entities covered under Annexes 2 and 3 were expanded in the final offer.

2.38 Specifically, in addition to the entities for which coverage was proposed under Annex 2 in its offer of 14 August 1992, Korea also proposed coverage of the following entities in its final offer: Kyonggi-do, Kang-won-do, Chungchongbuk-do, Chungchongnam-do, Kyongsangbuk-do, Kyongsangnam-do, Chollabuk-do, Chollanam-do and Cheju-do. Unlike the offer of 14 August 1992, the final offer did not state that the Offices of Subway Construction were not covered under Annex 2.

2.39 In relation to Annex 3, the final offer did not include the various Office of Waterworks that had been specified in the offer of 14 August 1992. However, the final proposal for Annex 3[37] included four banks (Korea Development Bank, Small and Medium Industry Bank, Citizens National Bank and Korea Housing Bank) and 17 corporations (Korea Tobacco & Ginseng Corporation, Korea Security Printing and Minting Corporation, Korea Electric Power Corporation, Dai Han Coal Corporation, Korea Mining Promotion Corporation, Korea Petroleum Development Corporation, Korea General Chemical Corporation, Korea Trade Promotion Corporation, Korea Highway Corporation, Korea National Housing Corporation, Korea Water Resources Corporation, Korea Land Development Corporation, Rural Development Corporation, Agricultural and Fishery Marketing Corporation, Korea National Tourism Corporation, Korea Labor Welfare Corporation, Korea Gas Corporation). It also included Korea Telecom and National Textbook Ltd.

(ii) Coverage of Products and Services

2.40 As in the case of Korea's offer of 14 August 1992, the final offer applied to all products except for goods referred to in parentheses next to the names of some of the listed entities. It also applied to a list of services specified in Annex 4 which was broader than the list of services that were

[35] "Korea's Offer in the Agreement on Government Procurement", dated 14 December 1993.
[36] *Ibid.* p. 1.
[37] *Ibid.* p. 9.

included in the offer of 14 August 1992.[38] Korea's final offer also included a range of construction services to be covered under Annex 5.[39]

(iii) Explanations and Qualifications

2.41 The note concerning the application of Annex 1 to "subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act*" that appeared in Korea's initial offer and its offer of 14 August 1992 also appeared in its final offer as Note 1 to Annex 1.

2.42 The Note that appeared in Annex 5 of Korea's offer of 14 August 1992 concerning special procurement procedures was deleted from the final offer. The qualifications to Annexes 4 and 5 in the offer of 14 August 1992 regarding "the Revised Conditional Offer of the Republic of Korea Concerning Initial Commitments on Trade in Services" were also deleted from the final offer.

2.43 The final offer additionally contained the following note (Note 1) which applied to Annex 2:

> "The above sub-central administrative government entities include their subordinate organizations under direct control and offices as prescribed in the Local Autonomy Law of the Republic of Korea."

2.44 The final offer also introduced general notes that applied to all the Annexes.[40] General Note 1 provided:

> "Korea will not extend the benefit of this Agreement
>
> (a) as regards the award of contracts by National Railroad Administration,
>
> (b) as regards procurement for airports by the entities listed in Annex 1,
>
> (c) as regards procurement for urban transportation (including subways) by the entities listed in Annexes 1 and 2
>
> to the suppliers and service providers of member states of the European Community, Austria, Norway, Sweden, Finland and Switzerland, until such time as Korea has accepted that those countries give comparable and effective access for Korean undertakings to their relevant markets."

2.45 In the final offer, qualifications again appeared in parentheses next to the names of some listed entities.

(e) The Government Organization Act

2.46 As noted above at paragraph 2.41, Korea's final offer provided in Note 1 to Annex 1 that all central government entities listed in Annex 1 included their "subordinate linear organizations, special local administrative organs and attached organs as prescribed in the *Government Organization Act* of the Republic of Korea". This qualification also appeared in Korea's previous accession offers.[41]

2.47 As at 30 December 1989, Article 2 of the *Government Organization Act* entitled "Establishment and Organization of Central Administrative Organs" provided in sub-article (3) that:

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[38] *Ibid.* p. 13.
[39] *Ibid.* p. 17.
[40] *Ibid.* p. 18.
[41] See paragraphs 2.17 and 2.32.

> "The subordinate linear organizations of the central administrative organs shall be Cha-Gwan (Vice-Minister), Cha-Jang (Deputy Administrator), Sil-Jang (Office Director), Guk-Jang (Bureau Director) or Bu-Jang (Department Director) and Gwa-Jang (Division Director), under Vice-Minister or Deputy Administrator, as division not belonging to Office, Bureau or Department may be set up except those otherwise prescribed by special provisions in this Act or any other laws. The subordinate linear organizations undertaking national police affairs under the Ministry of Home Affairs, however shall be Bon-Bu-Jang (Chief Commissioner of Policy), Bu-Jang (Department Director) and Gwa-Jang (Division Director); and for those undertaking civil defense affairs, Bon-Bu-Jang (Chief of Civil Defense Headquarters), Guk-Jang (Bureau Director) and Gwa-Jang (Division Director)."

2.48 Article 3 of the 1989 *Government Organization Act* entitled "Establishment of Special Local Administrative Organs" provided in sub-article (1) that:

> "Each central administrative organ may have local administrative organs as prescribed by Presidential Decree except those especially prescribed by laws, in case they are necessary for the implementation of the duties under its jurisdiction."

2.49 Article 4 of the 1989 *Government Organization Act* entitled "Establishment of Attached Organizations" provided that:

> "In an administrative organ, there may be established by the Presidential Decree organizations for experiment and research, education and training, culture, medicine, manufacturing or advice, respectively, if necessary for the fulfilment duties under its jurisdiction."

2.50 The above provisions remained largely the same in all relevant respects despite various changes that were made to the *Government Organization Act* from 30 December 1989 until Korea's GPA obligations came into effect. However, the English translation of the title of Article 2(3) was amended to prescribe "subsidiary organs of central administrative agencies" rather than "subordinate linear organizations of the central administrative organs", the latter phrase being used in the 1989 version of the Act.

3. Communication between the Parties During Korea's Accession

2.51 The United States began bilateral negotiations with Korea regarding its accession bid on 22 April 1991. During the course of these negotiations, the United States put a series of questions to Korea regarding its offer.[42] Question 6 asked:

> "How does the Airport Development Group relate to the Ministry of Communications? Does Korea's offer of coverage of the Ministry of Communications include purchases for the Airport Development Group? Please identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction."

2.52 In response, Korea answered[43]:

> "The new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation. The new airport construction project is scheduled to be completed by 1997 after the completion of the basic plan by 1992 and

[42] Letter from the US Trade Mission to the Mission of the Republic of Korea, dated 1 May 1991.
[43] Korea's Answers to Questions from the USTR delivered on 1 May 1991, dated July 1991.

> the working plan by 1993. The US company, Bechtel, is taking part in the basic plan projects.
>
> The responsible organization for procurement of goods and services relating to the new airport construction is the Office of Supply. But at present, the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage."

4. Korea's Accession

2.53 Korea became a signatory to the Agreement on Government Procurement signed at Marrakesh on 15 April 1994. There were no further changes made to Korea's accession offer between the date of Korea's final offer, namely, 14 December 1993, and the signing of the new GPA at the Marrakesh Ministerial Conference in April 1994.

2.54 While the GPA entered into force for existing Parties on 1 January 1996, it entered into force for Korea on 1 January 1997.[44]

2.55 In its final form at accession, Korea's Appendix I to the GPA was identical in all relevant respects to Korea's final offer of 14 December 1993.

D. KOREA'S IMPLEMENTATION OF THE GPA

1. Modification of Korea's Appendix I

2.56 On 24 October 1997, Korea notified the Committee on Government Procurement of a proposed modification to Appendix I pursuant to Article XXIV:6(a) of the GPA.[45] Paragraph 3 of the relevant communication stated:

> "Delete "Ministry of Construction" and "Ministry of Transportation." Add "Ministry of Construction and Transportation" instead. This rectification is based on the fact that the "Ministry of Construction" and the "Ministry of Transportation" have been merged to form the "Ministry of Construction and Transportation"."

2.57 In accordance with procedures of Article XXIV:6, the changes proposed by Korea entered into force on 23 November 1997.[46]

2. Notification of National Implementing Legislation

2.58 Korea notified its national implementing legislation to the Committee on Government Procurement in accordance with the Committee's Decision of 4 June 1996.[47]

E. THE INCHON INTERNATIONAL AIRPORT PROJECT

1. General Description of the Project

2.59 The project in question concerns the construction of Inchon International Airport. The airport is being built on reclaimed land between two islands, Yongjong and Yongyu[48], and is 52 kilometres

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[44] Article XXIV:3(a) of the GPA.
[45] Document GPA/W/59, dated 24 October 1997.
[46] WT/Let/207.
[47] GPA/1/Add.1 and GPA/12/Rev.1, dated 9 June 1997.
[48] "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 3.

west of the centre of the Republic of Korea's capital, Seoul. More specifically, it is located in the official district of Unsee-Dong, Chung-Ku, Inchon City.

2.60 The project commenced in 1990. The first phase of construction (which includes airport start-up and commissioning) is scheduled to be completed by the end of 2000. Later phases of airport construction will continue until 2020 and will be based on future traffic demand.[49]

2.61 It is estimated that the first phase of construction will cost W 300.9 billion. This includes the cost of land acquisition, compensation for fishing rights, the actual cost of construction and support expenses including design and supervision. The total cost of the project is estimated to be in the vicinity of W 2,964 billion. According to a publication regarding the IIA project, the government contribution to the cost of the project is projected to be 40 per cent of the total cost and the remainder will come from other sources including domestic and overseas capital markets.[50]

2. Chronology

(a) Project Stages

2.62 On 14 June 1990 the site for the IIA project was selected.[51] In November 1990, the preparation of the Master Plan commenced.[52] On 24 December 1991, the Master Plan was completed[53] and was announced on 16 June 1992.[54] On 12 November 1992, the ground-breaking ceremony occurred at the IIA site and site preparation commenced.[55] As at February 1999, the first phase of construction (airport start-up and commissioning) was 62.7 per cent complete.[56]

(b) Entities

(i) Introduction

2.63 An act regarding the IIA project, entitled the *Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction* ("*Seoul Airport Act*"), was enacted on 31 May 1991. Article 1 of the *Seoul Airport Act* provides that:

> "The purpose of this Act is, by specifying the matters necessary for the speedy construction of a new airport in the Seoul Metropolitan area, to push ahead efficiently with the new airport construction project to meet the rapidly growing demands for air transport service in the Seoul Metropolitan area and to contribute to the development of national economy."

2.64 While the Ministry of Transportation and, more specifically, the New Airport Development Group under that Ministry, was originally responsible for the IIA project[57], the *Seoul Airport Act* contemplated the appointment of an operator for the IIA project. However, the Act did not specify the identity of the operator. Rather, it left this issue open. Specifically, it provided in Article 6(1) that:

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[49] *Ibid.* p. 14.
[50] *Ibid.* p. 41.
[51] History of KOACA (Document from KOACA website) and "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 42.
[52] Timeline of events relating to Inchon International Airport construction prepared by the US.
[53] History of KOACA and "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 42.
[54] History of KOACA.
[55] History of KOACA and "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 42.
[56] "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 42.
[57] Korea's Answers to Questions from the USTR delivered on 1 May 1991, dated July 1991.

> "The new airport construction project shall be implemented by the state, local governments, or a government-invested institution as determined by the Presidential Decree."

2.65 Further, Article 6(2) provided that:

> "The Minister of Construction and Transportation may, where he deems it necessary for efficient execution of the new airport construction project, arrange for a person other than those referred to in paragraph (1) to implement part of the project."

2.66 Since the inception of the project, authority for the IIA project has been assigned to various authorities or "operators" by the Korean National Assembly. On 14 December 1991, authority was assigned to Korea Airports Authority (KAA). On 1 September 1994, authority was transferred to Korea Airport Construction Authority (KOACA). Finally, authority was transferred to the Inchon International Airport Corporation (IIAC) on 1 February 1999.

(ii) MOCT

2.67 The Ministry of Transportation originally had jurisdiction over the IIA project. Pursuant to Article 40 of the *Government Organization Act* as it existed in June 1993, it derived its authority from Article 40 of the *Government Organization Act*. Article 40(1) provided that:

> "The Minister of Transportation shall have jurisdiction over the affairs relating to land, air and marine transportation and tourism."

2.68 The current version of the *Government Organization Act* contains a similar provision in Article 42.

2.69 Of relevance is the *Aviation Act*, which was wholly amended on 14 December 1991. Article 1 of the Act as it then existed provided that:

> "The purpose of this Act is to contribute to the development of aviation and the promotion of public welfare by determining methods to assure the safety in air navigation, increasing the efficiency of installation and management of air navigation facilities, and establishing the order in the air transportation services, pursuant to the provisions of the International Civil Aviation Treaty and in conformity with standards and ways as adopted by the Annex to the said Treaty."

2.70 Article 1 of the current version of the *Aviation Act* contains a similar provision.

2.71 Additionally, Article 94(1) of the 14 December 1991 version of the *Aviation Act* provided that:

> "Except as provided otherwise by this Act or other laws and regulations, the airport development projects shall be carried out by the Minister of Transportation."

2.72 Article 94(1) of the current version of the *Aviation Act* which incorporates amendments up to and including 13 December 1997 contains a similar provision.

2.73 "Airport development projects" to which Article 94(1) of the December 1991 version of the *Aviation Act* referred was defined in Article 2(14) of the *Aviation Act* as "projects related to new construction, enlargement or improvement of airport facilities, executed under this Act". The current *Aviation Act* defines "airport development projects" in identical terms.

2.74 Article 94(2) of the December 1991 version of the *Aviation Act* provided that:

> "Any person other than the Minister of Transportation who desires to operate the airport development projects, shall obtain the permission of the Minister of Transportation under the conditions as prescribed by the Presidential Decree."

2.75 Article 94(2) of the current *Aviation Act* contains a similar provision but requires the operator to obtain permission from the Minister of Construction and Transportation rather than the Minister of Transportation.

2.76 The Ministry of Transportation and the Ministry of Construction merged on 23 December 1994[58] to create the Ministry of Construction and Transportation (MOCT). Accordingly, references to the Ministry of Transportation in Korean legislation including the *Government Organization Act* and the *Aviation Act* were replaced by references to MOCT.

2.77 The *Seoul Airport Act* also refers to the MOCT's role in relation to the IIA project. Article 3(1) of the Act provides:

> "The Minister of Construction and Transportation is empowered to designate an area necessary for the execution of the new airport construction project as the projected area for the construction of the new airport for the Seoul Metropolitan area … or to effect a change in the already designated projected area."

2.78 Article 4(1) of the *Seoul Airport Act* vests MOCT with the responsibility for drawing up the Master Plan for the IIA project. It provides that:

> "Where the Minister of Construction and Transportation has designated and announced publicly the projected area pursuant to Article 3, he shall draw up a master plan relating to the new airport construction … ."

2.79 Article 4-2 also empowers MOCT to make alterations to the master plan and Article 4-3 obliges MOCT to publicly notify the master plan upon its completion.

2.80 MOCT is required to approve execution plans prepared by the operator.[59] MOCT is also required to certify completion of the work undertaken by the project operator.[60] MOCT has the power to grant a subsidy or loan to the operator to help finance expenses associated with the project.[61] Further, MOCT may cancel or suspend permission of approval granted under the Act in certain circumstances.[62] Finally, Article 12-3(1) of the Act provides that:

> "The title to the land and facilities created or built as a consequence of the new airport construction project shall vest in the State upon completion … ."

(iii) New Airport Development Group (NADG)

2.81 In June 1990, MOCT created an internal organization, which is generally referred to as the New Airport Development Group (NADG), to assume responsibility for the IIA project. NADG was created pursuant to the *Regulation on Establishment of the New International Airport Construction Working Group*, which was enacted by Ministerial Order of the Minister of Transportation on 1 June 1990. NADG has been referred to by a variety of names including the "New International

[58] Excerpt from MOCT website, p. 2.
[59] *Ibid.* Article 7(1).
[60] *Ibid.* Article 12-2.
[61] *Ibid.* Article 15.
[62] *Ibid.* Article 13(1).

Airport Construction Working Group," "Corps of the New International Airport Construction Project," the "New Airport Construction Planning Team" and the "IIA Construction Corps."

2.82 At present, 30 government employees are assigned to NADG.[63] Specifically, 1 director general, 3 directors, 10 deputy directors, 14 assistant directors and 2 secretaries have been assigned from the current operator to NADG.

2.83 NADG is divided into two divisions – a planning division and a technology division. Pursuant to Article 6(1) of NADG's Regulations, the planning division is responsible for a number of matters including those concerning the establishment, inspection, and analysis of the basic operation plan for the IIA project; the coordination and control of matters related to the project; the funding for construction of the project; and the development of laws and systems for the airport's construction.

2.84 Further elaboration of the role of the NADG in relation to the IIA project is found in the *Rules of the Corps of New International Airport Construction Project and Rapid Railway Construction Project Foundation*, which were created by a directive of MOCT on 3 November 1996. Among other matters, the Rules prescribe the structure of NADG. Specifically, Article 3 of the Rules provides that the Corps is to be comprised of a planning department, a facility department and an operation support team. Article 3 of the Rules also makes it clear that members of the Corps are MOCT public officials.

2.85 Article 6 of the Rules defines the responsibilities of the three departments of the Corps. Article 6(1) provides that the planning division has responsibility for various types of "work" related to a range of topics including the establishment and modification of the master planning for the IIA project; budgeting; IIA project funding; and IIA project control and analysis.

(iv) The Korean Airports Authority (KAA)

Origins

2.86 The predecessor to the KAA was the Korea International Airports Authority.[64] The Korea International Airports Authority was renamed as the Korea Airports Authority on 7 April 1990[65] but is referred to in all the relevant legislation as the Korea Airport Corporation.

2.87 The *Korea Airport Corporation Act*, which was originally enacted on 28 December 1979, constitutes and regulates the KAA. Article 1 of the 3 August 1994 version of the *Korea Airport Corporation Act* provides:

> "The purpose of this Act is to ensure smooth air transportation and to contribute to the totally integrated development of aviation by establishing the Korea Airport Corporation … [which will be responsible for] constructing airport facilities, and managing and operating them efficiently."

Scope of Responsibility

2.88 The *Korea Airport Corporation Act* defines the rights and responsibilities of the KAA. Specifically, Article 7 provides that the Corporation shall carry out a range of projects including the management, operation, repair and maintenance of passenger and freight terminals, and their ancillary and supporting facilities; the management, operation, repair and maintenance of runways and moorings; the repair and maintenance of aeronautical communication facilities and aviation security facilities; landscaping and beautification of airports and installations; incidental projects; and other

[63] Korea's Answer to Question 14 from the Panel, dated 29 November 1999.
[64] KAA History from KAA website.
[65] *Ibid.*

projects entrusted to KAA by the Minister of Construction and Transportation for management, operation and improvement of airport facilities.

2.89 The provisions in the Act are supplemented by the *By-Laws of Korea Airport Corporation*, the most recent amendment to which was made on 30 December 1991. Article 2 of the 30 December 1991 version of the *By-Laws* states that the objectives of KAA "shall be to build airport facilities and manage the airport, promoting smooth operation of air transportation, developing comprehensive air transportation businesses." Article 4 further elaborates on the projects that KAA is required to undertake.

Relationship with MOCT

2.90 Article 28 of the *Korea Airport Corporation Act*, entitled "Direction and Supervision," prescribes the relationship between KAA and MOCT. Specifically, it provides that:

> (1) The Minister of Construction and Transportation shall direct and control the Corporation, and if it is deemed necessary to do so, he may have the Corporation report matters concerning its affairs, accounting and property, or have a public official under his control inspect books, documents, facilities and other things of the Corporation.
>
> (2) If it is found that any unlawful or unreasonable acts are committed as a result of the inspection under the provisions of paragraph (1), the Minister of Construction and Transportation may order the Corporation to take corrective measures.
>
> (3) Any public official who conducts the inspection under the provisions of paragraph (1), shall produce a certificate indicating his competence to the persons concerned.

2.91 Among other things, MOCT is empowered to permit use of, lend or concede gratuitously any state property to KAA.[66] In addition, KAA is required to annually prepare business plans[67] and statements of account[68] for approval by the Minister of Construction and Transportation. Funds can be borrowed by KAA from various bodies with the approval of MOCT.[69]

Legal Status

2.92 Article 3 of the *Korea Airport Corporation Act* states that the Korea Airport Corporation (that is, KAA) is a juristic person. Article 4(1) further states that the "Corporation shall come into existence by making a registration of incorporation at the location of its principal office."

Composition

2.93 Article 8 of the *Korea Airport Corporation Act* prescribes the composition of the Corporation. Specifically, it provides that:

> (1) The Corporation shall be composed of officers falling under each of the following subparagraphs:

[66] *Korea Airport Corporation Act*, Article 16.
[67] *Ibid.* Article 19.
[68] *Ibid.* Article 20.
[69] *Ibid.* Article 23.

1. A president of the board of directors;

2. A vice-president;

3. Not more than five directors; and

4. An auditor.

(2) The president, vice-president and auditor shall be appointed and dismissed by the Minister of Construction and Transportation.

2.94 KAA's board of directors[70] is required to decide on "important matters."[71] The Act provides that "the board of directors shall be composed of the president, vice-president and directors".[72] Article 8(3) of the Act provides that:

> "The directors shall be appointed and dismissed by the president with the approval of the Minister of Construction and Transportation."

2.95 The members of KAA's board of directors are not government employees.[73] Further, KAA employees are not government employees. However, Article 30 of the *Korea Airport Corporation Act* provides that officers and employees of KAA are to be considered public officials in the application of certain provision of Korea's *Criminal Act*. Further, Article 13 of the *Korea Airport Corporation Act* provides that the employees are employed and dismissed as prescribed by KAA's articles of incorporation.

Role in Relation to Inchon International Airport Project

2.96 On 14 December 1991, the Korea Airports Corporation or KAA was listed as a potential operator for the IIA project. This was achieved through an amendment to Article 6(1) of the *Seoul Airport Act*. Article 6(1) as amended provided:

> "The new airport construction project shall be implemented by the state, local governments, the Korea Airport Corporation established pursuant to the Korea Airport Corporation Act, or a government-invested institution as determined by the Presidential Decree."

2.97 Simultaneously, the *Korea Airport Corporation Act* was amended. As amended, Article 7, which defined the projects for which KAA is responsible, provided in sub-article 5-2 that KAA was responsible for:

> "New airport construction project pursuant to paragraph 2 of Article 2 of Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction."

2.98 Article 2 of the *Seoul Airport Act* was also amended on 14 December 1991 to provide that:

> "2. The term "new airport construction project" means any of the following activities:

[70] Exhibit Kor-110 lists KAA directors.
[71] *Korea Airport Corporation Act*, Article 12(1).
[72] *Ibid.* Article 12(2).
[73] Korea's Answer to Question 10 from the Panel, dated 3 November 1999.

(a) Construction of such airport facilities as stipulated in subparagraph 6 of Article 2 of the Aviation Act …

(c) Construction of urban railways, roads and port facilities etc. which are necessary to transport passengers and cargo using the Seoul Metropolitan area new airport

(d) Creation of the infrastructure connected with airport services such as convenience facilities for airport users and persons etc. engaged in air transport service and such other aviation-related services as determined by the Presidential Decree … air cargo distribution facilities and information communication facilities etc.

(e) Creation of infrastructure for facilities beneficial to the living such as accommodation facilities, etc., in favor of persons engaged in aviation-related services and persons who will be deprived of their residence because of the new airport construction project; and

(f) Reclamation of public water surface to create the projected area for the construction of the new airport."

2.99 Further, Article 4(6) of the *By-Laws of Korea Airport Corporation*[74] was amended with the approval of the Minister of Transportation on 30 December 1991 to provide that KAA was required to, among other things, "build the new capital area airport."

2.100 On 31 January 1992, KAA established the New Airport Construction Office to implement the IIA project.

Funding

2.101 During KAA's term as operator of the IIA project (that is, from 14 December 1991 until 14 August 1994), it exclusively relied upon government funds for the IIA project in 1992; 78 per cent government funds, 3.5 per cent debts and bonds and 18 per cent other means in 1993; 77 per cent government funding, 21 per cent debts and bonds and 1 per cent other means in 1994.[75]

Procurement

2.102 The rules according to which the Korea Airport Corporation procures are set out in the *Contract Procedure Rules of Korea Airport Authority*.[76] In addition, Article 90 of these rules provide that:

"With respect to the provisions not stipulated herein, the government contract related laws, regulations and so on shall be applied."

2.103 Teams of approximately 23 KAA employees are used for the opening and evaluation of bids for contracts tendered by KAA.[77]

[74] Exhibit Kor-15.
[75] Sources of Fund for KAA (Exhibit Kor-109).
[76] Exhibit Kor-18.
[77] Korea's Answer to Question 15 from the Panel, dated 29 November 1999.

(v) The Korea Airport Construction Authority (KOACA)

Origins

2.104 The Korea Airport Construction Authority (KOACA) was created pursuant to the *Korea Airport Construction Authority Act*, which was enacted on 3 August 1994 and entered into force on 1 September 1994.[78] That Act purported to transfer KAA's rights and responsibilities in relation to the IIA project to KOACA. Specifically, Article 5 of the Addenda to the Act provided that:

> "(1) Property and rights/obligations of Korea Airport Corporation related to the New Airport Construction Project before the enforcement of this Act, shall be entirely assigned to KOACA…
>
> (4) Any acts conducted by Korea Airport Corporation or taken upon Korea Airport Corporation in relation to New Airport Construction Project before [KOACA's] foundation, shall be considered as those conducted by or taken upon Korea Airport Corporation."

Scope of Responsibility

2.105 Article 1 of the *Korea Airport Construction Authority Act* provided that KOACA:

> "… will carry out the New International Airport Construction Project … around the Seoul metropolitan area for ensuring smooth air transportation and contributing to the national economic development."

2.106 Article 7 of the Act defines the projects for which KOACA is responsible. That Article specifically referred to the IIA project but also listed "other airport construction related projects entrusted by the government."[79]

2.107 Article 1 of the *By-Laws (Articles of Authority) of Korea Airport Construction Authority*[80] further provides that:

> "The object of this Authority is to facilitate the air transportation and further to contribute to the development of national economy by efficiently propelling the New Capital Airport Construction Project … ."

2.108 The By-laws further elaborate on KOACA's responsibilities.

Relationship with MOCT

2.109 Article 31 of the *Korea Airport Construction Authority Act*, entitled "Direction and Supervision" is identical in all relevant respects to Article 28 of the *Korea Airport Corporation Act* which prescribes the relationship between MOCT and KAA and which is referred to above in paragraph 2.90.

2.110 MOCT's power and KOACA's responsibilities *vis-à-vis* MOCT are essentially the same as for KAA.[81] In addition, the *Korea Airport Construction Authority Act* provides that "the title the land and

[78] *Korea Airport Construction Authority Act*, Article 1 of Addenda.
[79] Sub-articles 2 and 3 are blank.
[80] Exhibit Kor-45.
[81] See paragraph 2.91.

facilities of new airport created or built as the consequence of the new airport construction project by KOACA … shall be vested to the State upon completion."[82]

Legal Status

2.111 As in the case of KAA, KOACA is a juristic person and has corporate status.[83]

Composition

2.112 The composition of KOACA's board of directors is identical in all relevant respects to KAA.[84] As with KAA, KOACA's board of directors (which, according to the *Korea Airport Construction Authority Act*, shall be composed of the president, vice-president and directors)[85] is required to decide on "important matters."[86]

2.113 As in the case of KAA, KOACA's board of directors are not government employees[87] and neither are its employees. Again, similarly with KAA's empowering legislation, Article 35 of the *Korea Airport Construction Authority Act* provides that officers and employees of KOACA are to be considered public officials in the application of certain provision of Korea's *Criminal Act* and Article 15 provides that the employees are employed and dismissed as prescribed by KOACA's articles of incorporation.

Role in Relation to Inchon International Airport Project

2.114 KOACA's role in relation to the IIA project was defined by the *Korea Airport Construction Authority Act* and the *By-Laws (Articles of Authority) of Korea Airport Construction Authority*. Further, at the time that KOACA was created, the *Korea Airport Corporation Act* was also amended. Specifically, Article 7(5-2) which vested KAA with jurisdiction in respect of "the new airport construction project" was deleted.

Funding

2.115 During KOACA's term as operator of the IIA project (that is, from September 1994 until 1 February 1999), it relied upon 78 per cent government funding, 14 per cent domestic and foreign debt, 7 per cent bonds and 1 per cent other means for the IIA project in 1994; 80 per cent government funding, 19 per cent domestic and foreign debt, 2 per cent bonds in 1995; 69 per cent government funding, 28 per cent domestic and foreign debt, 4 per cent bonds in 1996; 38 per cent government

[82] *Korea Airport Construction Authority Act*, Article 19(1).

[83] Article 3 of the *Korea Airport Construction Authority Act* states that the KOACA is a juristic person. Article 4(1) states that "KOACA shall come into existence by making a registration of incorporation at the location of its principal office".

[84] Article 8 of the *Korea Airport Construction Authority Act* prescribes the composition of the KOACA. Specifically, it provides that:

> (1) Officers of KOACA shall be composed of five directors including a president of the board of directors and a vice president and an auditor.
> (2) The president and auditor shall be appointed and dismissed by the Minister of Construction and Transportation.
> (3) The vice president and auditor shall be appointed and dismissed by the president of KOACA with the approval of the Minister of Construction and Transportation.

[85] *Korea Airport Construction Authority Act*, Article 14(2). Exhibit Kor-110 lists KOACA directors.

[86] *Korea Airport Construction Authority Act*, Article 14(1).

[87] Korea's Answer to Question 10 from the Panel, dated 3 November 1999.

funding, 58 per cent domestic and foreign debt, 2 per cent bonds in 1997; 41 per cent government funding, 46 per cent domestic and foreign debt, 14 per cent bonds in 1998.[88]

Procurement

2.116 The rules according to which the KOACA procures are set out in the *Contract Administration Regulations of Korea Airport Construction Authority*.[89] In addition, Article 3 of these regulations provide that:

> "With respect to all contract administration matters of the KOACA, it shall be governed by the provisions of this contract administration regulations. Matters not stipulated in this contract administrations regulations shall be governed by Contracts to which the State is a Party…such as government procurement contracts."

2.117 As in the case of KAA, teams of approximately 23 KOACA employees are used for the opening and evaluation of bids for contracts tendered by KOACA.[90]

(vi) The Inchon International Airport Corporation (IIAC)

Origins

2.118 The Inchon International Airport Corporation (IIAC) was created on 1 February 1999 pursuant to the *Law on Inchon International Airport Corporation*. That law also purported to amend the *Korea Airport Corporation Act* and the *Seoul Airport Act.*[91] It was enacted on 26 January 1999 and came into effect on 1 February 1999.[92] The effect of those amendments was that KOACA was reconstituted as IIAC. This is evident from Article 5 of the Additional Rule contained in the *Law on Inchon International Airport Corporation*, which provides that:

> "(1) The IIAC inherits the assets, right and responsibilities of the Metropolitan New Airport Public Corporation (KOACA) when this law is enforced the moment the IIAC is established…
>
> (4) All the activities related with the Metropolitan New Airport Public Corporation (KOACA) and activities performed toward this IIAC are regarded as the ones that the IIAC conducted or are conducted toward the IIAC."

Scope of Responsibility

2.119 Article 1 of the *Law on Inchon International Airport Corporation* provides that:

> "This law is focused on effective operation of air freight delivery and improvement of national economy by managing efficiently Inchon International Airport … with [the] establishment of Inchon International Airport Corporation."

2.120 Article 10(1) of the Law defines the projects for which IIAC is responsible. Specifically it states that the IIAC is responsible for, among other things, "construction business" associated with the IIA project; management, operation and maintenance of IIA; the development of businesses in areas

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[88] Sources of Fund for New Airport Construction (KOACA and IIAC) (Exhibit Kor-109).
[89] Exhibit Kor-47.
[90] Korea's Answer to Question 15 from the Panel, dated 29 November 1999.
[91] *Law on Inchon International Airport Corporation*, Article 10 of the Additional Rule.
[92] *Ibid.* Article 1 of the Additional Rule.

adjacent to the airport to ensure the efficient management and operation of the IIA; and "other business" related to construction, management and operation, for which it has a licence from the Korean Government or other autonomous entities.

2.121 Article 2(1) of the *By-Laws (Articles of Incorporation) of Inchon International Airport Corporation*[93] further provides that the IIAC has authority, among other things, to construct the IIA in accordance with Article 2 of the *Seoul Airport Act*; to maintain, operate and repair the IIA; to develop neighbouring areas which are necessary for the effective operation and maintenance of the IIA; and "other businesses" related to construction and operation of the IIA which are delegated to IIAC by national local governments.

Relationship with MOCT

2.122 Article 16 of the *Law on Inchon International Airport Corporation*, entitled "Direction and Supervision," prescribes the relationship between IIAC and MOCT but in somewhat different terms to that prescribed as between MOCT and KAA[94] and also as between MOCT and KOACA.[95] Specifically, Article 16 provides that:

> "The Minister of Construction and Transportation can direct and supervise the IIAC about the matters that are necessary for increase of public goods which are designated by the Presidential Decree in managing the Airport. However, this isn't applied to the jobs related with the managing object promised by the law of the paragraph 1 of Article 13 which is about the improvement of the corporation's managing environment and about privatization."

2.123 Moreover, MOCT is empowered to permit the use of, lend or concede gratuitously national assets to IIAC.[96]

Legal Status

2.124 Article 2 of the *Law on Inchon International Airport Corporation* provides that "IIAC is supposed to be incorporated body." IIAC's corporate status is confirmed in Article 1 of *By-Laws (Articles of Incorporation) of Inchon International Airport Corporation* which provides that*:*

> "This Corporation is established by Inchon International Airport Corporation Law and shall be called … Inchon International Airport Corporation … ."

Composition

2.125 According to Article 6(1) of the Additional Rule of the *Law on Inchon International Airport Corporation*, the composition of the IIAC, at least at the time of it creation, was identical to the composition of KOACA. Article 6(1), entitled "Interim measures for staffs and workers of the KOACA" provides that:

> "(1) The president, chief director and the auditor of the Metropolitan New Airport Public Corporation (KOACA) shall be regarded as the president, chief director and auditor according to this law, however the term of office shall be till new president, chief director and auditor are newly appointed.

[93] Exhibit Kor-54.
[94] See paragraph 2.90.
[95] See paragraph 2.109.
[96] *Law on Inchon International Airport Corporation*, Article 11.

(2) The workers of the Metropolitan New Airport Public Corporation (KOACA) shall be employed as the workers of the IIAC."

2.126 The Law additionally provides that the board of directors is "implemented to process the works related with establishing the corporation"[97] and that "the board [of directors] for establishment consists of less than seven members appointed by the Minister of Construction and Transportation, and he becomes the chairman of the board."[98]

2.127 Under IIAC's articles of incorporation, the Corporation is governed by twelve directors, six of whom, as non-standing directors, are elected by the Corporation's stockholders and constitute the board of directors. IIAC's president, as one of the six standing directors, is nominated by a nominating committee and elected by the stockholders, while the remaining five standing directors are simply elected by stockholders.[99]

2.128 Again, as in the case of KAA and KOACA, neither IIAC's members of its board of directors are government employees[100] nor are its staff. IIAC currently employs 557 persons.

Role in Relation to Inchon International Airport Project

2.129 On 26 January 1999, IIAC was listed as a potential operator for the Inchon International Airport through an amendment to Article 6(1) of the *Seoul Airport Act*. Article 6(1) as amended provides:

> "The new airport construction project shall be implemented by the state, local governments, the Inchon International Airport Corporation established pursuant to the Inchon International Airport Corporation Act, or a government-invested institution as determined by the Presidential Decree."

Funding

2.130 During IIAC's term as operator of the IIA project (that is, from 2 February 1999 onwards), it relied upon 25 per cent government funding, 24 per cent domestic and foreign debt, 41 per cent bonds and 10 per cent other means in 1999.[101]

Procurement

2.131 The rules according to which the IIAC procures are set out in the *Contract Administration Regulations of Inchon International Airport Corporation*.[102] In addition, Article 3 of these regulations provides that:

> "With respect to all contract administration matters of the IIAC, it shall be governed by the provisions of this contract administration regulations. Matters not stipulated in this contract administrations regulations shall be governed by Contracts to which the State is a Party … such as government procurement contracts."

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[97] *Law on Inchon International Airport Corporation,* Article 3(1) of the Additional Rule.
[98] *Ibid.* Article 3(2).
[99] IIAC Articles of Incorporation, Articles 26, 27, 35.
[100] Exhibit Kor-110 lists IIAC directors. In Korea's Answers to Question 10 from the Panel, dated 3 November 1999, Korea notes that none of these directors are government employees.
[101] Sources of Fund for New Airport Construction (KOACA and IIAC).
[102] Exhibit Kor-55.

2.132 Again, as in the cases of KAA and KOACA, a "Property Management & Contract" team of approximately 23 IIAC employees is used for the opening and evaluation of bids for contracts tendered by the IIAC.[103]

(vii) Office of Supply

2.133 The *Procurement Fund Act* provides that the Office of Supply is primarily responsible for procurement using government procurement funds ("the Fund").[104] The projects for which the Fund may be used are set out in Article 6 of the Act:

> "The Fund shall be used for the following projects:
>
> 1. Purchasing, transport, manufacturing, storing, supplying and their accompanying projects
>
> 2. Management and operation of facilities and their accompanying projects
>
> 3. Other projects necessary in operation of the Fund."

2.134 The procurement procedures, which the Office of Supply is obliged to follow are referred to in Article 13 of the *Procurement Fund Act*. Specifically, Article 13 provides:

> "Matters necessary for the procurement procedures and ranges, such as purchasing, saving for emergency, manufacturing, and supplying of procurement goods and contracts for construction of facilities shall be provided for by the Presidential Decree."

2.135 The bodies for which the Office of Supply is required to procure are defined pursuant to a series of provisions in the *Procurement Fund Act*. First, the goods procured are defined in Article 2(2) and 2(3) of the Act:

> "(2) Procurement goods refers to goods demanded…
>
> (3) Goods demanded refers to goods required by a demanding agency pursuant to paragraph 5 and designated by Presidential Decree."

2.136 Secondly, Article 2(5) defines a "demanding agency" as a national agency, a local government organization or other agencies designated by Presidential Decree.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

A. UNITED STATES

3.1 The United States requested the Panel to make the following findings:

> "That MOCT (including the New Airport Development Group under MOCT), KAA, KOACA, and IIAC, all of which are or have been in the past Korean Government entities involved in procurement for the Inchon International Airport project, are covered under Korea's Appendix I of the GPA and:

[103] Korea's Answer to Question 15 from the Panel, dated 29 November 1999.
[104] *Procurement Fund Act*, Article 4(1).

(a) That by imposing bid deadlines for the receipt of tenders that are shorter than the GPA-required 40 days, Korea is in violation of Article XI:1(a) and XI:2(a) of the GPA.

(b) That by imposing qualification requirements specifying that an interested foreign supplier must have a licence that in turn requires that supplier to build or purchase manufacturing facilities in Korea, just so the supplier may be eligible to bid as a prime contractor, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.

(c) That by imposing domestic partnering requirements that force foreign firms to partner with, or act as subcontractors to, local Korean firms, just so the foreign firms may participate in tendering procedures, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.

(d) That by not establishing effective domestic procedures enabling foreign suppliers to challenge alleged breaches of the GPA for procurements related to the Inchon International Airport project, Korea is in violation of Article XX of the GPA."

3.2 The United States also requested the Panel to make the following finding:

"That should the Panel determine that the above measures do not violate the GPA, the measures nevertheless nullify or impair benefits accruing to the United States under the GPA, pursuant to Article XXII:2 of the GPA."

B. KOREA

3.3 Korea requested the Panel to reject the complaints to the United States on the basis of the following finding:

"That the entities conducting procurement for the Inchon International Airport are not covered entities under Korea's Appendix I of the GPA."

IV. ARGUMENTS OF THE PARTIES

A. ENTITIES COVERED UNDER KOREA'S APPENDIX I OF THE GPA

1. Interpretation of Appendix I and Notes

4.1 **Both parties argue** that regard should be had to the *Vienna Convention on the Law of Treaties* in interpreting Korea's Appendix I to the GPA.

4.2 In support of its argument that regard should be had to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* in interpreting Korea's Appendix I to the GPA, the **United States notes** that the Appellate Body and previous panels have consistently looked to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* for guidance in interpreting the provisions of the WTO agreements and that these articles have "attained the status of a rule of customary or general international law."[105]

[105] The United States refers to Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, (Adopted 1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R ("*Japan - Alcoholic Beverages*"), pp. 9-10 and to Appellate Body report on *United States - Standards for Reformulated and Conventional Gasoline* (Adopted 20 May 1996) WT/DS2/AB/R ("*United States - Reformulated Gas*"),

4.3 **Korea agrees** that the *Vienna Convention on the Law of Treaties* contains customary rules of interpretation that should be used in interpreting Korea's Note 1 to Annex 1.[106]

2. Appendix I, Annex 1: Branch Offices and Subsidiary Organizations

(a) Status of Notes, Annexes and Appendices to the GPA

4.4 **Both parties argue** that, according to Article XXIV:12 of the GPA, which states that the "Notes, Appendices and Annexes to this Agreement constitute an integral part thereof," Annex 1 and, specifically, the term "central government entity," must be interpreted "in accordance with customary rules of interpretation of public international law," pursuant to Article 3:2 of the DSU.[107]

(b) Interpretation of "Central Government Entity" according to the Ordinary Meaning

4.5 **The United States argues** that when interpreted according to its ordinary meaning, in its context and in light of the object and purpose of the GPA, the scope of "central government entity" in Annex 1 of the GPA includes coverage of its branch offices and subsidiary organizations unless otherwise provided for in the GPA. The United States asserts that its argument is based on a textual interpretation of the GPA, pursuant to Article 31 of the *Vienna Convention on the Law of Treaties*.

4.6 To further explain its argument, the United States contends that since all "central government entities" are composed of branch offices and subsidiary organizations, *a fortiori*, the scope of coverage of a "central government entity" must include these subordinate units, unless otherwise specified. The United States further argues that coverage of an entity that excludes its subordinate units actually amounts to no coverage at all. In support, the United States refers to its arguments in paragraphs 4.323 and 4.324.

4.7 **In response, Korea argues** that the claim that, "the coverage of a 'central government entity' under Annex 1 of the GPA includes coverage of its subordinate units, i.e. its branch offices and subsidiary organizations" is unsupported by any text of the GPA. Korea notes in this respect that the words "branch office" or "subsidiary organization" do not appear anywhere in the text of the GPA or in Korea's Appendix I.

4.8 Korea states that the United States is using the rules of the *Vienna Convention on the Law of Treaties* to interpret the "ordinary meaning" of treaty language that does not appear in the treaty. According to Korea, the terms "branch office" and "subsidiary organization," are terms that do not appear in the GPA and are, instead, merely labels with no significance in and of themselves.

4.9 **The United States argues in response** that the terms "branch offices" and "subsidiary organizations" are merely used as generic terms to depict the different types of subdivisions within a given entity. In support of this assertion, the United States notes that, as quoted often by Korea from a United States International Trade Commission Report, the GPA "is aimed at government ministries

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pp. 16-17, and panel report on *United States - Reformulated Gas* (Adopted 20 May 1996) WT/DS2/R, paragraph 6.7.

[106] Korea further notes that the Appellate Body has stated that tariff concessions in a Member's Schedule – much like commitments in a GPA signatory's Appendix I – are "part of the terms of the treaty," to be interpreted by resort to the rules of interpretation included in the Vienna Convention. *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (*"EC-LAN"*)(Adopted 22 June 1998), paragraph 84. Korea also refers to *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Adopted 6 November 1998), paragraph 114 ("A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted").

[107] Appellate Body report on *EC-LAN*, (WT/DS62, 67, 68/AB/R), paragraph 84.

[sic] and their subdivisions,"[108] and these subdivisions necessarily include branch offices and subsidiary organizations.

4.10 In support of its argument that branch offices and subsidiary organisations are not covered under the GPA, **Korea uses** an analogy to corporate law. Korea states that, in that field, a "branch" is defined as a "division, office, or other unit of business located at a different location from main office or headquarters."[109] Korea states that a subsidiary corporation, on the other hand, is "one in which another corporation (i.e. parent corporation) owns at least a majority of the shares and thus has control."[110] Korea argues that what is significant about these definitions, for the purposes of this case, is that a "branch" normally is not an independent entity, but is simply a division, office or other unit located somewhere else. Korea states that special local administrative organs could be considered branches, because they generally are located at some place other than the main office or headquarters.

4.11 Korea further argues that a branch has the same GPA obligations as the parent entity. On the other hand, it is Korea's view that a subsidiary is a separate legal entity. According to Korea, a subsidiary does not necessarily acquire the GPA obligations of another entity, even another entity that controls it to some extent.

(c) Application of the Ordinary Meaning of "Central Government Entity" to the Present Case

4.12 **The United States argues** that MOCT, like all other Korean "central government entities," is composed of branch offices and subsidiary organizations. In support, the United States refers to its arguments in paragraphs 4.435 and 4.436. The United States further argues that since the NADG, KAA, KOACA, and IIAC are either branch offices or subsidiary organizations of a covered "central government entity," namely, MOCT, coverage of MOCT under the GPA includes coverage of NADG, KAA, KOACA, and IIAC.

(i) NADG

4.13 **The United States notes** that the ordinary meaning of "entity" is an organization, a "being...the existence of a thing...all that exists...a thing that has a real existence."[111] The United States further notes that "central government" describes the level within a government structure at which the entity exists, i.e., at the national level as opposed to the state or local level. The United States argues that MOCT is, therefore, a GPA-covered entity at the national level of the Korean government structure. The United States argues that as with most, if not all, national-level entities in Korea, MOCT is organized into many branch offices and that the NADG is such an office. The United States asserts that it is undisputed that a listing of a "central government entity" under Annex 1 encompasses its branch offices, unless otherwise specified because, according to the United States, the two cannot be naturally separated for the purposes of GPA coverage. The United States refers to its arguments in 4.344.

4.14 **In response, Korea argues** that NADG is a not a "branch office" of MOCT and that the term "branch office" is not used by Korea for NADG. Korea states that NADG is, in fact, specially organized, ad hoc MOCT task force, and is not itself a legal person under Korean law.[112] Korea states that, as a result, NADG has no authority to undertake binding legal actions, such as contracting, on its own behalf. Korea further notes that NADG's regulations do not provide authority for procurement

[108] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979).

[109] Black's Law Dictionary (1990).

[110] *Ibid.*

[111] The New Shorter Oxford English Dictionary (1993 ed.), p. 830.

[112] *Regulation on Establishment of the New International Airport Construction Working Group*, MOT Order No. 902, 1 June 1990, Article 2 ("The Working Group is to be established under the authority of the Minister of Transportation.").

by NADG for IIA. Korea states that, therefore, both as to procurement and all other activities, NADG is MOCT itself – the entity listed on Annex 1. In support of this argument, Korea notes that Article 3 of NADG's regulations names MOCT's Assistant Minister of Planning and Management as the head of the task force, and MOCT's Director General of MOCT's Civil Aviation Bureau as the second in charge.

4.15 **In response to Korea's argument that NADG is MOCT itself, the United States questions** why the New Airport Development Group has a different name than MOCT, why did Korea in 1991 refer to the New Airport Development Group as "the New Airport Development Group under" MOCT, and not just as MOCT and how can the New Airport Development Group be "established within" MOCT in one instance yet be MOCT in another?

(ii) KAA, KOACA and IIAC

4.16 **Korea argues** that KAA, KOACA and IIAC are not subsidiary organizations of MOCT. In support of this argument, Korea notes that KAA, KOACA and IIAC are independent legal persons under Korean law. Korea further states that KAA, KOACA and IIAC, like the entities included on Korea's Annex 3, were established individually by special law. Korea states that each is identified as a legal or "juristic" person, rather than as an agency or instrumentality of MOCT or any other ministry. Korea further states that, as a separate legal person, each entity contracts on its own behalf, pursuant to its own bid announcements and its own procurement regulations. Each has its own officers and directors, and its employees are not government civil servants or employees.

4.17 **In response, the United States refers** to its arguments in paragraph 4.587. The United States also notes that, in fact, the affairs of KAA have always been the responsibility of the Civil Aviation Bureau, a branch office of MOCT.[113]

4.18 **In response to a question from the United States, Korea asserts** that all non-listed entities that are "independent legal persons" under domestic law are not covered under Annex 1 of the GPA. Korea states in this respect that Article I of the GPA and Annex 1 speak of "entities." Korea notes that the New Shorter Oxford English Dictionary defines "entity" as a "thing that has a real existence." In the context of the GPA, in Korea's view, an "entity" has real existence when it is a juristic or legal person in its own right, with its own officers, its own directors, its own rules and regulations. Korea argues that KAA, KOACA, IIAC are such entities.

4.19 **In response, the United States argues** that, merely because an entity is a separate legal person does not automatically mean it cannot be a subsidiary organization of another entity. The United States refers to its arguments in paragraph 4.435 for support. In support of its argument, the United States notes that "subsidiary" is defined as "serving to help, assist, or supplement, auxiliary, supplementary . . . subordinate, secondary." Thus, according to the United States, if one entity is supplementary or subordinate to another entity, it is a subsidiary organization of that other entity, regardless of its domestic legal status. The United States also refers to its arguments in paragraph 4.252.

(d) Significance of Note 1 to Annex 1

4.20 **Korea argues** that even if the ordinary meaning of "central government entity" includes "branch offices" and "subsidiary organizations," the United States' argument must be rejected because it ignores the ordinary meaning of Note 1 to Korea's Annex 1, which identifies the universe of bodies included within an entity listed on Annex 1, and which renders the ordinary meaning of the term "central government entity" irrelevant. Korea further argues that its commitments in Note 1 do not

[113] The Presidential Order on the Organization of the Ministry of Construction and Transportation, Article 16 (US Exhibit 71).

permit expansion of GPA coverage beyond those entities identified as "subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act* of the Republic of Korea." In support of this argument, Korea states that Note 1 provides specific, textual evidence of the intent and the agreement of the parties to the GPA, and as an "integral part"[114] of the GPA, it must be accorded both its ordinary meaning, and the "special meaning" it imposes upon the term "central government entity" for the purposes of Korea's Annex 1. Korea further states that Note 1 evidences and itself provides a "special meaning," under Article 31(4) of the *Vienna Convention on the Law of Treaties*, for the term "central government entity."[115]

4.21 **The United States responds** that, in its view, the text of Korea's Annex 1 fully supports the interpretation put forward by the United States. The United States asserts that it is wrong to argue that Note 1 exclusively governs the means of identifying the universe of entities internal to an Annex 1 entity that, while not themselves listed in Annex 1, are nevertheless covered under Annex 1 by virtue of their relationship to listed "central government entities." In support of its argument, the United States refers to the fact that Korea has admitted coverage of branch offices, such as the New Airport Development Group, which are neither "subordinate linear organizations," "special local administrative organs," nor "attached organs." Thus, according to the United States, these three terms cannot be exhaustive with regard to the "universe" of subordinate units within Korean "central government entities."

4.22 Further, the United States argues that Note 1 does not define the scope of "central government entity." Rather, according to the United States, Note 1 expands it. The United States contends that such an interpretation is consistent with the principle of effectiveness. The United States further asserts that such an interpretation is also consistent with the reasoning that Note 1 cannot both define and expand the scope of "central government entity." The United States refers to its arguments in paragraphs 4.159 and 4.161 and 4.163.

(e) Relevance of the Annex 1 List

(i) Explicit Listing

4.23 **The United States notes** that it is undisputed that the New Airport Development Group, a branch office of MOCT, is covered by virtue of the listing of MOCT in Annex 1, and not by its own listing. The United States argues that, therefore, the mere fact that the name of a branch office or a subsidiary organization is not explicitly listed in Annex 1 does not automatically mean that the branch office or subsidiary organization is outside the purview of the GPA.

4.24 The United States further argues that if all unlisted branch offices of enumerated "central government entities" were deemed excluded from Annex 1 coverage, then most Korean "central government entities" would not be effectively covered, since most of these entities are made up of branch offices, of which none are listed by name in Korea's Annex 1. The United States contends that, moreover, if the GPA only applied to enumerated subsidiary organizations, a Party, after agreeing to cover a "central government entity," could then unilaterally and without compensatory adjustments transfer procurement authority from the "central government entity" to its unlisted subsidiary organization, all the while retaining control of the procurements by this subsidiary organization within the "central government entity." According to the United States, the result would be a GPA emptied of its substance.

4.25 **In response, Korea refers** to its arguments in paragraphs 4.160, 4.31 and 4.290.

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[114] GPA Article XXIV:12.

[115] *Vienna Convention*, Article 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended.").

(ii) Transfer of Procurement Authority

4.26 **Korea notes** that since the United States considers KAA, KOACA and IIAC to be the same and interchangeable, "transfers" between them could have no cognizable effect under the terms of the GPA at issue in this case. Korea asserts that the only remaining "transfer" about which the United States apparently complains, must be the Korean National Assembly's decision to assign responsibility for the IIA project to KAA. Korea states that it was fully within its right to undertake this so-called "transfer unilaterally and without compensatory adjustments" because it occurred in December 1991, two years before Korea submitted its final offer for accession to the GPA, and five years before the effective date of the GPA for Korea. Korea notes that if a similar "transfer" occurred today, a GPA signatory would not be able to accomplish it "unilaterally and without compensatory adjustments." It would be required, under Article XXIV:6(a), to address claims for compensatory adjustments. Korea further asserts that it is one thing to transfer procurement authority from a not yet covered entity (MOCT in 1991) to a non-covered entity (KAA), and something else to transfer it from a covered entity to a non-covered entity. Korea states that the United States submissions do not appear to make this distinction, or to allow for the application of Article XXIV:6.

4.27 **In response, the United States argues** that it is irrelevant that Korea did not make its final offer until three years after the shift of procurement authority to KAA. As a subsidiary organization of MOCT, KAA remains covered under Annex 1 of the GPA because (1) all branch offices and subsidiary organizations of "central government entities" are automatically covered under Annex 1, unless otherwise specified, and (2) procurements by a subsidiary organizations are in fact procurements by a listed "central government entity" – pursuant to Article I of the GPA. Furthermore, the United States argues that pursuant to Article I, KAA remains covered regardless of whether or not it is a subsidiary organization of MOCT because KAA was merely the operator of the IIA construction project, and MOCT remained the entity responsible for IIA construction.

4.28 **Korea also states** that it has demonstrated that the Korean National Assembly made the various transfers of responsibility for the IIA project for entirely legitimate reasons. To illustrate that governments transfer authority over projects or portfolios for many legitimate reasons, Korea states that prior to passage of the *Energy Policy Act of 1992*[116], the United States Department of Energy was responsible for the production and sale of uranium fuel enrichment services for commercial nuclear power plants.[117] Korea states that this responsibility involved procurement authority for the various facilities associated with uranium enrichment, including the Department of Energy's gaseous diffusion enrichment plants.[118] Korea notes that the *Energy Policy Act of 1992* created the United States Enrichment Corporation, and transferred the Energy Department's responsibility for the sale and production of uranium enrichment services to the Corporation. Korea further notes that the transfer took effect when the Corporation commenced operations on 1 July 1993.[119] Korea states that the transfer from the Energy Department extended the procurement authority associated with the project to the Corporation, although the Act exempted the Corporation from many of the federal procurement requirements included in the *Federal Property and Administrative Services Act* of 1949, as amended, and the *Competition in Contracting Act* of 1984, as amended.[120] The Corporation issued its own

[116] Public Law No. 102-486, Title IX.

[117] The testimony of William H. Timbers, Jr., President and Chief Executive Officer, United States Enrichment Corporation, before the Subcommittee on Energy and Power of the House Committee on Commerce, 21 February 1995, pp. 3, 4 (Testimony of USEC President and CEO); Uranium Enrichment Activities Leading to Establishment of the US Enrichment Corporation, GAO Report GAO/RCED-94-227FS, 27 July 1994, p. 4 (1994 GAO Report); United States General Accounting Office, *Status of Open Recommendations FY97*, at http://www.gao.gov/openrecs97/abstracts/rc95245.htm.

[118] Uranium Enrichment: Process to Privatize the US Enrichment Corporation Needs to be Strengthened, GAO Report GAO/RCED-95-245, 14 September 1995, p. 5 (1995 GAO Report).

[119] 1994 GAO Report, p. 4.

[120] *Energy Policy Act*, Section 1312(f) and 1994 GAO Report, p. 7 and Testimony of USEC President and CEO, p. 6.

procurement policies and procedures, which it contends, adhere to the United States' Federal Acquisition Regulations.[121]

4.29 Korea further states that subsequent to this transfer, and pursuant to the *United States Enrichment Corporation Privatization Act* of 1996 (passed on 26 April 1996, months after the effective date of the GPA), the United States privatized the Corporation, ultimately selling its shares in the Corporation on the New York Stock Exchange on 23 July 1998.[122]

4.30 Korea notes that this involved, effectively, two transfers and three entities for the same activity in a period of five years. Korea further notes that there is nothing unusual or dubious about these transfers and nor is there anything unusual or dubious about the transfer of responsibility for the IIA project between the various Korean entities.

(f) Article I:3 of the GPA

4.31 **Korea argues** that the GPA does, in fact, provide a means of attaining coverage for procurements by non-listed entities. More specifically, Korea refers to Article I:3 which provides as follows:

> "Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply *mutatis mutandis* to such requirements."

4.32 Korea interprets this Article as meaning that where covered entities ("entities, in the context of a procurement covered by this Agreement")[123] require non-covered entities ("enterprises not included in Appendix I")[124] to adhere to particular requirements in awarding contracts pursuant to the latter's procurement responsibilities, the substantive national treatment and non-discrimination obligations included in Article III of the GPA must be observed. In Korea's view, Article I:3 effectively provides a standard to convert non-covered entities into de facto covered entities.

4.33 Further, in response to a question from the Panel, Korea argues that Article I:3 provides, "a formulation which offers a way of distinguishing between those [non-listed] 'organs' or 'organisations' which are 'attached/connected/affiliated' etc. to MOCT and are, therefore, covered entities for the purposes of the GPA and those which are not."[125]

4.34 Korea notes that if MOCT required KAA to award contracts with particular requirements, then, by operation of Article I:3, KAA would be covered by the national treatment and non-discrimination requirements of Article III of the GPA. However, Korea argues that there is no

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[121] 1994 GAO Report, p. 7.

[122] United States Enrichment Corporation website, http://www.usec.com/Content/ThirdTier/whoweare/cnt_about_privatization.html.

[123] Korea argues that the GPA does not use the terms "covered" versus "non-covered" entities. The terms "covered" and "non-covered" are shorthand terms adopted by the parties to this dispute. In the GPA, the use of the term "entity" automatically signifies coverage. See, e.g., the reference to simply "entities" in GPA Articles III:2(a), III:2(b), VI:1, VI:2, VI:4. The phrase "in the context of a procurement covered by this Agreement," therefore, clarifies that the procurement at issue, besides being conducted by a covered entity, must also be for a good or service for which the signatory has committed.

[124] Korea argues that the use of the term "entity" in the GPA automatically signifies coverage. Therefore, the term "enterprises" was most likely adopted in Article I:3 to distinguish such bodies from "entities," and to convey the intent to address in that Article the relevance of requirements imposed by covered entities upon bodies that are not covered.

[125] Korea's Answer to Question 11 from the Panel, dated 29 November 1999.

evidence suggesting that MOCT requires KAA, KOACA or IIAC to award IIA procurement contracts in accordance with Article I:3.

4.35 **In response, the United States argues** that Article I:3 cannot be used in this dispute because KAA, KOACA, and IIAC are not entities "not included in Appendix I." The United States further argues that a plain reading of Article I:3 makes it clear that it addresses the issue of subcontracts, not primary contracts. The United States questions how else can a non-covered entity be conducting a "procurement covered under this Agreement"? Further, the United States argues that adopting the approach proposed by Korea in relation to Article I:3 would mean that rectifications and modifications could be effected without the use of Article XXIV:6. The United States contends that this would render Article XXIV:6 an inutility. The United States emphasizes that Article I:3 cannot be interpreted as a means of expanding GPA coverage "beyond the list of entities included in a signatory's Appendix I."

4.36 The United States also contends that Korea's arguments contained in paragraphs 4.20, 4.31 and 4.296 regarding Article I:3 would lead to the result that, with the exception of Korea, every GPA Party's non-listed subdivisions of its "central government entities" would not be covered, because "only named entities, not other entities over which they may exert some control, are covered." The United States further contends that because these "non-covered" subdivisions are required by their covered "central government entities" "to award contracts in accordance with particular requirements," these subdivisions would then be subject to Article III of the GPA (non-discrimination), but not to the rest of the GPA disciplines. In contrast, Korea's non-listed subdivisions (*i.e.*, the "subordinate linear organizations," "special local administrative organs," and "attached organs" of listed entities) would be subject to all GPA disciplines, because "central government entity" for Korea – according to its Note 1 to Annex 1 – encompasses the entities' subdivisions. The United States concludes that, in short, Korea's arguments would result in major reductions of concessions for all GPA Parties, while singling out Korea as the sole Party providing full coverage of its non-listed entities. The United States argues that the text of the GPA does not support such a conclusion.[126]

3. Appendix I, Annex 1: The Scope of "Central Government Entities"

(a) The "Control" Test

4.37 Article I:1 of the GPA provides as follows:

> "This Agreement applies to any law, regulation or practice regarding any procurement by entities covered by this Agreement as specified in Appendix I."

4.38 **The United States argues** that Article I:1 should be considered to determine whether procurements by KAA, KOACA, and IIAC are in fact procurements by MOCT.

4.39 The United States contends that a textual interpretation of Article I:1, and specifically of the word, "by," suggests an analysis of the relationship between MOCT and these three entities *vis-à-vis* the procurement of IIA construction. According to the United States, in making this analysis, factors such as control, funding, ownership, and benefit may be considered. The United States argues that in the present dispute, MOCT controls, finances, benefits from, and owns the procurements of KAA, KOACA, and IIAC. The United States refers in this respect to a list of provisions from Korean law that, according to the United States, evidences MOCT's ultimate control and responsibility over the IIA project, the entities related to this project, and the procurements of these entities.[127]

[126] US Response to Korea's Answer to Question 5 from the Panel, dated 29 November 1999.
[127] US Exhibit 77.

4.40 The United States concludes that procurements by KAA, KOACA, and IIAC are procurements by MOCT and that, therefore, they are covered under Annex 1 of the GPA pursuant to Article I:1 of the Agreement.

(b) Factors Illustrating Control

(i) Status of Project Operators

4.41 **The United States notes** that the term "project operators" is defined in Article 95(1) of Korea's *Aviation Act*, which states:

> "Any operator of the airport development projects as prescribed in Article 94(2) [is] (hereinafter referred to as "project operator")... ."[128]

4.42 The United States also notes that Article 94(2) of that Act, in turn, describes a "project operator" as "any person other than the Minister of Construction and Transportation" who has obtained "the permission of the Minister of Construction and Transportation" "to operate the airport development projects."[129]

4.43 The United States contends that in further defining "project operator," the *Aviation Act* goes into explicit detail regarding the role and duties of project operators and the authority of MOCT over project operators carrying out airport development projects. The United States notes that, for example, project operators can only carry out airport development projects with the approval, permission, and consent of MOCT.[130] The United States further notes that the *Aviation Act* requires potential project operators to obtain approval from MOCT of their proposed operational plan, which must "specify or be accompanied by design drawings necessary for operating the projects, financing scheme, period of operation, and other matters prescribed by the Ordinance of the Ministry of Construction and Transportation."[131] The United States notes that, moreover, project operators must obtain approval from MOCT that the work performed conforms to project requirements.[132]

4.44 The United States further notes that the *Enforcement Decree of the Aviation Act* supplements the *Aviation Act* as follows:

> "Any person who desires to execute the airport development projects under Article 94(2) of the [Aviation] Act, shall submit to the Minister of Construction and Transportation an application for permission specifying the following matters . . . [o]bject and details of projects, [p]eriod and method of execution of projects; and [o]ther matters necessary for executing projects ... ."[133]

4.45 Furthermore, according to the United States, the *Act on the Promotion of a New Airport for the Seoul Metropolitan Area Construction* notes that MOCT may designate a "project operator" to

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[128] US Answer to Question 19 from the Panel, dated 29 November 1999.

[129] *Ibid.* The United States also notes that "airport development projects" are defined in Article 2(8) of the *Aviation Act* as "projects related to new construction, enlargement or improvement of airport facilities... ."

[130] *Aviation Act*, Article 96 (describing MOCT approval of a project operator's "operational plan." Article 95(1) indicates that the purpose of an operational plan is to obtain the permission of the Minister of Construction and Transportation with regard to an airport development project).

[131] *Ibid.* Article 95.

[132] US Answer to Question 19 from the Panel, dated 29 November 1999, citing Article 104 of the *Aviation Act.*

[133] US Answer to Question 19 from the Panel, dated 29 November 1999, citing Article 27 of the *Enforcement Decree of the Aviation Act.*

implement the Inchon International Airport construction project.[134] However, "the operator of the new airport construction project as provided for in Article 6 (hereinafter referred to as the "project operator") shall draw up the execution plan for the new airport construction project (hereinafter referred to as the "execution plan") containing the scale and contents of the project, the execution period, a financing scheme and such other matters as determined by the Presidential Decree, and obtain approval from the Minister of Construction and Transportation. The same shall apply where he intends to modify the matters already approved ... ."[135]

4.46 The United States argues that aside from the *Aviation Act*, no other law submitted in this case defines the term "project operators." Instead, argues the United States, they merely confirm the designation of KAA, KOACA, and IIAC as IIA project operators. Specifically, the United States notes that the *Seoul Airport Act*, lists the "Operator[s] of New Airport Construction Project."[136] The United States notes that the relevant article of the *Seoul Airport Act* was revised on a number of occasions since its passage in 1991 to include KAA and KOACA in the list of potential IIA project operators.[137] The United States notes that Korea confirms KAA, KOACA and IIAC as IIA project operators by specifically referring to them as "project operators" throughout Korea's submissions.

4.47 Finally, the United States argues that consistent with Article 94 of the *Aviation Act*, the *Seoul Airport Act* gives MOCT authority to choose a different procurement operator at any time, stating that, "[t]he Minister of Construction and Transportation may, where he deems it necessary for the efficient execution of the new airport construction project, arrange for a person other than those referred to in paragraph (1) to implement part of the project."[138] The United States argues that MOCT did just that when it made KAA the IIA project operator in December 1991, KOACA the project operator in August of 1994, and IIAC the project operator in 1999. However, the United States asserts that it is clear that throughout this eight-year period of switching project operators, MOCT retained statutory authority and ultimate control over the entire IIA airport development project.[139]

4.48 **Korea notes** that according to Article 6(1) of the *Seoul Airport Act*, "[t]he new airport construction project shall be implemented by" the operator identified therein. Korea states that although the term "operator" is not defined beyond the entity identified in Article 6(1), the term "new airport construction project" is defined, in Article 2(2) of the *Seoul Airport Act* to include various types of construction. In their respective authorizing statutes, KAA, KOACA and IIAC are charged with undertaking these types of construction projects.[140]

4.49 Korea further notes that the title of Article 6 of the 1991 *Seoul Airport Act* – which gave KAA responsibility for the IIA project – is "Operator of New Airport Construction Project."[141] Korea asserts that the wording of this title, and not anything from the *Aviation Act*, is precisely why Korea

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[134] *Act on the Promotion of a New Airport for the Seoul Metropolitan Area Construction, US Exhibit 11, Article 6.*

[135] *Ibid.* at Article 7(1).

[136] *Seoul Airport Act*, Article 6.

[137] US Answer to Question 19 from the Panel, dated 29 November 1999.

[138] *Seoul Airport Act*, Article 6(2).

[139] US Answer to Question 19 from the Panel, dated 29 November 1999.

[140] Korea's Answer to Question 10 from the Panel, dated 29 November 1999, citing *Korea Airport Corporation Act*, Article 7(5-2) (assigning KAA responsibility for "New airport construction projects as referred to subparagraph 2 of Article 2 of the Act on the promotion of New Airport Construction in Seoul Metropolitan Area."); *Korea Airport Construction Authority Act*, Article 2 (defining "project" for which KOACA is responsible as "any of the activities stipulated in the subparagraph 2, Article 2, '*Seoul Airport Act*.'"); *Law on Inchon International Airport Corporation*, Article 10(1)(1) (assigning IIAC responsibility for "Construction business of the Metropolitan New Airport (hereinafter referred to as Inchon International Airport) in accordance with the Article 2 of the promotional law on Metropolitan New Airport Construction.").

[141] 1991 *Seoul Airport Act*, Article 6.

and the United States used the shorthand term "project operator" when referring to KAA's role.[142] Korea asserts that the United States has specifically stated that a "project operator" may be designated for IIA construction under Article 6 of the *Seoul Airport Act*. Korea further asserts that the United States did not rely on the *Aviation Act* as its source for the term "project operator."[143]

(ii) Independent Legal Persons

4.50 **Korea argues** that MOCT does not control procurements by KAA, KOACA and IIAC. In support of this argument, Korea states that, as specified in their authorizing statutes, KAA, KOACA and IIAC were established by an act of the National Assembly as separate legal persons[144] and are, therefore, independent legal persons under Korean law. Korea further states that these entities authored and adopted their own by-laws, they authored and adopted their own Contract Administration Regulations governing all procurement matters[145], they issue their own requests for proposals and bid announcements, they publish bid announcements and requests for proposals of their own accord, and they conclude contracts with successful bidders on their own behalf. Korea argues that MOCT does not ask these entities, much less require them, to award contracts in accordance with particular requirements.

4.51 **The United States argues**, on the other hand, that a separate legal person may still be an agent or instrumentality of another entity. The United States refers to Black's Law Dictionary, which notes that an "agent" can be an "independent contractor," - that is, a separate legal entity. Further, in the view of the United States, merely having the status of a separate legal person does not in and of itself guarantee independence. The United States refers to its arguments in paragraph 4.424.

4.52 The United States continues by stating that "control" has nothing to do with an entity's legal status. According to the United States, a separate legal entity can be controlled. The United States refers in this respect to the concept of "subsidiary corporation" in corporate law, in which a separate legal entity is a subsidiary by means of control. The United States argues that this does not mean that the subsidiary corporation ceases to be a separate legal entity. The United States contends that while it agrees with Korea that MOCT's control would not lead to the surrender of KAA, KOACA, and IIAC's status as separate legal entities, this fact does not mean that the existence of separate legal entities make them *per se* incapable of being controlled. The United States further argues that laws creating KAA, KOACA and IIAC demonstrate that MOCT "guides", "supervises", "inspects" and "directs" the New Airport Development Group, KAA, KOACA and IIAC.[146]

4.53 The United States also states that if Korea's argument were to be accepted, then any Party to the GPA could unilaterally transform one of its covered entity's subdivisions into a "separate 'juristic' person" and then claim successfully that this "separate juristic" subdivision is no longer covered under the GPA. The United States further states that if other Parties were to object to this unilateral erosion of bargained-for coverage, the Party making this transformation could – according to Korea – simply claim that the objecting Parties have no rights in the matter because "separate 'juristic' persons" cannot possibly be subdivisions of "central government entities." The United States argues that this would

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[142] Korea's Response to the US Answer to Question 19 from the Panel, dated 29 November 1999.

[143] Korea's Response to the US Answer to Question 19 from the Panel, dated 29 November 1999, *quoting* US First Written Submission, paragraph 20.

[144] *Korean Airport Corporation Act*, Article 3; *Korea Airport Construction Authority Act*, Article 3; *Law on Inchon International Airport Corporation*, Article 2.

[145] *KAA Contract Administration Regulations*, Article 90; *KOACA Contract Administration Regulations*, Article 3; *IIAC Contract Administration Regulations*, Article 3.

[146] In support of this argument, the United States refers to Article 28 of the *Korea Airport Corporation Act*, Article 31 of the *Korea Airport Construction Authority Act* and Article 16 of the *Law on Inchon International Airport Corporation*.

reduce Article XXIV:6 – and the schedules – to inutility, contrary to the customary rules of interpretation of public international law.[147]

(iii) Oversight for Public Safety and Fiscal Propriety

4.54 **Korea also argues** that "control" exercised by a central government entity does not undermine the independence of separate legal persons such as KAA, KOACA and IIAC and, rather, is the minimum degree of oversight required to fulfill a government's fiduciary duty. Korea notes that constructing an airport, like any other public purpose project, is intimately linked to public welfare, safety and finance. In Korea's view, any responsible government will maintain oversight over the entities responsible for the project in order to guarantee to the public that the highest standards of safety and fiscal propriety are observed. Korea argues that this type of oversight does not surrender an entity's status as a separate legal person.

4.55 Korea argues that the MOCT's authority to appoint board members, the reporting requirements incumbent upon KAA, KOACA and IIAC, MOCT's oversight of fiscal decision-making, and its maintenance of blue-ribbon consultative commissions regarding the IIA project is consistent with the nature of the task with which KAA, KOACA and IIAC have been charged. Korea further argues that, apart from the obvious public safety issues associated with the construction of an airport, a certain amount of government oversight is justified to ensure that appropriate standards of fiscal propriety are observed. Korea notes that the budget for the IIA project stands at approximately $6 billion, with 40 per cent derived from public funds. According to Korea, accountability is needed to guarantee the observation of the highest standards of fiscal responsibility.

4.56 Additionally, Korea argues that the type of oversight referred to by the United States – the requirement that KAA, KOACA or IIAC seek approval for and report on certain of its actions – also ensures accountability. Korea argues that the approval and reporting requirements to which KAA, KOACA and IIAC are subject ensures that there is a public record evidencing their accountability for what they do. Korea states that they do not surrender their status as separate legal persons merely because they are called to account for their actions.

4.57 Finally, Korea argues that, even assuming for the sake of argument that the United States' control test applies, KAA, KOACA and IIAC cannot be considered to be controlled by MOCT under this test. Korea argues that this follows from the fact that the degree of control is not extreme but, rather, is only the degree of control necessary to ensure that the interests of the public are reflected in the operations of each corporation. Korea asserts that the United States itself, in discussing the control exercised over its own Amtrak and Comsat by central government entities, reasoned that "the retained links with the government may be seen as only those necessary to ensure that the interests of the public are reflected in the operations of [Amtrak and Comsat]," and that these links do not support the extension of GPA coverage to Amtrak and Comsat since "the code is aimed at government ministeries [sic] and their subdivisions – not the myriad organizations tangential to the essential function of government."[148]

4.58 **In response, the United States argues** that there is no support for the argument that MOCT's direction and supervision of KAA and KOACA are merely aimed at public policy matters in the texts of the *Korea Airport Corporation Act*, the *Korea Airport Construction Authority Act*, and the *Inchon International Airport Corporation Act*.

[147] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[148] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), p. 44.

(iv) Master Plan for IIA Project

4.59 **In support of its argument** that MOCT remains in ultimate control of the IIA project, **the United States refers** to Article 4(1) of the *Seoul Airport Act*, which requires the MOCT to establish the "master plan" for the IIA project. The United States notes that Article 4(2) stipulates that the master plan includes: 1. General direction of construction; 2. Outline of the construction plan; 3. Construction period; 4. Financing plan; and 5. Such other matters as the Minister of Construction and Transportation deems necessary.

4.60 **Korea argues in response** that Article 4 of the *Seoul Airport Act* does not authorize MOCT to undertake procurement for IIA or to require the project operator to award contracts for IIA procurements in accordance with any particular requirements.

4.61 **The United States also notes** that as project operators, NADG, KAA, KOACA and IIAC were and are required to follow the "master plan." The United States further notes that the NADG, KAA, KOACA, and IIAC are required to obtain MOCT approval for their project execution plans.

(v) Reporting Obligations

4.62 In further support of its argument that MOCT controls the IIA project operators, the **United States notes** that MOCT may:

> "where necessary for the implementation of the Act, order the project operator to make necessary reports on the new airport construction project or to submit necessary data, and may have public officials serving at his Ministry enter the project operator's office, the workplace or other relevant places to inspect the business of the new airport construction project"[149]

4.63 The United States also notes that if and when the project operator:

> "has completed the work on the new airport construction project, [he shall] submit a work completion report to the Minister of Construction and Transportation and obtain confirmation of the completion of work"[150]

(vi) Appointment and Dismissal

4.64 Also, in further support of its argument that MOCT controls each of the IIA "project operators," the **United States contends** that directors of NADG are accountable to the MOCT. Further, the presidents, vice-presidents, and auditors of KAA, KOACA, and IIAC are appointed and dismissed by MOCT while the rest of their boards are appointed and dismissed by the president "with the approval of" MOCT.

4.65 **In response, Korea argues that** KAA, KOACA and IIAC are governed by their own boards of directors that control all matters related to major corporate investments and all other major corporate issues of any significance.[151] Further, Korea states that KAA, KOACA and IIAC hire and fire a workforce that is not in the government's employ.[152]

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[149] US Answer to Question 19 from the Panel, dated 29 November 1999, citing Article 14(1) of the *Seoul Airport Act.*

[150] *Ibid.* citing Article 12-2(1) of the *Seoul Airport Act.*

[151] Korea refers to, for example, *KAA By-laws*, Articles 4(3), 4(1)(6), 14, 25; *KOACA By-laws*, Articles 7(1), 30; *IIAC Articles of Incorporation*, Articles 17, 47.

[152] *Korea Airport Corporation Act*, Article 13; *Korea Airport Construction Authority Act*, Article 15; *Law on Inchon International Airport Corporation*, Additional Rule Article 6(2) (KOACA employees, who were

(vii) Power to Cancel Permission or Approval

4.66 **In further support** of its control argument, **the United States notes** that Article 13(1) of the *Seoul Airport Act* provides that the MOCT retains final authority to:

> "cancel the permission or approval granted pursuant to this Act or order the suspension of or alteration in the work, or the reconstruction, modification or relocation of facilities:
>
> 1. Where the operator has obtained permission or approval under this Act by deceit or other wrongful means;
>
> 2. Where the operator has breached an order or disposition issued under this Act; and
>
> 3. Where continued execution of the new airport construction project has been made impossible owing to change of circumstances"[153]

4.67 **Korea argues in response** that MOCT's oversight authority is related to MOCT's mandate to police any potential criminal conduct by KAA, KOACA and IIAC. More specifically, Korea argues that MOCT is able to cancel, suspend or alter any action undertaken by KAA, KOACA or IIAC only where conduct by those entities is illegal or otherwise wrongful. Korea notes in this respect that it is only in exceptional situations, where KAA employees have committed certain criminal violations, that they will be treated as public officials. Korea further notes that under Article 30 of the *Korea Airport Corporation Act*, this "legal fiction" will result in the application of Chapter VII of the *Korean Criminal Act* to KAA employees.[154] Korea argues that MOCT oversight of the type described in Article 8(2) of the *Korea Airport Corporation Act* is aimed at policing such conduct. Korea states that it is "good government" to police the conduct of KAA, KOACA or IIAC officials, routing out any potential criminal conduct, or cancelling or suspending any "wrongful" or "deceitful" actions that might be undertaken by those officials.

(viii) Power to Dictate Technical and Non-Technical Requirements

4.68 In further support of its argument that MOCT controls the IIA procuring entities, the **United States argues** that MOCT dictates what technical or non-technical requirements are necessary for each procurement, the decision of which determines the final selection of the products or services. The United States notes that through its New Airport Development Group and its "New Airport Construction Deliberation Commission", MOCT *inter alia* deliberates on "important issues relating to building techniques, construction technology and traffic impact, etc. of the new airport construction project"; researches and develops "systems and regulations" concerning the airport; and plans, designs and oversees "actual works of [the airport's] civil engineering facilities, site preparation, supporting complex construction supporting facilities and accessible transport facilities."

4.69 **In response, Korea notes** that there is no evidence to demonstrate that MOCT dictates technical or non-technical requirements for procurements by KAA, KOACA or IIAC. Korea argues that the United States has not established that KAA, KOACA or IIAC are "required" by MOCT or any other covered entity "to award contracts in accordance with particular requirements," which is the standard provided in Article I:3 of the GPA to extend coverage to unlisted entities. According to Korea, neither the statutory provisions regarding MOCT's responsibility for the Inchon airport's basic

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by virtue of Article 15 of the *Korea Airport Construction Authority Act* not government employees, became employees of IIAC).

[153] US Answer to Question 19 from the Panel, dated 29 November 1999.

[154] *Criminal Act*, Act No. 293, 14 September 1953 (as amended by Act No. 2745, 25 March 1975).

plan, nor the statutory provisions requiring KAA, KOACA and IIAC to request approval for and report on certain of their actions, instruct MOCT to require KAA, KOACA or IIAC to award Inchon airport contracts in accordance with any particular requirements. Korea argues that it has in fact demonstrated that no such requirements exist, given its demonstration that KAA, KOACA and IIAC: are separate legal persons; have adopted their own procurement regulations; are empowered to and have in fact conducted procurements on their own behalf; and, have signed contracts on their own behalf.

(ix) Financing of IIA Project

4.70 **The United States also argues** that MOCT is responsible for all budget and funding matters related to the airport and, more particularly, that MOCT finances all IIA procurements. In support of this argument, the United States refers to Article 15 of the *Seoul Airport Act*, which, it argues, permits the Government of Korea - that is, MOCT - to grant a subsidy or a fiscal loan to the project operator to help him finance all or part of the expenses needed for the new airport construction project. The United States further argues that MOCT provides free loans of national assets, it concedes gratuitously any state property to KAA, KOACA and IIAC, it guarantees the bonds issued by these entities, and establishes the financial plans for the repayment of debt incurred by these entities from the construction of the airport. The United States also states that if these entities attempt to collect rents or charges for the use of airport facilities, borrow funds, or sell airport property, they must obtain MOCT's approval. Finally, the United States argues that MOCT funds the NADG.

4.71 **Korea argues in response** that there is no evidence indicating that MOCT finances all IIA procurements. Further, Korea argues that KAA, KOACA and IIAC fund portions of IIA procurement with their own funds.

4.72 In support of its argument regarding finance of the IIA project, **the United States refers** to a document entitled, "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time." The United States contends that this document shows that 40 per cent of the funding for the IIA construction project will come from government grant. The United States further states that the remaining IIA funding will come from borrowing guaranteed by the government, government land sales, and KAA. The United States notes that Korea is anticipating at this time that only 11.7 per cent of the IIA funding will come from private investment and that IIAC may not be privatized.

(x) Property in IIA Project

4.73 **The United States also argues** that MOCT retains possession of all products or services procured for the IIA project. The United States argues that the *Seoul Airport Act* confirms that the title to the land and facilities created or built as a consequence of the new airport construction project shall vest in the State upon completion. The United States also notes that the *Korea Airport Construction Authority Act* states that the ownership of new airport facilities constructed through the new airport construction project belongs to MOCT as soon as the construction is finished.

4.74 The United States also notes that the *Seoul Airport Act* provides that if the project operator chooses to "set up or expand in or relocate to the projected area or its adjoining area such facilities for the production of various construction materials as are required for the new airport construction project,"[155] "receive advance money for all or part of the land price from the persons who will be provided with a portion of the land to be created by the implementation of the new airport

[155] *Seoul Airport Act*, Article 8-2(3).

construction project,"[156] or "issue bonds convertible to land (hereinafter referred to as the "land redemption bonds")[157] the project operator must obtain the approval of MOCT."[158]

(c) Is Control Related to Procurement?

4.75 **Korea asserts** that the "control" factors identified by the United States are essentially two-fold: "control" stemming from MOCT's responsibility for formulating and amending the basic plan; and, "control" stemming from the statutory requirement that KAA, KOACA and IIAC request approval for and report on certain of their actions.

4.76 Korea argues that these factors are not related to procurement. Further, Korea argues that these factors do not demonstrate that MOCT requires KAA, KOACA and IIAC to award contracts in accordance with particular requirements.

4.77 Regarding the first category of control referred to in paragraph 4.75, Korea notes that Article 4(2) of the *Seoul Airport Act* describes what should be included in the basic or master plan. Korea argues that the Act does not direct or authorize MOCT to undertake procurement for IIA nor does it instruct MOCT to require KAA, KOACA or IIAC to award IIA contracts in accordance with any particular requirements.

4.78 Regarding the second category of MOCT control referred to in paragraph 4.75, Korea states that the United States only provides one example where MOCT oversight was connected to procurement by KAA, KOACA and IIAC. Korea makes specific reference to the assertion by the United States that MOCT's authority to cancel, suspend or alter actions undertaken by KAA, KOACA or IIAC, under Article 13(1) of the *Seoul Airport Act*, includes the right to cancel, suspend, or change any procurement decision. Korea argues that MOCT is authorized to exercise this discretionary authority only in instances where conduct by KAA, KOACA or IIAC is illegal, otherwise wrongful or unenforceable.[159] Korea reiterates that this power is related simply to MOCT's task to police any potentially criminal conduct by KAA, KOACA or IIAC.

4.79 **The United States argues** that MOCT is responsible for all "affairs relating to air transportation" and it oversees the "construction and administration of…airports and all other matters concerning construction and transport safety affairs." The United States asserts that although the New Airport Development Group, KAA, KOACA or IIAC may purport to have the procuring authority for the IIA project, they are merely procurement agencies acting on behalf of MOCT. The United States maintains that such procurements are, in fact, conducted by MOCT and, therefore, are within the scope and meaning of Korea's Annex 1 of the GPA.

(d) Relevance of the Aviation Act to the IIA Project

(i) MOCT and the Aviation Act

4.80 **The United States argues** that Article 94(1) of the *Aviation Act* confers on MOCT authority over airport development projects. The United States also argues that the *Aviation Act* confirms

[156] *Ibid.* Article 11.
[157] *Ibid.*
[158] US Answer to Question 19 from the Panel, dated 29 November 1999.
[159] *Seoul Airport Act*, Article 13(1). Article 13(1)(3) lists impossibility owing to changed circumstances as a reason justifying MOCT cancellation, suspension or alteration of action by KAA, KOACA or IIAC. "Impossibility" is a general term of contract law dictating that in exceptional circumstances, changed circumstances can excuse a party from performance of a contract. See generally E. Allan Farnsworth, CONTRACTS, § 9.5 (2nd Ed., 1990) (Little, Brown, Boston). Thus, "impossibility" owing to changed circumstances leads to the same result as illegality or other wrong – the action by KAA, KOACA or IIAC is *unenforceable* as a matter of law.

MOCT's control. The United States refers to the following provisions of that Act in support of its argument:[160]

> "The airport development projects shall be carried out by the Minister of Construction and Transportation . . . Any person other than the Minister of Construction and Transportation, who desires to operate the airport development projects, shall obtain the permission of the Minister of Construction and Transportation ... .[161]
>
> Any operator of the airport development projects . . . shall make an operational plan before he undertakes the work under the conditions as prescribed by the Presidential Decree. In this case, the project operator as prescribed in Article 94(2) shall produce an operational plan to obtain the permission of the Minister of Construction and Transportation . . . The operational plan . . . shall specify or be accompanied by design drawings necessary for operating the projects, financing scheme, period of operation and matters as prescribed by the Ordinance of the Ministry of Construction and Transportation . . ."[162]

4.81 The United States notes that the *Aviation Act* defines "airport development projects" as "projects related to new construction, enlargement or improvement of airport facilities."[163]

4.82 Further, the United States relies upon the *Enforcement Decree of the Aviation Act* which, it says, supplements the *Aviation Act*:

> "Any person who desires to execute the airport development projects under Article 94(2) of the Act, shall submit to the Minister of Construction and Transportation an application for permission specifying the following matters . . . [o]bject and details of projects, [p]eriod and method of execution of projects; and [o]ther matters necessary for executing projects ... ."[164]

4.83 The United States argues that, according to the *Aviation Act*, MOCT not only carried out past "projects related to new construction, enlargement or improvement of airport facilities," but is also presently carrying out the IIA construction project.[165] The United States notes that MOCT has the authority to choose and transfer the project operators of the construction project at will: it was MOCT that transferred IIA procurement responsibility from KAA to KOACA and from KOACA to IIAC. As project operators, according to the United States, KAA, KOACA amd IIAC are mere tools used by MOCT to construct the IIA.

4.84 Finally, the United States argues that various provisions in the *Aviation Act* confirm the subordinate nature of project operators.[166]

4.85 **In response, Korea argues** that although some Articles of the *Aviation Act* were incorporated by reference into the *Seoul Airport Act*, the Articles mentioned by the United States – Articles 2(8), 94(1), 94(2), 103, 103(1), 104(2), 107 and 108 of the *Aviation Act* – were not so incorporated. Korea concludes that the United States' arguments must, therefore, be rejected.[167]

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[160] US Answer to Question 18 from the Panel, dated 29 November 1999.
[161] *Aviation Act*, Article 94.
[162] *Ibid.* Article 95.
[163] US Answer to Question 18 from the Panel, dated 29 November 1999, citing Article 2(8) of the *Aviation Act.*
[164] *Enforcement Decree of the Aviation Act*, Article 27.
[165] *Aviation Act,* Articles 94 and 2(8).
[166] Articles 95, 96, 103, and 104 of the *Aviation Act*.
[167] Korea's Response to the US Answer to Question 18 from the Panel, dated 29 November 1999.

(ii) Applicability of the Aviation Act

Later Act Supersedes the Former

4.86 **Korea argues** that the *Aviation Act* is not applicable to the IIA project because, in May 1991, the National Assembly enacted the *Seoul Airport Act*. Korea argues that this Act governs the IIA project.

4.87 In support of its argument, Korea notes that Article 1 of the *Seoul Airport Act* provides that:

> "The purpose of this Act is, by specifying the matters necessary for the speedy construction of a new airport in the Seoul Metropolitan area, to push ahead efficiently with the new airport construction project to meet the rapidly growing demands for air transport service in the Seoul Metropolitan area and to contribute to the development of national economy."[168]

4.88 Korea notes that one reason to consider the *Seoul Airport Act*, rather than the *Aviation Act*, as determinative for questions regarding the construction of IIA, is that the *Seoul Airport Act* was enacted subsequent to the *Aviation Act*.[169]

4.89 Korea notes as a matter of clarification that the *Aviation Act* was superseded by the *Seoul Airport Act* for the purposes of IIA construction only. Korea notes that the *Aviation Act* still exists and is operative for other purposes.[170] Specifically, Korea states that apart from Section 2 of its Chapter V, titled "Airport," the *Aviation Act* regulates a variety of areas irrelevant to an airport like IIA that is not yet completed or operating: Chapter II, regarding "Aircraft"; Chapter III, "Airman"; Chapter IV, "Operation of Aircraft"; Chapter VI, "Air Transportation Business, Etc."; Chapter VII, "Aircraft Handling Business, Etc."; Chapter VIII, "Foreign Aircraft"; Chapter VIII-2, "Investigation of Aviation Accident"; Chapter IX, "Supplementary Provisions"; and, Chapter X, "Penal Provisions". Korea states that, furthermore, the provisions of Section 2 of Chapter V of the *Aviation Act* continue to apply to other airport construction projects in Korea, in the absence of "other Acts" or "other laws" providing otherwise.[171]

4.90 **In response, the United States argues** that Korea cites no provision in the *Seoul Airport Act* that would support a conclusion that the *Seoul Airport Act* supersedes the *Aviation Act*.[172]

4.91 The United States notes specifically that nowhere in Article 8 of the *Seoul Airport Act* entitled "Relations with Other Acts" does it say that the *Seoul Airport Act* supersedes the *Aviation Act*. On the contrary, the United States argues that Article 8 of the *Seoul Airport Act* specifically cross-references the *Aviation Act* and states that the approval of the "execution plans" under the *Seoul Airport Act* shall constitute approval under the *Aviation Act*.[173]

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[168] 1997 *Seoul Airport Act*, Article 1.
[169] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[170] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[171] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[172] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[173] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999, citing Article 8 of the *Seoul Airport Act* which states, in relevant part:

> Article 8 (Relations with Other Acts)
> (1) Where the project operator obtains approval for the execution plan pursuant to Article 7, it shall be presumed that the following approval, permission, authorization, decision, designation, licensing, consultation, consent...have been granted or made...and where the Minister of Construction and Transportation brings to public notice of the approval of the execution plan, it shall be presumed that a public notification or announcement of

4.92 The United States argues that if the *Seoul Airport Act* were intended to supersede provisions of the *Aviation Act* relating to airport development projects, as Korea argues, there would be no need for the *Seoul Airport Act* to indicate that approval of the execution plan would also constitute approval under Article 95(1) of the *Aviation Act*, i.e., Article 95(1) of the *Aviation Act* would simply not apply to the IIA project. Thus, according to the United States, Article 8 of the *Seoul Airport Act* clearly demonstrates first, that the *Aviation Act* is not superseded by the *Seoul Airport Act*, and secondly, that the IIA project is included in the airport development projects to which the *Aviation Act* applies.[174]

4.93 The United States notes that other Korean statutes illustrate that when one law "replaces" or "supersedes" another, this change is clearly and unambiguously stated in law as a matter of statutory drafting. The United States notes that, for example, when Korea enacted the law creating the IIAC, which superseded the KOACA law and transferred the duties of IIA project operator from KOACA to IIAC, the new IIAC law made it clear that the IIAC law displaced the KOACA law. The United States refers for support of its argument to Article 2 (Additional Rule) of the *Law on Inchon International Airport Corporation* which states:

> "Article 2. (Abolition of other law) The law on Metropolitan New Airport Public Corporation shall be abolished."[175]

4.94 The United States concludes that there is no indication in the *Seoul Airport Act*, the laws establishing KAA, KOACA, or IIAC (or any of the by-laws for those entities), or in any other law or regulation that the *Seoul Airport Act* supersedes the *Aviation Act* in any way.[176]

Specific Act Takes Precedence over General

4.95 **Korea argues** that the material articles of the *Seoul Airport Act* replace often in virtually verbatim form parallel Articles in the *Aviation Act* dealing with the construction of an airport. Korea argues that it is axiomatic that a more specific rule, i.e., one narrowly targeted at a particular project like the IIA, replaces a more general, albeit co-existing rule, i.e., one broadly addressed to any airport project.[177]

4.96 Korea also submits that as to construction of the IIA, where the *Seoul Airport Act* contains Articles corresponding directly with identical or similar Articles contained in the *Aviation Act* – the purpose of which is, considerably more general, "to contribute to the development of aviation and the promotion of public welfare" – the provisions of the *Seoul Airport Act* apply.[178]

4.97 Korea notes that, for example, Article 94 of the 1997 *Aviation Act*, entitled "Operator of Airport Development," states at subparagraph (1) that MOCT shall carry out airport development projects.[179] Korea notes that Article 6 of the 1997 *Seoul Airport Act*, not coincidentally entitled "Operator of New Airport Construction Project," states at subparagraph (1) that KOACA (by its alias, the Seoul Metropolitan Area New Airport Construction Corporation) shall implement the IIA project.[180]

> authorization and permission, etc. has been made or granted pursuant to on the of following Acts:
>
> …
>
> 16. Approval of an execution plan as stipulated in Article 95(1) of the Aviation Act...

[174] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[175] *Ibid.*
[176] *Ibid.*
[177] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[178] *Ibid.*
[179] *Ibid.* citing 1997 *Aviation Act*, Article 94(1).
[180] *Ibid.* citing Article 6(1) of the 1997 *Seoul Airport Act*.

4.98 Korea notes that, similarly, the 1991 *Aviation Act*, at Article 94(1), under the title "Operator of Airport Development Projects," states that MOCT shall carry out airport development projects[181] while the 1991 *Seoul Airport Act*, at Article 6(1), under the title "Operator of New Airport Construction Project," states that KAA shall implement the IIA project.[182]

4.99 Korea argues that, therefore, with regard to the IIA project, the more specific provision of *Seoul Airport Act* take precedence over the more general provision of the *Aviation Act*, with the result being that KAA, KOACA or IIAC, rather than MOCT, carry responsibility for the IIA project.[183]

4.100 Korea notes that examples of the National Assembly's substitution of Articles in the *Aviation Act* with Articles from the *Seoul Airport Act* are plentiful. Korea refers to the charts below, which compare the two Acts in 1997 and 1991. Korea notes that the Korean National Assembly elected, for the purposes of IIA construction, to replicate and replace the terms of Section 2 of Chapter V of the *Aviation Act* with the terms of the *Seoul Airport Act*. Korea notes that the titles of the corresponding articles are often virtually identical, which, according to Korea, establishes the clear intent of the National Assembly to replace the regulatory framework of the *Aviation Act*, for purposes of construction of the IIA, with the new framework of the *Seoul Airport Act*.[184]

1997 Aviation Act	***1997 Seoul Airport Act***
Article 89 (Establishment of Basic Airport Development Plan)	Article 4 (Drawing-up of Master Plan for New Airport Construction)
Article 90 (Modification, etc. of Basic Plan)	Article 4-2 (Alterations, etc. to Master Plan)
Article 91 (Public Announcement on Basic Plan)	Article 4-3 (Public Notice of Master Plan)
Article 92 (Contents of Basic Plan)	Article 4 (Drawing-up of Master Plan for New Airport Construction)
Article 93 (Restriction on Act, etc.)	Article 5 (Restriction on Acts, etc.)
Article 94 (Operator of Airport Development Projects)	Article 6 (Operator of New Airport Construction Project)
Article 95 (Establishment, Approval, etc. of Operational Plan)	Article 7 (Approval of Execution Plan)
Article 96 (Relations With Other Acts)	Article 8 (Relations With Other Acts)
Article 97 (Access to and Use of Land)	Article 9 (Entry Into and Use of Land)
Article 98 (Expropriation of Land, etc.)	Article 10 (Expropriation of Lands, etc.)
Article 99 (Restriction, etc. on Disposal of State-owned Land)	Article 12 (Restriction, etc. on Disposal of State and Public Lands)
Article 100 (Entrustment With Affairs Concerning Land Purchase, etc.)	Article 16 (Entrustment of Land Purchase Business, etc.)
Article 101 (Execution of Appurtenant Work)	Article 7-2 (Execution of Appurtenant Work)
Article 104 (Inspection of Completion)	Article 12-2 (Confirmation of Completion of Work)
Article 104 (Inspection of Completion)	Article 14 (Report and Inspection, etc.)
Article 105 (Reversion of Airport Facilities and Exemption From Rent)	Article 12-3 (Title, etc., to Facilities)
Article 110 (Supervision)	Article 13 (Supervision)

[181] 1991 *Aviation Act*, Article 94(1).

[182] Korea's Answer to Question 9 from the Panel, dated 29 November 1999, citing Article 6(1) of the 1991 *Seoul Airport Act.*

[183] *Ibid.*

[184] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

1991 Aviation Act	*1991 Seoul Airport Act*
Article 89 (Establishment of Basic Airport Development Plan)	Article 4 (Drawing-up of Master Plan for New Airport Construction)
Article 93 (Restriction on Act, etc.)	Article 5 (Restriction on Acts, etc.)
Article 94 (Operator of Airport Development Projects)	Article 6 (Operator of New Airport Construction Project)
Article 95 (Establishment, Approval, etc. of Operational Plan)	Article 7 (Approval of Project Plan)
Article 96 (Relations With Other Laws)	Article 8 (Relations With Other Acts)
Article 97 (Access to and Use of Land)	Article 9 (Entry Into and Use of Land)
Article 98 (Expropriation of Land, etc.)	Article 10 (Expropriation of Lands, etc.)
Article 99 (Restriction, etc. on Disposal of State-owned Land)	Article 12 (Restriction, etc. on Disposal of State and Public Lands)
Article 100 (Entrustment with Affairs Concerning Land Purchase, etc.)	Article 16 (Entrustment of Land Purchase Business, etc.)

4.101 **In response, the United States argues** that, first, there is an inherent contradiction in Korea's argument that the articles of the *Seoul Airport Act* " replace" certain articles in the *Aviation Act*, when these very articles in the *Aviation Act* are still in force today.[185] The United States contends that Korea cites no provision in any act that suggests this to be true, nor can Korea provide evidence that the provisions of the *Aviation Act* apply to all airport development projects except the IIA project.[186]

4.102 Second, the United States refers to the above charts in which Korea points to 17 articles in the 1997 *Aviation Act* that have "similar" titles to Articles in the 1997 *Seoul Airport Act*. The United States argues that, however, given that the 1997 *Aviation Act* contains 184 Articles (not including six addenda articles), the mere fact that 17 of these 184 articles (less than 10 per cent) have "similar" titles to another act is not persuasive. According to the United States, if a Korean statute could "take precedence over," "supersede," or "replace" another statute, simply by showing that its article titles are "similar" to 10 per cent of the titles in the second statute, then a large number of Korea laws would no longer be in existence. In addition, contends the United States, many of the "similar" titles in Korea's chart can be found in acts other than the *Aviation Act*. The United States notes, for example, such article titles as "Relations With Other Acts," "Restriction, etc. on Disposal of States and Public Lands," "Entrustment of Land Purchase Business, etc.," and "Supervision" can be found in the KAA law, the law establishing KOACA, and the IIAC law. Moreover, the United States submits that many of the titles of Korea's 17 articles are neither similar, nor virtually identical. For example, "Reversion of Airport Facilities and Exemption From Rent" is not identical to "Title, etc., to Facilities." Likewise, "Contents of Basic Plan" is not identical to "Drawing up Master Plan for New Airport Construction."[187]

4.103 The United States notes, third, that the substance of the articles that Korea maintains as "similar" or "identical" are not always so. The United States notes that, for example, while the titles of Article 104 of the *Aviation Act* (Inspection of Completion) and Article 14 of the *Seoul Airport Act* (Report and Inspection, etc.) appear similar, their texts are quite different. The United States refers to the following side-by-side chart of the two articles[188]:

[185] The US notes that in its Response to Question 9 from the Panel, dated 29 November 1999, Korea states that, "The *Aviation Act* is, of course, still in effect."

[186] US Response to Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[187] *Ibid.*

[188] *Ibid.*

1997 Aviation Act	*1997 Seoul Airport Act*
Article 104 (Inspection of Completion) (1) When a project operator, as described in Article 94(2) has completed the work, he shall submit without delay a report on work completion to the Minister of Construction and Transportation to undergo the inspection of completion. (2) The Minister of Construction and Transportation shall, upon receiving an application for inspection and completion under paragraph (1), conduct the inspection of completion, and in a case where he deems that the work has been executed in conformity with the permission on the work, he shall deliver a certificate of completion to the applicant. (3) When the certificate of completion inspection is delivered under paragraph (2), the inspection, authorization, etc. of completion on the work according to approval, permission, license, etc. under the subparagraphs of Article 96(1) shall be considered to be obtained. (4) The land and airport facilities which are created or installed by the airport development projects, shall not be used before a certificate or completion inspection as referred to in paragraph (2) is delivered: Provided, That this shall not apply in a case where a permission on use prior to completion is granted by the Minister of Construction and Transportation.	**Article 14 (Report of Inspection, etc.)** (1) The Minister of Construction and Transportation may, where necessary for the implementation of the Act, order the project operator to make necessary reports on the new airport construction project or to submit necessary data, and may have public officials serving at his Ministry enter the project operator's office, the workplace or other relevant places to inspect the business of the new airport construction project. (2) The public officials conducting an inspection of the affairs pertaining to the new airport construction project under paragraph (1) shall carry a certificate indicating his mandated powers and produce it to relevant personnel. (3) Matters necessary for the certificate as provided for in paragraph (2) shall be determined by the Ordinance of the Ministry of Construction and Transportation.

4.104 The United States asserts that each of the examples above shows the weaknesses in Korea's argument, and reinforces the US position that the *Seoul Airport Act* does not replace the *Aviation Act*. The United States reiterates that the acts are entirely consistent with one another. The United States concludes that, indeed, to the extent that certain articles are similar, it is because the *Aviation Act* is the foundation upon which supplementary laws like the *Seoul Airport Act* are based.[189]

[189] *Ibid.*

Incorporation by Reference

4.105 **Korea acknowledges** that the National Assembly chose to incorporate certain provisions of the *Aviation Act* into the *Seoul Airport Act*, placing occasional specific references to the former in the latter. Korea notes that the 1997 *Seoul Airport Act* does, for example, at Article 2(2)(a), list Article 2(6) of the *Aviation Act* as the source for the definition of the term "airport facilities." Korea notes that, similarly, Article 2(1) of the 1997 *Seoul Airport Act* incorporates Article 111 of the *Aviation Act*; Article 111 in turn refers to certain of the Articles in Section 1 of Chapter V of the Aviation Act, concerning "Aerodrome and Navigation Aids" (navaids). Korea states that pursuant to Article 111, Article 75 of the *Aviation Act*, regarding the installation of navaids by MOCT or another entity granted permission to so install, does not apply. Korea states that Articles 77(1), 81 or 87, each of which address subsequent acts regarding entities granted permission to install navaids, also do not apply. However, Korea notes that Article 111 of the *Aviation Act* refers to and thus incorporates into the *Seoul Airport Act*, Article 76 of the *Aviation Act*, regarding public notice of navaid installation; Article 77(2), regarding inspection and further public announcement of installed navaids; Article 79, regarding delayed or discontinued use of navaids; Article 80, regarding management of navaids; Article 82, regarding the restriction of various "obstacles"; Article 83, regarding the requirement of aviation obstacle lights and beacons; Article 85, regarding forbidden or illegal acts; and, Article 86, regarding rent due to parties using navaids once they are installed. Finally, Korea notes that Articles 105(3) and 105(4) of the 1997 *Aviation Act*, by virtue of Article 12-3(2) of the 1997 *Seoul Airport Act*, permit investors or project operators to operate and derive revenue from airport facilities.[190]

4.106 Korea notes that the 1991 *Seoul Airport Act* similarly incorporates by reference several provisions of the 1991 *Aviation Act*. Article 2(2)(b) of the 1991 *Seoul Airport Act* turns to the 1991 *Aviation Act* for a definition of the term "aircraft handling business."[191] Korea states that, moreover, the reference in Article 2(1) of the 1991 *Seoul Airport Act* to Article 111 of the 1991 *Aviation Act* is identical to the parallel reference in the 1997 Acts, incorporating by reference Articles 76, 77(2), 79, 80, 82, 83, 85 and 86 of the 1991 *Aviation Act*. Korea states that, finally, by virtue of Article 8(1) of the 1991 *Seoul Airport Act*, subparagraph 16, KAA's "operational plan" is to be approved by the Minister of Transportation under Article 95(1) of the 1991 *Aviation Act*. Korea notes that such approval was already required under Article 7 of the 1991 *Seoul Airport Act*.[192]

4.107 Korea argues that these specific Articles of the *Aviation Act*, while incorporated by reference into the *Seoul Airport Act*, do not demonstrate that MOCT, rather than KAA, KOACA or IIAC, is the entity responsible for procurement for the IIA construction project. Korea argues that even if the United States' "control" test was determinative of GPA coverage, these specific Articles do not demonstrate "control" by MOCT over KAA, KOACA or IIAC. Further, Korea argues that they do not demonstrate, under the test included in Article I:3 of the GPA, that MOCT "requires" KAA, KOACA or IIAC "to award contracts in accordance with particular requirements." In support of its argument, Korea refers to evidence showing that KAA, KOACA and IIAC conduct their own procurements and conclude their own contracts, pursuant to their own *Contract Administration Regulations*.[193]

4.108 Korea concludes that it has demonstrated that the National Assembly enacted amendments to the *Seoul Airport Act* and the *Korea Airport Corporation Act*, rather than the *Aviation Act*, in order to appoint KAA as the entity responsible for IIA construction in December 1991. Korea further states

[190] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[191] Korea notes that there appears to be a typographical error in Article 2(2)(b). Rather than Article 2(26) of the 1991 *Aviation Act*, the definition of the term "aircraft handling business" is found at Article 2(30) of the 1991 *Aviation Act.*

[192] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[193] *Ibid.*

that along with Article 6(1) of the *Seoul Airport Act*, which was amended in December 1991 to appoint KAA to the IIA project, amendments to KAA's authorizing statute, the *Korea Airport Corporation Act*, assigned to KAA the IIA project "as referred to [in] subparagraph 2 of Article 2 of the *Seoul Airport Act*."[194]

4.109 **In response, the United States argues** that the *Seoul Airport Act* does not appoint the entity responsible for the IIA project — it merely lists a range of entities that could be IIA project operators. It then grants MOCT ultimate authority to select any entity to be the project operator for the IIA project.

4.110 The United States further argues that the *Aviation Act* is the primary Korean law relating to aviation matters, and it addresses a range of aviation-related issues, including aircraft registration, aviation safety, air transportation businesses, and airport development projects. According to the United States, this *Act* is then supplemented by a host of additional Korean laws and measures in these areas.[195] The United States argues that the *Seoul Airport Act* is just one such law, that it provides ancillary rules for the IIA project.[196]

4.111 As such, the United States argues that the *Seoul Airport Act* is entirely consistent with the *Aviation Act*. The United States notes that, for instance, Article 2(2) of the *Seoul Airport Act* cross-references the *Aviation Act* by defining the term "new airport construction project" as "[c]onstruction of such airport facilities as stipulated in subparagraph 6 of Article 2 of the *Aviation Act.* In fact, the United States notes that there is no provision in either act (or in any other Korean law) that expressly or implicitly suggests that the *Seoul Airport Act* "replaces" or "supersedes" the *Aviation Act*. [197]

(iii) Proviso in Article 94(1) of the Aviation Act

4.112 **Korea notes** that Article 94(1) of the 1997 *Aviation Act* states that MOCT shall carry out airport development projects, "provided that this shall not apply in case (of) provided otherwise by this Act or other Acts and subordinate statutes." Korea notes that, similarly, Article 94(1) of the 1991 *Aviation Act* states that "[e]xcept as provided otherwise by this Act or other laws and regulations," MOT shall carry out airport development projects.[198]

4.113 Korea states that the "other Acts" and "other laws" providing that an entity other than MOCT is to implement IIA construction are the *Seoul Airport Act*, the *Korea Airport Corporation Act*, the *Korea Airport Construction Authority Act*, and the *Law on Inchon International Airport Corporation*. Korea also notes that December 1991 amendments to the *Seoul Airport Act* and the *Korea Airport Corporation Act* appointed KAA as the entity responsible for the IIA project, August 1994 amendments to the *Seoul Airport Act* and the September 1994 enactment of the *Korea Airport Construction Authority Act* appointed KOACA to that role and February 1999 amendments to the *Seoul Airport Act*, together with passage of the *Law on Inchon International Airport Corporation*, similarly appointed IIAC to perform this task. Korea argues that in each case, the *proviso* in Article 94(1) of the *Aviation Act* was triggered.[199]

4.114 **In response, the United States argues** that this argument is inconsistent with Korea's argument that the *Aviation Act* was "replaced" and "superseded by the *Seoul Airport Act*." The United States asserts that Korea now argues that the *Aviation Act* in fact does apply to the Inchon

[194] Korea's Response to the US Answer to Question 18 from the Panel, dated 29 November 1999, citing *Korea Airport Corporation Act*, Article 7(5-2). Korea also notes that Footnotes 46 and 47 to Korea's response to Question 9 make the same point with regard to KOACA and IIAC.

[195] Articles 15, 24, 39, 74, 108, and 112 of the *Aviation Act*.

[196] US Response to Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[197] *Ibid.*

[198] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[199] *Ibid.*

International Airport project, and that the *Seoul Airport Act* and other laws "trigger" the *proviso* in Article 94(1). The United States argues that neither the *Aviation Act* was replaced and superseded by the *Seoul Airport Act*, nor was the *proviso* in Article 94(1) triggered by the *Seoul Airport Act*. The United States notes in this respect that Korea concedes that KAA, KOACA, and IIAC are "project operators," as designated by the *Seoul Airport Act*. The United States argues that if the *Seoul Airport Act* designates these entities as "project operators," then this Act cannot trigger the *proviso* in Article 94(1) of the *Aviation Act* as Korea suggests, because the *proviso* relates to MOCT's authority over airport development projects and not to the designation of project operators. The United States asserts that the designation of project operators is addressed in Article 94(2).[200]

4.115 The United States acknowledges that the proviso contained in Article 94(1) of the *Aviation Act* appears to indicate that the statutory authority of MOCT over airport development projects can be modified when specifically provided for in the *Aviation Act* or other statutes. However, the United States argues that there is nothing in the *Aviation Act* or any other Korean law that indicates that MOCT no longer has statutory authority over the IIA project or that this authority has been granted to any entity other than MOCT. Instead, the United States argues that the Korean laws that relate to the IIA project merely confirm the designation of entities such as KAA, KOACA, and IIAC as "project operators" of the IIA project pursuant to Article 94(2) of the *Aviation Act*. The United States further argues that Article 94(2) is separate and distinct from Article 94(1), and does not affect MOCT's statutory authority over the airport construction project.[201]

4.116 The United States argues that the *Aviation Act* provides support that MOCT retains authority over airport development projects following the selection of a project operator. The United States notes that Article 103(1) of the *Aviation Act* states, for example, that: "[i]f there is a person who performs a work or an act to damage or destroy the airport facilities under control of the Minister of Construction and Transportation, the Minister may have the operator of such work or the person doing such act bear the whole or part of the expenses..." According to the United States, this provision recognizes that even when there is a project operator on an airport development project, MOCT maintains its statutory authority over the project. The United States contends that, moreover, after the designation of a project operator, MOCT continues to have authority to direct the project operator[202] and ultimately is responsible for making the determination as to whether the project operator's work "has been executed in conformity with the permission on the work."[203]

(e) Is the Control Test Justified Under the GPA?

(i) Does a Control Test Exist in the GPA?

4.117 **Korea argues** that the United States' test does not exist in the GPA. More specifically, Korea argues that the test itself, the categories of "control" identified by the United States as relevant and the degree of control identified by the United States as sufficient to deem an entity "controlled" are not referred to anywhere in the GPA. Korea further argues that the non-textually-based test proposed by the United States would have the effect of overriding the basis upon which signatories negotiated their GPA commitments – that is, the specific enumeration of lists of entities to which the substantive obligations of the Agreement were to apply. Korea refers to its arguments in paragraphs 4.291 - 4.312.

4.118 **In response, the United States acknowledges** that the *Vienna Convention* requires first and foremost a textual interpretation of a treaty, which would ensure that an explicit enumeration of lists

[200] US Response to Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[201] US Answer to Question 18 from the Panel, dated 29 November 1999.
[202] *Aviation Act*, Articles 103, 107, 108.
[203] US Answer to Question 18 from the Panel, dated 29 November 1999, citing Article 104(2) of the *Aviation Act.*

of entities would override everything else. However, the United States argues that the relationship between a listed entity and a non-listed entity is a legitimate factor to consider in determining whether certain procurements are covered under the GPA.

4.119 The United States further argues that the notion of "control" does exist in the current GPA. In addition, although it is not applicable to this dispute, the United States notes that Article XXIV:6(b) also relies on the concept of "control":

> Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee . . . In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.

4.120 The United States contends that, indeed, if "control" did not exist in the Agreement, then the coverage of non-listed entities that are "'attached/connected/affiliated' etc." to a listed entity (*e.g.*, branch offices, subsidiary organizations, and other subdivisions) would not be achieved.[204]

4.121 The United States further argues that if the notion of control did not exist in the GPA, the GPA would be rendered a nullity, in contravention of numerous Appellate Body decisions. According to the United States, the implication of Korea's "no control" interpretation would be to allow GPA Members to transfer procurement authority from a listed entity to a non-listed entity that is controlled by the listed entity, thus effectively avoiding being subject to GPA disciplines. The United States argues that, in the context of this dispute, Korea's argument would allow a covered entity such as MOCT to simply designate a new project manager to avoid subjecting the IIA project to the GPA. According to the United States, such a result would be contrary to the object and purpose of the GPA as reflected in its text and context, and cannot be what the drafters of the GPA intended. The United States argues that such an interpretation would have significant negative ramifications on the future applications and interpretations of the Agreement.[205]

4.122 **Korea argues in response** that the United States is wrong when it argues that without a "control" test, GPA signatories would be able to transfer procurement authority from a listed entity to a non-listed entity that is controlled by the listed entity, thus effectively avoiding being subject to GPA disciplines. Korea reiterates that Article I:3 of the GPA in fact provides for the extension of coverage to non-listed bodies where those non-listed bodies are required by covered entities to award contracts in accordance with particular requirements.[206]

4.123 Korea notes that, moreover, the United States contended previously that the concept of "compensatory adjustments" under Article XXIV:6 of the GPA would provide a remedy in these circumstances.[207] Korea refers to its arguments contained in paragraphs 4.26 and 4.560.

(ii) Relevant Appellate Body Decisions

4.124 **The United States emphasizes** that the absence of the word "control" in the GPA text does not mean that such a test cannot and should not be applied. To support this argument, the United States refers to *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (*Canada - Dairy*).[208] The United States contends that in the *Canada - Dairy* decision, the

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[204] US Response to Korea's Answer to Question 5 from the Panel, dated 29 November 1999.
[205] US Answer to Question 20 from the Panel, dated 29 November 1999.
[206] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.
[207] *Ibid.*
[208] *Canada – Dairy*, WT/DS103/AB/R, WT/DS113/R (adopted on 27 October 1999).

Appellate Body applied a control test to determine whether a provincial board made up of milk producers was actually a "government" for the purposes of Article 9.1(a) of the *Agreement on Agriculture*. The United States argues that there is no reference to "control" in Article 9.1(a), yet the Appellate Body applied such a test to pierce through the fiction created by the provincial board to find that the board was actually a "government." In the view of the United States, the instant case is closely analogous.

4.125 The United States also asserts that the Appellate Body decision provides guidance on the determination of "control" in its report. The United States makes reference to the following excerpts from that decision:

> "A "government agency" is, in our view, an entity which exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character, that is, to "regulate," "restrain," "supervise" or "control" the conduct of private citizens. As with any agency relationship, a "government agency" may enjoy a degree of discretion in the exercise of its functions . . .
>
> The "governmental" character of the boards' functions, as well as the extent of their regulatory control is underlined by the fact that their orders and regulations are enforceable in courts of law. Thus, the powers of the provincial boards are augmented by the machinery of the State itself, and the boards have at their disposal the public force to ensure that their regulatory functions and decisions are carried out. Although the provincial boards enjoy a high degree of discretion in the exercise of their powers, governments retain "ultimate control" over them. The Panel was, therefore, correct to conclude that the provincial milk marketing boards are "government agencies.""[209]

4.126 The United States argues that the Appellate Body in the *Canada – Dairy* case agreed with the panel's analysis that the Government of Canada had "ultimate control" over Canada's provincial milk marketing boards based on two factors: delegation of power (that is, whether the marketing boards acted under explicit authority granted to them by the government), and function (that is, whether the marketing boards acted in the manner in which the government would have acted otherwise).

4.127 The United States asserts that the Appellate Body decision supports the United States' interpretation of Article I:1. Further, the United States argues that it uses the same analysis in this dispute as the Appellate Body in the *Canada - Dairy* case to determine whether KAA, KOACA and IIAC are subdivisions of MOCT. The United States argues that it verified, through the use of Korea's laws, that KAA's, KOACA's and IIAC's powers derive from authority explicitly delegated to them as project operators by MOCT and that they cannot act outside the purview of their delegated powers. The United States also argues that its "control" analysis confirms that KAA, KOACA and IIAC are only performing functions that, had the authority not been delegated to them, MOCT would itself be performing.

4.128 **In response, Korea notes** that there is no evidence to indicate that the authority of KAA (and KOACA and IIAC) has been delegated from MOCT. Korea argues that, rather, the authority of KAA and its successors was derived from legislation, passed by the National Assembly.

4.129 Korea also notes that in *Canada – Dairy*, the issue was whether provincial milk marketing boards, composed in part of private citizens, that exercised government power, were "government" for purposes of the *Agreement on Agriculture*. Korea argues that this issue is very different from the issue presented by MOCT and KAA. According to Korea, the question is not whether KAA (and

[209] Appellate Body report in *Canada - Dairy*, paragraphs 97 and 100.

KOACA and IIAC) are government entities. Rather, the question is whether they are covered government entities.

4.130 Korea further notes that the United States cites the opinion of the Appellate Body in the *Canada – Dairy* case for the proposition that the degree of control allegedly exercised by MOCT over KAA, KOACA and IIAC requires a determination that those independent entities are MOCT. In Korea's view, in fact, *Canada – Dairy* establishes the opposite.

(f) The Implications of a Control Test for Parties' Annex 1

(i) Amtrak

4.131 **Korea argues** that if the United States' "control test" were to prevail, a signatory's express decision to leave entities off its lists of commitments would have no effect. To illustrate its point, Korea considers the case of Amtrak, an entity created by the US Congress in 1970 for the purpose of operating the nation's intercity passenger rail service. Amtrak is not included in the United States' commitments. Korea argues that Amtrak is, nonetheless, subject to the control of the Executive Office of the President, which is itself an Annex 1 covered entity. Korea makes the following comments in support of its argument.

4.132 First, Korea notes that Amtrak's board, consists of seven voting members, all of whom are appointed by the Executive Office of the President. Korea states that the Secretary of Transportation, head of another Annex 1 covered entity, the US Department of Transportation, is a voting member of the Amtrak board.

4.133 Secondly, Korea notes that Amtrak is required to submit an annual report to the Executive Office of the President detailing its operations, activities, revenues, expenditures and accomplishments for the previous fiscal year. Korea states that the Secretary of Transportation is also required to prepare an annual report on Amtrak's effectiveness in helping to meet the requirements for a balanced US transportation system. Korea further states that this report is to include recommendations for further legislation regulating Amtrak's activities.

4.134 Thirdly, Korea notes that the Executive Office of the President submits a proposed budget to the US Congress on Amtrak's behalf, and any congressional appropriation is made to the Secretary of Transportation, rather than to Amtrak itself. Korea states in this respect that federal subsidies for Amtrak's operation are massive. Korea specifically states that since 1971, the United States Government has provided a total of $21 billion in federal subsidies to Amtrak. Most recently, the *Amtrak Reform and Accountability Act* of 1997 authorized appropriations to Amtrak of over $5 billion in capital and operating funds for the period 1998-2002 alone.

4.135 Korea further states that despite the fact that KAA, KOACA and IIAC are independent legal persons under Korean law, each of the factors discussed above in relation to Amtrak – authority to appoint board members, composition of the board, reporting requirements, oversight of fiscal decision-making and source of funding – was used by the United States to argue that KAA, KOACA and IIAC are subject to control by MOCT, and by virtue of that control should be considered covered entities. Korea concludes that, similarly, under the United States' test, Amtrak would, by virtue of the control exercised by the Executive Office of the President and the Department of Transportation, be considered a covered entity.

4.136 Korea argues that this outcome would, presumably, prove problematic for the United States since Amtrak's procurement authority includes an explicit requirement that it exclusively buy "unmanufactured articles, material, and supplies mined or produced in the United States," and "manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States." Korea also

argues that the United States' proposed "control" test would have a broad effect on GPA signatories' commitments generally.

(ii) Comsat

4.137 **To further illustrate its argument, Korea notes** the impact of the United States' "control" test on Comsat, another entity not included in the United States' GPA commitments. Korea states that pursuant to the *Communication Satellite Act* of 1962, the US Congress authorized the creation of Comsat, for the purpose of facilitating the establishment of a commercial communications satellite system. Korea asserts that like Amtrak's authorizing statute, the *Communication Satellite Act* of 1962 states that Comsat "will not be an agency or establishment of the United States Government."[210]

4.138 Korea states that along with the appointment of members to Comsat's board, the Executive Office of the President, an Annex 1 covered entity, undertakes considerable oversight of Comsat's activities. Korea specifically, notes that the President shall "provide for continuous review of all phases of the development and operation of [a communications satellite] system, including the activities of [Comsat]."[211] Korea further notes that Comsat is also required to provide to the Executive Office of the President "annually and at such other times as it deems desirable, a comprehensive and detailed report of its operations, activities, and accomplishments."[212]

4.139 Korea states that, additionally, the US Federal Communications Commission ("FCC"), another Annex 1 covered entity, is directed to perform a number of oversight functions regarding Comsat. Korea notes that, for example, the FCC is empowered "to authorize [Comsat] to issue any shares of capital stock . . . or to borrow any moneys, or to assume any obligation in respect of the securities of any other person, upon a finding that such issuance, borrowing, or assumption is compatible with the public interest, convenience, and necessity."[213]

4.140 Korea further notes that the FCC's control extends to Comsat's procurement. Korea states, more specifically, that the FCC shall "insure effective competition, including the use of competitive bidding where appropriate, in the procurement by [Comsat] . . . of apparatus, equipment, and services required for . . . the communications satellite system."[214] The FCC shall also "approve technical characteristics of the operational communications satellite system to be employed by [Comsat]."[215]

4.141 Korea argues that under the United States' "control" test, the control exercised by the Executive Office of the President and the FCC would make Comsat a covered entity. Korea states that as with Amtrak, the factors mentioned with regard to Comsat – authority to appoint board members, reporting requirements, oversight and virtual direction of fiscal decision-making and oversight of the technical and procedural aspects of procurement – were specifically used by the United States to argue that KAA, KOACA and IIAC are subject to control by MOCT, and by virtue of that control should be considered covered entities. Korea argues that, in contrast to the FCC's control over Comsat, MOCT does not require KAA, KOACA or IIAC to award contracts in accordance with particular requirements.

[210] 47 U.S.C. § 731.
[211] 47 U.S.C. § 721(a)(2).
[212] 47 U.S.C. § 744.
[213] 47 U.S.C. § 721(c)(8).
[214] 47 U.S.C. § 721(c)(1).
[215] 47 U.S.C. § 721(c)(6).

(iii) Conclusions from Amtrak and Comsat Examples

4.142 **Korea argues** that it is clear from the Amtrak and Comsat examples that, were the United States' "control" test to be accepted, it would have broad, unintended and unpredictable effects upon signatories' express decisions to leave entities off their Appendix I lists of commitments.

4.143 Korea refers to the fact that in discussing the control exercised by central government entities over Amtrak and Comsat, the United States has noted that "the retained links with the Government may be seen as only those necessary to ensure that the interests of the public are reflected in the operations of each corporation."[216] Korea further notes that the United States has observed that a strong and logical argument against coverage of Amtrak and Comsat is that "the code is aimed at government ministries [sic] and their subdivisions – not the myriad organizations tangential to the essential function of government."[217] Korea states that it agrees with this observation and on the basis of these comments made by the United States, argues that the broad expansion of GPA signatories' commitments that would result from the imposition of the United States' "control" test should be rejected.

(g) Implications of a Control Test for Annex 3

4.144 **Korea notes** that every entity on Korea's Annex 3 is controlled by an Annex 1 entity in the same sense that KAA is "controlled" by MOCT. Korea refers to several examples discussed in paragraphs 4.262 - 4.269. Korea states that it believes that most, if not all, Annex 3 entities of other parties are also controlled by their Annex 1 entities. In support of this belief, Korea refers to the control exercised by Japan's Ministry of Transport, an Annex 1 entity, over the New Tokyo International Airport Authority, an Annex 3 entity. Korea refers to paragraph 4.250 where this example is further discussed.

4.145 Korea argues that, if control converts an entity not on Annex 1 into an Annex 1 entity, then Annex 3 would be greatly diminished, if not reduced to a nullity. First, Korea argues that under the US "control" test, entities listed on a Member's Annex 3 will be considered covered under Annex 1 by virtue of the "control" over them by Annex 1 entities. Korea cites Japan's New Tokyo International Airport Authority as an example. Second, Korea argues that separate and distinct entities, like the United States' Amtrak and Comsat, will be nonetheless subject to the same degree of control by Annex 1 entities as that allegedly exercised by MOCT over KAA despite their intentional exclusion from Annex 3.[218] Korea further argues that given the differences in thresholds between Annex 1 and Annex 3, this would have the effect of greatly changing the commitments of the parties to the GPA and this is a result to be avoided. Korea notes that all GPA signatories except Japan committed to substantially lower thresholds for goods and services procurements by Annex 1 entities than for such procurements by Annex 3 entities.

4.146 **In response, the United States argues** that a control analysis will not reduce Annex 3 to a nullity because, pursuant to Articles 31 and 32 of the *Vienna Convention*, an interpretation of the GPA will be first and foremost based on its text. The United States contends that, therefore, the text of Annex 3 will always take precedence over any control analysis. The United States reiterates that "control" is useful in determining whether non-listed entities should be covered under the GPA because they are "'attached/connected/affiliated' etc." to a listed entity. The United States argues that this in no way expands any GPA Party's obligations beyond what was agreed to at the close of negotiations on 15 April 1994. The United States asserts that, in fact, it ensures that the balance of

[216] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), p. 44.
[217] *Ibid.*
[218] Korea's Answer to Question 11 from the Panel, dated 29 November 1999.

rights and obligations and the comparable level of mutually agreed coverage among the Parties, as provided in the GPA, are preserved.[219]

(h) Article I:3

4.147 **Korea argues** that the "control" test proposed by the United States does not comport to the standard included in Article I:3. More specifically, Korea argues that none of the factors submitted by the United States as illustrative of the "control" exercised by MOCT over KAA, KOACA and IIAC suggests that MOCT requires those three entities to adhere to any particular requirements in awarding contracts for the IIA project.

4.148 Korea further argues that it has demonstrated that KAA, KOACA and IIAC are separate legal persons under Korean law, that each entity has adopted its own procurement regulations, and that each entity is, as a result of its status as a legal person, empowered to and has in fact conducted procurements and signed contracts on its own behalf.

4.149 Korea also reiterates that the United States has offered no evidence supporting a conclusion that MOCT or any other covered entity has ever "required" KAA (or KOACA or IIAC) "to award contracts in accordance with particular requirements." Korea states that it has, in fact, affirmatively demonstrated that no such requirements exist.[220]

(i) Relevance of Lists in Annexes

4.150 **Korea argues** that the control test cannot be sustained because, according to that test, entities need not be listed in Annex 1 or included via any notes thereto, for their procurements to be subject to the GPA. Rather, under the United States' test, if a central government entity listed on a signatory's Annex 1 "retain[s] control of the procurements by" another entity, or "remains in ultimate control" of "procurement authority," procurements are de facto made by that central government entity. In Korea's view, "de facto" coverage of unlisted entities would undermine the entire basis upon which signatories negotiated their GPA commitments – the specific enumeration of lists of entities to which the substantive obligations of the Agreement were to apply. It would, according to Korea, have broad, unintended effects upon signatories' express decisions to leave entities off their Appendix I lists of commitments. Korea also refers to its arguments in paragraphs 4.31, 4.117 and 4.142.

(j) Relevance of Note 1 to Annex 1

4.151 **Korea argues** that the US "control" test does not exist in the language of the GPA and that, instead, Note 1 to Korea's Annex 1 specifically, and exclusively, governs the means of identifying "covered entities," which, while not themselves listed on Annex 1, are nonetheless considered covered. Note 1 states that "subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act*" are such entities.

(k) Relevance of Domestic Practices and Laws

4.152 **Korea also argues** that the "control" test proposed by the United States in these proceedings is inconsistent with the test that would apply under US procurement law to determine whether a private entity undertaking procurement for a central government entity is effectively under the control of that central government entity, as an "agent" or "conduit."

4.153 Korea argues that even where a central government entity: (i) approved the private entity's decision to conduct the procurement; (ii) was the final selection authority for the procurement;

[219] US Response to Korea's Answer to Question 22 from the Panel, dated 29 November 1999.
[220] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.

(iii) would take title to the material procured; and (iv) would pay for the system procured with government funds, US courts have held that the private procurement entity was not sufficiently controlled by the central government entity to confer jurisdiction over challenges to allegedly unlawful procurement practices undertaken by the private procurement entity.[221] Korea further argues that for jurisdiction to attach, the private procurement entity would have to have been identified contractually as an "agent" for the central government entity.

4.154 Korea argues that under this standard, KAA, KOACA and IIAC could not be considered "stand-ins" for MOCT, and considered covered entities by virtue of their relationship thereto. Korea contends that IIA procurements by KAA, KOACA and IIAC are not nearly as closely tied to MOCT as are procurements by the US private procurement entities to US central government entities in the cases described above, under factors (i) – (iv).

4.155 In support of its argument, Korea notes that it has demonstrated that KAA, KOACA and IIAC are the "final selection authorities" for IIA procurements rather than MOCT. Moreover, MOCT does not finance all of the procurements related to the Inchon project. Korea states that, moreover, and most importantly, the authorizing statutes for KAA, KOACA and IIAC – like a contract governing the relationship between a private US procurement entity and a US central government entity – expressly state that those three entities are legal persons under Korean law.[222] For all of these reasons, Korea asserts that they are not agents for MOCT or any other Korean central government entity. Korea concludes that under the test imposed under US law, KAA, KOACA and IIAC could not be considered covered entities *via* MOCT.

4.156 **In response to Korea's argument** that US courts have held that one cannot challenge a "central government entity" over "unlawful procurement practices undertaken by a private entity" under its control, the **United States notes** that Korea's argument merely confirms that control is unrelated to an entity's legal status. According to the United States, no matter how much the control, an entity's separate legal status cannot be pierced, unless for non-control reasons. Thus, the United States argues that not only is US case law irrelevant to the interpretation of the GPA, this particular case does not even support Korea's position in this dispute. The United States also responds by noting that the relationship between a listed and non-listed entity is a legitimate factor to consider in determining whether certain procurements are covered under the GPA. According to the United States, Korea itself uses this factor when, in discussing its position regarding Note 1, it mentions Note 1 to Korea's Annex 1 provides the exclusive means by which to identify as Annex 1 covered entities those entities that, while not literally listed on Annex 1, are nonetheless considered Annex 1 covered entities by virtue of their relationship with entities listed on Annex 1.

4. Appendix I, Annex 1: Note 1

(a) Interpretation of Note 1

4.157 **Korea argues** that the *Vienna Convention on the Law of Treaties* contains customary rules of interpretation that should be used in interpreting Korea's Note 1 to Annex 1. Korea further argues that pursuant to Article 31 of the *Vienna Convention on the Law of Treaties*, the first step is to consult the ordinary meaning of Note 1.[223]

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[221] *US West Communications Services, Inc. v. United States*, 940 F.2d 622, 629-630 (Fed. Cir. 1991). See also *Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1526 (6th Cir. 1992), *cert. denied*, 507 US 984 (1993).

[222] *Korean Airport Corporation Act*, Article 3; *Korea Airport Construction Authority Act*, Article 3; *Law on Inchon International Airport Corporation*, Article 2.

[223] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted on 6 November 1998), paragraph 114 ("A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted").

4.158 **The United States argues** that the fundamental principle of *effet utile* ("principle of effectiveness") applies to the interpretation of Note 1. The United States claims that, according to this principle, "a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility."[224] The United States further argues that this principle must apply to any interpretation of Note 1.

(b) Expansive or Restrictive Interpretation of Note 1 to Annex 1?

4.159 **The United States further states** that it is arguable that Note 1 serves both to clarify that Annex 1 covers all possible categories of subordinate units of "central government entities," particularly given Korea's exclusive terminology of certain subordinate units and also to expand Korea's Annex 1 coverage to include those entities that may not be subordinate units, but may nevertheless be considered "subordinate linear organizations," "special local administrative organs," or "attached organs."

4.160 **On the other hand, Korea argues** that Note 1 to Korea's Annex 1 specifically, and exclusively, governs the means of identifying "covered entities," which while not themselves listed on Annex 1, are nonetheless considered covered. Korea notes in this respect that Note 1 states that "subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act*" are such entities.

4.161 **The United States notes in response** that Annex 1 cannot contain the universe of bodies internal to central government entities under Korean law because it does not contain the New Airport Development Group. The United States argues that this is obvious since Korea acknowledges that the New Airport Development Group is internal to MOCT. However, the New Airport Development Group is not included within Annex 1. The United States argues that, similarly, the entirety of the Korean central government structure cannot be embodied in the *Government Organization Act* because Korea further admits that the New Airport Development Group is neither a "subordinate linear organization," a "special local administrative organ," or an "attached organ" of MOCT. The United States asserts that these statements are inconsistent with each other.

4.162 The United States further argues that Note 1 cannot define "central government entity" by giving the term a special meaning, unique only to Korea thus displacing the ordinary meaning of "central government entity." In support of its argument, the United States notes that nowhere in this provision is there any indication, explicit or implicit, that Note 1 is meant to define "central government entity."

4.163 The United States additionally argues that the verb "includes" in Note 1 makes clear that Korea's Annex 1 entities cover more than just the three categories of sub-entities referred to in the Note. The United States argues that Korea's interpretation, therefore, suggests that every single party to the GPA has agreed to provide Korea with its own unique definition of "central government entity", different from the common definition of "central government entity" they use. The United States questions whether the European Communities, Hong Kong, Japan, Liechtenstein, Norway and Switzerland agreed to this and notes that the United States did not. The United States argues that Korea offered no supplementary means of interpretation to back this claim up. Further, the United States argues that Note 1 does not define the scope of "central government entity."

[224] Appellate Body report on *Canada - Dairy*, WT/DS103/AB/R, WT/DS113/AB/R, paragraph 133; Appellate Body report on *United States - Reformulated Gas* (adopted on 20 May 1996), WT/DS2/AB/R, p. 23; and Appellate Body report on *Japan - Alcoholic Beverages* (adopted on 1 November 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12.

(c) Ordinary Meaning of "Prescribed in the Government Organization Act"

(i) Status of Government Organization Act in the context of Note 1 to Annex 1

4.164 **The United States argues** that KAA, KOACA and IIAC are covered under Annex 1 on the ground that they are "subordinate linear organizations" within the meaning of Korea's Note 1 to Annex 1 of the GPA.

4.165 In support of its argument, the United States contends that Note 1 explains that the term, "subordinate linear organization," is "prescribed in the *Government Organization Act* of the Republic of Korea." According to the United States, the ordinary meaning of "prescribe" is conveyed by the definition of "prescriptive," which means "giving definite precise directions or instructions . . . laying down rules of usage ... ."[225] The United States argues that, therefore, the *Government Organization Act* in Note 1 merely lays down the rules of usage for "subordinate linear organization."

4.166 The United States argues that Article 1 of the *Government Organization Act* confirms the interpretation that the *Government Organization Act* merely lays down the rules of usage for "subordinate linear organizations" by stating that its aim is to provide "guidelines for the establishment, organization and the scope of function of national administrative organs for the systematic and efficient execution of national administrative affairs."[226] The United States contends that, further, Article 2 of the *Government Organization Act* does not define "subordinate linear organization," but instead offers a list of what "subordinate linear organizations" "shall be" for all "central government entities." According to the United States, Korea itself admits that the Act does not provide a definition for "subordinate linear organizations" but instead offers a list that "identifies not entities but officials within a ministry's hierarchy". Article 2 of the Act states that the subordinate linear organizations of the central administrative organs shall be Cha-Gwan (Vice-Minister), Cha-Jang (Deputy Administrator), Sil-Jang (Office Director), Guk-Jang (Bureau Director) or Bu-Jang (Department Director) and Gwa-Jang (Division Director), under Vice-Minister or Deputy Administrator, as division not belonging to Office, Bureau or Department may be set up except those otherwise prescribed by special provisions in this Act or any other laws. The subordinate linear organizations undertaking national police affairs under the Ministry of Home Affairs, however, shall be Bon-Bu-Jang (Chief Commissioner of Policy), Bu-Jang (Department Director) and Gwa-Jang (Division Director); and for those undertaking civil defense affairs, Bon-Bu-Jang (Chief of Civil Defense Headquarters), Guk-Jang (Bureau Director) and Gwa-Jang (Division Director).[227]

4.167 The United States argues that Note 1 of Korea's Annex 1 of the GPA expands Korea's Annex 1 coverage by including "subordinate linear organizations," a category of subdivisions in Korea. The United States argues that according to the *Vienna Convention* rules of interpretation, "subordinate linear organization" is virtually synonymous with subsidiary organization. Therefore, as subsidiary organizations of MOCT, KAA, KOACA and IIAC are also "subordinate linear organizations" of MOCT.

4.168 **In response, Korea argues** that the ordinary meaning of Note 1 is such that the *Government Organization Act* "limits," "restricts," "imposes authoritatively," "appoints," "dictates" and "directs" the identification of those entities that constitute subordinate linear organizations, special local administrative organs and attached organs. Korea further argues that the *Government Organization Act* does not have mere suggestive force. Korea states that, rather, it carries "imperative force," and offers "definite precise directions or instructions" regarding the identification of subordinate linear organizations, special local administrative organs and attached organs. The ordinary meaning of

[225] The New Shorter Oxford English Dictionary (1993 ed.), p. 2339.
[226] *Government Organization Act*, Article 1.
[227] Article 2(3) of the *Government Organization Act* of the Republic of Korea (version submitted by Korea in 1991, official English translation).

"subordinate linear organizations, special local administrative organs and attached organs" is irrelevant; the only relevant meaning is that prescribed by the *Government Organization Act*.

4.169 In support of its argument, Korea notes that the verb "prescribe" means to "[l]imit, restrict; confine within bounds," or to "[w]rite or lay down as a rule or direction; impose authoritatively; appoint, dictate, direct."[228] Korea argues that, similarly, something that is "prescriptive" is something that "giv[es] definite precise directions or instructions," or "ha[s] or impl[ies] an imperative force."[229]

(ii) "Prescribe" versus "Define"

4.170 **The United States argues** that Korea is essentially arguing that the term "subordinate linear organizations" is defined by the *Government Organization Act*. However, according to the United States "prescribe" and "define" are not synonyms. In support of this argument, the United States refers to The New Shorter Oxford English Dictionary for the ordinary meanings of "prescribe" and "prescriptive" none of which, according to the United States, define "prescribe" as "define." According to the United States, the ordinary meaning of "prescribe" means "giving definite precise directions or instructions" and "laying down rules of usage."

4.171 The United States argues that it is clear from considering the text of the *Government Organization Act* itself that the Act does not provide a definition for "subordinate linear organization." The United States notes that all the Act does is, in Korea's words, to identify "officials within a ministry's hierarchy."

4.172 The United States further argues that the textual interpretation that "prescribed in" is not the same as "defined by" is further supported by Note 1 of Korea's Annex 2, which states, "The above sub-central administrative government entities include their subordinate organizations under direct control and offices as prescribed in the Local Autonomy Law of the Republic of Korea." The United States argues that, analogous to Note 1 of Korea's Annex 1, the two terms used in Korea's Note 1 of Annex 2 are "subordinate organizations under direct control" and "offices." The United States notes that these terms are found in Articles 104 and 105 of the *Local Autonomy Law*, respectively.[230] The United States further notes that, like the *Government Organization Act*, the *Local Autonomy Law* does not define the two terms. In the view of the United States, these terms are not terms of art and should, therefore, be interpreted according to their ordinary meanings.

4.173 **In response, Korea states** that the United States makes too much of the minor difference between the verbs "prescribe" and "define." Korea notes that, in fact, the definition of the verbs "prescribe" and "define" employ many of the same terms, challenging the argument that they are not synonymous. Korea further notes that both definitions refer to the drawing of "bounds" or "boundaries," both make ample use of the term "precise" or "precisely," and both contain the term "restrict."[231] Korea finally notes that the definition of "define" includes the verb "prescribe," and the definition of "prescriptive" includes the term "definitive."[232]

4.174 Second, Korea asserts that the fact that Article 2(3) of the *Government Organization Act* lists officials within a ministry's hierarchy, does not mean that Article 2(3) fails to provide a definition for the term "subordinate linear organizations." Korea argues that the Act does provide a definition of the term "subordinate linear organization" and that Article 2(3) of the Act is that definition.

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[228] The New Shorter Oxford English Dictionary (1993 ed.), p. 2339.
[229] *Ibid.*
[230] *Local Autonomy Law* Act. No. 4004.
[231] The New Shorter Oxford English Dictionary (1993 ed.), pp. 618 and 2339.
[232] *Ibid.*

4.175 Korea further argues that it had every right to define a term in its GPA commitments by reference to domestic law. Korea notes in this respect that it has been joined in so doing by the European Communities, Hong Kong, Japan, Liechtenstein, Norway, Switzerland and the United States, which, according to Korea, confirms the legitimacy of this practice. More specifically, Korea notes that within the context of the GPA, Annex 1 to the United States' GPA Appendix I defines certain excepted Department of Energy procurements with reference to the *Atomic Energy Act*. Korea further notes that, similarly, US Annex 2 commitments regarding the state of Oklahoma likewise identify covered entities as those "state agencies and departments subject of the *Oklahoma Central Purchasing Act.*"[233]

[233] See also European Communities' GPA Appendix I, General Note 11 (refers to the Public Procurement Act for the meaning and identification of entities which are themselves contracting authorities); Hong Kong, China's GPA Appendix I, General Note 2 ("Hong Kong's commitments on telecommunications services are subject to the terms of the licence held by Hong Kong Telecommunications International Ltd. ... ."); Japan's GPA Appendix I, Annex 1, Note 1 ("Entities covered by the Accounts Law include all their internal sub-divisions, independent organs, attached organizations and other organizations and local branch offices provided for in the National Government Organization Law."); Japan's GPA Appendix I, Annex 2, Note 1 ("'To', 'Do', 'Fu', 'Ken' and 'Shitei-toshi' covered by the Local Autonomy Law include all internal sub-divisions, attached organizations and branch offices of all their governors or mayors, committees and other organizations provided for in the Local Autonomy Law."); Liechtenstein's GPA Appendix I, Annex 3, Title II (Defines Annex 3 covered entities associated with the provision of electricity as those "[p]ublic authorities and public undertakings . . . operating on the basis of authorizations for expropriation pursuant to the Gesetz vom 16.Juni 1947 betreffend die 'Liechtensteinischen Kraftwerke' (LKWG)."); Liechtenstein's GPA Appendix I, Annex 3, Title III (Defines certain Annex 3 covered entities in the field of transport services with reference to "Vertrag vom 9.Januar 1978 zwischen dem Fürstentum Liechtenstein und der Schweizerischen Eidgenossenschaft über die Besorgung der Post- und Fernmeldedienste im Fürstentum Liechtenstein durch die Schweizerischen Post-, Telefon- und Telegrafenbetriebe (PTT)."); Norway's GPA Appendix I, Annex 3, Number 1 (Defines Annex 3 covered entities in the electricity sector as those "[p]ublic entities producing, transporting or distributing electricity pursuant to Lov om Bygging og drift av elektriske anlegg (LOV 1969-06-19), Lov om erverv av vannfall, bergverk og annen fast wiendom m.v., Kap. I, jf. Kap. V (LOV 19-17-24 16, kap. I), or Vassdragsreguleringsloven (LOV 1917-12-14 17) or Energiloven (LOV 1990-06-29 50)."); Norway's GPA Appendix I, Annex 3, Number 2 (Defines Annex 3 covered entities in the urban transport sector as those public entities "providing a service to the public in the field of transport . . . according to Lov om anlegg og drift av jernbane, herunder sporvei, tunellbane og forstadsbane m.m. (LOV 1993-06-11 100), or Lov om samferdsel (LOV 1976-06-04 63) or Lov om anlegg av taugbaner og løipestrenger (LOV 1912-06-14 1)."); Norway's GPA Appendix I, Annex 3, Number 3 (Defines Annex 3 covered entities as those "[p]ublic entities providing airport facilities pursuant to Lov om luftfart (LOV 1960-12-16 1)."); Norway's GPA Appendix I, Annex 3, Number 4 (Defines Annex 3 covered entities providing port services as those "[p]ublic entities operating pursuant to Havneloven (LOV 1984-06-08 51)."); Norway's GPA Appendix I, Annex 3, Number 5 (Defines Annex 3 covered entities as those "[p]ublic entities producing or distributing water pursuant to Forskrift om Drikkevann og Vannforsyning (FOR 1951-09-28)."); Norway's GPA Appendix I, General Note 6 (States that with regard to Annex 4, the GPA is not applicable to "contracts awarded to an entity which is itself a contracting authority within the meaning of the Public Procurement Act: 'Lov om offentlige anskaffelser m.v.' (LOV 1992-11-27 116) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision."); Switzerland's GPA Appendix I, Annex 3, Title II (Defines Annex 3 covered entities in the electricity sector as those "[p]ouvoirs publics ou entreprises publiques" operating "conformément à la 'loi fédérale du 24 juin 1902 concernant les installations électriques à faible et à fort courant'" or "conformément à la 'loi fédérale du 22 décembre 1916 sur l'utilisation des forces hydrauliques' et á la 'loi fédérale du 23 décembre 1959 sur l'utilisation pacifique de l'énergie atomique et la protection contre les radiations'."); Switzerland's GPA Appendix I, Annex 3, Title III (Defines Annex 3 covered entities in the transport as those entities operating "au sens de l'article 2, 1er alinéa, de la 'loi fédérale du 20 décembre 1957 sur les chemins de fer,'" "au sens de l'article 4, 1er alinéa, de la 'loi fédérale du 29 mars 1950 sur les entreprises de trolleybus,'" "au sens de l'article 2 de la 'loi fédérale du 18 juin 1993 sur le transport de voyageurs et les entreprises de transport par route,'" and "au sens de l'article 4 de la 'loi fédérale du 18 juin 1993 sur le transport de voyageurs et les entreprises de transport par route.'"); Switzerland's GPA Appendix I, Annex 3, Title IV (Defines Annex 3 covered entities providing airport services as those "[p]ouvoirs publics ou entreprises publiques exploitant des

4.176 Korea states that in proposing and accepting the incorporation by reference of provisions of domestic law in each of these instances, GPA signatories agreed to the meaning ascribed to a particular term in domestic law. Korea states that this was also the case with the signatories' acceptance of the meaning accorded by Korea's circumscription of the term "central government entity" to include listed entities and their subordinate linear organizations, special local administrative organs and attached organs, "as prescribed in the Government Organization Act of the Republic of Korea."

4.177 Korea finally argues that it has the right to define "subordinate linear organization" in the way that it has in Article 2(3) of the *Government Organization Act*. Nothing in the GPA requires that Korea define the term "subordinate linear organization" in its domestic law in any particular way.

(d) Ordinary Meaning of "Subsidiary Linear Organizations"

4.178 **The United States argues** that the interpretation of Note 1 to Korea's Annex 1, based on Articles 31 and 32 of the *Vienna Convention*, confirms that in "prescribing" the terms "subordinate linear organization," "special local administrative organ," and "attached organ," the *Government Organization Act* does not define these terms. Hence, according to the United States, a textual interpretation is to be applied. The United States argues that in doing so, "subordinate linear organization" is found to be synonymous with subsidiary organization.

4.179 The United States argues that the ordinary meaning of "subordinate," according to The New Shorter Oxford English Dictionary, is "of inferior rank; dependent upon the authority or power of another . . . dependent on or subservient to a chief or principle thing of the same kind . . . submissive . . . of inferior importance; secondary, minor ... ."[234] The United States further argues that the ordinary meaning of "linear" is, *inter alia*, "progressing in a single direction by regular steps or stages, sequential."[235] Finally, the United States argues that the ordinary meaning of "organization" is "an organized structure, body, or being."[236] The United States asserts that, taken together, the term "subordinate linear organization" suggests an organization that is directly controlled by, dependent upon, and secondary to another organization – that is, it is a subsidiary organization.

4.180 **In response, Korea argues** that to suggest that the term "subordinate linear organization" is synonymous with the terms "subsidiary organizations" or "subsidiary or subordinate body" is not possible given the ordinary meaning of Note 1 which states that the term "subordinate linear organization" is "prescribed in the Government Organization Act of the Republic of Korea." Korea also questions the United States' use of the principles of interpretation of the *Vienna Convention of the Law of Treaties* to determine the ordinary meaning of a term such as "subsidiary organization," which is not in fact found in the GPA.

4.181 In support of its argument that the term, "subordinate linear organization," is synonymous with "subsidiary organization," **the United States refers** to the fact that Korea re-translated "subordinate linear organization" as "subsidiary organs." The United States quotes Korea: "The re-translation did not, however, alter the substantive effect of Note 1 to Annex 1." The United States argues that by amending its English translation, Korea determined that the English phrase, "subsidiary organs," is not only synonymous with "subordinate linear organizations," but is probably a better representation of what "subordinate linear organizations" was originally intended to mean. The United States also refers to its arguments in paragraph 4.435.

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aéroports en vertu d'une concession au sens de l'article 37 de la 'loi fédérale du 21 décembre 1948 sur la navigation aérienne.'").

[234] The New Shorter Oxford English Dictionary (1993 ed.), p. 3121.

[235] *Ibid.* p. 1596.

[236] *Ibid.* p. 2020.

4.182 The United States concludes that given that KAA, KOACA and IIAC are subsidiary organizations of MOCT then they are also "subordinate linear organizations" of MOCT and are, therefore, covered under Annex 1 of the GPA.

4.183 **In response, Korea argues** that KAA, KOACA and IIAC were not converted to GPA covered entities when the term "subordinate linear organizations" was re-translated in English to "subsidiary organs" in Article 2(3) of the *Government Organization Act*. Korea notes in this respect that the term "subordinate linear organization" was re-translated by the Korean Legislation Institute as "subsidiary organs" by an amendment to the *Government Organization Act* that was enacted on 28 February 1998. Korea notes that the Korean version of the term remained the same, as did, the Korean and English versions of the enumerated list of "subordinate linear organizations" included in Article 2(3) of the Act.

(e) Subordinate Linear Organizations: Officials or Entities?

4.184 **In response to a question from the Panel, Korea notes** that it is Korean practice to refer to an organization through its head. For example, rather than say that a particular "Ministry" has authority to take certain action, Korea notes that it would say that a particular "Minister" has the authority.[237] Korea further notes that, in Korean law as embodied in the *Government Organization Act*, authority is delegated from the chief of a government agency to individual officials in the vertical chain of command, who are in some instances, in turn, authorized to delegate to other individual officials further down the chain of command. Korea notes that, in addition to the Minister and Vice-Minister, all divisions, offices and bureaus are led by "Division Directors," "Office Directors" or "Bureau Directors" listed in Article 2(3) of the *Government Organization Act* as "subordinate linear organizations."[238] Korea further notes that all legislation envisions government activity in terms of the people undertaking that activity and the chain of command under which decisions regarding that activity is made. Korea finally notes that this system may be divergent from western legal systems, but nothing in the WTO Agreements, including the GPA, prohibits it. Korea also refers to its arguments in paragraphs 4.175, 4.177 and 4.376.

4.185 **In response to Korea's argument, the United States asserts** that Korea's description of the relationship between the chief of a government agency and subsidiary linear organizations is precisely what "control" is all about. The United States argues that control exists when one entity's power to act is delegated to it by another entity, and when these acts are done on behalf of this other entity. The United States notes that this analysis was affirmed by the Appellate Body in the recent *Canada - Dairy* dispute.[239] The United States contends that KAA, KOACA and IIAC are mere project operators of the IIA project whose authorities are delegated from MOCT, and whose acts are only done on behalf of MOCT, for the benefit of MOCT. The United States further states that if "subordinate linear organizations" also act in this manner, then KAA, KOACA and IIAC must be "subordinate linear organizations" of MOCT.

4.186 **In response to a question from the Panel regarding MOCT's organization chart, Korea notes** that all of the "organs" or "organizations" included on the chart are in fact prescribed in the *Government Organization Act*. The listed "divisions, offices and bureaus" are according to Korea covered under the GPA because they are led by "Division Directors," "Office Directors" or "Bureau Directors," which are listed in Article 2(3) of the *Government Organization Act* as "subordinate linear organizations" and therefore covered by virtue of Note 1 to Korea's Annex 1. The other organizations

[237] Korea's Answer to Question 11(b) from the Panel, dated 3 November 1999.

[238] Korea's Answer to Question 11 from the Panel, dated 29 November 1999, citing the *Government Organization Act.*

[239] Appellate Body report on *Canada - Dairy*, WT/DS103/AB/R, WT/DS113/AB/R (issued on 13 October 1999) paragraphs 96-102. Also see panel report on *Canada - Dairy*, WT/DS103/R, WT/DS113/R (issued on 17 March 1999) paragraph 7.78.

listed on page 2 of the chart are MOCT's "special local administrative organs" and "attached organs" under the *Government Organization Act*.[240]

4.187 **The United States argues** that Korea's argument that the divisions, offices, and bureaus of MOCT are covered under Annex 1 of the GPA because they are "subordinate linear organizations" of MOCT is flawed. The United States notes that MOCT's divisions, offices, and bureaus are already covered under Annex 1 of the GPA because they are "'attached/connected/affiliated' etc. to MOCT." According to the United States, for Korea to now interpret the term, "subordinate linear organizations," as encompassing these entities would make this term redundant, because "subordinate linear organization" would merely provide for the coverage of entities that are already covered. According to the United States, such an interpretation is contrary to the "principle of effectiveness."[241]

4.188 **In response to a question from the Panel, Korea also notes** that the reference to individuals in Article 2(3) of the *Government Organization Act* is not a reference to these people as natural persons, but as titles of officials who head an office or bureau in the line of command within a government agency.[242] Further, in response to a question from the United States, Korea states that in Korea's terminology, reference to an "official" within the hierarchy is a reference to the position and the office itself.[243] Korea notes that the officials listed as "subordinate linear organizations" in Article 2(3) of the *Government Organization Act* are those authorized to act on behalf of the chief of the government agency concerned. Korea further states that the "subordinate linear organizations" are not the "organizations" that report to a listed individual but, rather, they are the titles of officers who report on behalf of the division or bureau. Thus, in interpreting the term "subordinate linear organization" Korea suggests that the organizational unit (ministry, bureau, division, etc.) represented by the title should be considered.[244] Korea also argues that the structure of Article 2(3) does not mean that only procurements undertaken personally by an official in Article 2(3) are covered under Annex 1. Korea argues that, rather, the entirety of that official's office is considered covered. Finally, Korea notes that all central government entities may not necessarily have each of the listed subordinate linear organizations provided for in Article 2(3) of the *Government Organization Act*.[245]

4.189 **In response, the United States argues** that the organizational units that represent the titles referred to in Article 2(3) of the *Government Organization Act* are merely branch offices of "central government entities," and are already covered pursuant to the ordinary meaning of "central government entity."

(f) Are KAA, KOACA and IIAC "Subordinate Linear Organizations"?

4.190 **In response to the argument by the United States** that KAA, KOACA and IIAC are "subordinate linear organizations" of MOCT under Note 1 to Korea's Annex 1 in paragraph 4.164, **Korea notes** that KAA, KOACA and IIAC are not identified as "subordinate linear organizations" (or the re-translated term, "subsidiary organs") in Article 2(3) of the *Government Organization Act*. Note 1 to Korea's Annex 1 states that Korea's Annex 1 includes those "subordinate linear organizations . . . prescribed in the Government Organization Act of the Republic of Korea." Korea further notes that both in its current form and as it existed during the negotiations leading up to the

[240] Korea's Answer to Question 11 from the Panel, dated 29 November 1999.

[241] US Response to Korea's Answer to Question 11 from the Panel, dated 29 November 1999, citing Appellate Body report on *Canada - Dairy* (issued on 13 October 1999), WT/DS103/AB/R, WT/DS113/AB/R, paragraph 133; Appellate Body report on *United States - Reformulated Gas* (adopted on 20 May 1996) WT/DS2/AB/R, p. 23; and Appellate Body report on *Japan - Alcoholic Beverages* (adopted on 1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12.

[242] Korea's Answer to Question 11(b) from the Panel, dated 3 November 1999.

[243] Korea's Answer to Question 3 from the US, dated 3 November 1999.

[244] Korea's Answer to Question 11(b) from the Panel, dated 3 November 1999.

[245] Korea's Answer to Question 6 from the US, dated 3 November 1999.

submission by Korea of its final offer list for accession to the GPA, Article 2(3) identifies not entities, but officials within a ministry's hierarchy.

4.191 **In response, the United States argues** that it is illogical for Korea to make the claim that KAA, KOACA and IIAC are not identified as "subordinate linear organizations," given the structure of and information in the *Government Organization Act*. Specifically, the United States refers to the fact that that the *Government Organization Act* does not identify entities as "subordinate linear organizations," but only as "officials within a ministry's hierarchy." The United States additionally notes that the *Government Organization Act* does not specifically name any entities as "special local administrative organs" or "attached organs."

(g) Is NADG a "**Subordinate** Linear Organization"?

4.192 **In response to a question from the United States, Korea states** that the New Airport Development Group was established within the Ministry of Transportation. Korea further states that it drew personnel from several subordinate linear organizations, as defined in the *Government Organization Act*, within the Ministry. Korea notes that NADG is not a separate legal person but, rather, it is an ad hoc group within the Ministry. Korea concludes that NADG is not a subordinate linear organization as defined in Article 2(3) of the Act.[246]

(h) Ordinary Meaning of "Special Local Administrative Organs"

4.193 **Korea discusses** those entities identified as MOCT's "special local administrative organs," which are by virtue of Note 1 to Korea's Annex 1 considered covered entities. Korea states that among MOCT's special local administrative organs are its two Regional Aviation Offices – the Seoul Regional Aviation Office and the Pusan Regional Aviation Office.[247] Korea notes that these regional aviation offices conduct procurement for existing airports in their regions. Korea further notes that where not otherwise provided by special law, as in the case of the legal authority for the construction of IIA[248], these Offices are responsible for construction and maintenance of Korean airports, including Yangyang, Yeosoo, Muan, Daegu, Pohang, Yecheoon and Uljin Airports.

4.194 **The United States argues** that Korea, by implication, uses the ordinary meaning to interpret "special local administrative organ," and that, therefore, it is not a term of art. The United States points out that in defining "special local administrative organs", Korea chooses to use the ordinary meaning by stating, "As the term suggests, special local administrative organs carry regional portfolios". By doing so, according to the United States, Korea essentially confirms that Note 1 does not require "subordinate linear organizations", "special local administrative organs" or "affiliate organs" to be defined by the *Government Organization Act*. The United States further asserts that, indeed, "subordinate linear organization," "special local administrative organs," and "attached organs" are used uniquely by Korea to categorize the subordinate units of its "central government entities." However, according to the United States, since they are not unique terms of art and they are not defined by the *Government Organization Act*, their ordinary meaning should apply. Further, the United States notes that the *Government Organization Act* does not identify the Seoul Regional Aviation Office and the Pusan Regional Aviation Office as "special local administrative organs."

[246] Korea's Answer to Question 7 from the US, dated 3 November 1999.

[247] Korea states that, as the term suggests, special local administrative organs carry regional portfolios. MOCT maintains other special local administrative organs, including five National Territory Management Offices (Seoul, Wonju, Taejon, Iksan and Pusan) and five River Flood Control Offices (Han River, Nakdong River, Keum River, Sumjin River and Yeongsan River).

[248] See, e.g., the *Seoul Airport Act*, Article 7(5-2) of the *Korea Airport Corporation Act*, Article 7 of the *Korea Airport Construction Authority Act*, or Article 10 of the *Law on Inchon International Airport Corporation.*

4.195 **Korea argues** that the terms "subordinate linear organization," "special local administrative organ" and "attached organ" are in fact "unique terms of art" found in the *Government Organization Act*.

4.196 In response to a question from the United States requesting Korea to reconcile its statement that the Seoul Regional Aviation Office and the Pusan Regional Aviation office are special local administrative organs although they are not identified in the *Government Organization Act* and its statement that Note 1 to Korea's Annex 1 provides the exclusive means by which to identify as Annex 1 covered entities those entities, Korea makes the following argument. First, Korea argues that Article I:1 of the GPA limits coverage to "entities." Korea states that one of the "entities" covered by Korea's commitment is MOCT, which is a central government entity within the meaning of Annex 1 to Appendix I of Korea's GPA Schedule. Korea further states that the Seoul Regional Aviation Office and the Pusan Regional Aviation Office, which conduct the implementation of the affairs of MOCT in their respective regions, are special local administrative organs of MOCT. Korea asserts that, unlike, for example, KAA, KOACA and IIAC, they are not separate legal entities in their own right. According to Korea, MOCT has determined that its aviation responsibilities in those regions will be most efficiently administered by the use of these regional offices, as provided for in Article 3(2) of the *Government Organization Act*. Korea concludes that any body identified as a special local administrative organ pursuant to Article 3(2) of the *Government Organization Act* is an Annex 1 covered entity by virtue of Note 1.[249]

5. Responses to Panel Question Regarding KAA

(a) Arguments by the United States

4.197 The Panel asked both Parties to explain why KAA should or should not be considered as "'attached/connected/affiliated' etc." to MOCT and, therefore, a covered entity for the purposes of the GPA.[250]

4.198 **In response to the Panel's question, the United States argues** that KAA should be considered "'attached/connected/affiliated' etc." to MOCT because of MOCT's pervasive links to, authority over, and control of KAA.[251]

4.199 In support of its argument, the United States notes that KAA, formerly known as the "International Airport Management Committee," was created in 1979 "under the Construction and Transportation Ministry . . . to bring about efficiency of International Airport management ... ."[252]

4.200 The United States refers to the composition of the KAA and the projects for which KAA is responsible.[253] The United States notes that KAA may "establish a branch office,"[254] "lend or sublease any property contributed or leased,"[255] "collect rents or charges for use from those who use or utilize airport facilities managed and operated by it,"[256] "borrow funds[257], "have beneficiaries of its

[249] Korea's Answer to Question 1 from the US, dated 3 November 1999.
[250] Question 20 from the Panel, dated 15 November 1999.
[251] US Answer to Question 22 from the Panel, dated 29 November 1999.
[252] US Answer to Question 22 from the Panel, dated 29 November 1999, citing Article 1 of the *International Airport Management Act*, Presidential Decree 9549.
[253] US Answer to Question 22 from the Panel, dated 29 November 1999.
[254] *International Airport Management Act* Article 5.
[255] *Ibid.* Article 17.
[256] *Ibid.* Article 18.
[257] *Ibid.* Article 23.

projects bear expenses required for the projects,"[258] and "dispose of important property,"[259] but only with the approval of MOCT.[260]

4.201 The United States also notes that KAA must: [261]

> prepare a business plan and budget bill for each business year . . . and submit them to the Minister of Construction and Transportation to obtain his approval. The same shall also apply, if it wishes to modify them . . .[262]
>
> [and] prepare a settlement of accounts on revenues and expenditures for each business year . . . and submit it to the Minister of Construction and Transportation after undergoing an audit by a certified public accountant designated by the Minister of Construction and Transportation . . .[263]
>
> [and] make rules relating to organization, accounting, personnel affairs, remuneration, etc. and obtain the approval of the Minister of Construction and Transportation. The same shall also apply, if [KAA] wishes to modify such rules.[264]

4.202 The United States refers to Article 28 of the *Korea Airport Corporation Act* which states:

> "The Minister of Construction and Transportation shall direct and control [KAA], and if it is deemed necessary to do so, he may have [KAA] report matters concerning its affairs, accounting and property, or have a public official under his control inspect books, documents, facilities and other things of [KAA]."[265]

4.203 The United States notes that the Civil Aviation Bureau within MOCT provides "guidance and supervision" for KAA[266], that KAA is listed on MOCT's Internet website as a "subsidiary organization" of MOCT[267] and that during the time-period KAA supposedly had procurement authority for the IIA project, procurements related to the project were announced as MOCT procurements.[268] The United States contends that, moreover, during the period KAA was involved in the IIA project, MOCT retained ultimate authority and control over the project. According to the United States, this further confirms that KAA is "'attached/connected/affiliated' etc." to MOCT. The United States notes that during the period KAA was involved in the IIA project the United States argues that MOCT retained jurisdiction "over the affairs relating to land, air and marine transportation, and tourism,"[269] pursuant to the *Government Organization Act of the Republic of*

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[258] *Ibid.* Article 24.
[259] *Ibid.* Article 26.
[260] US Answer to Question 22 from the Panel, dated 29 November 1999.
[261] US Answer to Question 22 from the Panel, dated 29 November 1999.
[262] *International Airport Management Act*, Article 20.
[263] *Ibid.* Article 20.
[264] *Ibid.* Article 22.
[265] US Answer to Question 22 from the Panel, dated 29 November 1999.
[266] See Duties of Civil Aviation Bureau, *in* MOCT Internet website document, http://www.moct.go.kr/mcte/ mct_about/aboutml/mcthpg_air.htm.
[267] See MOCT List of Subsidiary Organizations, from the MOCT Internet website, http://www.moct.go.kr/ ours/e-o023.html. MOCT's website is also discussed at paragraph 4.432 *et seq.*
[268] See, e.g., *Transportation Department Announcement 1993-33*, from MOCT for a procurement relating to railway connection from the Inchon Airport.
[269] *Government Organization Act*, Article 40. The most recent version of the *Government Organization Act* states in its Article 42:

> "The Minister of Construction and Transportation shall take charge of the affairs relating to the establishment and adjustment of comprehensive plans for construction in national territory, the

Korea and that it was the responsibility of MOCT to *inter alia* "designate" and "publicly announce" the Inchon Airport construction project[270] to "designate an area necessary for the execution of the new airport construction project as the project area for the construction of the new airport"[271] and to "draw up a master plan relating to the new airport construction."[272] The United States notes that the "master plan" shall include the following matters: General direction of construction; outline of the construction plan; construction period; financing plan; and such other matters as the Minister of Construction and Transportation deems necessary.[273] The United States also notes that MOCT could "change the master plan formulated pursuant to the provisions [of the *Act on the Promotion of a New Airport for the Seoul Metropolitan Area Construction*, and] make alterations therein."[274]

4.204 The United States contends that Korea's *Aviation Act* confirmed that:

> "The airport development projects shall be carried out by the Minister of Construction and Transportation . . . Any person other than the Minister of Construction and Transportation, who desires to operate the airport development projects, shall obtain the permission of the Minister of Construction and Transportation ... ."[275]

4.205 The United States argues that MOCT has ultimate authority to carry out the IIA project.[276] KAA was merely a project operator, designated and used by MOCT to construct the Inchon International Airport.[277]

4.206 The United States also notes that the New Airport Construction Deliberation Commission under MOCT was established:

> "to deliberate on important issues relating to building techniques, construction technology and traffic impact, etc. of the new airport construction project . . .[278]
>
> [The Commission] comprised of members, including Chairman, not exceeding one hundred persons who shall be appointed or commissioned by the Minister of Construction and Transportation from among persons coming under one of the following subparagraphs:
>
> 1. Public officials in the fourth grade or above serving at a central or local administrative organ or a local government concerned with the affairs of the new airport construction project;
>
> 2. Members on the board of directors of public entities or research institutions; and

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conservation, utilization, and development of national territory and water resources, the construction of cities, roads, and housing, coasts, rivers, and reclamation, land transportation, and air services."

[270] *Seoul Airport Act*, Article 2(1).

[271] *Ibid.* Article 3(1).

[272] *Ibid.* Article 4(1).

[273] *Ibid.* Article 4(2).

[274] US Answer to Question 22 from the Panel, dated 29 November 1999, citing *Seoul Airport Act* Article 4-2(1).

[275] US Answer to Question 22 from the Panel, dated 29 November 1999, citing *Aviation Act* Article 94.

[276] See Articles 94 and 2(8) of the *Aviation Act.*

[277] US Answer to Question 22 from the Panel, dated 29 November 1999, referring to, e.g., Articles 95, 96, 103, and 104 of the *Aviation Act*. The United States contends that these and other provisions confirm the subordinate nature of project operators.

[278] *Seoul Airport Act*, Article 7-3(1).

3. Persons of such professional learning and experience in airport, building, civil engineering, fire fighting and the environment, etc. as determined by the Minister of Construction and Transportation."[279]

4.207 According to the United States, many of the exhibits provided by Korea corroborate the United States argument that regardless of KAA, KOACA and IIAC's status as subsidiary organizations of MOCT, they nevertheless remain covered under the GPA because procurements by KAA, KOACA and IIAC are, in fact, procurements by MOCT. The United States notes that MOCT not only controls procurements by KAA, KOACA and IIAC, but it also funds, owns and benefits from these procurements.

4.208 The United States refers also to the *Rules of the New Airport Development Group* which state in Article 5 that the "head of the Aviation Office shall assume the overall authority to supervise and control the construction and operation of the New International Airport."[280] The United States notes that the New Airport Development Group under MOCT retained the following responsibilities: establishing and coordinating basic plans for the airport; budget and funding matters related to the airport; researching and developing "systems and regulations" concerning the airport; planning, designing and overseeing "actual works of [the airport's] civil engineering facilities, site preparation, supporting complex construction supporting facilities and accessible transport facilities"; analysing and controlling "all [airport] work processes;" planning, designing and overseeing "actual works of the [airport's] structural, mechanical, communication electronics and power facilities; supervising the operation of the "[t]he New Airport Construction Deliberation Commission;" and establishing "financial plans for repayment of debt incurred from the construction [of the airport] and securing . . . funds for operation" of the airport.

4.209 The United States notes that a Korean business guide touted MOCT as the entity controlling the IIA project[281], that KAA utilized the Office of Supply and its regulations for procurement purposes, just as MOCT would and that employees of KAA in certain circumstances were "treated as public officials."[282]

4.210 **In response to this argument, Korea states** that there is no evidence that even remotely suggests that KAA has, as the United States argues, "utilised the Office of Supply and its regulations for procurement purposes, just as MOCT would."[283] Korea states that the procurements referred to by the United States for which KAA requested Office of Supply assistance, were not for the IIA – which is, exclusively, the subject of the Panel's terms of reference in this case. In any event, Korea notes that Korea's Annex 1 specifically states that Office of Supply coverage is "limited to purchases for entities in this [Annex 1] list only." Korea further notes that KAA is not listed on Annex 1.[284]

4.211 Korea argues that a publication by the US Foreign Commercial Service of the American Embassy, Seoul, produced in conjunction with a Korean trade association (the Association of Foreign Trading Agents) can scarcely be considered to bind the Korean Government to GPA obligations,

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[279] US Answer to Question 22 from the Panel, dated 29 November 1999, citing the *Seoul Airport Act*, Article 7-3(3).

[280] US Answer to Question 22 from the Panel, dated 29 November 1999.

[281] American Business in Korea: Guide & Directory 1992-93, p. 126. This guide was published by the Association of Foreign Trading Agents of Korea, a Korean business association, in conjunction with the Foreign Commercial Service of the American Embassy, Seoul. The United States notes that the Inchon International Airport is also known as the "Youngjong-do" project, as it is being constructed on Youngjong Island near Inchon.

[282] US Answer to Question 22 from the Panel, dated 29 November 1999. Further arguments regarding publications that the US argues evidence MOCT's control over the IIA project are contained in paragraph 4.420.

[283] Korea's Response to the US Answer to Question 22 from the Panel, dated 29 November 1999, quoting US Answer to Question 22.

[284] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.

including the proposition offered by the United States that this joint US-private sector publication proves MOCT's role "as the entity controlling the IIA project."[285]

4.212 **The United States concludes** that, therefore, due to the fact that KAA is "'attached/connected/affiliated' etc." to MOCT, KAA should be considered a covered entity for the purposes of the GPA because:

> (1) Annex 1 of the GPA, which covers MOCT as a "central government entity," also covers the subdivisions of MOCT. KAA is a subdivision of MOCT because it is "'attached/connected/affiliated' etc." to MOCT.
>
> (2) Article I:1 of the GPA, which states that the GPA "applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement," applies to KAA because, as an entity "'attached/connected/affiliated' etc." to MOCT, any procurement by KAA is in fact a procurement by MOCT.
>
> (3) Note 1 of Korea's Annex 1 of the GPA, which states that coverage of the listed "central government entities" "include[s] their subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the Government Organization Act of the Republic of Korea," also covers KAA because – as an entity "'attached/connected/affiliated' etc." to MOCT – KAA is a "subordinate linear organization" of MOCT.[286]

4.213 The United States argues that KAA is covered pursuant to: Korea's Annex 1 of the GPA, which lists MOCT as a covered "central government entity;" Note 1 to Korea's Annex 1 of the GPA, which states that "subordinate linear organizations" of MOCT are also covered; and Article I:1 of the GPA. The United States further argues that given that KAA is a covered entity, as a factual matter, any procurement conducted by KAA that is within the scope of the GPA (*i.e.*, above the Agreement's thresholds and not subject to any of the exceptions enumerated in the Agreement's text) is covered. This includes procurements related to the other regional airports for which KAA is responsible.[287]

4.214 The United States notes that KAA was involved in the IIA airport development project from 1992 until KOACA's creation in 1994. The United States contends that, apparently, this was the only "new airport construction" which KAA participated in. With regard to the procurement for this "new airport construction," the United States contends that it expected KAA to be covered, given its May 1991 question[288] to Korea. The United States also notes that as for the rest of KAA's work, which according to Korea, "has traditionally been limited to the management and maintenance of [existing] Korean airports," the US May 1991 question did not focus on these procurements. However, the United States argues that they are nevertheless covered by the GPA because of the coverage of KAA as a subdivision of MOCT.

4.215 **In response, Korea argues** that the US May 1991 question was not about just any generic airport procurement. Korea notes that the actual text of the United States' question was:

> "How does the Airport Development Group relate to the Ministry of Communication? Does Korea's offer of coverage of the Ministry of Communications include purchases for the Airport Development Group? Please identify all Ministries that will be

[285] *Ibid.*
[286] US Answer to Question 22 from the Panel, dated 29 November 1999.
[287] US Answer to Question 16 from the Panel, dated 29 November 1999.
[288] The US May 1991 question is discussed further below at paragraph 4.328 *et seq.*

> responsible for the procurement of goods and services related to new airport construction."

4.216 Korea states that its reasonable interpretation of this question was that the United States was interested in the NADG – the New Airport Development Group.[289] Korea states that, therefore, its response dealt with NADG and its relationship with MOCT, and the Office of Supply, as the entity that would in principle be responsible for procurement for the IIA under the terms of the *Government Procurement Fund Act*, had there even been any procurements for IIA construction at the time. Korea states that it reasonably considered that the United States was not asking a question about airport procurement in general.

4.217 **The United States further argues** that the coverage of procurement resulting from KAA's management and maintenance of Korea's regional airports is similar to the coverage of procurement by the Seoul and Pusan Regional Aviation offices which are covered under Korea's GPA obligations. The United States contends that these regional offices conduct procurement for new airport construction of certain airports other than the IIA. In addition, they also conduct procurement for the maintenance of these airports. The United States argues that regardless of whether the Seoul and Pusan Regional Aviation offices are procuring for the construction or the maintenance of these airports, their procurements are covered under the GPA because they, as subdivisions of MOCT, are covered under the GPA.[290]

4.218 The United States notes that it has not uncovered any additional documentation not already provided that demonstrates the contemplation of the coverage of KAA over the "management and maintenance" of these other regional airports. However, it notes that it is not unheard of for a country to find that it has "GPA benefits" that "it had not anticipated," due to the coverage of an entity that, although originally covered for a particular purpose, engages in the procurement of other projects or sectors that were not explicitly excluded from GPA coverage.[291]

4.219 In response to a question from the Panel regarding evaluation of the Korean accession offer by the United States, the United States notes that throughout the GPA accession process, it has analysed the offers of countries acceding to the GPA on an ongoing basis but does not routinely prepare formal "studies". With regard to assessment of the value of Korea's accession offer, the United States notes that the potential monetary value of a country's GPA accession offer is often not as important to the United States as the quality of the overall package (including coverage of key entities and projects/sectors of interest). The United States recognizes that the US procurement market is substantially larger than that of most of its trading partners and that the monetary value of the opportunities offered by an acceding country is unlikely to be equivalent to the monetary value of opportunities offered by the United States. Therefore, the United States notes that its acceptance of another country's accession package is often based on the extent to which the offer includes coverage of areas of key interest to US suppliers and services providers, i.e., the coverage of key entities, projects and sectors of interest to the United States. The United States argues that airport was such a priority.[292]

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[289] Further discussion of Korea's interpretation of the US May 1991 question is contained below at paragraph 4.343.

[290] US Answer to Question 16 from the Panel, dated 29 November 1999.

[291] *Ibid.*

[292] US Answer to Question 24 from the Panel, dated 29 November 1999.

(b) Arguments by Korea

4.220 **In response to the Panel's question referred to above in paragraph 4.197 Korea, on the other hand, argues** that KAA should not be considered as "'attached/connected/affiliated' etc. to MOCT" for the purposes of determining GPA coverage, for the following reasons.[293]

4.221 First, Korea states that Note 1 to its Annex 1 governs the determination of which non-listed entities are covered by virtue of their relationship with entities listed on Annex 1. Korea states that, specifically, Note 1 refers to the *Government Organization Act of the Republic of Korea*, which "prescribes" those entities that, as "subordinate linear organizations," "special local administrative organs" or "attached organs," are considered covered despite their absence from Annex 1.[294]

4.222 Korea notes that Note 1, with its incorporation by reference of the *Government Organization Act*, evidences and itself provides a "special meaning," under Article 31(4) of the *Vienna Convention on the Law of Treaties*. According to Korea, Note 1 provides specific, textual evidence of the intent and the agreement of the parties to the GPA, and as an "integral part" of the GPA, under Article XXIV:12 thereto, must be accorded both its ordinary meaning, and the "special meaning" it imposes upon the term "central government entity" for the purposes of Korea's Annex 1.[295]

4.223 Korea argues that KAA is not considered a covered entity by virtue of Note 1. Specifically, Korea argues that KAA is not a "subordinate linear organization," "special local administrative organ" or "attached organ," within the meaning of the *Government Organization Act*, and its status as a separate legal person with the authority to conduct its own procurements distinguishes it from a body such as NADG, which is effectively MOCT itself.[296]

4.224 Korea also notes that unlike the entities prescribed by the *Government Organization Act*, KAA has the following characteristics[297]: KAA was established by an act of the National Assembly as a separate legal person[298]; KAA authored and adopted its own by-laws[299]; KAA is governed by its own board of directors that controls all matters related to major corporate investments and all other major corporate issues of any significance[300]; KAA hires and fires its own workforce that is not in the government's employ[301]; KAA authored and adopted its own Contract Administration Regulations[302] distinct from the government procurement rules included in the *Korean Budget and Accounting Act* and used those Regulations for IIA procurements; KAA published bid announcements and requests for proposals of its own accord[303]; and, KAA concluded contracts with successful bidders on its own behalf.[304]

4.225 Korea argues that each of these factors demonstrates that KAA is an entity in its own right, separate and distinct from MOCT. Korea also argues, in response to a question from the Panel, that all of the "organs" or "organizations" included on the MOCT organization chart are in fact prescribed

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[293] Korea's Answer to Question 22 from the Panel, dated 29 November 1999.
[294] *Ibid.*
[295] *Ibid.*
[296] Korea's Answer to Question 22 from the Panel, dated 29 November 1999.
[297] Korea's Answer to Question 11 from the Panel, dated 29 November 1999.
[298] *Korea Airport Corporation Act*, Article 3. See also Notification of Act No. 3219, *Official Gazette*, 28 December 1979, p. 5892.
[299] KAA By-laws.
[300] *Ibid*. Articles 4(3), 4(1)(6), 14, 25.
[301] *Korea Airport Corporation Act*, Article 13.
[302] KAA Contract Administration Regulations, Article 90.
[303] Exhibits Kor-19A through Kor-19D.
[304] *Ibid*.

by the *Government Organization Act*, and covered under the GPA, as subordinate linear organizations, special local administrative organs or attached organs.[305]

4.226 Second, Korea argues that even if Note 1 is not controlling, the "control" test proposed by the United States enjoys no support in the GPA. Although Article I:1(c) of the Tokyo Round GPA[306] included what the United States has styled a "normative" control test[307] this test was not included in the Uruguay Round GPA[308], in either a normative or a binding form. Korea argues that according to the Appellate Body, the disappearance of a provision during negotiations "strongly reinforces the presumption" that prior practice has changed.[309] Quoting the Appellate Body, Korea states that rejecting prior practice in these circumstances "is the commonplace inference that is properly drawn from such disappearance," and an interpreter is "not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen."[310]

4.227 Korea states that the United States itself agrees that the "control" test included in Article I:1(3) of the Tokyo Round GPA was "excluded" from the Uruguay Round GPA, but argues that rather than rejecting the "'control' concept, . . . Annex 3 made it unnecessary." Korea states that this argument does not explain why the United States argues in these proceedings for importation of the "control" test into *Annex 1*, which is the locus of its claim for KAA coverage. Korea states that, more importantly, if Annex 3 made the Tokyo Round "control" test unnecessary, then reference to Annex 3 for evidence of KAA coverage is appropriate. Korea notes that KAA is not included on Korea's Annex 3.[311]

4.228 Korea argues that in either case, whether the Tokyo Round "control" test was rejected altogether by the Uruguay Round GPA negotiators, or whether the negotiators intended Annex 3 to encompass the concept of "control," the importation by the United States of a "control" test into Annex 1, and its claim that KAA is an Annex 1 covered entity by virtue of the control allegedly exercised over it by MOCT, must be rejected.[312]

4.229 Third, Korea argues that the test included in the Uruguay Round GPA to extend coverage beyond the list of entities included in a signatory's Appendix I – Article I:3 – is not met in the circumstances of this case. Korea argues that the United States' "control" test, either as drafted or as applied by the United States, does not comport to the requirements of Article I:3, and that there is no evidence that suggests that KAA was even asked by MOCT or any other covered entity, let alone required, to award contracts for IIA procurements in accordance with particular requirements. Korea states that the United States' list of "control" factors speaks largely to the statutory requirement that KAA request approval for and report on certain of its actions. Korea argues that neither of these

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[305] Korea Answer to Question 11 from the Panel, dated 29 November 1999.

[306] The Tokyo Round GPA and, more particularly, Article I:1(c) is discussed below at paragraph 4.291 *et seq.*

[307] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), pp. 26, 27-28, 38, 44.

[308] The removal of the control test from the Uruguay Round GPA is discussed below at paragraph 4.296 *et seq.*

[309] See paragraph 4.300 *et seq.*

[310] Korea's Answer to Question 22 from the Panel, dated 29 November 1999, quoting *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R (adopted on 25 February 1997), p. 17.

[311] Korea's Answer to Question 22 from the Panel, dated 29 November 1999. The Annex 3 issue is discussed further at paragraph 4.307 *et seq.*

[312] *Ibid.*

factors, nor any other evidence offered by the United States, demonstrate that KAA is required to apply particular requirements in awarding IIA procurements.[313]

4.230 Fourth, Korea argues that considering KAA to be a covered entity by virtue of a "control" test that (i) utilizes categories of "control" without textual basis in the GPA, and (ii) adopts an arbitrary degree of "control," also without any textual base, sufficient to deem an entity controlled and, therefore, covered, will seriously disrupt the delicate balance of rights and obligations agreed to by signatories to the GPA. Korea states that a decision that this non-textually-based test should trump the entire basis upon which signatories negotiated their GPA commitments – the positive enumeration of entities subject to the terms of the GPA – will have effects well beyond KAA.[314]

4.231 Korea states that each entity included on Korea's Annex 3 is controlled by an Annex 1 entity in the same sense that KAA is "controlled" by MOCT.[315] Korea states that whether discussing entities included on Annex 3, or entities excluded from but susceptible to inclusion on Annex 3 such as Amtrak, Comsat and KAA, the result of the United States' "control" test would be to subject those entities to coverage under Annex 1. Given the lower thresholds applicable to procurements by Annex 1 entities, the result of the United States' test would be not only to reduce Annex 3 to a nullity, but also to expand greatly signatories' GPA obligations.[316]

4.232 Korea argues that for the four reasons mentioned above, KAA should not be considered covered by virtue of its "attachment," "connection" or "affiliation" to MOCT. Korea states that there is no textual basis in the GPA to expand Korea's GPA commitments to KAA in the manner proposed by the United States, and the test provided by the GPA to secure coverage of non-listed entities – Article I:3 – is not satisfied under the factual circumstances of this case.[317]

4.233 **In response, the United States refers** to its arguments in paragraphs 4.118 and 4.146.

4.234 **Further, Korea argues** that it did not commit, or intend to commit, to GPA coverage for KAA, whether procurements were for the IIA or "other regional airports for which KAA is responsible." Korea reiterates that KAA is responsible for the management of existing regional airport operations, a task that may involve incidental repair and maintenance, and procurements therefor. Korea states that the only significant construction authority possessed by KAA was its responsibility for procurement for the IIA project, during the period December 1991 – August 1994. Korea argues that there is no evidence suggesting that Korea committed to coverage for KAA's procurements. Korea also argues that it did not commit to coverage for procurements undertaken on KAA's behalf by the Office of Supply since Korea's commitment to Annex 1 coverage for the Office of Supply is limited to purchases for entities on Annex 1 only and KAA is not on Annex 1.[318]

6. Appendix I: General Note 1(b)

(a) Ordinary Meaning of Note 1(b)

4.235 **The United States argues** that General Note 1(b) confirms that there are in fact "entities listed in Annex 1" responsible for "procurement of airports." The United States asserts that the reference to airport procurement entities can only be a reference to MOCT given that it is the only enumerated entity under Korea's Annex 1 with a mandate to oversee "all matters concerning public roads, railways, air and maritime transport . . . [such as the] construction and administration of roads

[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid.*
[317] *Ibid.*
[318] Korea's Answer to Question 21 from the Panel, dated 29 November 1999.

and airports and all other matters concerning construction and transport safety affairs . . . [including] the construction of the . . . Inchon International Airport"[319] and MOCT, the NADG, KAA, KOACA, and IIAC are the only entities Korea has held out as being "responsible" for procurements of airports.

4.236 **In response, Korea argues** that General Note 1(b) to Korea's GPA Appendix I does not convert KAA, KOACA or IIAC into covered entities. Korea notes in this respect that since December 1991, KAA, KOACA and IIAC have been the entities responsible for IIA procurement, and that KAA, KOACA and IIAC are not covered entities by virtue of Korea's Annex 1 or the Notes thereto. Korea argues that even an *a contrario* reading of General Note 1(b) does not imply that IIA procurement is extended to US suppliers and service providers under the terms of the GPA since the Korean entities conducting such procurements are not "entities listed in Annex 1."

4.237 Korea further notes that as a matter of reciprocity, General Note 1(b) withholds GPA benefits for "procurement for airports by the entities listed in Annex 1" from suppliers and service providers of the member States of the European Communities, Norway and Switzerland.

(b) Entities to Which General Note 1(b) Refers

(i) Seoul and Pusan Regional Aviation Offices

4.238 **Korea states** that the reference to airport procuring authorities in General Note 1(b) is a reference to the Seoul and Pusan Regional Aviation Offices. Korea notes that these are MOCT's "special local administrative organs," and, therefore, as covered entities pursuant to Note 1 to Korea's Annex 1, are charged with procurement responsibility associated with construction and maintenance of Yangyang, Yeosoo, Muan, Daegu, Pohang, Yecheoon and Uljin Airports. Korea further notes that the Regional Aviation Offices may conduct such procurement or request that Office of Supply procure on their behalf. Korea asserts that, in either case, procurement for these airports is subject to the GPA.

4.239 In response to a question from the Panel, Korea provides details of the construction projects (including value) that have been undertaken by the Seoul and Pusan Regional Aviation Offices since 1990.[320] Further, Korea refers to examples of contracts awarded by the Office of Supply, in conjunction with MOCT's Seoul and Pusan Regional Aviation Offices.[321]

4.240 **In response, the United States refers** to its arguments in paragraphs 4.340, 4.402 and 4.403.

(ii) Covered and Uncovered Entities

4.241 **Korea explains** its rationale for dividing airport procurement between various entities and, for submitting some, rather than all, of those procurement entities to coverage under Annex 1 of the GPA. Korea states that there are differences between construction of and attendant procurement for a $6 billion off-shore airport on reclaimed land, and procurement for the considerably smaller projects.

4.242 Korea also states that it had a right to commit to coverage for certain entities, and to exclude others. Korea asserts that every single GPA signatory did likewise. Korea notes that the United States, for example, excluded the Federal Aviation Administration ("FAA") and its Office of Airports from coverage under Annex 1, but included other airport procurement authorities such as the Port Authority of New York and New Jersey under Annex 3. Korea further notes that although both the FAA's Office of Airports and entities like the Port Authority of New York and New Jersey each have

[319] "History of the Ministry of Construction and Transportation," found on MOCT's Internet website at http://www.moct.go.kr/mcte/mct_about/mctha2.htm.
[320] Korea's Answer to Question 17 from the Panel, dated 3 November 1999.
[321] Exhibits Kor-61A – Kor-61B.

airport procurement responsibilities, the United States considered it legitimate to exclude the FAA from coverage while including the Port Authority.

4.243 In response to a question from the Panel concerning the difference in categorization of the IIA authorities on the one hand and Seoul and Pusan Regional Airport Authorities on the other, Korea also states that the procurement responsibility associated with construction and maintenance of existing airports conducted by the Regional Aviation Offices is in the nature of routine maintenance and relatively minor construction, which is not on the scale of the construction of a new airport of the magnitude of IIA. Korea further states that since this construction and maintenance is well within the capabilities of the Regional Aviation Offices, Korea has lodged it there, along with the authority for any necessary procurement. Korea finally states that, because of the magnitude of the IIA project, Korea found that an entirely separate entity, devoted only to that task, was needed. Korea also refers to its arguments in paragraphs 4.443 - 4.445.

(c) Coverage of "New Airport Construction" under Korea's Annex 1

4.244 **In response to a question from the Panel, the United States says** that it interpreted the reciprocal derogations between the EC and Korea regarding airports as an indication that Korea and the EC could not agree that each was offering "comparable and effective access [to their] relevant markets."[322] The United States further states that, moreover, the United States interpreted these derogations as a confirmation that Korea's GPA offer indeed included coverage of "new airport construction" under its Annex 1, consistent with Korea's July 1991 statement regarding the coverage of MOCT and the Office of Supply – as entities responsible for the IIA project – under Annex 1. The United States contends that it was able to draw this conclusion because Korea's country-specific derogation, which listed the EC and others, did not include the United States when carving out "procurement for airports by the entities listed in Annex 1."[323]

4.245 **Korea argues that** it is not at all apparent why Korea's General Note 1(b) is confirmation that Korea's GPA offer indeed included coverage of "new airport construction" under its Annex 1 as postulated by the United States. Korea argues that if an *a contrario* interpretation of General Note 1(b) is adopted, one could presume that "procurement for airports by the entities listed in Annex 1" – the actual language of General Note 1(b) – would be subject to GPA-consistent terms for US suppliers and service providers. However, Korea states that there is no specification of "new airport construction," as asserted by the United States; rather, any "procurement for airports" by any Annex 1 entity is covered.[324]

7. Appendix I: Annex 3

(a) Procuring Entities under Annex 3

4.246 **Korea argues** that if, in fact, it had intended to cover KAA, KOACA and the IIAC under the GPA, it would have listed those entities under Annex 3 rather than Annex 1 of Appendix I to the GPA given their independent legal existence and their association with a public-purpose project.

(i) Independent Legal Persons

4.247 **Korea argues** that like KAA, KOACA and IIAC, each of the entities listed on Annex 3 of Korea's Appendix I were established by a special legislative act, rather than by an order or directive issued by an entity included on Annex 1 and were created to engage in particular public-purpose commercial or non-commercial tasks.

[322] See EC General Note 1 and Korea General Note 1 to Appendix I of the GPA.
[323] US Answer to Question 17 from the Panel, dated 29 November 1999.
[324] Korea's Response to the US Answer to Question 17 from the Panel, dated 29 November 1999.

4.248 Korea also argues that the entities listed on Annex 3 are, like KAA, KOACA and IIAC, independent legal or "juristic" persons under Korean law, as stated in their authorizing statutes. Korea states that this is not the case with an entity, such as NADG, established by an Annex 1 entity on its own authority.

4.249 Korea argues that as legal persons under Korean law, Annex 3 entities, like KAA, KOACA and IIAC, are able to enter into binding legal commitments on their own behalf. Each has its own officers and directors, and its employees are not government civil servants or employees.

4.250 In support of its argument, Korea notes that Japan's New Tokyo International Airport Authority ("NTIAA"), like KAA, KOACA and IIAC, is a "juridical person."[325] Korea notes that NTIAA is led by officers who are appointed and dismissed by, or subject to the approval of, the Japanese Minister of Transport.[326] Korea further notes that NTIAA employees are not government civil servants but, rather, are hired and fired by the president of NTIAA itself. Finally, Korea notes that despite their private sector status, NTIAA officers and employees are considered "employees engaged in public duties" for the purposes of the Japanese *Criminal Act*.[327]

4.251 **In response, the United States argues** that whether an entity is a separate legal entity or not is irrelevant. In support of its argument, the United States asserts that a GPA member can choose to put any of its entities in Annex 1 or Annex 3, provided that the other GPA members agree to this. Therefore, whether an entity is a separate legal entity or not is irrelevant.

4.252 Further, the United States argues that a separate legal entity is normally created for the purposes of limiting liability and providing continuity. The United States also argues that an organization need not possess this legal fiction to be considered an "entity." The United States refers to Black's Law Dictionary which defines a separate legal entity of a corporation as follows:

> "An artificial person or legal entity created by or under the authority of the laws of a state. An association of persons created by statute as a legal entity. The law treats the corporation itself as a person, which can sue and be sued. The corporation is distinct from the individuals who comprise it . . . [and it] survives the death of its investors, as the shares can usually be transferred."[328]

4.253 Accordingly, the United States argues that applying these notions to the facts of this case, subdivisions such as the New Airport Development Group are "entities," even though they are not separately legal. The United States additionally argues that, in fact, the New Airport Development Group has its own director and its own regulations. The United States asserts that an Annex 1 entity does not automatically become an Annex 3 entity because it becomes a separate legal entity. The United States asserts that Korea's own National Railway Administration confirms this principle. The United States concludes that, thus, the status of an entity is irrelevant to the determination of this dispute.

(ii) Specific Task or Purpose

4.254 **Korea argues** that like KAA, KOACA and IIAC, the entities included on Korea's Annex 3 list were established to engage in tasks that, while closely linked to the public interest, are for self-evident reasons generally considered better or more efficiently performed by an entity outside the traditional central government apparatus. Korea states that constructing or maintaining major utility or transportation projects is just such a task. Korea notes that Korea's Annex 3 list includes the Korea

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[325] *New Tokyo International Airport Authority Act*, Article 3.
[326] *Ibid*. Articles 11, 14.
[327] *Ibid*. Article 19.
[328] Black's Law Dictionary (6th ed., 1990), p. 340.

Highway Corporation and the Korea Gas Corporation. Korea also notes that, similarly, the United States' Annex 3 list includes the Port Authority of New York and New Jersey, which, among other things, oversees metropolitan New York's three major airports – JFK International, Newark International and LaGuardia. Korea asserts that building or maintaining an airport fits in this category.

4.255 To elaborate on this point, Korea also notes that each Annex 3 entity, as with KAA, KOACA and IIAC, is associated with a relatively narrow task or large-scale public project, rather than with the broad portfolio typically associated with a government ministry. Korea further notes that, like the IIA project, the tasks or projects with which Annex 3 entities are charged, while closely linked to the public interest, are still rather "tangential to the essential function of government," in the words of the United States itself.[329] Korea states that placing those tasks in the hands of entities isolated from the constraints of large government bureaucracy and structured to more readily attract private capital facilitates prompt completion of the project.

(iii) Subject to Central Government Oversight

4.256 **Korea argues** that its Annex 3 entities are, like KAA, KOACA and IIAC, subject to certain oversight by central government entities, despite their status as independent legal persons under Korean law. Korea further argues that given their key roles in major public purpose projects, and the implications of their actions on public safety and welfare, this oversight is necessary and justifiable to ensure that the public interests inextricably linked to the performance of their tasks are adequately protected and observed. Korea asserts that there is nothing inconsistent with government oversight of Annex 3 entities. Korea further asserts that MOCT oversight to which KAA, KOACA and IIAC are subject would not prevent Korea from placing those entities on its Annex 3 list, had it decided to do so or had its negotiating partners demanded that it do so. Korea notes that the IIA project and the projects with which Korea's Annex 3 entities are charged are linked closely enough to the public interest to require, as the United States itself has stated, "retained links with the Government" sufficient "to ensure that the interests of the public are reflected ... ."

4.257 In support of this argument, Korea notes that Japan's New Tokyo International Airport Authority (NTIAA), is included on Japan's Annex 3 despite the significant oversight by Japan's Ministry of Transport to which the Authority is subject. Korea states that reference to the *New Tokyo International Airport Authority Act*, which bears remarkable resemblance to the *Seoul Airport Act*, the *Korea Airport Corporation Act* and the *Korea Airport Construction Authority Act*, demonstrates this fact.

4.258 **In response, the United States argues** that, as a factual matter, KAA and KOACA are different in nature from the entities found in Korea's Annex 3. The United States notes that as the Panel itself noted in a question to the Parties, "[t]he entities listed in Annex 3 are all referred to as 'Corporations' while the KAA and [KOACA] is an 'Authority'." The United States refers to its arguments in paragraph 4.442.

4.259 **Korea further states** that while the Japanese Minister of Transportation is responsible for drawing up a "master plan" for the airport[330], NTIAA is charged with executing the plan[331], pursuant to a "Program of Duty" authored by NTIAA and subject to approval by the Minister.[332] Further,

[329] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), p. 44 (describing the activities of Amtrak, which is charged with development and maintenance of a national railway system, and Comsat, which is charged with the establishment of a commercial communications satellite system).

[330] *New Tokyo International Airport Authority Act*, Article 21.

[331] *Ibid*. Article 22.

[332] *Ibid*. Article 24.

Korea notes that similar to the entities responsible for IIA procurement, NTIAA is subject to the "supervision and inspection" of the Japanese Minister of Transportation.[333] Korea states that like KAA, KOACA and IIAC, NTIAA is required to observe significant reporting requirements, submitting for the Minister of Transportation's approval, prospectively, an annual business plan, budget plan and funding plan[334], and retrospectively, detailed financial statements and statements of accounts.[335] NTIAA may also be instructed by the Minister to submit reports on various financial matters, and must open its books for inspection by individuals sent by the Minister.[336] Finally, Korea states that, like the entities responsible for IIA procurement[337], NTIAA may obtain loans or issue airport bonds[338], after receiving approval from the appropriate Minister.

4.260 Korea argues that this example demonstrates that GPA signatories have included airport authorities on Annex 3 despite the subjection of those authorities to at least the degree of oversight by an Annex 1 entity as is maintained in the case of the Korean entities responsible for IIA procurement.

4.261 **In response, the United States argues** that Korea is one GPA signatory that included airport authorities in Annex 1 since it has repeatedly maintained that the Seoul and Pusan regional airport authorities are covered under Korea's Annex 1.[339]

4.262 **In further support of its argument, Korea refers** to the Act authorizing the activities of the Small and Medium Industry Bank, an entity listed on Korea's Annex 3.[340] Korea notes that despite the Bank's status as an independent legal person[341], oversight by the Minister of Finance and Economy, an Annex 1 entity, is noted in this Act in a number of provisions.[342]

4.263 Korea notes that, in a similar fashion to KAA and KOACA, officers and directors of the Small and Medium Industry Bank are appointed and dismissed by either the President of Korea or the Minister of Finance and Economy.[343] Like KAA, KOACA and IIAC, Bank employees are not government civil service employees, but are appointed and dismissed by the Bank itself.[344] Although not public officials, officers of the Bank, as in the case of the entities responsible for IIA procurement, are in the case of criminal acts treated as such and subject to the terms of the *Korean Criminal Act*.[345]

4.264 Korea notes that to engage in activities beyond those specifically enumerated by the *Industrial Bank of Korea Act*, the Small and Medium Industry Bank must obtain the approval of the Minister of Finance and Economy[346]; KAA, KOACA and IIAC must similarly receive MOCT approval to go beyond the scope of their specifically-enumerated portfolios.[347]

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[333] *Ibid*. Articles 36-37.
[334] *Ibid*. Article 26.
[335] *Ibid*. Article 27.
[336] *Ibid*. Article 37.
[337] *KAA By-laws*, Article 7(3); *Korea Airport Construction Authority Act*, Articles 16, 28, 25.
[338] *New Tokyo International Airport Authority Act*, Article 29.
[339] US Response to Korea's Answer to Question 11 from the Panel, dated 29 November 1999.
[340] *Industrial Bank of Korea Act* Act No. 641, 1 July 1961 (as amended by Act No. 5529, 28 February 1998).
[341] *Ibid*. Article 3(1).
[342] *Ibid.* Article 6(2), Article 26(1), Article 26(2), Article 26(3), Article 28, Article 33-2(1), Article 33(2-2), Article 33(9), Article 35(1), Article 35-2, Article 37(2), Article 37(3), Article 44(1), Article 44(2), Article 46(1), Article 46(2), Article 48(1) Article 48(3) Article 48(4) Article 49.
[343] *Industrial Bank of Korea Act*, Article 26.
[344] *Ibid*. Article 31.
[345] *Ibid*. Article 32.
[346] *Industrial Bank of Korea Act*, Article 33(9).
[347] *Korea Airport Corporation Act*, Article 7(7); *Korea Airport Construction Authority Act*, Article 7(4); *Law on Inchon International Airport Corporation*, Article 10(1)(6).

4.265 Korea further notes that the Bank, KAA, KOACA and IIAC all have provisions in their respective statutes subjecting them to the "supervision and management" or the "direction and supervision" of the relevant ministry.[348] Korea states that the Bank is also required to prepare for the Minister's review, and to obtain approval from the Minister for, its business plans, its operations manual and its annual budgets and reports.[349] Korea also states that the Bank may, moreover, be instructed by the Minister to submit reports on any matters "as may be deemed necessary," and must open its books to designated officials upon request by the Minister.[350] Korea asserts that the entities responsible for IIA procurement are subject to nearly identical reporting requirements.[351]

4.266 As yet another example, Korea refers to the Act authorizing the activities of the Korea Development Bank, another Annex 3 entity.[352] Korea states that despite the Bank's status as an independent legal person[353], oversight by the Minister of Finance and Economy, an Annex 1 entity, is noted in this Act in a number of provisions.[354]

4.267 Korea states that, like KAA and KOACA, officers and directors of the Korea Development Bank are appointed by either the President of Korea or the Minister of Finance and Economy.[355] Korea further states that like KAA, KOACA and IIAC, Bank employees are appointed and dismissed by the Bank itself, and therefore are not government employees.[356] Korea notes that Bank officers, while not public officials, are, like officers of the IIA procurement entities, treated as public officials and subjected to the terms of the *Korean Criminal Act* if criminal acts are committed.[357]

4.268 Further, Korea notes that if the Bank wishes to engage in activities beyond those specifically enumerated by the *Korea Development Bank Act*, it must obtain the approval of the Minister of Finance and Economy.[358] The entities responsible for IIA procurement would in this situation also need MOCT approval.

4.269 Korea states that the Bank is subject to overall supervision by the Minister of Finance and Economy.[359] Korea further states that the Bank must also prepare for the Minister's review, and obtain approval from the Minister for, its operational programme, its service manual and its annual budgets and reports.[360] Korea notes that the Minister may also instruct the Bank to submit reports on any matters "as he deems it necessary," and must open its books to designated officials upon request

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[348] *Industrial Bank of Korea Act*, Article 46; *Korea Airport Corporation Act*, Article 28; *Korea Airport Construction Authority Act*, Article 31; *Law on Inchon International Airport Corporation*, Article 16.

[349] *Industrial Bank of Korea Act*, Articles 35, 35-2, 37, 49.

[350] *Ibid*. Article 48.

[351] *Korea Airport Corporation Act*, Articles 19, 20; *Korea Airport Construction Authority Act*, Articles 21, 22; *Law on Inchon International Airport Corporation*, Article 17.

[352] *Korea Development Bank Act*, Act No. 302, 30 December 1953 (as amended by Act No. 5505, 13 January 1998).

[353] *Ibid*. Article 2(1).

[354] Article 5(2), Article 12(1), Article 12(2), Article 12(3), Article 14, Article 17, Article 18(8), Article 20(1), Article 21, Article 24, Article 37(2), Article 37(3), Article 37(6), Article 47(1), Article 47(2), Article 48(1), Article 48(2), Article 48(3), Article 49(1), Article 49(2), Article 54-3(2), Article 54-3(3), Article 54-3(4), Article 55(1), Article 55(2), Article 55(3), Article 57.

[355] *Ibid*. Article 12.

[356] *Ibid*. Article 16.

[357] *Ibid*. Article 17.

[358] *Ibid*. Article 18(8).

[359] *Ibid*. Article 47.

[360] *Ibid*. Articles 20, 21, 24, 37.

by the Minister.[361] Korea argues that the entities responsible for IIA procurement are subject to nearly identical reporting requirements.[362]

(iv) Choice between Annex 1 and Annex 3

4.270 **In response to a question from the United States** as to whether members of the GPA could choose to place any entity within Annex 1 or Annex 3, regardless of the project or sector that entity is procuring for, **Korea** confirms that this was its understanding.

4.271 Korea states that it is aware of nothing in the GPA that, in principle, would control the Annex in which a covered entity is placed. However, Korea notes that Annex 1 covers "central government entities" while Annex 3 covers "other entities." Korea notes further that Korea and other parties to the GPA have tended to put ministries and the like in Annex 1 and "other entities," such as Airport Authorities and government-invested corporations, in Annex 3.[363] Korea further notes that Annex 2, is reserved for specific kinds of entities, while Annexes 4 and 5 are reserved for specific kinds of procurements.

4.272 Korea argues that it would not have been alone in listing KAA, KOACA and the IIAC under Annex 3 rather than Annex 1 of Appendix I to the GPA. In support of this argument, Korea notes that on their respective Annex 3 lists, the United States has included the Port Authority of New York and New Jersey, which has jurisdiction over metropolitan New York's three major airports; Hong Kong has included its Airport Authority; and Japan has included the New Tokyo International Airport Authority. Similarly, on their Annex 3 lists, Israel has included its Airport Authority; Norway has included its National Civil Aviation Administration; Switzerland has included its various airport authorities; and Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom, as member States of the European Communities, have listed their airport authorities.

4.273 **In response, the United States argues** Korea's assertion that it and other parties to the GPA have tended to put ministries and the like in Annex 1 and "other entities," such as Airport Authorities and government-invested corporations, in Annex 3 is contradicted by the fact that Korea's Regional Aviation Authorities are placed in Annex 1. Further, the United States notes that Korea's attempt to define Annex 3's "other entity" is without textual support. The United States argues that it is clear that the text of the GPA does not define this term, and there is no basis to interpret the term by way of "trends" that Korea itself does not follow.

4.274 **In response to a question from the United States** as to why the Seoul and Pusan Regional Aviation Offices are covered under Annex 1 rather than Annex 3, **Korea states** that the procurement responsibility associated with construction and maintenance of airports conducted by the Regional Aviation Offices is in the nature of routine maintenance and relatively minor construction and not on the scale of the construction of a new airport of the magnitude of IIA. Korea states that since the task is well within the capabilities of those Offices, Korea chooses to assign it to them. Korea notes that because they are internal to MOCT, and not separate legal entities, they are covered by the GPA.[364]

4.275 **In response, the United States notes** that, on the one hand, Korea claims that the activities of building and maintaining an airport must be conducted by Annex 3-type entities and, on the other hand it represents that the Seoul and Pusan Regional Airport Offices, which are responsible for the construction and maintenance of airports, are covered under Annex 1. The United States contends

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[361] *Ibid*. Article 49.

[362] *Korea Airport Corporation Act*, Articles 19, 20; *Korea Airport Construction Authority Act*, Articles 21, 22; *Law on Inchon International Airport Corporation*, Article 17.

[363] Korea's Answer to Question 12 from the US, dated 3 November 1999.

[364] Korea's Answer to Question 11 from the US, dated 3 November 1999.

that a GPA Party can choose to place an entity under either Annex 1 or Annex 3, subject to agreement with other Parties, regardless of the procurement subject-matter or the type of entity. The United States notes that Korea has acknowledged this fact.

4.276 The United States argues that, moreover, as a factual matter, KAA and KOACA are different in nature from the entities found in Korea's Annex 3. Specifically, the entities listed in Annex 3 are all referred to as "Corporations" while the KAA (and KOACA) is an "Authority".

4.277 **In response to a question from the Panel, Korea notes** that there is no significance in the use of the term "authority" or "corporation" in the context of Korean Government entities. Korea states that the terms are used interchangeably. For example, the English translation of the *Korea Airport Corporation Act* of 14 December 1991 refers to the "Korea Airport Corporation" which in fact is KAA. Korea notes that KAA (or "KAC") is a separate juridical person, as are the other entities in its Annex 3. Under Korean law, both authorities and corporations must have by-laws and be registered.[365]

(b) Shifting of an Entity from Annex 1 to Annex 3

4.278 The Panel pointed out to the Parties that the Korean National Railway Administration is listed as an Annex 1 entity but with a note that it may be made into a public corporation and shifted to Annex 3 without further compensation. The Parties were asked to discuss the relevance of this, if any, to the interpretation of the Korean Schedule.[366] **In response, Korea notes** that the Korean National Railway Administration was placed in Annex 1 because it is a central government entity. With privatization (which has not yet occurred) it would become a separate legal person, and therefore, would be more appropriate for Korea's Annex 3, which consists of separate legal persons. Korea states that it is because KAA is a separate legal person that Korea would have placed it on its Annex 3 offer had Korea intended KAA to be a covered entity.[367]

4.279 **In response to Korea's answer, the United States notes** that the "privatization" of an entity has nothing to do with its becoming a "separate legal entity." In the view of the United States, these are two completely different concepts that have no relevance to each other.

4.280 In response to the Panel's question, the United States notes that Korea's explanatory note concerning the Korean National Railway Administration implicitly recognizes two legal points. First, shifting an entity from one Annex to another is a substantive alteration in a mutually agreed balance of concessions between Members. Second, if a GPA concession is unqualified, and does not provide explicitly for the possibility that an entity will be shifted to another Annex, then any such shift in coverage is inconsistent with the concession.[368]

4.281 The United States argues that this legal point can be understood all the more clearly by drawing an analogy to the law of tariff concessions. According to the United States, it is possible to make a tariff concession subject to a qualification regarding future changes in treatment. To illustrate, the United States considers the example of a US concession on Vitamin B12, which was made subject to a general note reserving the ability of the importing country to adjust the duty rate in the event that a particular customs valuation method was eliminated; because of this general note (and the factual circumstances of its application).[369] The United States notes that a panel found that conversion of the duty rate in question was not inconsistent with US obligations. The United States further states that where a tariff concession is unqualified, any excess of the duty rate over the bound rate or a switch in

[365] Korea's Answer to Question 8 from the Panel, dated 3 November 1999.
[366] Panel's Question 30 to the Parties, dated 20 October 1999.
[367] Korea's Answer to Question 30 from the Panel, dated 3 November 1999.
[368] US Answer to Question 30 from the Panel, dated 3 November 1999.
[369] Analytical Index notes at p. 71.

the basis for levying duties (*e.g.,* from specific to *ad valorem* or vice versa) is inconsistent with the legal obligations of that Member under Article II.[370]

8. Coverage of Entities versus Coverage of Projects

4.282 **The United States argues** that all airport construction in Korea should be covered by Korea's GPA commitments. The United States further argues that the GPA covers projects and sectors by way of entities and that all airport construction in Korea should be covered by Korea's GPA commitments. The United States asserts that this is apparent throughout the text of the GPA, where Members often refer to sectors rather than entities. The United States notes that, for instance, Korea's General Note 1(b) refers to "procurement for airports by the entities listed in Annex 1," Korea's General Note 1(c) refers to "procurement for urban transportation," and Korea's Annex 3 refers to "purchases of common telecommunication commodity products." The United States notes that in all three cases, entities are identified by what they procure, that is, their projects or sectors, and not by their names. The United States notes that, likewise, exceptions to coverage under the GPA are often expressed in terms of projects or sectors, rather than entity names. Finally, Annex 4 of the GPA does not even refer to entities, but solely to sectors.

4.283 **Korea argues** that the United States' claim that "all airport construction in Korea" should be covered by Korea's GPA commitments, regardless of which entity conducts procurement for such construction, must be rejected as anathematic to the underlying premises of the GPA. In Korea's view, the United States argues that it bargained for coverage of IIA procurement under Korea's Annex 1. However, Korea asserts that Korea's Annex 1 does not identify projects subject to the GPA. Korea further argues that the GPA does not identify "covered projects." Rather, according to Korea, Korea's Annex 1 and the Notes thereto identify "covered entities."

4.284 **The United States argues in response** that if the GPA merely covers particular entities and not particular projects, Members could then transfer procurement authority out of a covered entity without notification or compensation, and still claim to be acting consistently with the Agreement. According to the United States, this would render the GPA a nullity, because the GPA would only end up covering entities that lack procurement authority.

4.285 **In response, Korea refers** to its arguments in paragraph 4.26.

9. Amendments to Appendix under Article XXIV:6

4.286 **The United States argues** that Article XXIV:6 provides the only procedure within the GPA according to which a Party may alter its annexes. The United States contends that any changes to a Party's schedule of concessions, no matter how minor, must be notified to the WTO Committee on Government Procurement. This includes transfers of procurement authority from a covered entity to a non-covered entity, since such transfers will disrupt the balance of rights and obligations between the Parties to the GPA. The United States argues that Korea has never used Article XXIV:6 to notify the Committee of any of its transfers of procurement authority for the IIA construction project. The United States argues that, by not notifying the Committee (assuming Korea did not violate Article XXIV:6), Korea is in essence confirming that these transfers took place within one "central government entity" – namely, MOCT.

4.287 The United States further argues that any transfer of procurement authority from a branch office of a covered entity to a subsidiary organization of the same entity or from a subsidiary organization of a covered entity to another subsidiary organization of the same entity, need not be notified to the Committee, for the procurement authority remains within that covered entity. The schedule of concessions do not change and the "balance of rights and obligations" is not disrupted.

[370] US Answer to Question 30 from the Panel, dated 3 November 1999.

The United States concludes that Korea need not utilize the procedures of Article XXIV:6 for no changes were made to its schedule of concessions with regard to airport procurement for the IIA project.

4.288 **Korea argues** in response that Article XXIV:6 of the GPA does not apply given that authority had been transferred from a non-covered entity to other non-covered entities. It argues that Korea has not shifted procurement responsibilities from covered to non-covered entities in order to circumvent its obligations under the GPA. Rather, Korea asserts that those procurement responsibilities have, since December 1991, always rested with non-covered entities.[371]

4.289 Korea argues that neither the United States nor the European Communities claim that the transfer of responsibility for IIA procurement from KAA to KOACA, or from KOACA to IIAC, effected any change cognizable under the provisions of the GPA since, for the purposes of the United States' and the European Communities' claims, KAA, KOACA and IIAC are essentially the same. Korea states that it agrees with this position. Korea argues that, accordingly, the only remaining transfer of responsibilities about which the United States and the European Communities apparently complain is the "transfer" of responsibility for IIA procurement from MOCT to KAA. Korea reiterates that that event occurred in December 1991, five years before the effective date of the GPA for Korea, and two years before Korea submitted its final offer for accession to the GPA on 15 December 1993. Korea states that no GPA commitments were incumbent upon Korea at that time.

4.290 Finally, Korea notes that any alleged violation of Article XXIV:6 is not within the Panel's terms of reference.

B. PREPARATORY WORK AND OTHER EVIDENCE

1. Negotiation of the GPA

(a) Article I:1(c) of the Tokyo Round GPA and Annex 3 of the Uruguay Round GPA

4.291 **Korea notes** that like the Uruguay Round GPA, the Tokyo Round GPA applied only to procurements "by the entities subject to this Agreement."[372] Article I:1(c) of the Tokyo Round GPA, however, spoke directly to the issue of "control" raised by the United States' proposed "control" test:

> "1. This Agreement applies to:
>
> . . . .
>
> (c) procurement by the entities under the direct or substantial control of Parties and other designated entities, with respect to their procurement procedures and practices. Until the review and further negotiations referred to in the Final Provisions, the coverage of this Agreement is specified by the list of entities, and to the extent that rectifications, modifications or amendments may have been made, their successor entities, in Annex I."[373]

4.292 Korea states that the United States discussed the implications of Article I:1(c) extensively in a report issued by its International Trade Commission regarding the Tokyo Round GPA.[374] According

[371] Korea notes that since obligations under the GPA were not effective until 1 January 1997, it is more accurate to state that IIA procurement has since December 1991 rested with entities that would not have been covered entities, had the GPA been effective at the time.

[372] Tokyo Round GPA, Article I:1(a).

[373] *Ibid.* Article I:1(c).

[374] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), pp. 26-28, 38-46.

to Korea, in that report, the United States concludes that the "direct or substantial control" test included in Article I:1(c) was merely a "normative rule" and that "Annex I is clearly the sole determinant of entities covered."[375]

4.293 Korea states that, according to the United States, however, the "normative" control test in Article I:1(c) was important, as it was to be "the guide for future negotiations on expanded coverage."[376] Korea further quotes: "the code is aimed at government ministries [sic] and their subdivisions – not the myriad organizations tangential to the essential function of government."[377] Korea states that the United States cited in the USITC report examples including the United States' National Rail Passenger Corporation, known as "Amtrak," and the Communications Satellite Corporation, known as "Comsat."[378] Determining whether coverage should be extended to these types of "myriad organizations tangential to the essential function of government," the United States concluded, was to be left to future negotiations; "negotiations rather than normative rules will always be determinative."[379]

4.294 Korea states that, thus, while the control test included in Article I:1(c) of the Tokyo Round GPA was, according to the United States, not binding, the United States characterized it as "the guide for future negotiations" and "perhaps . . . the objective to which parties will refer when establishing the initial list and later in review and negotiation."[380]

4.295 **The United States notes** that Article I:1(c) did "serve as the starting point for future negotiations," for it was during the Uruguay Round that a new category of covered entities, Annex 3, was conceived. Article I:1(c) was excluded from the new GPA, not because the negotiators rejected the "control" concept, but because Annex 3 made it unnecessary.

(i) Deletion of Article I:1(c)

4.296 **Korea agrees that** while there was a control test in Article I:1(c) of the Tokyo Round GPA and despite the fact that the "control" concept was to serve as the starting point for future negotiations, the negotiators excluded such a test for the Uruguay Round GPA. Korea notes that, in other words, the Uruguay Round negotiators rejected the notion of covering unnamed entities based on their control by named entities.

4.297 Korea also argues that not even the "normative" version of the "control" test included in Article I:1(c) of the Tokyo Round GPA was retained in the Uruguay Round GPA and that no remnant of the "control" test remains. In Korea's view, if the negotiators of the Uruguay Round GPA had intended to take up the invitation from the Tokyo Round negotiators to change the merely "normative" version of the control test included in Article I:1(c) of the Tokyo Round GPA into a binding, determinative test in the Uruguay Round GPA, they would have made some indication that they so intended in the text of the Agreement. Instead, states Korea, they rejected even the Tokyo Round's "normative" control test.

4.298 Korea states that it is implausible to accept that the GPA negotiators, who thought the "control" test important enough even in its strictly "normative" form to include it in the text of the Tokyo Round GPA, would have eliminated any mention of such a test from the text of the Uruguay

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[375] *Ibid*. p. 26. See also *Ibid*. pp. 27-28 ("The Annex is in fact the exclusive rule for code application."); p. 28 ("The control test thus appears to impose no real obligation in implementation of the code . . ."); p. 38 (Covered entities "are only those found in Annex I."); p. 44 ("[T]he operations of entities not on Annex I will continue unaffected by the agreement.").

[376] *Ibid*. p. 26.

[377] *Ibid*. p. 44.

[378] *Ibid*.

[379] *Ibid*.

[380] *Ibid*. pp. 26, 28.

Round GPA while still intending to impose it as binding upon signatories to that Agreement. Korea states that in these circumstances, the United States' assertion that KAA, KOACA and IIAC should be subject to the GPA by virtue of a "control" test must be rejected.

4.299 **In response, the United States argues** that the language in Article I:1(c) of the Code is not found in the new GPA because it is no longer needed in the new Agreement. The United States reiterates that Article I:1(c) is merely a "guide for future negotiations on expanded coverage."[381] The United States contends that these "future negotiations" had already taken place in the Uruguay Round, during which time the goals that Article I:1(c) set forth were fulfilled when additional annexes to the GPA were agreed upon to cover "quasi-governmental purchasing agents" and other entities such as "political subdivisions" and "provincial governments." According to the United States, in other words, Article I:1(c) no longer exists in the new GPA, not because the Uruguay Round negotiators rejected the "control" concept, but because the additional annexes of the GPA made the provision redundant and unnecessary.[382]

4.300 **In response, Korea** refers to its arguments in paragraphs 4.310 and 4.311. Further, in support of its argument regarding the deletion of Article I:1(c) of the Tokyo round GPA, Korea notes that a similar situation was presented in *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear.* Korea, noting that a provision of the prior *MFA* was not carried over into the *Agreement on Textiles and Clothing*, states that the Appellate Body said that the disappearance of the provision "strongly reinforces the presumption" that a prior practice no longer was permissible. "This is the commonplace inference that is properly drawn from such disappearance," the Appellate Body observed. "We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen."[383]

4.301 Korea argues that the disappearance of the control test was not accidental or inadvertent oversight either. Korea argues that it was tried and found wanting, and was not continued. In Korea's view, the message from its disappearance is that only named entities, not other entities over which they may exert some control, are covered.

4.302 **In response, the United States argues** that Korea wrongly suggests that, on the basis of the *United States - Underwear* Appellate Body decision, a "presumption" exists in this case that a control test is not included in the GPA. First, the United States argues that such presumptions cannot be independently derived from the disappearance of language but must, instead, come from a *Vienna Convention* interpretation of the GPA. With the disappearance of the language acting as mere "reinforcement" of the presumption[384] the above explanation regarding the fulfilment of the goals of Article I:1(c) in the new GPA can easily distinguish the present dispute from that of *United States - Underwear*.[385]

4.303 Secondly, the United States argues that the "presumption" identified by the Appellate Body in *United States - Underwear* resulted from the Appellate Body's interpretation of Article 6.10 of the ATC[386] and not from the absence of language on retroactive application that had been in the Multifiber Arrangement.[387] Thus, according to the United States, the issue is whether the absence of a

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[381] USITC Report, p. 26.
[382] US Answer to Question 20 from the Panel, dated 29 November 1999.
[383] WT/DS24/AB/R (adopted on 25 February 1997), p. 17.
[384] Appellate Body report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R (adopted on 25 February 1997) ("*US - Underwear*"), p. 17.
[385] US Answer to Question 20 from the Panel, dated 29 November 1999.
[386] Appellate Body report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, p. 14.
[387] *Ibid.* pp. 16-17.

provision in a new text is evidence (not a presumption) that the new text does not include the meaning or concepts in the old text.

4.304 The United States notes that it believes that the instant case is distinguishable from the *United States - Underwear* case for the reasons set forth in the 1979 USITC report and, more specifically, the explanation regarding the fulfilment of the goals of Article I:1(c) in the new GPA. The United States notes that in *United States - Underwear*, the Appellate Body stated that when:

> "The above underscored clause of Article 3(5)(i), MFA, . . . disappeared with the supersession of the MFA by the new ATC; no comparable clause was carried over into Article 6.10 of the ATC. [Also, t]he Panel did not draw any operable inference from the disappearance of the MFA clause."[388]

4.305 However, according to the United States, unlike *United States - Underwear*, Article I:1(c) of the Code was in fact replaced by the additional annexes in the new GPA. The United States asserts that these annexes are "comparable clauses" that allow for the coverage of "quasi-governmental purchasing agents" and "political subdivisions." The United States further states that, unlike *United States - Underwear*, an "operable inference" may be drawn from the disappearance of Article I:1(c) of the Code, for with the creation of the additional annexes in the new GPA, Article I:1(c) – if maintained – would be redundant.[389]

4.306 The United States contends that, in addition, in this case, the absence of direct references to control in the GPA that had existed in the Tokyo Round GPA does not mean that the notion of control cannot exist in determining the coverage of entities under the GPA. The United States further states that, indeed, if the notion of control did not exist in the GPA, such an interpretation would render the interpretation of the GPA a nullity in contravention of numerous Appellate Body decisions. The United States argues that the implication of Korea's "no control" interpretation would be to allow GPA members to create new entities with exactly the same functions, personnel, and operation as listed entities. The United States contends that by eliminating the old listed entities, and preventing the piercing of the legal fiction of the new entity, Members could effectively avoid GPA disciplines. According to the United States, such a result would be contrary to the object and purpose of the GPA as reflected in its text and context.

(ii) Annex 3

4.307 **Korea notes** that, in relation to the comment by the United States referred to above at paragraph 4.295, the reason the Uruguay Round negotiators rejected the control test is "because Annex 3 made it unnecessary," Korea submits that this can only mean that entities controlled by Annex 1 entities are not subject to GPA coverage by virtue of that control, but by virtue of their inclusion in Annex 3.

4.308 Korea states, in agreeing with this conclusion, that at least four entities, legal persons in their own right but subject to the same supervisory control by MOCT that KAA, KOACA and IIAC are subject, are on Korea's Annex 3. Korea notes that they are the National Housing Corporation, the Water Resources Corporation, the Land Corporation and the Highway Corporation. Korea further notes, however, that KAA, KOACA and IIAC are not on Annex 3 and never have been. Korea argues that, by the analysis proposed by the United States and agreed to by Korea, the only place they could be listed is Annex 3, and because they are not there, they are not and never have been covered entities.

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[388] US Answer to Question 20 from the Panel, dated 29 November 1999 citing Appellate Body report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, pp. 16-17.

[389] US Answer to Question 20 from the Panel, dated 29 November 1999.

4.309 **The United States argues** that a GPA Party can choose to place an entity under either Annex 1 or Annex 3, subject to agreement with other Parties, regardless of the procurement subject matter or the type of entity. According to the United States, the negotiating history of Annex 3 confirms this:

> "The definition of Group C entities is of interest. The heading of Group C (or Annex 3) entities in the new Agreement, reads: "Other entities which procure in accordance with the provisions of this Agreement." The title suggests problems in defining what Annex 3 (Group C) would eventually cover. In the end, this heading was chosen as a compromise to refrain from defining Group C (Annex 3) entities and to leave it up to each delegation to list in Annex 3 what is wished to list, subject of course, to acceptance by its negotiating parties."[390]

4.310 **Korea states** that the United States' assertion that the additional annexes of the Uruguay Round GPA made Article I:1(c) of the Tokyo Round GPA redundant and unnecessary are unsupported by any evidence. Korea states that the United States proposes to overturn the principles of treaty interpretation included in the *Vienna Convention*, and the Appellate Body's reasoning regarding "the commonplace inference that is properly drawn from [the] disappearance" of the "direct or substantial control" test from the GPA, on the basis of nothing more than its own unsupported assertion that the drafters of the Uruguay Round GPA theoretically could have meant for Annexes 2 or 3 to replace or encompass the "control" concept.[391]

4.311 Korea states that, assuming, however, that the United States is correct, it has not explained why the result of its analysis is not merely to refer the Panel to the lists of Korean entities included in Annexes 2 or 3 of the Uruguay Round GPA. Korea notes that KAA does not appear on either of these lists. Korea asks why the United States insists that KAA is included on Annex 1 by virtue of the "control" allegedly exercised over it by MOCT, an Annex 1 entity, if the negotiators of the Uruguay Round GPA intended, when they "excluded" the control test included in Article I:1(c) of the Tokyo Round GPA to incorporate the concept of "control" in Annexes 2 or 3. Korea asserts that the result of the United States' theory should rather be to direct an interpreter of the GPA, and Korea's Appendix I, to Korea's Annexes 2 and 3.[392]

4.312 **In response, the United States argues** that Korea's argument takes the United States' comments out of context, and attributes an incorrect conclusion to its analysis of Article I:1(c) of the Code.[393]

(b) Relevance of Control to 1991 Amendments to IIA Legislation

4.313 **In response to a question from the Panel, Korea argues** that the reference to control in the Tokyo Round GPA, and its absence from the Uruguay Round GPA, is fatal to the US claim that KAA, KOACA and IIAC are covered under the GPA by virtue of the "control" allegedly exercised over them by MOCT. In Korea's view, even if, when responsibility for the Inchon airport project was assigned to KAA in December 1991, the United States relied on the Tokyo Round "control" test to assume that MOCT "control" over KAA would subject KAA to GPA coverage, everything changed when the Uruguay Round negotiators subsequently dropped the "control" test from the GPA. From that point on, the United States could no longer have reasonably expected that unlisted entities, not

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[390] Blank and Marceau, "The History of the Government Procurement Negotiations Since 1945," p. 113.

[391] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.

[392] *Ibid.*

[393] US Response to Korea's Answer to Question 5 from the Panel, dated 29 November 1999. The United States refers to the US Answer to Question 20 from the Panel, dated 29 November 1999, for what it says is an accurate presentation of its views regarding the normative "control" test of Article I:1(c) of the Code.

themselves listed on an Annex, would be covered by virtue of the control exercised over them by listed entities. As a matter of law, according to Korea, entities controlled by named entities, but not themselves named, no longer would be covered. Korea argues that to the extent the United States relied on the Tokyo Round GPA's "control" test, it did so at its peril once that test was eliminated by the Uruguay Round GPA negotiators.[394]

4.314 **In response to the same question from the Panel, the United States argues** that the reference to control in the Tokyo Round Procurement Code is irrelevant to any analysis about the US response (or lack thereof) to the 1991 amendments made to the *Act on Promotion of a New Airport for Seoul Metropolitan Area Construction*, the *Korea Airport Corporation Act* and the *By-Laws of Korea Airport Corporation* since the reference to control, found in Article I:1(c) of the Tokyo Round Procurement Code ("Code"), is actually unrelated to "central government entities."[395]

4.315 The United States argues that according to the 1979 USITC report, Article I:1(c) is essentially a "guide for future negotiations" to expand the Code coverage in two directions.[396] First, it suggests expanding the Code to apply to procurement by the "entities under the direct or substantial control of Parties." Secondly, it also suggests expanding the Code to apply to procurement by "other designated entities."

4.316 The United States argues that with regard to the expansion of coverage to procurements by "entities under the direct or substantial control of Parties," the 1979 USITC report states that "[t]he broader language 'direct or substantial control' apparently is intended to encompass not only governmental units but quasi-governmental purchasing agents as well." In other words, this control reference is not related to the control of "central government entities" over their subdivisions. Instead, it is referring to the control of Code parties (*i.e.*, the governments themselves) over their "quasi-governmental purchasing agents."[397]

4.317 As for the expansion of coverage to procurements by "other designated entities," the United States argues that the USITC report makes clear that this reference is not related to the concept of control and in addition, this reference is unrelated to "central government entities." According to the United States, instead, it is referring to procurement by those entities that are not "specified by the lists" in the Code[398] and are not "under the direct or substantial control of Parties" to the Code[399] but would nevertheless fall under the rubric of "government" procurement. The United States further argues that, according to the USITC report, this reference encompasses such entities as "political subdivisions" and "provincial governments."[400]

4.318 The United States concludes that it did not respond to the 1991 amendments made to the *Act on Promotion of a New Airport for Seoul Metropolitan Area Construction*, the *Korea Airport Corporation Act* and the *By-Laws of Korea Airport Corporation* because these amendments came about merely as a result of MOCT's decision to designate KAA as a project operator of the IIA project, with MOCT itself retaining ultimate authority and control over the project and over KAA. The United States argues that this is an example of an entity being controlled by another entity, and is irrelevant to the control reference in the Code because Article I:1(c) of the Code has nothing to do with the control of entities by "other entities." Instead, according to the United States, Article I:1(c) is referring to the control of entities by "Parties" to the Agreement.[401] The United States further argues

[394] Korea's Answer to Question 20 from the Panel, dated 29 November 1999.
[395] US Answer to Question 20 from the Panel, dated 29 November 1999.
[396] USITC report, p. 26.
[397] US Answer to Question 20 from the Panel, dated 29 November 1999.
[398] Article I:1(c) of the Code, second sentence.
[399] *Ibid.* first sentence.
[400] US Answer to Question 20 from the Panel, dated 29 November 1999, citing USITC report, pp. 25-26.
[401] Article I:1(c) of the Code.

that it is alluding to the coverage under the GPA of what the USITC calls "quasi-governmental purchasing agents," i.e., entities that are controlled by the governments themselves, and not by other entities.[402]

4.319 **In response, Korea argues that**, the United States' assertion that the "control" test in Article I:1(c) of the Tokyo Round GPA "is not related to the control of 'central government entities' over their subdivisions," and instead refers to "the control of Code parties (*i.e.*, the governments themselves) over their 'quasi-governmental purchasing agents'" is not supported by the 1979 US International Trade Commission Report, as the United States claims.[403]

4.320 Korea states that the quote extracted by the United States from the Report confirms, first of all, that Article I:1(c) refers to "governmental units" as well as "quasi-governmental purchasing agents."[404] Korea states that, moreover, in discussing the impact of the "control" test in Article I:1(c), the Report specifically considers whether Amtrak and Comsat would be covered under "the normative 'direct substantial control' rule," and goes on to catalogue the control exercised over those entities by central government entities listed on the United States' Annex I.[405] Korea states that whether characterized as "governmental units" or "quasi-governmental purchasing agents," Korea had demonstrated that the MOCT "control" to which the United States alleges KAA is subject is remarkably similar to the control to which Amtrak and Comsat are subject by US Annex 1 entities. Korea states that if KAA is subject to GPA coverage by virtue of this "control" test, so are Amtrak, Comsat, and many other non-listed "myriad organizations tangential to the essential function of government."[406]

(c) Coverage of Entities or Sectors

4.321 **The United States asserts** that the GPA's negotiating history confirms the interpretation that the GPA provides for the coverage of sectors by way of entities. Specifically, the United States notes that in the 1979 independent USITC report, the Commission made clear that, with regard to coverage, "The code approach is to define coverage in terms of procuring entities . . . and value of contracts, together with numerous exceptions." However, the goal of "maximum coverage of procuring entities must be attained while achieving an agreeable balance of coverage in terms of quality (type) and quantity (value) of goods procured," which meant that coverage is actually:

> "a function of four factors: (1) types of procurement actions; (2) value of the procured product; (3) identity of procuring entity; and (4) specific exclusions from coverage. Each of these factors must be taken into account when determining the applicability of the code to any government contract action."

4.322 The United States argues that it is apparent from this excerpt that entities were covered based on the sectors and projects that they procure for, and not on the identities of the entities themselves. In other words, the sectors and projects that an entity was responsible for were the major factors for countries in considering which entities they would seek to be covered under the GPA. The United States contends that when a balance of rights and obligations was established between two of these negotiating countries, the balance was often considered not in terms of the number or the names of the entities, but in terms of total procurement value and/or the quality (for example, future procurement opportunities for domestic industry) of the concession packages. The United States asserts that, in short, GPA negotiators bargained for what the entities bought, not for who the entities were.

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[402] US Answer to Question 20 from the Panel, dated 29 November 1999.
[403] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.
[404] USITC Report, p. 25.
[405] *Ibid*. pp. 41-44.
[406] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999, citing USITC Report at p. 44.

(d) "The History of the Government Procurement Negotiations Since 1945"

4.323 **The United States argues** that when interpreted according to its ordinary meaning, in its context and in light of the object and purpose of the GPA, the scope of "central government entity" in Annex 1 of the GPA includes coverage of its branch offices and subsidiary organizations unless otherwise provided for in the GPA.

4.324 The United States contends that the negotiating history of the GPA confirms this interpretation. Specifically, the United States refers to an article entitled, "The History of the Government Procurement Negotiations Since 1945" which notes that "[i]t was necessary for the Agreement to have the widest possible coverage. This principle was agreed in the OECD."[407] The United States contends that, to now exclude coverage of a listed entity's subordinate units would not only be contrary to the above, but would also rid the GPA of most of its substantive coverage, for coverage of an entity that excludes its subordinate units actually amounts to no coverage at all.

2. History of Korea's Accession

(a) Bilateral Negotiations Prior to Korea's Accession

4.325 In order to confirm its interpretation of "central government entity" in Korea's Annex 1, **the United States** looks to the preparatory work of the GPA and the circumstances of its conclusion pursuant to Article 32 of the *Vienna Convention*. According to the United States, during Korea's accession negotiations, the United States explicitly bargained for and received coverage of all Korean Government entities responsible for the procurement of products and services related to new airport construction projects under Annex 1.

4.326 The United States submits that, from the outset of negotiations with Korea, it was made clear that the United States would only accept from the Government of Korea, a "credible offer with respect to ongoing negotiations to expand [the Procurement Code's] coverage,"[408] which included coverage of "all entities in the telecommunications, energy, transportation, and water sectors;" as well as "services and construction contracts."[409]

4.327 **Korea responds** that despite the United States' claim that it would have accepted nothing less, in negotiations with Korea, than coverage of "all entities in the . . . transportation . . . sector[]," it has acknowledged that it failed to achieve this goal.[410]

(i) The July 1991 Communication from Korea

Contents of the Communication

4.328 **The United States notes** that on 1 May 1991, pursuant to issues raised during the 22 April bilateral negotiations, the United States sent a list of follow-up questions to Korea regarding its accession package.[411] In it, the United States notes that it explicitly asked:

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[407] Annet Blank and Gabrielle Marceau, "The History of the Government Procurement Negotiations Since 1945," 5 *Public Procurement Law Review* 77, p. 99 (1996). The reference to the OECD alludes to "the research and negotiating work undertaken by the OECD from 1963 onwards" that attempted "to re-introduce government procurement into the general multilateral trade rules." *Ibid.* p. 77.

[408] US Department of Commerce Reporting Cable (Geneva 05022, May 91), paragraph 1. The "ongoing negotiations" is in reference to the Uruguay Round negotiations to expand coverage of the Procurement Code.

[409] *Ibid.* paragraph 5.

[410] Korea refers here to the US Department of Commerce Memorandum, referred to below in paragraph 4.388 *et seq.*

> "How does the Airport Development Group relate to the Ministry of Communications? Does Korea's offer of coverage of the Ministry of Communications include purchases for the Airport Development Group? Please identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction."

4.329 In response to a question from the Panel as to what prompted these questions, the United States notes as follows. To assist US officials negotiating Korea's accession to the GPA following Korea's initial accession offer of 25 June 1990, the American Embassy in Seoul conducted a survey of US companies regarding areas of interest in the Korean procurement market. Specifically mentioned by American companies as priority areas of interest were coverage of the "Airport Development Group" with its responsibility over procurement for the new airport construction, as well as procurement of specific sectors including "airport systems," and "air and maritime communication and navigation equipment."[412]

4.330 The United States refers to Korea's response to the follow-up questions which was received in July 1991:

> "The new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation. The new airport construction project is scheduled to be completed by 1997 after the completion of the basic plan by 1992 and the working plan by 1993. The US company, Bechtel, is taking part in the basic plan projects.
>
> The responsible organization for procurement of goods and services relating to the new airport construction is the Office of Supply. But at present, the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage."[413]

Procuring Entities Referred to in Communication

4.331 **The United States notes** that at the time the July 1991 response was received from Korea, the two entities Korea represented as being responsible for new airport construction projects in the response – the Ministry of Transportation and the Office of Supply – had already been listed in Korea's initial GPA offer. The United States further notes that coverage under Annex 1 of the same two entities was finalized on 15 April 1994 when Korea became a Party to the GPA.

4.332 The United States argues that following July 1991 when Korea represented that the Ministry of Transportation and the Office of Supply would be responsible for airport procurement, Korea did not broach the subject of airport procurement again. Further, the United States asserts that Korea did not attempt to amend the statements made in July 1991. According to the United States, given this series of communications and subsequent silence by Korean officials, it is reasonable for the United States to conclude that MOCT and the Office of Supply were indeed the only entities engaging in procurements for new airport construction projects. **Korea acknowledges** that its July 1991 response identified the Office of Supply as the "responsible organization" for IIA procurement. Korea states that pursuant to Article 2(5) of the *Government Procurement Fund Act*[414], the Korean Office of Supply would in principle have assumed procurement responsibility in respect of the IIA project.

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[411] US Questions Relating to Korea's Request to Accede to the Agreement on Government Procurement, May 1991.

[412] US Answer to Question 21 from the Panel, dated 3 November 1999.

[413] Korea's Answers to the Questions from USTR Relating to Korea's Request to Accede to the GPA, 1 July 1991, p. 6.

[414] Act No. 3580, 27 December 1982.

However, Korea argues that since the plan for the IIA project had not been completed and that site preparation for the project was not to commence for at least 16 months from the time Korea provided its response to the United States, Korea emphasized in its response that "the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage."[415] In response to a question from the United States, Korea states that these words should have served to alert any reasonable person that, at that point, nothing with regard to procurement was fixed. According to Korea, that would include the entity ultimately responsible for procurement.[416]

4.333 **In response, the United States notes** that with regard to the specifics of the 1991 Korean response, the United States does not consider the Korean statement "[b]ut at present, the concrete procurement plan has not been fixed…" as indicating a possible change in the entities responsible for procurement for the IIA project. According to the United States, Korea's response merely notes that the specifics of the procurement plan (i.e. the tendering schedule, estimated value of tenders etc.) have not yet been determined. The logical reading of Korea's statement is that the entities responsible for the procurement of the new airport construction are the New Airport Development Group under MOCT and the Office of Supply. However, exactly how these entities will construct the airport and what value of the associated procurements will be, has not yet been determined. The United States argues that had Korea intended to focus on which entities are responsible for airport procurement, it would have stated that the "procuring entities have not been fixed…" rather than the "procurement plan has not been fixed."

4.334 Moreover, the United States argues that Korea was clear and unequivocal regarding which entities were responsible for IIA procurement. The United States notes that in response to the United States question, the statement that the construction "is being conducted by the New Airport Development Group under the Ministry of Transportation," appears in an earlier paragraph before Korea's "qualification," and precedes a discussion of the possible timetable for the new project. Finally, the United States argues that by noting in its response that Bechtel was taking part in the basic plan project, Korea acknowledges that procurement had already begun for the airport project, with the assumption that the entities named were responsible for conducting this procurement.

4.335 **Further, in response to a question from the Panel, Korea notes** that the July 1991 communication should be put in context. Korea states that the inquiry from the United States was to Korea, largely academic when it was received. Korea states that its response was an accurate, good faith, honest response to an inquiry in another language. Korea further states that it was drafted – probably dictated to a stenographer in the drafter's second language – without reference to the New Shorter Oxford English Dictionary. Korea states that it believed it honestly and reasonably informed the United States that as of July 1991 the relevant entities were the Ministry of Transportation and the Office of Supply, but that nothing, as of that date, was fixed, and that a reasonable reader of that communication would have concluded that the existing situation was temporary.[417] Korea argues that this interpretation is warranted by the structure of the second paragraph of Korea's July 1991 response. Korea notes that immediately after the reference to the Office of Supply, Korea wrote, "But at present the concrete procurement plan … ." Korea argues that the reference to the entity in principle responsible for IIA procurement at that time, followed immediately by the statement that the "concrete procurement plan has not been fixed," coupled with the qualifier, "But at present," would lead any reasonable reader to conclude that the entire IIA project was in its infancy and undecided.[418]

4.336 **The United States responds by arguing** that Korea appears to suggest that it is exempt from the normal rules of treaty interpretation and of state responsibility with respect to its GPA schedules and other official documents merely because those documents were translated from Korean to

[415] Korea's Answers to Questions 15 & 16 from the US, dated 3 November 1999.
[416] Korea's Answer to Question 15 from the US, dated 3 November 1999.
[417] Korea's Answer to Question 16 from the Panel, dated 3 November 1999.
[418] *Ibid.*

English. The United States notes that Korea has already agreed that its schedule to the GPA be "[a]uthentic in the English language only." Indeed, the United States notes that all negotiating documents provided by Korea including the *Government Organization Act* were provided in English. Moreover, according to the United States, Korea has in many other instances argued for precise textual interpretations of translated Korean documents.

4.337 **In further support of its argument that it had not made any commitments regarding entities responsible for airport procurement, Korea refers** to a European Communities report regarding the progress of the Uruguay Round negotiations dated March 1993. Korea notes that the European Communities explicitly stated in the report that Korea had given "no offer regarding airports."

4.338 **In response, the United States notes** that Korea has not reconciled the statement in the EC report with its earlier statement that the Seoul and Pusan Regional Aviation Offices, responsible for airport projects "during the period 1992-1998," are covered under Annex 1 of the GPA. The United States argues that as "special local administrative organs" of MOCT, these Regional Aviation Offices should have been covered from the time MOCT was first placed on Korea's GPA accession offer in June of 1990.

4.339 The United States further notes that given the fact that Korea previously represented to the United States that IIA construction is the only airport project currently underway and that GPA Parties can choose to cover any entity under Annexes 1 or 3 regardless of the entity's procurement subject-matter or domestic legal status, Korea's position regarding the Regional Aviation Offices *vis-à-vis* General Note 1 remains highly problematic with respect to Korea's overall defense that KAA, KOACA and IIAC are not covered under Korea's GPA obligations.

Seoul and Pusan Regional Aviation Offices

4.340 **The United States argues** that in 1991, when the United States asked Korea for a list of entities responsible for new airport construction procurements, Korea made no mention of the Seoul and Pusan Regional Aviation Offices. The United States contends that this answer appears to contradict Korea's present argument that the Regional Aviation Offices have been awarding airport procurement contracts "during the period 1992-1998."

4.341 **Korea argues** that if the United States was intent on achieving GPA coverage for IIA procurement, it surely would have consulted industry regarding airport procurement. Korea asserts that, in that case, the United States would have been aware of the numerous examples of contracts awarded by the Regional Aviation Offices or the Office of Supply, during the period while the GPA negotiations were pending, for projects associated with the relevant airports. Korea refers to the evidence referred to in paragraph 4.239.

4.342 Korea further notes that in describing Korea's alleged failure in July 1991 to mention the Regional Aviation Offices in response to a question regarding the IIA project, the United States contends that its question "asked Korea for a list of entities responsible for new airport construction procurements." Korea states that this assertion is in error. Korea notes that the actual text of the United States' question was:

> "How does the *Airport Development Group* relate to the Ministry of Communication? Does Korea's offer of coverage of the Ministry of Communications include purchases for the *Airport Development Group*? Please identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction."

4.343 Korea argues that its impression was that the United States was not asking about just any generic airport procurement. Given the United States' obvious emphasis on the Airport Development Group, NADG, Korea states that its response was entirely focused upon the airport with which NADG was associated – IIA. Korea states that its entirely reasonable assumption was that the United States' question was about the IIA project and that its response was to give as much information as was available about what was, at the time, a fledgling project.

Coverage of Entities or Projects

4.344 **The United States argues** that, in response to a direct question regarding the coverage of new airport construction from the United States, Korea explicitly represented that the New Airport Development Group of MOCT and the Office of Supply would be responsible for procurement of new airport construction. The United States asserts that by phrasing the question in sectoral terms, it is clear that the United States was interested in projects related to airport procurements. The United States further argues that Korea's response, in entity terms, created an expectation that airport procurements would be covered through the listing of MOCT and the Office of Supply. The United States concludes that it could reasonably expect airport procurement to be subject to the disciplines of the GPA through coverage of MOCT and the Office of Supply.

4.345 The United States further argues that the sectors and projects that an entity was responsible for were the major factors for countries in considering which entities they would seek coverage for under the GPA. In relation to this case, the United States contends that it sought to cover "new airport construction." The United States notes that Korea responded in July of 1991 that MOCT and the Office of Supply were responsible for "new airport construction."[419] The United States argues that, therefore, MOCT and the Office of Supply became covered, not just for procurements related to "new airport construction," but, pursuant to Article I:1 of the GPA for "any procurement by [these] entities," subject to explicit exceptions.[420]

4.346 **In response to a question from the Panel, Korea states** that its Annex 1 commitments were negotiated on the basis of entities, rather than projects. Korea notes that Annex 1 does list entities rather than projects. Korea states that it fails to see how this fact can be disputed. Korea further notes that neither Korea's initial offer nor its second offer nor its third and final offer, submitted in December 1993, include a list of projects for Annex 1.[421] In any event, Korea argues that since KAA was the entity responsible for IIA procurement from December 1991 through August 1994, if it was not covered, then the IIA was not covered.[422]

4.347 **The United States argues in response** that to accept Korea's position that the GPA provides pure entity coverage is to make the GPA a nullity. According to the United States, a Party could transfer procurement authority from listed entities to non-listed entities and not have to notify or compensate other Parties for such transfers because, as an agreement covering purely on the basis of entities, the listed entities are technically still "covered." The United States argues that, needless to say, the GPA would quickly be emptied of substance.

4.348 **Further, in response to the United States' argument, Korea reiterates** that procurements by MOCT and NADG (were any to exist) are indeed subject to the GPA, as are procurements by the Office of Supply for Annex 1 entities. However, according to Korea, this result does not flow from Korea's July 1991 response. Korea states that its July 1991 response was a reply to a factual question

[419] The United States notes that both these entities were already in Korea's GPA accession offer, and in fact MOCT was already responsible for awarding the first IIA procurement contracts for the basic plans.
[420] US Answer to Question 16 from the Panel, dated 29 November 1999.
[421] Korea's Answer to Question 4 from the Panel, dated 29 November 1999.
[422] Korea's Answer to Question 5 from the Panel, dated 29 November 1999.

from the United States about NADG, and did not speak in any way whatsoever to the question of GPA coverage.[423]

4.349 Korea states that, moreover, its July 1991 response did not speak to "new airport construction." Korea stresses that neither the question nor the answer spoke to a commitment to GPA coverage for anything at all – neither an entity, nor a sector called "new airport construction." Korea asserts that both the May 1991 question and the July 1991 answer were factual, and spoke to NADG and the IIA. Korea further states that the July 1991 response spoke to an entity that would in principle have been responsible for procurements for a particular airport, had there even been any at the time. Korea states that it is inaccurate to say that, in its July 1991 response, made two and one-half years before it signed the GPA, Korea committed to GPA coverage at all, much less GPA coverage for a sector called "new airport construction." Korea argues that the United States is using its own question, and not Korea's response, as evidence of Korea's commitments. This, states Korea, is no evidence at all.[424]

The February 1991 *Supplementary Explanation* of Korea's GPA Offer

4.350 Korea argues that during negotiations regarding Korea's accession to the GPA, the United States was aware of the existence and activities of Annex 1 entities undertaking "procurement for airports," whether related to new airport construction or work on existing airports. Korea further argues that the United States was aware that entities other than KAA – namely, the Regional Aviation Offices – existed, procured for Korean airports other than IIA and were included in Korea's offer.[425]

4.351 Korea notes that the Korean cable report[426], the questions put to Korea by the United States in May 1991[427] and a May 1991 US Department of Commerce cable report[428] all note the United States' receipt of a February 1991 document entitled "*Supplementary Explanation of the Note by the Republic of Korea, dated 29 June 1990, relating to the Agreement on Government Procurement*."[429] Korea further notes that page 11 of this *Supplementary Explanation*, explaining Korea's initial offer, lists the Regional Aviation Offices or Bureaus as included within Korea's commitment of the Ministry of Transportation. Korea notes that it does not list KAA.

The Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction

Reference to Act in 1991

4.352 **In response to a question from the Panel** requesting an explanation why Korea did not mention the 1991 *Seoul Airport Act* in its July 1991 response, **Korea notes** that the United States posed 17 questions, which deal with a wide variety of issues. Korea notes that only one question deals with the IIA. Korea asserts that an employee of the Ministry of Commerce provided good faith answers to all of these questions on 1 July 1991. Korea further states that the answers provided were, moreover, in depth and thorough.[430]

4.353 Korea argues that as is evident from Korea's July 1991 responses, it went to considerable lengths to answer the United States' questions, providing a 29-page response to two pages of questions from the United States. Korea states that it took the inquiries seriously, and provided thorough, detailed responses to anything that was asked of it. Korea states that it did not read into the United

[423] Korea's Response to US Answer to Question 17 from the Panel, dated 29 November 1999.
[424] Korea's Response to US Answer to Question 16 from the Panel, dated 29 November 1999.
[425] Korea's Response to US Answer to Question 17 from the Panel, dated 29 November 1999.
[426] Exhibit Kor-118.
[427] US Exhibit 4, Questions 9, 10, 11, 14, 15.
[428] US Exhibit 2, p. 2.
[429] Exhibit Kor-117.
[430] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

States' inquiry, questions that were not posed, including questions about the *Seoul Airport Act* or any other legislation related to the IIA, such as the *Korea Airport Corporation Act*.[431]

4.354 Korea argues that given the diversity of topics raised by the United States, and the breadth of the answers given, it is not reasonable to expect Korea, or any Member, to go well beyond what was asked, and to provide information in each case about whatever it may have considered that the United States might possibly have considered interesting. Korea states that were it or any other Member to accept such a burden, the virtual impossibility of successfully addressing every possible issue would virtually guarantee failure, and subject it to certain liability in later disputes.[432]

4.355 In support of its position, Korea states that this undoubtedly is one reason why the Appellate Body, in the *Computer Equipment* case, rejected the notion that the "importing party" (here, Korea) bore the responsibility for the clarity of its tariff schedule. Korea states that according to the Appellate Body, "exporting Members" (here, the United States) have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed.[433] Korea notes that in July 1991, Korea offered 29 pages of good faith responses to 17 questions posed by the United States. Korea asserts that under the principles enunciated by the Appellate Body in the *Computer Equipment* case, it can be charged with nothing more, without forcing upon it a burden properly put upon the United States.[434]

Status of Act at Time of July 1991 Response

4.356 **In response to a question from the Panel** that requested details regarding the progress of the *Seoul Airport Act* from the policy phase to the legislation phase, **Korea argues** that, in the abstract, it is impossible to say with any precision how long it takes for legislation to run its course. Korea argues that as with most other Members with legislatures independent of the executive, the time required to pass legislation depends on many factors, including the degree and intensity of opposition.[435]

4.357 Korea states that the following timeline, applied to the December 1991 amendments to the *Seoul Airport Act*, by which KAA was nominated as the entity responsible for the IIA project:[436]

26 June 1991:	MOT makes an internal decision to recommend that KAA be assigned by the National Assembly as the entity responsible for the IIA project, in draft legislation proposed to amend the *Seoul Airport Act*
10 July 1991:	MOT publishes a public notice of draft legislation containing proposed amendments to the *Seoul Airport Act*
29 July 1991:	Vice-Ministers of concerned Ministries meet to discuss the draft legislation
6 August 1991:	Directors General of these same concerned ministries meet to discuss the draft legislation
14 August 1991:	The draft legislation is approved at a meeting of the Vice-Ministers of the Economic Ministries
8 October 1991:	The draft legislation is approved at a meeting of all Vice-Ministers
9 October 1991:	The draft legislation is approved at a Cabinet meeting of the all Ministers
16 October 1991:	The draft legislation is approved by the President of Korea

[431] *Ibid.*
[432] *Ibid.*
[433] *EC – LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted on 22 June 1998), paragraph 109.
[434] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[435] Korea's Answer to Question 3 from the Panel, dated 29 November 1999.
[436] *Ibid.*

21 October 1991:	The draft legislation is transferred to the National Assembly
12 November 1991:	The draft legislation is tabled with the National Assembly's Committee on Transport and Communication
19 November 1991:	The draft legislation is approved by the National Assembly's Committee on Transport and Communication
20 November 1991:	The legislation is adopted at a plenary session of the National Assembly
29 November 1991:	The legislation is transferred to the President of Korea
14 December 1991:	The legislation is signed by the President, promulgated as Law No. 4436 and published in the *Official Gazette*

4.358 Korea notes that the legislation in question was not particularly controversial, and, thus, was enacted in a comparatively short time. Korea states that, as is evident from this timeline, the Ministry of Transportation made an internal decision to recommend that the National Assembly appoint KAA as the entity responsible for the IIA project on 26 June 1991. Korea notes that a public notice was not issued by the Ministry of Transportation until 10 July, 10 days after the 1 July response from the Ministry of Commerce, an entirely different agency. The Ministry of Transportation's decision to recommend KAA was not discussed with other ministries until the 29 July and 6 August meetings of interested vice-ministers and directors general.[437]

4.359 Korea states that the Ministry of Commerce, which prepared Korea's responses to the United States' questions, was simply not aware of the Ministry of Transportation's internal decision when it provided those responses to the United States on 1 July 1991. Korea further states that, moreover, the employee of the Ministry of Commerce who drafted responses to the United States' questions would have completed a draft before 26 June 1991, to allow for review by his superiors in advance of the 1 July 1991 submission. Korea argues that for either or both of these reasons, the decision to recommend KAA's involvement in the IIA project would not have been known to the Ministry and individual preparing Korea's 1 July 1991 response.[438]

4.360 Korea argues that even if the individual preparing Korea's 1 July 1991 response had been aware of the Ministry of Transport's 26 June decision, it would have been highly presumptuous for an employee of the Ministry of Commerce to communicate to the United States the inclusion of KAA in draft legislation yet to be discussed, let alone approved, by the relevant directors general, vice-ministers and ministers, along with the President of Korea and the National Assembly. Korea states that on 1 July 1991, when Korea provided its response to the United States, the draft legislation with proposed amendments to the *Seoul Airport Act* was little more than a proposal.[439]

4.361 Korea offers a parallel example to illustrate its point. In Korea's view, it would be politically impossible for an employee of the Office of the United States Trade Representative to offer preliminary information or assurances to a foreign negotiating partner regarding specific terms of not-yet-introduced legislation before domestic approval of the legislation was secured from the Cabinet and the President, if not of the Congress. According to Korea, conduct by the USTR suggesting that any of these approvals was merely a technical formality would engender serious political ramifications, and would counsel against providing the information to the foreign negotiating partner in the first place. Korea states that it should not be held to a different standard.[440]

4.362 **In response, the United States notes** that Korea's responses themselves do not indicate on which day in July they were provided. The United States notes that these responses merely read,

[437] *Ibid.*
[438] *Ibid.*
[439] *Ibid.*
[440] *Ibid.*

"July 1991." The United States asserts that Korea offers no basis for its arbitrarily determined date of 1 July.[441]

4.363 The United States further notes that, in any case, it remains uncontested that the Ministry of Transportation's internal decision to recommend that KAA be assigned as the IIA project operator was made prior to the date on which Korea provided its responses to the United States, and that Korea did not inform the United States of MOT's internal decision in its July 1991 responses. The United States argues that because it remains unclear on what day in July 1991 Korea provided its responses, it is quite possible that MOT had already published the public notice of draft legislation containing proposed amendments to the *Seoul Airport Act*[442] and that the Vice-Ministers had already met to discuss this draft legislation[443] before Korea provided the United States with its July 1991 responses.[444]

4.364 The United States argues that, finally, it is important to keep the above discussion in perspective, and remember that the December 1991 amendment to the *Seoul Airport Act* did not alter MOCT's ultimate authority over the IIA project, and merely added KAA to the list of potential project operators.[445]

Completion Date of the Project

4.365 **In response to a question from the Panel, Korea notes** that its July 1991 response which states that the project would be completed by 1997, was provided six months before the basic plan was completed by a US company, Bechtel, in December 1991.[446] Korea notes that even though the statement in July 1991 regarding the 1997 completion date was apparently for the entire project, it was obviously based on very preliminary estimates by the Korean Government. Korea asserts that 1997 was simply a target time. Korea argues that while the schedule for the IIA project has, as with most large construction projects, been subject to considerable change over the years, the airport is currently scheduled to open in January 2001.[447]

4.366 The United States argues in response that although the airport is currently scheduled to open in January 2001, according to a 1998 revision to the airport plan, the Inchon airport development project will not be fully completed until 2020.[448] The United States asserts that, thus, Korea's discriminatory procurement practices have the potential of adversely affecting US companies for the next two decades.[449]

(ii) The May 1991 US Cable Report

Contents of the Cable Report

4.367 **The United States argues** that the arguments advanced by Korea would merely diminish Korea's obligations under Annex 1, which would then be in conflict with Korea's previous representations. Specifically, the United States refers to a May 1991 US Department of Commerce reporting cable, which, according to the United States, provides a factual account of the first round of GPA bilateral negotiations between the United States and Korea, held on 22 April 1991:

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[441] US Response to Korea's Answer to Question 3 from the Panel, dated 29 November 1999.
[442] Korea indicates that this took place on 10 July 1999.
[443] Korea indicates that this took place on 29 July 1991.
[444] US Response to Korea's Answer to Question 3 from the Panel, dated 29 November 1999.
[445] *Ibid.*
[446] Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time, p. 42. See also Exhibit Kor-11 (Contract for the basic plan).
[447] Korea's Answer to Question 13 from the Panel, dated 29 November 1999.
[448] US Exhibit 18.
[449] US Response to Korea's Answer to Question 13 from the Panel, dated 29 November 1999.

> "The Korean Del was asked to clarify Note 1 [of Korea's Annex 1]. The Korean Rep said that this Note was meant to "explain, not to derogate." The US Del noted that it seemed to be obvious that if an entity were covered, then all its subsidiary bodies would also be covered unless an explicit exception were stated [sic] in the offer. Therefore, it was unclear what the note was meant to add. The Korean Rep reiterated that the Note was not intended to limit their offer in any way and suggested that if it was causing concern they could consider dropping it."[450]

Meaning of the Cable Report

4.368 **According to the United States**, the May 1991 US Department of Commerce reporting cable summarizes the discussion between Korea and the United States as they tried to reach a mutual understanding regarding the meaning of Note 1.[451] The United States contends that the cable records the parties' agreement regarding Note 1's intent to cover all "subsidiary bodies" of "central government entities" under Korea's Annex 1, unless "an explicit exception were stated in the offer." The United States asserts that, as Korea represented, Note 1 was not meant to "derogate," nor to "limit [Korea's] offer in any way;" Note 1 was never intended to exclude subsidiary organs from Annex 1 coverage. The United States concludes that, therefore, as subsidiary organizations of MOCT, KAA, KOACA and IIAC are also covered under Korea's Annex 1 pursuant to Note 1.

4.369 The United States further argues that Note 1 does not embody the "universe of bodies internal to central government entities under Korean law" and the *Government Organization Act* does not encompass the "entirety of the Korean central government structure". The United States argues that Note 1 does not define the scope of "central government entity" but, rather, expands it. The United States asserts that this interpretation has been confirmed by Korea when it states that, "Note 1 was not meant to 'limit' its Annex 1 offer." The United States argues that such an interpretation is consistent with the principle of effectiveness. The United States further argues that it is also consistent with the reasoning that Note 1 cannot both define and expand the scope of "central government entity."

4.370 The United States notes that the negotiating history may be used as a supplementary means of interpretation pursuant to Article 32 of the *Vienna Convention* should there remain any uncertainty or ambiguity about the meaning of Note 1. For example, in its recent report on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the Appellate Body, after determining that "the language in the notation in Canada's Schedule is not clear on its face…the language is general and ambiguous and, therefore, requires special care on the part of the treaty interpreter," found it "necessary, in this case, to turn to 'supplementary means of interpretation' pursuant to Article 32 of the *Vienna Convention*."

4.371 According to the United States, in the May 1991 US Department of Commerce reporting cable, Korea agreed with the United States that, "if an entity were covered, then all its subsidiary bodies would also be covered unless an explicit exception" were stated otherwise, and then conceded that Note 1 "is not intended to limit their offer in any way." Thus, the United States maintains that it is clear that Note 1 does not diminish the scope of coverage of Korea's Annex 1, i.e., branch offices and subsidiary organizations are still covered. The United States argues that in order to avoid interpreting Note 1 as being redundant or useless then one must interpret it as expanding Korea's Annex 1 coverage to include entities that might not be branch offices or subsidiary organizations of

[450] Department of Commerce Reporting Cable (Geneva 05022, May 1991), paragraph 14.

[451] The United States notes that it is the common practice of US government officials to provide just such a factual report after each negotiating round. Although it might be argued that such a description is one-sided or capable of being inaccurate, the United States contends that it must be kept in mind that the US negotiator is under a duty to observe, report, and record these negotiations properly and factually, without any attempt at analysis. These reports are made in the "ordinary course" of a negotiator's business, and therefore should be considered reliable.

listed "central government entities" but are still a "subordinate linear organization," "special local administrative organ" or "attached organ" pursuant to Note 1.

4.372 **In response, Korea notes** that despite the fact that Note 1 to Korea's Annex 1 specifically and unambiguously defines the terms "subordinate linear organization," "special local administrative organ" and "attached organ" by reference to the *Government Organization Act*, and despite the fact that the *Government Organization Act* does not include KAA, KOACA or IIAC within the definition of "subordinate linear organization," "special local administrative organ" or "attached organ," the United States argues that this cable, alone, subjects procurement by KAA, KOACA and IIAC to the terms of the GPA. Korea states that this position cannot be accepted.

4.373 Korea argues that the cable does not state, and Korea did not agree, as the United States alleges, "to cover all 'subsidiary bodies' of 'central government entities' . . . unless 'an explicit exception were stated in the offer'." Korea states that Note 1 clarifies and defines the scope of those bodies internal to ministries listed on Annex 1. Korea further argues that Note 1 "excludes" or "excepts" nothing that would otherwise be included in these ministries under Korean law. Rather, in listing "subordinate linear organizations, special local administrative organs, and attached organs as prescribed by the *Government Organization Act* of the Republic of Korea," Korea argues that Note 1 includes the universe of bodies that are internal to an Annex 1 entity, and are, therefore, logically covered.

Status of the Cable Report

4.374 With respect to the status of the cable, **Korea argues** that this document cannot be considered "preparatory work," for two reasons. Korea argues that, first, it was not available to Korea before its accession to the GPA, and as a result cannot possibly be part of the commitments Korea accepted upon accession.[452] Korea states that had it seen the cable report prior to accession and therefore known the United States' view, it would have objected to or at least clarified the United States' interpretation of statements made by Korea at the 22 April 1991 meeting that the US cable purports to record. Korea states that, secondly, the cable report speaks only to the United States' expectations of what it had secured. Korea notes that the United States' expectations are relevant only in the context of its non-violation claim.[453]

4.375 Korea states that even if the cable report is considered "preparatory work," Article 32 of the *Vienna Convention* provides that "preparatory work" is relevant only where the ordinary meaning of an agreement is ambiguous, obscure, or leads to an absurd result. Alternatively, it may be used to "confirm" an interpretation derived through the application of Article 31.

4.376 Korea states that the circumstances surrounding the United States' reliance on the May 1991 cable do not satisfy the requirements of Article 32. According to Korea, the reference in Note 1 to the *Government Organization Act* as the source of the definition for the term "subordinate linear organizations" is anything but ambiguous. Further, Korea states that Article 2(3) of the Act is clear, even if it does not correspond to a list the United States might adopt in its own domestic law. Korea argues that, furthermore, the fact that the United States, the European Communities, Hong Kong, Japan, Liechtenstein, Norway and Switzerland all define terms in their respective GPA Appendix I by

[452] Sir Ian Sinclair, The Vienna Convention on the Law of Treaties (2nd Ed., 1984), p. 144. Korea notes that Professor Sinclair reasons that preparatory works must be "in the public domain" so that subsequently acceding States can know to what they are being bound. There is no logical reason why original signatory States should not also have the benefit of knowing about any documents that purport to bind them to something of which they were not aware.

[453] *EC - LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted on 22 June 1998), paragraph 80 (Reference to a complainant's reasonable expectations "in the context of a violation complaint 'melds the legally-distinct bases for violation and non-violation complaints . . . into one uniform cause of action,' and is not in accordance with established GATT practice.").

reference to provisions of their domestic law indicates that to do so is far from an obscure or an absurd practice. Korea also states that the fact that the United States had the *Government Organization Act* at its disposal during negotiations with Korea regarding its GPA commitments demonstrates that giving the reference in Note 1 to the *Government Organization Act* effect is far from absurd. Finally, Korea asserts that the United States is not relying on this so-called preparatory work to "confirm" an interpretation derived through the application of Article 31. According to Korea, it is, rather, using the cable in an attempt to overturn the ordinary meaning of Korea's Note 1.

4.377 Korea states that, at most, the cable constitutes one party's record of discussions regarding the GPA. Korea argues that this type of evidence is self-serving. Korea states that it does not accept the unilateral characterization of the April 1991 meeting made by the United States. Korea further argues that Article 32 of the *Vienna Convention* does not, for good reason, permit the notes of a party with a vested interest in a particular interpretation to trump the unambiguous ordinary meaning of the terms included in an agreement, particularly where both the accuracy and the interpretation of those notes is disputed, as it is in this case.

4.378 **In response, the United States argues** that the cable report should be taken into account because Article 32 of the *Vienna Convention* explicitly permits the use of "circumstances of [the GPA's] conclusion" as a supplementary means of interpretation.

4.379 The United States further argues that the *Vienna Convention* rightly accords only a subordinate role to "supplementary means of interpretation" precisely because the documentary record of preparatory work or the circumstances of a treaty's conclusion may be incomplete, one-sided, or inconclusive. The United States argues that the Panel can and should determine through an interpretation under Article 31 that airport procurement is covered within the scope of Korea's GPA commitments. According to the United States, this interpretation is neither ambiguous nor obscure and does not lead to an absurd or unreasonable result. The United States asserts that, to the contrary, an interpretation that this procurement is not covered would be absurd and unreasonable. The United States argues that it is not necessary for the Panel to have recourse to any supplementary means to confirm the reading that the United States has given to Korea's Schedule under Article 31.

Accuracy of the Cable Report

4.380 Regarding the accuracy of the US cable, **Korea notes** that the document discussed at the meeting to which the cable relates was Korea's 25 June 1990 offer, which contained both notes and footnotes. Korea states that its notes of the April 1991 meeting, which are included in a Korean reporting memorandum written the day after the meeting, confirm that the United States indeed asked a question regarding whether attached organs, supporting organs and offices were included in Korea's offer.[454] Korea states that the notes also confirm that the United States asked a question about "the reason for setting up 'Footnote 1', 'Footnote 3', and 'Note 1', 'Note 2', 'Note 3', 'Note 4' and 'Note 5'; and the possibility of removing these 'Footnotes' and 'Notes'." The specific offer under consideration was Korea's first offer, dated 25 June 1990. Korea notes that that offer included a list of "Purchasing Entities," along with four footnotes and five notes thereto.

4.381 Korea states that the accuracy of the United States' May 1991 cable, however, ends there. Korea states that it offered to drop footnote 1 and not Note 1. Korea states that, indeed, footnote 1 was dropped and Note 1 was not dropped. Korea states that the memorandum containing Korea's report of the meeting records no discussion about Note 1, and instead includes a conditional offer to delete Footnote 1, which exempted "purchases for the purpose of maintaining public order" from

[454] Memorandum from the Permanent Mission of the Republic of Korea, 23 April 1991, p. 2. Korea states that the notes contained in this memorandum report on 22 April 1991 bilateral GPA negotiations with both the European Communities and the United States.

Korea's offer to include procurements by the Ministry of Home Affairs. Specifically, the Korean memorandum states:

> "Regarding 'Footnote 1' and 'Note 2' and 'Note 3,' Korea stated that if Korea and US had a clear mutual understanding of the GPA and GATT agreements, it may be possible to delete these points."

4.382 Korea states that it did not, therefore, offer to delete Note 1 from its offer, that any discussion about the "explanatory" as opposed to the "limiting" effect of its offer was, like its conditional offer regarding deletion, relevant to Footnote 1, Note 2 and Note 3. Korea notes that while a slightly amended version of what was Note 3 to Korea's initial offer appears in Korea's Annex 1 as Note 2, Footnote 1 and Note 2 to Korea's initial offer were deleted, and do not appear in its Annex 1.

4.383 Korea states that, moreover, and assuming, *arguendo*, that Korea's offer was to delete Note 1 rather than Footnote 1, the Korean memorandum reporting on this same meeting stated that the offer to do so was conditional on reaching a "clear mutual understanding" with the United States regarding the GPA. Korea states that such an understanding would have to include an agreement of the whole point to Note 1 in the context of the Korean Government system.

4.384 Korea notes that it is true that Note 1 was not meant to "limit" its Annex 1 offer. Korea notes that when it committed to coverage for the entities listed on Annex 1, along with their "subordinate linear organizations, special local administrative organs, and attached organs as prescribed by the *Government Organization Act*," Korea committed the universe of bodies internal to central government entities under Korean law.

4.385 Korea notes that if, indeed, it stated that Note 1 was "meant to 'explain, not to derogate'" or "to limit," it said so with the knowledge that it was committing everything that belongs to any of the central government entities listed on Annex 1, under the Korea system of government represented in the *Government Organization Act*. The entirety of the Korean central government structure is embodied in the *Government Organization Act*, and all of it, with regard to the entities listed on Annex 1, is included in Korea's Annex 1 commitment.

4.386 Korea notes that according to the United States, the May 1991 US cable report indicates an "agreement" between the parties. Korea states that the cable report makes clear that Korea made no such commitment. Further, Korea states that it does not accept the unilateral characterization of the April 1991 meeting by the United States.

Timing of Cable Report

4.387 **Korea states** that even if it were assumed for the sake of analysis that the May 1991 US cable report is correct in its description of events, Korea submits that it establishes nothing in relation to Korea's GPA obligations. Korea notes in this respect that April 1991 was a full three years before the GPA was signed and July of 1991 was more than two and one-half years before the GPA was signed. Korea further notes that these events were some two years and two and one-half years, respectively, before Korea's final offer. Korea notes that it didn't have any GPA obligations at that time.

(iii) US Department of Commerce Memorandum

4.388 **Korea also states** that despite the United States' claim that it would have accepted nothing less, in negotiations with Korea, than coverage of "all entities in the telecommunications, energy, transportation, and water sectors," it has acknowledged that it did not achieve this goal. In a Department of Commerce memorandum regarding the GPA, the United States explains that "major purchasers of transportation and telecommunications equipment" are absent from its own GPA

commitments "because other GPA signatory countries were unwilling to offer these entities for coverage ... ."[455]

4.389 Korea notes that in similar circumstances, the International Court of Justice has attached particular significance to "statements against interest," such as these, placing them on equal footing with evidence offered by disinterested witnesses, and deeming them to be "of superior credibility."[456] Korea notes that, for example, in the Nicaragua case, the Court considered such statements tantamount to admissions:

> "The material before the Court . . . includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission."[457]

4.390 Korea submits that the statements by the United States and the European Communities (in the EC Commission report of March 1993), as "statements against interest," should be considered as admissions of the fact that the entities responsible for IIA procurement are not covered entities under the terms of the GPA.

4.391 **In response, the United States argues** that one glance at the Department of Commerce memorandum will tell the reader that the memorandum is not about what Korea excluded from its coverage. The United States asserts that, instead, it is about broader issues, such as the European Community's General Note 6, which explicitly states that "contracts awarded by entities in Annexes 1 and 2 in connection with activities in the fields of drinking water, energy, transport or telecommunications, are not included." In contrast, argues the United States, Korea's argument enjoys no such textual support.

(b) Communications Following Korea's Accession

(i) July 1998 Communication from the United States

Interpretation of Contents of Letter

4.392 **Korea refers** to a letter from the United States Embassy in Seoul to the Korean Ministry of Foreign Affairs and Trade, dated July 1998, in which the United States proposed that:

> "During the period before KOACA formally is brought under the GPA, . . . [KOACA] agree to measures that would bring its procurement policies and practices de facto into conformity with the internationally-acceptable provisions of the GPA ... ."

4.393 Korea argues that if the time at which the above letter was written, namely, July 1998, was "before" the entities responsible for IIA procurement were "formally" covered, then those entities

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[455] US Department of Commerce, International Trade Administration, Government Procurement Agreement, Publication No. 4019, undated, pp. 6 –7.

[456] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, 42-43 (paragraph 69).

[457] *Ibid*. paragraph 64, p. 41.

were not covered at all at that time. Korea further argues that there is no such thing as informal coverage and that if the entities referred to in the United States were "formally" covered in July 1998, the United States would not have requested de facto compliance with the GPA. Rather, it would have demanded *de jure* compliance.

4.394 In response to a question from the Panel requesting clarification of the July 1998 letter, the **United States notes** that at all times, including in the July 1998 letter from the US Commercial Officer, the United States has maintained that procurement by entities responsible for the construction of the Inchon International Airport were covered under Korea's obligations under the WTO GPA. The United States asserts that its position that KOACA was a covered entity has never changed.[458]

4.395 Further, the United States argues that Korea's argument was based on a single sentence taken out of context. The United States notes that had Korea quoted the entire relevant paragraph, it would have included the sentence indicating that the United States, "hold[s] firm to our position that KOACA should be covered by GPA disciplines."[459]

4.396 The United States also notes that following this statement of the US position, the letter goes on to urge the Korean Government to ensure that KOACA bring its procurement policies and practices de facto into conformity with the GPA. The United States contends that this is entirely consistent with the US position that KOACA and other entities procuring for the Inchon International Airport, were, and, as far as is known, continue to be as a matter of fact, acting in violation of the GPA. The United States notes that in the letter, the United States urges Korea, as a factual matter, to discontinue these discriminatory practices.[460]

Interpretation in light of the *Vienna Convention on the Law of Treaties*

4.397 **In response to a question from the Panel, Korea argues** that while the July 1998 letter is not itself treaty language, Korea believes it has great relevance to the interpretation of Korea's obligations under the GPA in light of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. Korea argues that, first, with regard to the good faith requirement of Article 31.1, the United States cannot now claim that KOACA is a covered entity when only last year the United States explicitly took the position that KOACA was not covered. Second, Korea argues that with regard to Article 31.2(a), the letter is evidence of an agreement (in the sense of a common understanding) between the parties that KOACA was not covered. In Korea's view, this letter, four years subsequent to the treaty, clearly shows that both parties agreed on an interpretation of the provisions of the GPA that do not cover KOACA. Third, Korea states that with regard to Article 31.3(a), the letter is evidence of subsequent agreement between the parties regarding the interpretation of the GPA or the application of Article I and Appendix I. Fourth, Korea states that with regard to Article 31.3(b), the letter is practice that establishes the agreement of the parties regarding the GPA's interpretation. Fifth, Korea states that with regard to Article 31.3(c), the principle of equitable estoppel is a rule of international law[461]; Korea states that it reasonably relied on the United States' letter as evidence of its position and argues that the United States should not now be permitted to change its position to the detriment of Korea. Sixth, Korea states that it does not believe resort to Article 32 is necessary, but if it were, the letter clearly is a "supplementary means of interpretation" that confirms Korea's reading of its GPA obligations. Finally, Korea states that while not directly relevant to Articles 31 and 32, the July 1998 letter, in the context of this dispute, constitutes a statement against interest, which, as the

[458] US Answer to Question 27 from the Panel, dated 3 November 1999.
[459] *Ibid.*
[460] *Ibid.*
[461] J.L. Brierly, The Law of Nations 63 (Oxford 1963); Ian Brownlie, Principles of Public International Law 18 (Oxford 1990).

International Court of Justice has noted, may be construed as a form of admission, as discussed in paragraph 4.389.[462]

4.398 **In response to the same question from the Panel, the United States argues** that in its view, its July 1998 letter does not fit within the customary rules of treaty interpretation, as set forth in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. Article 31 states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The United States contends that as the letter in question post-dates the concession, it cannot be used to determine the object or purpose of Korea's concessions. In addition, the United States contends that this letter does not provide evidence of "any subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation" under Article 31.3(b). The United States contends that, indeed, the letter was drafted at a time when Korea and the United States were on a pre-litigation footing. The United States contends that, thus, it cannot be construed as evidencing any type of either agreement or practice between the United States and Korea. The United States further states that it does not suggest that there is any "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" as provided for in Article 31.3(a) of the *Vienna Convention*, particularly given the clear disagreement between the United States and Korea regarding what the letter says. The United States argues that, moreover, the meaning of Korea's concession in this case is not ambiguous or obscure, so an interpretation under Article 32 is inappropriate.[463]

Impact of Interpretation of Letter on other Arguments

4.399 In response to a question requesting clarification of how the fact that KOACA was not a covered entity would impact on the argument that KAA and IIAC are covered, **the United States argues** as follows. The United States asserts that if it is determined that KOACA was not a covered entity, there would be no impact on the US argument that KAA is covered because (1) KAA is still a subsidiary organization of MOCT, and all subsidiary organizations of "central government entities" are automatically covered under Annex 1 unless otherwise specified, and (2) KAA's procurements are in fact procurements by MOCT, pursuant to Article I of the GPA. The United States argues that as to the question of whether IIAC would be covered, that would depend on the reason why KOACA is not covered. In any case, if KOACA was determined not to be covered, the United States asserts that the result would be a shift in the mutually agreed balance of concession — MOCT responsibility for IIA procurement was transferred out of a covered entity. The United States argues that, therefore, Korea is obliged to make compensatory adjustment for its unilateral exclusion of airport procurement in order to re-balance the rights and obligations between the two countries.[464]

(ii) Letters from US Government Officials to Korean Government Officials

4.400 **The United States contends** that it has made its position undeniably clear on many occasions that KOACA is covered under Korea's GPA obligations and that KOACA's discrimination against US bidders on IIA projects is inconsistent with Korea's GPA obligations. In this respect, the United States refers to the fact that senior United States officials sent at least six letters to Korean Government officials unequivocally asserting the US position that KOACA was covered under Korea's GPA obligations, and that KOACA's procurement practices were in violation of Korea's obligations under the GPA.[465] These letters include: a letter dated 3 June 1997 from Charge d'Affaires Richard Christenson of the American Embassy in Seoul to KOACA Chairman Kang, Dong-Suk; a

[462] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, 42-43 (paragraph 69).
[463] US Answer to Question 31 from the Panel, dated 3 November 1999.
[464] US Answer to Question 28 from the Panel, dated 3 November 1999.
[465] US Answer to Question 27 from the Panel, dated 3 November 1999.

letter sent 17 August 1998 from United States Under Secretary of Commerce David Aaron to Korean Minister of State for Trade Han, Duck-Soo; a letter sent 17 August 1998 from United States Under Secretary of Commerce David Aaron to KOACA Chairman Kang, Dong-Suk; a letter dated 11 September 1998 from US Ambassador to the WTO Rita Hayes to Korean Ambassador to the WTO Man-Soon Chang; a letter dated 15 September 1998 from United States Under Secretary of Commerce David Aaron to Minister of Construction and Transportation Lee Jung; a joint letter dated 14 January 1999 from Secretary of Commerce William Daley and US Trade Representative Charlene Barshefsky to Korean Minister of Foreign Affairs and Trade Hong Soon-Young.

(iii) Memorandum from Korea's Ministry of Foreign Affairs and Trade to KOACA

4.401 **The United States also refers** to a memorandum from Korea's Ministry of Foreign Affairs and Trade (MOFAT) to KOACA, which it says reveals that Korea never had any misunderstanding regarding the US position that KOACA and IIA procurement are covered under Korea's GPA obligations. The United States notes that the memorandum was sent shortly after the July 1998 letter from the US Commercial Officer, Karen Ware. The United States further notes that the subject of the memorandum is "GPA application to KOACA," and states, in relevant part, "Ms. Karen Ware, Commercial attaché of US Embassy pointed out as per the attached letter that GPA should be applied by KOACA tender... ."[466]

(iv) Representations made in September 1998

4.402 **The United States argues** that in September 1998, in response to a question from the United States regarding the scope of KOACA's responsibility and whether KOACA was "responsible for all airport construction projects currently being planned or implemented by government entities in Korea," Korea did not mention procurements for other airports by the Office of Supply or the Regional Aviation Offices, and instead replied:

> "KOACA is responsible for the construction of the Inchon International Airport. At present, there are no other plans for airport construction."[467]

4.403 The United States argues that throughout Korea's GPA accession negotiation, and even after the GPA came into force for it, Korea never once referred to these Regional Aviation Offices in the context of Annex 1 coverage of airport procurement. Further, the United States contends that Korea's answer appears to contradict Korea's present argument that the Regional Aviation Offices have been awarding airport procurement contracts during the period 1992-1998.

4.404 The United States also notes that in the question immediately preceding the question posed by the United States mentioned above, the United States asked:

> "Please identify all government entities that were responsible for airport construction projects at [the time bilateral negotiations between the United States and Korea relating to Korea's participation in the GPA were concluded (1993)] and the relationship of those entities to KOACA, which was established subsequently."

4.405 The United States notes that Korea responded as follows:

> "No other institutions besides the New Airport Development Group was involved in the construction of the airport."[468]

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[466] *Ibid.*
[467] Korean response to US Question 7(a), dated September 1998, (GPA/W/76).
[468] Questions 6(a) and 6(b) (GPA/W/76).

4.406 The United States notes that, again, Korea neglected to mention the Seoul and Pusan Regional Aviation Offices. The United States state that, in fact, Korea even neglected to mention KAA, thus admitting that, as of 1993, the New Airport Development Group of MOCT was still responsible for IIA construction.

4.407 **Korea argues in response** that the United States neglects to mention that the entire backdrop to the series of 27 questions raised in the September 1998 questionnaire was a growing dispute with Korea regarding the applicability of the GPA to, specifically, KOACA, as an entity responsible, again specifically, for IIA procurement. Korea refers to the minutes of the 18 February 1998 and 25 June 1998 meetings of the Committee on Government Procurement, which record the disagreement and characterize it as one regarding the "*Korea Airport Construction Authority*" and the "*International Airport Construction Corporation*."[469] Korea also refers to a letter from Ambassador David Aaron of the US Department of Commerce, dated 17 August 1998, specifically discussing *KOACA's* procurement procedures for the IIA project.[470] Korea notes that the questionnaire was sent to Korea by the United States shortly after this letter, on 11 September 1998.[471]

4.408 Korea argues that the context and content of the questionnaire, therefore, was entirely focused on KOACA and its role in the IIA project. Korea states that it is understandable that Korea's response to the United States' questions would, therefore, focus on KOACA and the IIA project.

4.409 Korea argues that it is not incumbent upon Korea to mention something about which the United States did not ask, such as the Regional Aviation Offices. Korea states that for practical reasons alone, guessing what would have been important to the United States or any other negotiating partner would have been impossible. If any participant in a negotiation were to accept such a burden, the sheer impossibility of fulfilling it would subject it to almost certain liability. Korea questions whether any deleterious impact on the United States or any other signatory could be alleged with regard to the "failure" by Korea to raise the role of the Regional Airport Offices in procurement for airports have had on the United States or any other signatory, and what the effect it would it have on this dispute. In any event, Korea notes that if the United States consulted with US industry carefully and extensively with regard to airport procurement, it surely would have been aware of both the potential bidding opportunities available to and the contracts secured by US companies from the Office of Supply and the Regional Aviation Offices during the period while the GPA negotiations were pending.

4.410 Korea also notes that the United States was in fact aware of the Regional Aviation Offices during negotiations regarding Korea's accession to the GPA. Korea points to a February 1991 document, titled "*Supplementary Explanation of the Note by the Republic of Korea, dated 29 June 1990, relating to the Agreement on Government Procurement*," that lists the Regional Aviation Offices as included within Korea's offer by virtue of its inclusion of MOCT. Korea provides evidence demonstrating that the United States received this document in February 1991.[472]

4.411 **In response, the United States** notes that Korea argues that when the United States asked Korea to "identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction" in 1998, Korea neglected to mention the Regional Aviation Offices because the United States was focused only on the New Airport Development Group. However, the United States queries as to why it would ask about other entities if the United States was

[469] GPA/M/8, 24 May 1998, *Minutes of the Meeting Held on 18 February 1998*, pp. 1, 5; GPA/M/9, 1 September 1998, *Minutes of the Meeting Held on 25 June 1998*, pp. 1, 6.

[470] Letter from Ambassador David L. Aaron, Under Secretary for International Trade, US Department of Commerce (with cover letter from Karen L. Ware, Acting Minister Counsellor for Commercial Affairs, US Embassy Seoul), to Mr. Kang, Dong-Suk, Chairman and President, KOACA, dated 17 August 1998.

[471] GPA/W/76, 18 September 1998, *Request for Information Pursuant to Paragraphs 1 and 2 of Article XIX of the Agreement on Government Procurement, Communication from the United States.*

[472] Korea's Answer to Question 21 from the Panel, dated 29 November 1999.

focused only on the New Airport Development Group. The United States also notes that Korea argues that when the United States asked about "all airport construction projects currently being planned or implemented by government entities in Korea," Korea neglected to mention the projects by the Regional Aviation Offices because the United States was focused only on the IIA project. The United States again queries as to why it would ask about other projects if the United States was focused only on the IIA project. The United States contends that if Korea's responses to these questions are to be taken seriously, then Korea should be estopped from arguing that General Note 1 is not referring to the New Airport Development Group or the IIA project.

(c) Statements against Interest

4.412 **The United States notes** that Korea was the Party that initially raised the issue of "statements against interest". The United States then lists "statements against interest" made by Korea.[473] For example, the United States notes that when MOCT's website states that KAA, KOACA and IIAC are its "subsidiary linear organizations," this could be interpreted as a statement against interest and an admission that these entities are in fact MOCT's subsidiary organizations. The United States argues that, furthermore, Korea's 1991 statements that the New Airport Development Group under MOCT and the Office of Supply are responsible for IIA construction could also be interpreted as statements against interest and as government admissions of the coverage of airport construction under the GPA. According to the United States, throughout this dispute, Korea makes many statements against its interest.

4.413 **Korea refers** to the United States list of "statements against interest" and challenges the "inconsistencies" alleged by the United States. In each instance, Korea argues that "Korea" (not a monolith, but many individuals) was asked a question in a foreign language and answered, also in a foreign language. Korea states that, later the question was asked again, and a different set of words was used to convey the same meaning or two different statements were issued by different people at different times referring to the same subject, using different verbal formulas. Korea states that the list of statements against interest to which the US refers then takes these "different" responses and suggests that they constitute contradictions or statements against interest, and that the doctrine of estoppel is relevant. Korea states that, in any case, Korea made its best efforts to respond to questions that came from the United States. If the United States did not understand an answer, Korea tried a different verbal formula to convey the same meaning.

(d) Doctrine of Estoppel

4.414 **The United States refers** to the international law doctrine of estoppel and, more specifically, quotes from a decision of the International Court of Justice:

> "Estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and convincingly evinced acceptance by that State of a particular regime, but also had caused another State, in reliance on such conduct, detrimentally to change position or suffer some prejudice."[474]

4.415 The United States argues that Korea made repeated declarations concerning whether airport procurement would be within the scope of its GPA offer. The United States contends that it relied upon these declarations in agreeing to Korea's terms of accession. The United States argues that, therefore, Korea is now estopped from changing its position on the very facts it held out to be true during negotiations.

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[473] US Exhibit 79.

[474] Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment, *ICJ Reports 1984*, p. 415, paragraph 51.

3. Subsequent Practice

(a) Coverage of Entities or Projects

4.416 **The United States argues** that subsequent practice in the application of the GPA confirms that the GPA does not contemplate pure entity coverage. The United States notes that, for instance, in considering "the greatest possible extension of [GPA] coverage," pursuant to Article XXIV:7(b) of the Agreement, the Parties at informal consultations suggested:

> "Identification of potential sectors for extended coverage. Reference was made to the inclusion of the telecommunications, transportation and steel sectors. In response to this suggestion, the appropriateness of focusing work on the expansion of coverage in the telecommunications and transportation sectors has been questioned since many countries had made significant progress towards privatization in these sectors. It has been suggested that the review relating to this element should focus on the elimination of the derogations from coverage in some other sectors existing in Appendix I of Parties."[475]

(b) Discussion in relation to GPA Requirements

4.417 **The United States argues** that it first became aware that Korea was not conducting procurement for the IIA project in a manner consistent with its GPA obligations approximately two years ago in 1997, when US companies began informing the United States Government that they were being treated unfairly and in a manner that was inconsistent with GPA requirements when bidding for contracts relating to the Inchon International Airport construction project. At that time, the United States began looking into these practices, and when the United States contacted Korea to discuss the situation, Korea informed the United States that it did not consider the IIA project to be covered by the GPA.[476]

4.418 The United States contends that it continued to discuss this issue with Korean Government officials in Seoul and on the margins of meetings of the WTO Committee on Government Procurement. The United States contends that when it became clear that this matter was not going to be quickly resolved by informing Korean trade officials of KOACA's discriminatory procurement practices and reminding Korea of its obligations under the GPA, the United States began raising this issue formally in the WTO Committee on Government Procurement, sending letters to the Korean Government, and raising this matter in bilateral negotiating fora.[477]

4.419 The United States notes that prior to initial complaints from US companies in mid-1997, the United States continued to believe that it was undisputed that IIA procurement was covered under the Ministry of Transportation, and was part of Korea's GPA commitments. The United States notes, for example, that a 1992-1993 publication jointly produced by Commercial Service Seoul and the Association of Foreign Trading Agents of Korea (AFTAK)[478], listing major projects in Korea, indicates that the new international airport project as being conducted by the Ministry of Transportation.[479] The United States notes that, in addition, a United States Government reporting

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[475] Committee on Government Procurement, "Checklist of Issues Raised in Informal Consultations Regarding Modalities for the Review of the Agreement on Government procurement," (7th revision) Job No. 369, 25 January 1999, p. 29.

[476] US Answer to Question 29 from the Panel, dated 3 November 1999.

[477] US Answers to Questions 27 and 29 from the Panel, dated 3 November 1999.

[478] The United States notes that AFTAK is a private trade association of over 10,000 Korean agents and distributors.

[479] *American Business in Korea, Guide & Directory 1992-93*, the Association of Foreign Trading Agents of Korea in cooperation with the Foreign Commercial Service, American Embassy, Seoul. The United States notes that while many projects contained in the chart of "Major Projects Status as of October 1992" list

cable describing Korea's new GPA obligations, sent on 1 May 1997, specifically notes that infrastructure projects such as the new Inchon Airport are subject to the new conditions of the GPA.[480]

4. Press Releases and Other Publications

(a) Procurements Announced as MOCT Procurements

4.420 **The United States argues** that MOCT's control is so prevalent that, at times, procurements for the IIA construction project are announced as "MOCT" procurements. The United States further argues that such thorough control of these entities has led the public to view MOCT as being responsible for making the award determinations for IIA procurements.

4.421 In support, the United States refers to a 1996 article in the Korea-Herald, which notes that "The tender contract for the project to build and operate refuelling facilities at the Inchon International Airport in South Korea, has been awarded to a consortium led by Hanjin Group. The decision by MOCT to select the Hanjin-led consortium ended the month-long squabble for the project between Hanjin and Kumho Group ... ."[481] The United States asserts that even awardees of Inchon International Airport contracts considered their awards to have been made by MOCT: A press release on the PR Newswire specifies that the "Korean Ministry of Construction and Transportation awarded a Samsung and Lockheed Martin team a contract for the Korean Area Control Center (KACC) system to be installed at the new airport and facility in Inchon, Korea."[482] The United States argues that there is no indication that Korean officials ever disputed or sought to change these characterizations of the role of MOCT.

4.422 **In response, Korea notes** that the selection of a consortium to build and operate the refuelling facility was not a "procurement." Korea states that, to the contrary, it was the award of a franchise or concession to build and operate the refuelling facility. Korea further states that such arrangements are common at airports. As to the KACC system, Korea notes that this was not a procurement for the IIA, but for a replacement for the nationwide air traffic control system presently located at Taegu. Korea states that the new system will indeed be located at Inchon, rather than Taegu, but it will direct air traffic on a national basis, not for the airport. The air traffic control systems for the airport are being procured by KOACA and IIAC. Korea further notes that the award regarding refuelling predated the effective date of GPA obligations for Korea.[483]

4.423 The United States also notes that in an article that appeared in the February 1998 edition of the magazine, "Air Transport World" it was stated that:

> "Since the national government controls both the airport construction authority and the Korea Airports Authority – which operates South Korea's major airports and is expected to manage IIA – it will set the fees."[484]

4.424 **The United States also refers** to press clippings and publications in support of its assertion that MOCT maintains managerial responsibility (including the approval of budgets and implementation plans) over the IIA project as a whole. Specifically, the United States refers to publications, which it says, establish that: (a) primary facilities of the IIA, such as the passenger

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the entity responsible for the project as a government invested corporation (*i.e.* Korea Gas Corp.), and not a central government entity, the Ministry of Transportation is listed with regard to the new international airport.

[480] US Answer to Question 29 from the Panel, dated 3 November 1999, citing US Department of State Reporting Cable, (prepared 1 May 1997), paragraph 10.

[481] "Hanjin-Led Consortium Wins Deal," *Korea-Herald*, 28 August 1996, p. 8.

[482] "Korean Ministry of Construction and Transportation Awards Air Traffic Center Contract to Samsung/Lockheed Martin," *PR Newswire*, 26 May 1998.

[483] Korea's Answer to Question 1 from the Panel, dated 3 November 1999.

[484] Adele C. Schwartz, "Return to Inchon," Air Transport World (February 1998), p. 89.

terminals, the concourses, and the runways, must by law be paid for by the government, controlled by the government, and owned by the government[485]; (b) although "[p]rivate investment for the construction of certain IIA facilities [called 'secondary facilities,' which include cargo terminals, refuelling facilities, and catering facilities] is also actively solicited by IIAC, and is authorized by the *Private Capital Inducement Act for the Expansion of Social Overhead Capital*," these facilities must nevertheless "be turned over to the government after a certain period of time"[486]; (c) during the period that KAA, KOACA and IIAC were responsible for IIA construction, MOCT was issuing its own bid announcements related to IIA construction, while other bid announcements noted MOCT's "control" over KOACA.[487]

4.425 With respect to the bid announcements to which the United States refers to illustrate MOCT's "control" over KOACA, **Korea states** that they both pre-date Korea's GPA obligations and they are not Korean documents. Korea states that, rather, they are reports from the US Embassy in Seoul.

4.426 Specifically, Korea notes that one of the examples referred to by the United States begins, in its substantive part, with the statement, "The Korea Airport Construction Authority (KOACA), under the control of the Ministry of Construction and Transportation … ." Korea states that it appears that this is a statement from KOACA or MOCT, but Korea states that this is not the case. Korea notes that the original bid announcement states simply, "The Korea Airport Construction Authority (KOACA) invites bids for the procurement of the Soil and Concrete Testing Equipments on the following conditions." Korea further notes that there is no mention of MOCT or control in this bid announcement.

4.427 Korea further notes that another example to which the United States refers concerns a co-generation power plant. Korea states that this is not a procurement but the award of a franchise or concession to build and operate a power plant.

4.428 Korea provides press materials which it says challenges the United States' argument that press clippings and publications support the view that MOCT controls the IIA project. Korea provides press releases by US companies identifying KOACA as the contracting entity for IIA projects during its tenure in that role[488], and news articles identifying KAA as the entity in charge of IIA procurement while it held that responsibility.[489]

(b) MOCT Officials Take Credit

4.429 **The United States also states** that MOCT officials themselves have also taken credit for major decisions related to the construction of the Inchon International Airport. The United States refers, for instance, to a March 1996 article in the Korea-Economic Daily in which an MOCT spokesman announcing the decision by MOCT to formally name the Inchon International Airport the "Seoul-Inchon International Airport."[490] In addition, the United States notes that the Korea-Herald quotes an MOCT official declaring that MOCT had re-estimated the cost for the Inchon International

[485] "SOC Project in 1996," Business Korea, March 1996, Vol. 13, Issue 2, p. 3. Also see section 22 of the Private Capital Inducement Act for the Expansion of Social Overhead Capital.

[486] Inchon International Airport brochure, p. 41.

[487] "Korea: Invitation to Bids for New Seoul Int'l Airport Soil and Concrete Testing Equipment" (6 June 1995), paragraph 1. For more evidence of MOCT's control over KOACA, also see "Korea: Yongjongdo Airport Co-Gen Power Plant Proj: Opp'ties" (25 January 1996), which states in its paragraph 1 that "With the approval of the Ministry of Construction and Transportation (MOCT), the Korea Airport Construction Authority (KOACA) recently held an orientation and question/answer session regarding Request For Proposal (RFP) for the Yongjongdo co-generation project on 12 January 1996."

[488] Exhibits Kor-50 and Kor-51.

[489] Exhibits Kor-102 and Kor-103.

[490] "New Airport to be Called Seoul-Inchon International Airport," *Korea-Economic Daily*, 25 March 1996.

Airport from W 5.7 trillion to W 7.48 trillion (US$5.8 billion), that MOCT did not see any problem in meeting the planned date for opening, and that MOCT would complete the first phase of the construction by mid-2000.[491] This official was identified as MOCT's "director general who is in charge of the new airport construction."[492]

(c) Publications Concerning Airport Projects

4.430 **The United States argues** that the airport procurements referred to in General Note 1(b) can only mean those of the IIA construction project. The United States contends that from the time Korea tabled its GPA commitment offer on 29 June 1990, to the present, the United States knows of no new major airport construction projects in Korea, other than the Inchon project. According to the United States, this is the understanding, not only of the United States, but also of other countries interested in the Korean procurement market.

4.431 In support of its argument, the United States notes that, for example, in a 1998 publication by the European Communities ("EC"), entitled "Business Opportunities and the Government Procurement Agreement: A Handbook for EU Companies," a list of "major construction and transportation projects" in Korea is provided, in which the IIA is the only airport procurement project enumerated. Furthermore, the publication offers a list of "major purchasing entities in Korea." The United States contends that the publication also identifies "MOCT, Korea Airport Authority Corp." as the "competent ministry" for the IIA project.[493] The United States asserts that if, in fact, another entity was responsible for procurements for the Inchon project, or other airport procurements, surely it would have been included on this list. The United States contends that, moreover, if the "Korea Airport Authority Corp." is an entity independent of MOCT, it would have been listed separately. The United States notes that, however, MOCT is the only entity listed as being responsible for airport procurement, and "Korea Airport Authority Corp." is not listed separately.

5. MOCT's Website and Other Entities' Websites

4.432 **The United States argues** that in interpreting Annex 1 of the GPA reliance must be placed on the "ordinary meaning" of its text, in its context and in light of the object and purpose of the GPA, in accordance with Article 31 of the *Vienna Convention*.[494] The United States notes that it then looks to MOCT's website to confirm this interpretation. The United States asserts that this is a proper use of the information on MOCT's website and, therefore, should be fully considered in this dispute.

4.433 The United States argues that throughout the Inchon International Airport construction process, MOCT let it be known that it is the entity responsible for the construction of the new Inchon International Airport.

4.434 In support of this argument, the United States refers to the Internet website of MOCT, which proclaims, "In preparation for the 21st century, this ministry is . . . dedicated to the construction of the Seoul-Pusan high-speed rail and the Inchon International Airport." The United States contends that the website also declares that "As of today, MOCT's organization consists of 3 offices, 5 bureaus and 47 divisions which overlook the affairs on national development planning, housing, city planning,

[491] "Inchon Airport Cost Balloons 31 Percent to W 7.5 Trillion," *The Korea Herald*, 22 July 1998.

[492] *Ibid.*

[493] The United States asserts that although it appears unclear as to whether "Korea Airport Authority Corp." is referring to KAA or KOACA, either way, it is evident that "Korea Airport Authority Corp." is considered by the European Communities to be a subordinate organization of MOCT.

[494] Article 31 of the *Vienna Convention*. In addition, Article 32 permits the use of supplementary means to either confirm an Article 31 interpretation, or to interpret the treaty when an Article 31 interpretation "leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."

land policy, water resources policy, construction and administration of roads and airports and all other matters concerning construction and transport safety affairs."[495]

4.435 The United States also asserts that national-level entities in Korea have subsidiary organizations, and unless otherwise specified, a listing of a "central government entity" under Annex 1 also embodies its subsidiary organizations. In support of this argument, the United States refers to the fact that Korea specifically uses the term, "subsidiary organization," on MOCT's website to describe KAA, KOACA and IIAC.

4.436 The United States also argues that the New Airport Development Group which, Korea represented in July of 1991 as the entity responsible for IIA construction and which exists to this day as the "New Airport Construction Planning Team" is a branch office of MOCT. The United States notes that MOCT lists the New Airport Construction Planning Team on the organizational chart located on its webpage.

4.437 **In response, Korea argues** that it is irrelevant for the purposes of interpreting Korea's Annex 1 and Note 1 that MOCT's website (which has been prepared by MOCT's public affairs office) refers to KAA, IIAC and eight other entities as "subsidiary organizations." Korea notes in this respect that Note 1 to Annex 1 states that the term "subordinate linear organizations" is to be interpreted "as prescribed in the *Government Organization Act*," and not as referred to on MOCT's website.

4.438 Korea also notes that in other parts of the organizational chart included on the MOCT website, KAA is described, along with 47 other entities, as a "Related Organization" to MOCT, rather than a "subsidiary organization." Korea further states that the relevant excerpt of the MOCT website, while a useful informational guide, is, for purposes of interpreting legal terms of art, imprecise. Korea states that it is for this reason, undoubtedly, that Note 1 does not state that the central government entities listed on Annex 1 include their subordinate linear organizations "as prescribed by the website of the Ministry of Construction and Transportation of the Republic of Korea."

4.439 Further, in response to a question from the United States, Korea argues that the organizational chart included on the MOCT website is an unofficial "Organizations Chart" printed out from MOCT's website, which post-dates the 15 April 1994 signing of the GPA, which explicitly references the *Government Organization Act*. Korea notes that the website, which was first put online in 1997, could not have contributed to the United States' expectations concerning coverage of KAA at the time the GPA was signed.[496]

4.440 **In response, the United States contends** that the excerpt of the MOCT webpage to which Korea refers that categorizes KAA as a "related organization" instead of a "subsidiary organization" is simply a more recent version of the website that categorized KAA and KOACA as "subsidiary organizations." The United States asserts that it was only after the consultations with the United States in March of 1999 that Korea replaced the term, "subsidiary organization," with "related organization," on every page of MOCT's website. However, the United States asserts that there is still one page that labels KAA and IIAC as "subsidiary organizations."

4.441 **Korea states in response** that it does not see how a website put up in 1997 could have influenced a Member's attitude when it signed the GPA in 1994. Korea also has noted that KAA and KOACA are not the only entities that appear on that website as somehow related or subordinate to MOCT. At least four of Korea's Annex 3 entities also are listed: Korea National Housing

[495] The United States contends that, in addition, Article 16(34) of the *Presidential Order on the Organization of the Ministry of Construction and Transportation* provides that the Civil Aviation Bureau within MOCT is responsible for "[a]ffairs relevant to construction, maintenance, improvement and operation of airport facilities."

[496] Korea's Answer to Question 10 from the US, dated 3 November 1999.

Corporation; Korea Water Resources Corporation; Korea Land Corporation; and Korea Highway Corporation. Korea submits that if "control" by an Annex 1 entity subjects another entity, not on Annex 1, to GPA coverage under that Annex, then it does so to these four entities as well as to those responsible for Inchon Airport procurement. Korea asserts that the "control" is the same in all instances. Korea argues that, however, if "control" subjects these entities to Annex 1 coverage, it is unclear what the consequences are given their placement on Annex 3 and the higher thresholds that apply.

4.442 **The United States also states** that, in fact, on MOCT's webpage, subsidiary organizations are separated into three distinct and separate categories: "Government Investment Corporations," "Government Contribution Authorities," and "Government Contribution Research Institutes." The United States contends that the subsidiary organizations cited under "Government Investment Corporations" are all listed in Korea's Annex 3, while the "Government Contribution Authorities" (which include KAA and KOACA) and the "Government Contribution Research Institutes" are not. The United States argues that this is consistent with the textual interpretation that all subsidiary organizations are covered within the scope of "central government entity" under Annex 1, unless otherwise specified (as in the case of "Government Investment Corporations"). The United States argues that, moreover, only the "Government Investment Corporations" are subject to a special legislative act, the *Framework Act on the Management of Government-Invested Corporations*; there is no analogous legislation for "Government Contribution Authorities" or "Government Contribution Research Institutes."

4.443 **In support of its arguments made in paragraph 4.243** regarding the categorization of IIA entities on the one hand and the Seoul and Pusan Aviation Authorities on the other hand**, Korea refers** to a list of "Airport Profiles" from the Japanese Ministry of Transportation website.[497] Korea notes that while the "founder" and "administrator" for many Japanese airports is the Japanese Ministry of Transportation itself, the New Tokyo International Airport Authority is listed as the founder and administrator of the New Tokyo International (Narita) Airport.

4.444 Korea refers to another extract, from the New Tokyo International Airport's website, which it says explains that although "[i]n the past, the national government has directly administered the establishment and management of international airports in Japan . . . it was decided that the New Tokyo International Airport Authority would perform the construction, management, and operation of [the New Tokyo International Airport] ... ."[498] Korea notes that Japan offers several reasons for this decision, including the need to attract "massive amounts" of private capital to fund such a large project[499], the need for greater flexibility than a traditional government bureaucracy could offer[500], and the need for greater efficiency, demanded by the complex operating demands of the project, than could be generated through a traditional government bureaucracy.[501]

4.445 Korea's asserts that its decision to separate the implementation of the IIA project from other airport construction was motivated by similar reasons, and was entirely legitimate.

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[497] Japanese Ministry of Transportation website, *Airport Profiles*, http://www.motnet.go.jp/info/kuko03.htm.

[498] New Tokyo International (Narita) Airport website, *Adoption of Airport Authority Format and the First Step Toward Construction of New Airport*, http://www.narita-airport.or.jp/airport-e/prpf_e/keii_e/koudan1_e.html.

[499] *Ibid*. ("[B]ecause the construction of a new airport requires massive amounts of capital, it would be necessary to obtain some project funds from the private sector.").

[500] *Ibid*. ("[F]lexibility would be needed in the areas of organization, personnel, and accounting.").

[501] *Ibid*. ("[T]he complexity of airport operation would require an efficient, self-supporting system.").

C. PRACTICES IN VIOLATION OF THE GPA

1. Bid Deadlines

4.446 **The United States argues** that Korea routinely imposes inadequate bid deadlines that are shorter than the durations required by the GPA. The United States provides the following examples in support of its claim:

- Korea announced the procurement of a radar and communication system on 13 June 1998, then required tenders to be received less than 26 days later on 8 July 1998.[502]
- Korea announced the procurement of a contract for the ventilation systems on 9 November 1998, then required tenders to be received less than 23 days later on 1 December 1998.[503]
- Korea announced the procurement of a 22.9 KV electrical cable on 23 November 1998, then required tenders for Part I of the procurement to be received less than 17 days later on 9 December 1998, with tenders for Part II to be received less than 29 days later on 21 December 1998.[504]
- Korea announced the procurement of electrical wire facilities on 23 November 1998, then required tenders to be received less than 25 days later on 17 December 1998.[505]
- Korea announced the procurement of outdoor lighting equipment on 24 November 1998, then required tenders for Part I of the procurement to be received less than 15 days later on 11 December 1998, with tenders for Part II to be received less than 28 days later on 22 December 1998.[506]

4.447 The United States contends that the imposition by Korea of deadlines of less than 40 days for receiving tenders from the date of publication of the procurement announcements was inconsistent with the requirements of Article XI:1(a) and XI:2(a).

2. Qualification requirements

4.448 **The United States argues** that Korea imposes qualification requirements that require domestic investment while favouring domestic bidders. The United States contends that, for example, in the procurement of vertical transportation equipment – that is, elevators and escalators - Korea limited participation of parties as prime contractors to those that "completed the registration for manufacturing business of [elevators and escalators] under the laws of lift manufacturing and management and [to those that possess] both the licence of lift installation business under *Construction Industry Basic Act* and the licence of the first class electrical construction business under *Electricity Work Business Act*."[507] The United States argues that, in other words, this condition required firms bidding as prime contractor to have four Korean-issued licences: an elevator manufacturing licence, an escalator manufacturing licence, an elevator installation licence, and an electrical construction licence. The United States contends that two of these licences could only be

[502] Announcement of Bid for Radars and ATC Communication System for Inchon International Airport (IAA), KOACA Publication 98-39 (18 June 1998).

[503] Passenger Terminal and Attached Building Machine Installation and TAB Operation, New Airport Construction Corporation Announcement No. 98-69 (9 November 1998).

[504] 22.9 KV Electrical Cable Manufacture/Purchase Project (I) and (II), New Airport Construction Corporation Announcement No. 98-70 (23 November 1998).

[505] 22.9 KV Electrical Wire Facilities Construction, New Airport Construction Corporation Announcement No. 98-71 (23 November 1998).

[506] Inchon International Airport Outside Lighting Fixtures Manufacture Purchase Project (I) and (II), New Airport Construction Corporation Announcement No. 98-72 (24 November 1998).

[507] Announcement for the Procurement of the Manufacture and Installation of Vertical Transportation Equipment (15 May 1998), Item 2.1 of Information for Proposal.

obtained by firms that had committed substantial investment in Korea by either building or purchasing local manufacturing facilities. The United States argues that one can see the difficulties faced by foreign suppliers in becoming prime contractors as compared to domestic suppliers who no doubt already have manufacturing facilities in their home country. The United States argues that the discriminatory nature of this condition is further highlighted by the fact that the actual equipment used to satisfy the requirements of this specific contract need not be produced in the local manufacturing facilities in Korea.[508]

(a) Article III:1(a) of the GPA

4.449 **The United States argues** that Article III:1(a) requires non-discriminatory treatment between foreign and domestic products, services, and suppliers in government procurement. According to the United States, the standard of this non-discrimination obligation in the GPA is expressed in terms of "treatment no less favourable." The United States notes that similar, though not identical, language is found in Article III:4 of the General Agreement on Tariffs and Trade (GATT 1994).

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use ... ."

4.450 The United States contends that there are strong similarities between Article III:4 of the GATT 1994 and Article III:1 of the GPA that should guide the interpretation of the GPA. The United States argues that, for example, both provisions prohibit discriminatory treatment based on product origin. Further, according to the United States, both utilize the "treatment no less favourable" standard. Under Article III:4 of the GATT 1994, this standard requires "equal treatment with respect to competitive opportunities."

4.451 The United States notes that, as first articulated by the panel in Section 337 of the *Tariff Act* of 1930:

> "These words ["treatment no less favourable,"] are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III . . . The Panel therefore considered that, in order to establish whether the "no less favourable" treatment standard of Article III:4 is met, it had to assess whether or not Section 337 in itself may lead to the application to imported products of treatment less favourable than that accorded to products of United States origin. It noted that this approach is in accordance with previous practice of the Contracting Parties in applying Article III, which has been to base their decisions on the distinctions made by the laws, regulations or requirements themselves and on their potential impact, rather than on the actual consequences for specific imported products."[509]

[508] *Ibid.*
[509] Panel report on *United States - Section 337*, paragraphs 5.11 and 5.13.

4.452 The United States contends that this interpretation of "no less favourable treatment" in Article III of GATT 1994 as requiring equality in terms of competitive opportunities has been followed consistently in subsequent panel and Appellate Body reports.[510]

4.453 The United States argues that Korea's qualification requirements are inconsistent with the GPA's national treatment requirements in Article III:1(a) because they unfairly discriminate against foreign suppliers in favour of domestic suppliers.

4.454 The United States further argues that by using "treatment no less favourable" in the GPA, the Parties to the GPA obviously intended to create a standard that also refers to less favourable competitive opportunities. The United States argues that, thus, if Korea's procurement practices have modified the competitive opportunities against foreign suppliers in favour of domestic suppliers, Korea should be deemed to have provided "less favourable treatment" to foreign suppliers, in violation of Article III:1(a) of the GPA.

4.455 The United States further argues that, in fact, the qualification requirements imposed by Korea in the vertical transportation equipment procurement accorded less favourable competitive opportunities for foreign firms than for domestic firms. According to the United States, in that procedure, a firm could not bid as a prime contractor unless it possessed by building or purchasing certain manufacturing facilities in Korea. The United States further states that foreign suppliers (who more often than not do not maintain manufacturing facilities in Korea) could, therefore, only bid as prime contractors if they invested considerable resources towards building or purchasing these local manufacturing facilities. The United States argues that this requirement provides less favourable conditions to foreign suppliers, since competing Korean suppliers need not expend the same amounts of additional resources in order to submit bids as prime contractors. The United States argues that, as such, this measure constitutes "less favourable treatment" within the meaning of GPA Article III:1(a).

(b) Article VIII first sentence of the GPA

4.456 **The United States contends** that qualification procedures set forth by Parties to the GPA must be consistent with the provisions of Article VIII. The United States further states that Korea's qualification requirements are all requirements within qualification procedures for procurements related to the IIA project. However, the United States argues that since it has already established that these requirements discriminate against foreign suppliers generally within the meaning of Article III:1(a) of the GPA, *a fortiori*, they also discriminate against foreign suppliers in violation of Article VIII, first sentence.

(c) Article VIII(b) of the GPA

4.457 **The United States argues** that Article VIII(b) establishes that any qualification requirements must be "essential" in order to ensure the "capability" of the firm to fulfill the contract. The United States argues that in applying Article 31 of the *Vienna Convention on the Law of Treaties*, one finds that the ordinary meaning of the term "essential," is "absolutely indispensable or necessary."[511] The United States argues that under Article VIII(b), such conditions for participation may include "financial guarantees, technical qualifications and information necessary for establishing the financial commercial and technical capacity of suppliers, as well as the verification of qualifications." Bearing

[510] See, e.g., *Japan - Measures Affecting Consumer Photographic Film and Paper*, 31 March 1998, WT/DS44/R, paragraph 10.379 ("*Japan - Film*"); *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (adopted on 18 February 1992), BISD 39S/27, paragraphs 5.12-5.14 and 5.30-5.31; *US - Malt Beverages*, BISD 39S/206, paragraph 5.30; *US - Gasoline*, WT/DS2/R, paragraph 6.10; *Canada - Periodicals* (adopted on 30 July 1997), WT/DS31/R, p. 75; *Bananas III*, WT/DS27/R, paragraphs 7.179-7.180.

[511] The New Shorter Oxford English Dictionary (1993 ed.), p. 852.

in mind that, under the first sentence of Article VIII, the qualification process must not be discriminatory, the United States asserts that the question is whether a qualification requirement is really necessary to guarantee that a winning bidder will in fact be able to perform the very contract it has been awarded. The United States contends that it can thus be determined that Korea's qualification requirements are not "essential" in the sense of Article VIII(b).

4.458 The United States further argues that Korea's qualification requirements are inconsistent with Article VIII(b) of the GPA because, as conditions for participating in the tender procedures, they are not "essential" to a firm's "capability to fulfill the contract." Rather, it appears that these conditions were put in place to ensure that Korean suppliers would be able to benefit from and better participate in these valuable procurements.

4.459 Additionally, the United States argues that Korea's requirement for a firm to maintain elevator or escalator manufacturing facilities in Korea, just so the firm can participate in a tender proceeding for vertical transportation equipment, is clearly not "essential to ensure the firm's capability to fulfill the contract." The United States contends that the elements that make it possible for a firm to supply and install an elevator or escalator – reliability, technical expertise, solvency – have no necessary relation to whether the firm owns a manufacturing facility located in Korea (as opposed to some other country), nor to whether the firm owns any factories at all. In fact, the factory requirement at best imposes a buy-national or local-content requirement. The United States asserts that if such a requirement is "essential to ensure the firm's capability to fulfill the contract," then any other GPA Party could exclude from its tender proceedings any bidder that does not have a factory in that country. In the view of the United States, this would eliminate any possibility that a bidder located wholly abroad could bid on a GPA-covered tender and supply the product from a foreign factory. The United States concludes that a key objective of the drafters of the GPA, to ensure that procurement rules and practices are not applied "so as to afford protection to domestic products or services or domestic suppliers,"[512] would be defeated.

3. Domestic Partnering Requirements

4.460 **The United States argues** that Korea has conducted procurements under bidding rules specifying that foreign suppliers can participate only if they partner with or act as a subcontractor to domestic suppliers. The United States notes that, for example, in a procurement for "site preparation and weak foundation enforcement," Korea established the requirement that any "company that has its base outside the Inchon Metropolitan Area must enter into a joint venture for at least 10 per cent of the contract with an Inchon-based company that possesses a Civil Engineering and Construction Licence (including Civil Engineering) issued in the Inchon Metropolitan Area."[513] The United States asserts that, in other words, foreign companies, since they are obviously based outside of the Inchon Metropolitan Area, must enter into joint ventures with local companies in order to even participate in the tendering process. The United States asserts that Korea used similar language to limit the participation of foreign firms in a procurement for electrical wire facilities.[514]

4.461 The United States further argues that in a procurement for a movement area management system, Korea specified that "[f]oreign firms should participate in a bid with local firms (leading or prime company) as consortium members or subcontractors."[515] The United States notes that Korea used this same language to limit the participation of foreign suppliers as prime contractors in

[512] Second paragraph of the preamble to the GPA.

[513] Facilities Infrastructure Construction, New Airport Construction Corporation Announcement No. 98-68.

[514] 22.9 KV Electrical Wire Facilities Construction, New Airport Construction Corporation Announcement No. 98-71 (3 November 1998).

[515] Announcement of Bid for Movement Area Management System (MAMS) for Inchon International Airport (IIA), KOACA Publication 98-37 (16 June 1998).

procurements for radar and communication systems[516], as well as for weather radar systems.[517] Finally, the United States argues that Korea prohibited foreign firms from bidding in a procurement unless they participated in a consortium with no less than two Korean firms.[518]

(a) Article III:1(a) of the GPA

4.462 **The United States argues** that Korea's domestic partnering requirements are inconsistent with the GPA's national treatment requirements contained in Article III:1(a) because they unfairly discriminate against foreign suppliers in favour of domestic suppliers.

4.463 The United States argues that Korea's domestic partnering requirements have provided less favourable competitive opportunities for foreign firms, in comparison with domestic firms. The United States contends, for instance, that in the procedures for "site preparation" and "electrical wire facilities," foreign suppliers were required to participate as joint bidders with local suppliers based in the Inchon area. The United States argues that this requirement accorded less favourable conditions to foreign firms in the procurement, since it became necessary for foreign firms to expend additional resources just to find and obtain partnering contracts with local suppliers. The United States contends that, moreover, for the foreign supplier, the potential profits from winning the tender were substantially reduced, since the foreign supplier would be obligated to share these profits and/or other benefits of the award with the local supplier. The United States further notes that, in contrast, local firms could bid alone, without being subjected to additional costs. The United States asserts that, as such, these requirements provide foreign suppliers with "less favourable treatment" than local suppliers within the meaning of GPA Article III:1(a).

4.464 The United States further argues that other domestic partnering requirements also provided less favourable competitive opportunities as between foreign and domestic suppliers. In the tendering procedures for "movement area systems," "radar and communications systems" and "weather radar systems," the United States asserts that Korea prohibited foreign suppliers from bidding as prime contractors, and further specified that local firms should be the "prime or leading company," with foreign suppliers permitted only to act as subcontractors or consortium members. The United States argues that this measure discriminated against foreign suppliers, because they could only participate if they were able to enter into a "partnership" arrangement with a domestic firm, not only to bid jointly, but to bid in a subordinate position. The United States argues that any potential profits for the foreign supplier must be shared with the domestic supplier (who, in this case as the prime contractor, would most likely exercise its control over the sharing of the profits). According to the United States, domestic suppliers, in contrast, could bid alone if they so choose, again without being subjected to additional costs or other disadvantages.

4.465 As a final example, the United States refers to another domestic partnering scheme in which foreign suppliers were obligated to bid with two or more domestic suppliers. The United States contends that domestic suppliers, on the other hand, were not forced to bid with foreign suppliers, let alone other domestic suppliers. The United States argues that this requirement again singled out foreign suppliers for less favourable competitive opportunities.

4.466 The United States argues that, for the foregoing reasons, it is clear that Korea's domestic partnering practices and procedures provide less favourable treatment to foreign suppliers than that accorded to domestic suppliers within the meaning of Article III:1(a) of the GPA.

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[516] Announcement of Bid for radars and ATC Communication System for Inchon International Airport, KOACA Publication 98-39 (18 June 1998).

[517] Announcement of Bid for Terminal Doppler Weather Radar for Inchon International Airport, KOACA Publication 98-66 (23 October 1998).

[518] Manufacture and Installation of IIA Passenger Boarding Bridge System, Project No. PMD1 (12 March 1998).

(b) Article VIII first sentence of the GPA

4.467 **The United States argues** that qualification procedures set forth by Parties to the GPA must be consistent with the provisions of Article VIII and that Korea's domestic partnering requirements are all requirements within qualification procedures for procurements related to the IIA project. The United States contends that, however, since it has already been established that these requirements discriminate against foreign suppliers generally within the meaning of Article III:1(a) of the GPA, *a fortiori*, they also discriminate against foreign suppliers in violation of Article VIII, first sentence.

(c) Article VIII(b) of the GPA

4.468 **The United States argues** that Korea's domestic partnering requirements are inconsistent with Article VIII(b) of the GPA because, as conditions for participating in the tender procedures, they are not "essential" to a firm's "capability to fulfill the contract." The United States argues that, rather, it appears that these conditions were put in place to ensure that Korean suppliers would be able to benefit from and better participate in these valuable procurements.

4.469 The United States further argues that Korea's requirement that a foreign supplier bid as a joint contractor with a domestic supplier also cannot be deemed as "essential to ensure the firm's capability to fulfill the contract." The United States asserts that there is no legitimate rationale for concluding that all foreign suppliers would be incapable of performing the contract on their own. In the view of the United States, this too is simple protectionism. The United States asserts that if this were permitted, all GPA-covered procurements might eventually be subjected to such domestic partnering requirements, nullifying much of the benefit of the GPA.

4.470 The United States argues that, similarly, Korea in some procurements has permitted foreign suppliers to bid not as prime contractors, but only as subcontractors or consortium members (with a Korean supplier as the prime contractor). The United States further argues that there is no necessary basis for concluding that all foreign suppliers would be incapable of performing the contract as prime contractors. The United States contends that, therefore, it cannot legitimately be argued that these conditions are "essential to ensure the firm's capability to fulfill the contract."

4.471 Finally, the United States argues that Korea's requirement that foreign suppliers bid with two Korean suppliers is again simply protectionism. The United States contends that it cannot legitimately be argued that all foreign suppliers are incapable (acting individually or jointly) of fulfilling a contract, and that one Korean partner is not enough (i.e., for a foreign firm to fulfil the contract, the firm will need to partner with two Korean suppliers). The United States argues that as with the other requirements previously identified, this qualification requirement is imposed for the mere purpose of ensuring maximum domestic participation in procurements for the IIA project.

4. Absence Of Access To Challenge Procedures

4.472 **The United States notes** that in 1995, Korea passed the *Act Relating to Contracts to Which the State is a Party*.[519] This Act established the "International Contract Dispute Mediation Committee" as the impartial and independent body that reviews domestic challenges to the procurement practices of GPA-covered entities.[520] The United States notes that Korea has indicated officially that this Committee is the impartial and independent body that will review challenges to the

[519] Law No. 4868, 5 January 1995.
[520] *Ibid.* Articles 28 and 29.

procurement practices of GPA-covered entities, which is meant to satisfy Korea's obligations under Article XX of the GPA.[521]

4.473 However, the United States argues that when suppliers and service providers protested certain procurement practices by KOACA, alleging inconsistencies with the GPA, the International Contract Dispute Mediation Committee has refused to consider such challenges on the grounds that KOACA is not "recognized as an entity covered by the government [sic] procurement agreement."[522]

4.474 The United States contends that, to date, Korea has yet to grant suppliers and service providers participating in procurements for the IIA construction project with access to non-discriminatory, timely, transparent, and effective domestic challenge procedures. Korea has failed to provide aggrieved foreign suppliers with access to the appropriate challenge procedures under Article XX.

4.475 Further, the United States argues that Korea has not otherwise provided suppliers and service providers of these procurements access to non-discriminatory, timely, transparent and effective domestic challenge procedures. In fact, KOACA's internal rules do not even contain dispute resolution procedures. Accordingly, no relief is allotted to foreign suppliers and service providers when an Inchon Airport procurement is conducted in a GPA-inconsistent manner. Thus, Korea is in violation of Article XX of the GPA.

5. Korea's Response to the Violation Claim

4.476 The Panel asked Korea whether it agreed with the United States' assertion that if the entities engaging in procurement for the IIA are "covered entities," such entities' IIA procurement practices would not be consistent with the Agreement on Government Procurement.[523] **In response, Korea states** that it has not taken a position on the assertions of the United States with regard to the consistency of Korea's procurement practices with the GPA, other than to note that the entities responsible for IIA procurement are not covered entities.[524]

D. NON-VIOLATION CLAIM: NULLIFICATION OR IMPAIRMENT OF BENEFITS

1. Details of the Non-Violation Claim

4.477 The **United States** argues that regardless of whether or not the measures referred to above violate the various articles of the GPA, they nevertheless nullify and impair any benefits accruing to the United States under the Agreement.

4.478 The United States argues that a successful determination of a non-violation nullification and impairment in the GPA requires the finding of three elements: (1) a concession was negotiated and exists; (2) a measure is applied that upsets the established competitive relationship; and (3) the measure could not have been reasonably anticipated at the time the concession was negotiated.[525]

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[521] GPA/12/Rev.1, Notification of National Implementing Legislation of the Republic of Korea, 9 June 1997.

[522] Report to Karen Ware, US Deputy Senior Foreign Commercial Service Officer to the Republic of Korea, containing remarks by Dr. Kim Jung-Min, Deputy Director, Government Procurement & Accounting Policy Division of MOFE on 18 November 1998.

[523] Panel's Question 20 following the First Substantive Meeting.

[524] Korea's Answer to Question 20 from the Panel, dated 3 November 1999.

[525] Report of the Working Party on *The Australian Subsidy on Ammonium Sulphate* (adopted on 3 April 1950), BISD II/188-196, paragraph 12; Panel Report on *Treatment by Germany of Imports of Sardines* (adopted on 31 October 1952), G/26, BISD 1S/53-59, paragraph 16; Panel Report on *European Economic Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried*

4.479 The United States argues that given the inconsistency with the GPA of the procurement practices engaged in by the IIA authorities, elements (2) and (3) of the non-violation claim have already been met. The United States asserts that the only outstanding issue is the first element – that is, whether or not there is a concession.

4.480 The United States contends that, as a matter of judicial economy, it does not request a ruling on the non-violation claim if it is established that Korea has violated its obligations under the GPA. The United States also notes that a finding of non-violation nullification or impairment leads in the first instance to compensation and not necessarily to compliance. The United States contends that its interest in the dispute is first and foremost to assure Korea's compliance with its GPA obligations through the elimination of its GPA-inconsistent procurement practices.

4.481 **In response, Korea argues** that the burden placed upon the United States to support its non-violation claim under Article XXII:2 of the GPA is substantial. Korea notes that under Article 26:1(a) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, "the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."[526]

4.482 Korea refers to the Panel in *Japan – Film*[527] which noted three elements of a non-violation complaint incumbent upon the complainant to prove. Korea states that these elements are evident in the terms of Article XXII:2 of the GPA; namely, "(1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification of the benefit as the result of the application of the measure."[528]

4.483 Korea argues that the United States must demonstrate, by virtue of the requirement in Article XXII:2 that it identify a "benefit accruing" to it under the GPA, that it "reasonably expected" to obtain the benefit of GPA coverage for IIA procurement.[529] Korea further argues that "for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated."[530] Korea asserts that this requirement is self-evident and quotes for support: "If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures."[531]

4.484 Korea also notes that the United States is correct that the first requirement referred to above in paragraph 4.478 - a concession - is very much at issue. Korea asserts that just what "concession" the United States made in exchange for the alleged inclusion of KAA among Korea's commitments is not clear. Korea states that it is aware of no evidence from the United States on this point. Korea also notes, as item (2) on the US list implies, that an "agreement" is necessary. Korea states that it

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Grapes, 20 February 1985 (unadopted), L/5778, paragraph 51; and Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (adopted on 25 January 1990), L/6627, BISD 37S/86, paragraphs 142-152.

[526] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 26:1(a).

[527] Although the Panel in *Japan – Film* addressed a non-violation claim under Article XXIII:1(b) of the GATT 1994, there is no material difference between the language used in Article XXIII:1(b) of the GATT 1994 and Article XXII:2 of the GPA to enumerate the requirements for a non-violation complaint. The Panel's legal reasoning is, therefore, applicable in its entirety.

[528] *Japan - Film*, paragraph 10.41.

[529] *Ibid.* paragraph 10.72. As further support for this principle, see *EEC - Oilseeds*, BISD 37S/86, 128-129 (paragraphs 147-148); *Operation of the Provisions of Article XVI*, BISD 10S/201, 209 (paragraph 28) (adopted on 21 November 1961); *Other Barriers to Trade*, BISD 3S/222, 224 (paragraph 13) (adopted on 3 March 1955); *Germany - Sardines*, BISD 1S/53, 58-59 (paragraph 16) (adopted on 31 October 1952); *Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39, BISD II/188, 193-194 (adopted on 3 April 1950).

[530] *Japan - Film*, paragraph 10.76.

[531] *Ibid.*

understands that the essence of a non-violation is that some action of a party, after an agreement is concluded, which could not have been reasonably anticipated at the time of the agreement, nullifies or impairs a concession made by another party. According to Korea, the United States has not specified what agreement was made by the parties that was nullified or impaired by action taken by Korea after that agreement was entered into. Korea argues that it could not have been an agreement to include KAA (and KOACA and IIAC) in Korea's GPA coverage, for Korea never agreed to include KAA in any of its offers. Korea also states that in addition to the first point, the third is also very much in contention. Korea questions how the United States could reasonably anticipate that Korea would apply the GPA to procurements for the new airport without an agreement and a concession. In Korea's view, the whole premise of the United States' non-violation case rests on the elements it needs to prove for its violation claim: an agreement between the parties, which included a concession by the United States.

2. Concession

(a) 1991 Negotiations

4.485 **The United States argues** that during 1991 negotiations with Korea, the United States specifically accrued the benefit of all new airport construction projects under the coverage of the GPA. Further, the United States contends that even if the transfer of procurement authority as between the various IIA entities was reasonably anticipated by the United States, this fact is irrelevant to a determination of whether a concession was made.

4.486 For support of its argument that a concession was made, the United States notes that in July of 1991, Korea stated that the "New Airport Development Group under" MOCT and the "Office of Supply" are responsible for new airport construction projects. The United States further notes that in relation to the IIA project, Korea stated that the "basic plan" will be completed "by 1992 and the working plan by 1993," that Bechtel "is taking part in the basic plan project," and that the "procurement plan" is not yet "fixed because now the whole airport construction project is only in a basic planning stage." The United States notes that Korea is now arguing that when it said the "procurement plan has not been fixed," it actually meant "nothing concrete was fixed,"[532] or "nothing with regard to procurement was fixed."[533] The United States argues that, however, an entity is not a plan; the Office of Supply is not a procurement plan, it is a procuring entity.

4.487 Further, the United States argues that Korea has always made a distinction between an entity and a plan. The United States notes that Korea made such a distinction in attempting to explain what "procurement plan" meant. The United States quotes: "This included both the entities that might ultimately be responsible for procurement as well as the procurement plan itself."[534] The United States argues that if Korea had meant the "procurement plan" and the "entities that might ultimately be responsible for procurement," it would have said so in its July 1991 response. The United States notes that, instead, Korea only stated that the "procurement plan has not been fixed." The United States argues that Korea's plain language speaks for itself and questions how Korea's mention of "procurement plan" can refer to both the "procurement plan" and the "entities that might ultimately be responsible for procurement."

4.488 The United States also argues that Korea's claim that it had made no decision regarding "which entity would be responsible for IIA construction"[535] in July 1991 is inconsistent with Korea's actions in 1991. In support of this argument, the United States notes that it expressly held out MOCT and the Office of Supply as the responsible airport procurement entities, it included MOCT and the

[532] Korea's Answer to Question 16 from the Panel, dated 3 November 1999.
[533] Korea's Answer to Question 15 from the US, dated 3 November.
[534] Korea's Answer to Question 16 from the Panel, dated 3 November 1999.
[535] Korea's Answer to Question 3 from the Panel, dated 3 November 1999.

Office of Supply in its GPA schedule offer, and it conducted the procurement of IIA's basic plan through MOCT.[536]

4.489 Regarding the United States' interpretation of its July 1991 response, **Korea notes** that, in fact, the July 1991 response does not state that either MOCT or NADG were to be involved in procurement.[537] Moreover, Korea states that its July 1991 response was not a concessions offer, but merely a response to an inquiry. Even if it were such an offer, Korea argues, action by the Korean National Assembly in December 1991, designating KAA as the responsible entity for the IIA project, notified the United States of its position. The United States, moreover, admits that it had actual notice, and was even "surprised" by it.

4.490 **In response, the United States asserts** that this new argument by Korea is totally without basis. Korea's July 1991 response states that, "the new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation." The United States submits that any reasonable interpretation of "conducting the new airport construction" suggests "involvement" in the procurement process by MOCT. The United States further submits that, in fact, Korea itself admitted that MOCT solicited and awarded the first IIA procurement for the 1990-1991 basic plan.

4.491 With regard to the Office of Supply, **Korea states** that it does not consider that the interpretation suggested by the United States is reasonable and, therefore, does not consider that Korea's July 1991 response is reasonably susceptible to the interpretation suggested by the United States. Korea states that the qualification ("But at present . . .") offered immediately after identification of the Office of Supply as the entity that would in principle, under the *Government Procurement Fund Act*, have undertaken IIA procurement had there even been any at the time, over 16 months before site preparation for the airport was to begin, made it unreasonable for any negotiator to conclude that the Office of Supply would, forever after, be the entity responsible for IIA procurement.[538]

4.492 **In response, the United States reiterates** that the phrase "But at present, the concrete procurement plan has not been fixed . . ." refers only to the procurement plan and not the procurement entity.[539] The United States argues that, in addition, because MOCT was responsible for the first IIA procurement, *i.e.*, the 1990-1991 basic plan "by virtue of the *Government Procurement Fund Act*," the Office of Supply should also have been responsible for that procurement.[540]

4.493 The United States argues that, furthermore, it is wrong to imply that, based on its July 1991 representation, the United States concluded that "the Office of Supply would, forever after, be the entity responsible for IIA procurement." The United States contends that, rather, the United States reasonably expected that if Korea were to alter its position regarding an explicit representation made on paper during formal GPA negotiations, it would have explicitly informed the US trade negotiators of such change. The United States contends that, moreover, a decision was taken by the Committee on Government Procurement that each signatory would notify changes to its annexes taking place between the signing of the GPA at Marrakesh and its entering into force.[541] The United States further states that if Korea were to change its position after the GPA came into force for it, Korea would be

[536] Korea's Answer to Question 16 from the Panel, dated 3 November 1999, and Korea's Answer to Question 5 from the US, dated 3 November 1999.

[537] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[538] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[539] Second Written Submission of the United States, paragraph 61.

[540] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[541] See GPA/IC/M/2 at Annex 2, "Administration of Modifications to the Appendices to the Agreement on Government Procurement (1994) Prior to its Entry into Force, Other Than Rectifications of a Purely Formal Nature or Those Resulting from Negotiations Aimed at Expanding Coverage."

obligated to utilize Article XXIV:6 of the Agreement, the sole GPA provision that permits rectifications or modifications to a Party's annexes.[542]

4.494 **Korea states** that it has demonstrated that KAA, KOACA and IIAC, rather than the Office of Supply, have conducted the procurements for IIA.[543] Korea argues that since the Office of Supply has not in fact procured for the IIA, Korea's July 1991 response can speak only to the United States' expectations regarding the entities responsible for IIA procurement, purportedly held prior to the conclusion of negotiations for Korea's accession to the GPA.[544] Korea argues that to serve as the basis for a non-violation complaint, those expectations "must not have been reasonably anticipated at the time the tariff concession was negotiated."[545] Given the qualified nature of Korea's July 1991 response, followed by: the December 1991 amendments to the *Seoul Airport Act* appointing KAA as the entity responsible for the IIA project; correspondence between the United States and Korea regarding KAA's role in the IIA project[546]; and between Korea and major US airport authorities regarding KAA's role in the IIA project[547]; the successful participation of numerous US companies, closely consulted by the United States regarding Korea's offer[548] in KAA procurements for the IIA[549]; KAA's role as a separate "juristic" person[550]; the inclusion of airport authorities on Annex 3 rather than Annex 1 by the United States itself, Hong Kong, Israel, Japan, Aruba, Norway, Singapore, Switzerland and every member State of the European Communities; and the absence of KAA from any of the Annexes included in Korea's Appendix I, Korea argues that the United States' purported interpretation, even if reasonable in July 1991, was no longer reasonable after these developments, well in advance of the conclusion of negotiations regarding Korea's concession, in December 1993.[551]

(b) Ambiguity associated with July 1991 Response

4.495 **In response to a question from the Panel, Korea argues** that if Korea's July 1991 response is open to the interpretation the US now claims, Korea submits that the US interpretation is not the only possible interpretation, nor even the best possible interpretation. Korea further argues that the fact that the US interpretation is not the only possible interpretation is fatal to the US case.[552]

4.496 The **United States argues in response** that Korea newly attributes a "claim" to the United States that Korea's July 1991 response is open to more than one interpretation. The United States contends that Korea does not provide any citation as to where the United States allegedly made such a claim. The United States notes that, in fact, the United States has made statements directly to the contrary, which is consistent with the US view that Korea's July 1991 response to US questions concerning new airport construction projects was unequivocal and unambiguous.[553]

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[542] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[543] Exhibits Kor-19A through Kor-19D, Kor-48A through Kor-48N, Kor-57A through Kor-57E.

[544] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[545] *Japan - Film*, paragraph 10.76.

[546] Letter from US Senator Slade Gorton to Mr. Wan-Sik Yook, Chairman, KAA, 6 October 1992; Letter from Council member of Seattle City Council to Mr. Wan-Sik Yook, Chairman, KAA, 22 September 1992; Letter from the Vice Chairman of KAA to Sung Yong Kim and J.A. Corbett, staff secretaries in the Economic Section of the US Embassy Seoul, 8 August 1992.

[547] Exhibit Kor-34 (Port Authority of New York and New Jersey); Exhibit Kor-35 (Los Angeles Department of Airports); Exhibit Kor-36 (Denver (Stapleton) International Airport); Exhibit Kor-37 (Dallas/Fort Worth International Airport).

[548] US First Written Submission, paragraph 92.

[549] Exhibit Kor-23.

[550] Notification of Act No. 3219, *Official Gazette*, 28 December 1979, p. 5892. Korea reiterates that KAA was established by the National Assembly pursuant to this Act. Article 3 states that KAA is a "juristic person."

[551] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[552] *Ibid.*

[553] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

4.497 **Korea notes** that while the US was asking questions in its native language, Korea was responding in a foreign language. Korea notes further that ambiguity generally is in the eye of the reader or listener, not the writer or speaker. Korea states that those who communicate do not normally aim at ambiguity, and Korea certainly did not do so in this instance. Korea states that this July 1991 communication, which the US now finds is subject to more than one interpretation, concerned a subject that was apparently of crucial importance to the United States: the extent of Korea's GPA offer in relation to the new airport.[554]

4.498 **In response, the United States argues** that in making its argument, Korea appears to suggest that Korea is exempt from the normal rules of treaty interpretation, and of state responsibility, with respect to its GPA schedules and other official documents merely because those documents were translated from Korean to English. The United States asserts that this argument is specious and states that Korea has already agreed that its schedule to the GPA be "[a]uthentic in the English language only."[555] Indeed, all negotiating documents provided by Korea, including the *Government Organization Act of the Republic of Korea*, were provided in English. The United States contends that, moreover, when it has suited Korea, Korea has in many other instances argued for precise textual interpretations of translated Korean documents.[556]

4.499 **In response to a question from the Panel, Korea submits** that if the subject of Korea's GPA coverage was as important as the US suggests, and if the July 1991 communication was as imprecise as the US argues (in that it would support the US interpretation as well as Korea's) then Korea states that it is puzzling that the US did nothing to clear up the matter. Korea argues that a reasonable US reader of an allegedly imprecise communication concerning a crucial matter would have sought clarification, particularly when it knew that the language of the response was not the first language of the person who prepared it. Korea reiterates that no clarification was sought, and the US has submitted no evidence to the contrary.[557]

(c) Burden of Proof

4.500 **Korea refers** to the views of the Appellate Body in the *EC - LAN* case. Korea states that in that case, the panel concluded that it was the importing party – in the context of this case, Korea – that bore the responsibility for the clarity of its tariff schedule. Korea states that the Appellate Body disagreed. The Appellate Body said: "It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs." "On the other hand," it continued, "exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed."[558] In other words, exporting Members have an obligation to ensure that their interests are guaranteed.[559]

4.501 Korea argues that the reasoning of the Appellate Body is equally applicable to this case. Korea states that it was entitled to define its GPA offer, and its ensuing obligations, in terms that suited its own needs. Korea further states that it was up to the United States to ensure that its interests were protected in this process; it was not up to Korea to do so.

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[554] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[555] US Exhibit 45.

[556] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999, referring to Korea's Answer to Questions from the Panel, dated 29 November 1999, at p. 21 in which Korea argues that "Article 6 of the 1997 *Seoul Airport Act*, however, [was] not coincidentally titled 'Operator of New Airport Construction Project'."

[557] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[558] *EC – LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, AB-1998-2 (adopted on 22 June 1998) paragraph 109.

[559] Korea's Answer to Question 2 of the Panel, dated 29 November 1999.

4.502 Korea further argues that just what "concession" the United States made in exchange for the alleged inclusion of KAA among Korea's commitments is not clear. Korea asserts that there is no evidence on this point.

4.503 **In response, the United States argues that** Korea appears to suggest that it has no responsibility for the clarity of its GPA schedule. However, the United States argues that what the Appellate Body in *EC - LAN* made clear was that "[t]ariff negotiations are a process of reciprocal demands and concessions, of 'give and take'."[560]

4.504 The United States argues that, in addition, the *EC - LAN* dispute involved a situation in which "the detailed product composition of tariff commitments was never discussed in detail during the tariff negotiations" and the negotiators "relied on a continuation of the status quo."[561] The United States contends that, indeed, the factual record in *EC - LAN* confirms that the "detailed product composition of the tariff category" in question in that dispute was not discussed at all. The United States argues that, in contrast in this case, the United States specifically asked Korea during negotiations to "identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction." The United States notes that believing that the United States' question was emphasizing the IIA project, Korea responded that "[t]he new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation . . . The responsible organization for procurement of goods and services relating to the new airport construction is the Office of Supply." The United States argues that, thus, it was through this question and response that the United States made sure "that [its] corresponding rights [were] described in such a manner in the Schedules of [Korea] that [its] interests, as agreed in the negotiations, [were] guaranteed."[562]

3. Measure

(a) Application of a Measure

4.505 **Korea argues** that the United States must demonstrate that the assignment to KAA of the responsibility for IIA procurement is a "measure" within the meaning of Article XXII:2 of the GPA. Korea argues that Article XXII:2 is written in the present tense. Korea notes that the Panel in *Japan – Film* stated that Article XXII:2, therefore, "contemplates nullification or impairment in the present tense," and "limits the non-violation remedy to measures that are currently being applied."[563]

4.506 Korea argues that since the measure granting KAA authority to undertake IIA procurement is no longer in effect, the United States' non-violation claim under Article XXII:2 must be rejected. Korea notes in this respect that the *Seoul Airport Act* was amended in August 1994 to shift responsibility for implementation of the IIA project from KAA to KOACA. Korea further notes that, similarly, Article 7(5-2) of the *Korea Airport Corporation Act*, which previously vested KAA with the authority to implement the IIA project, was deleted in August 1994.

4.507 Korea also argues that the transferral of responsibility from MOCT or Office of Supply in December 1991 to KAA which the United States claims undermined its legitimate expectations, occurred two years before the conclusion of the GPA negotiations, in December 1993, when Korea and other signatories submitted their final offers. Korea asserts that, as such, it must be presumed that the United States anticipated and in fact had knowledge of the event. It is the United States that bears the very significant burden of rebutting that presumption.

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[560] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999, referring to Appellate Body report on *EC - LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted on 22 June 1998), paragraph 109.

[561] *EC - LAN*, paragraph 91.

[562] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999, referring to *EC - LAN*, paragraph 109.

[563] *Japan - Film*, paragraph 10.57.

4.508 **In response, the United States argues** that the measures at issue in this dispute are the procurement practices and not, the United States argues as asserted by Korea, the transfer of procurement authority.

4.509 **Further, in response to a question from the Panel, Korea states** that KAA's authority over the IIA project was transferred to KOACA because it was determined that KAA's responsibilities for existing airports did not permit it to conduct the construction of the IIA efficiently. Korea notes in this respect that KAA is primarily focused upon the management of existing airport operations. Korea states that this may involve incidental repair and maintenance. Korea further notes that the only significant construction authority possessed by KAA was its responsibility, from December 1991 to August 1994, for the IIA. Korea states that it believed that an entity devoted solely to the project was necessary given that KAA's existing portfolio made it difficult to balance its construction responsibilities for the IIA. As a result, responsibility for implementation of the basic plan for the IIA project and IIA procurement was transferred by the National Assembly to KOACA in August 1994. Korea notes that KAA continues to supervise the operation of existing airports, including construction and maintenance at those airports.[564]

(b) Measure Upsets Competitive Relationship

4.510 **The United States notes** that the situation in this dispute is analogous to a 1952 dispute, Treatment by Germany of Imports of Sardines, in which tariff reductions negotiated by Norway with Germany were later not honoured by Germany. The United States refers to the relevant panel report, which explains:

> "a nullification or an impairment of a benefit accruing to Norway directly or indirectly under the [GATT] . . . would exist if the action of the German Government, which resulted in upsetting the competitive relationship between [products from Norway and other directly competitive products] could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff reductions on [its products]. The Panel concluded that the Government of Norway had reason to assume, during these negotiations that [the products from Norway] would not be less favourably treated than [other directly competitive products] and that this situation would not be modified by unilateral action of the German Government . . .
>
> As the measures taken by the German Government have nullified the validity of the assumptions which governed the attitude of the Norwegian delegation [during negotiations] and substantially reduced the value of the concessions obtained by Norway, the Panel found that the Norwegian Government is justified in claiming that it had suffered an impairment of a benefit accruing to it under the General Agreement."[565]

4.511 The United States contends that, similarly, during Korea's GPA accession negotiations, the United States bargained for and received from Korea the coverage of all government entities responsible for the procurement of products and services related to new airport construction projects under Annex 1. According to the United States, Korea subsequently engaged in, and continues to engage in, measures in procurement that could not have reasonably been anticipated by the United States at the time the coverage of new airport construction was negotiated. More specifically, the United States argues that by applying GPA-inconsistent practices in the procurement of new airport construction projects, Korea upsets the established competitive relationship between US products,

[564] Korea's Answer to Question 18 from the Panel, dated 3 November 1999.

[565] Panel report on *Treatment by Germany of Imports of Sardines* (adopted on 31 October 1952,) G/26, paragraphs 16-17.

services and suppliers and Korean products, services and suppliers. The United States argues that these measures result in the upsetting of the established competitive relationship between US products, services and suppliers and Korean products, services and suppliers in the IIA construction project, a competitive relationship worth potentially US$6 billion. On this basis, the United States argues that Korea is nullifying or impairing benefits accruing to the United States under the GPA.

4.512 **Korea argues** that the requirement that the measure at issue upset the competitive relationship created by the Agreement implies, that an "agreement" is necessary. Korea further argues that the essence of a non-violation claim is that some action of a party, after an agreement is concluded, which could not have been reasonably anticipated at the time of the agreement, nullifies or impairs a concession made by another party. Korea asserts that the United States has not specified what agreement was made by the parties that was nullified or impaired by action taken by Korea after that agreement was entered into. Korea further asserts that it could not have been an agreement to include KAA, KOACA and IIAC in Korea's GPA coverage given that Korea never agreed to include KAA in any of its offers.

4. Reasonable Expectation of a Benefit

(a) Relevance of "Reasonable Expectation of Benefit"

4.513 **Korea emphasizes** that whether or not the United States' expectations regarding Korea's GPA commitments are "reasonable" is entirely irrelevant to a "violation" complaint under the GPA. Korea notes that reference to a complainant's reasonable expectations in the context of a violation complaint "melds the legally-distinct bases for violation and non-violation complaints . . . into one uniform cause of action, and is not in accordance with established GATT practice."[566] Korea asserts that the question whether expectations are reasonable or not is, therefore, relevant only in the context of a "non-violation" complaint, raised by the United States pursuant to Article XXII:2 of the GPA.

(b) Has there been a Reasonable Expectation of Benefit in this Case?

4.514 **Korea argues** that during the negotiation of the GPA, and specifically, during the period leading up to the submission by Korea of its final offer list for accession to the GPA, the United States was very much aware that KAA, rather than MOCT, Office of Supply or any other covered entity, was in fact responsible for IIA procurement. Korea further argues that the United States was aware of KAA's role as the entity responsible for IIA procurement years before Korea submitted its final offer for accession to the GPA, in December 1993. Korea notes in this respect that responsibility for IIA procurement was assigned to KAA two years before Korea's submission of its final offer for accession to the GPA on 15 December 1993, nearly two and one-half years before the conclusion of the Marrakesh Agreement on 15 April 1994, and six years before the effective date of the GPA, which for Korea was 1 January 1997.

4.515 Korea further argues that during negotiations regarding Korea's accession to the GPA, the United States was aware of the existence and activities of Annex 1 entities undertaking "procurement for airports," whether related to new airport construction or work on existing airports. Specifically, Korea argues that the United States was aware that entities other than KAA – namely, the Regional Aviation Offices – existed, procured for Korean airports other than IIA and were included in Korea's offer.[567]

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[566] *EC - LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted on 22 June 1998), paragraph 80.

[567] Korea's Response to the US Answer to Question 17 from the Panel, dated 29 November 1999.

4.516 Korea states in this respect that the Korean cable report[568], the questions put to Korea by the United States in May 1991[569] and the May 1991 US Department of Commerce cable report[570] all note the United States' receipt of a February 1991 document titled "*Supplementary Explanation of the Note by the Republic of Korea dated 29 June 1990 relating to the Agreement on Government Procurement*." Korea further notes that page 11 of this *Supplementary Explanation*, explaining Korea's initial offer, lists the Regional Aviation Offices or Bureaus as included within Korea's commitment of the Ministry of Transportation. Korea notes that it does not list KAA.[571]

4.517 Furthermore, Korea states that it has furnished proof of procurements undertaken by the Regional Aviation Offices both during the negotiations and up to the present.[572] Korea argues that it is not credible for the United States to claim, on the one hand, that it consulted carefully and extensively with US industry regarding Korean airport procurement and yet, on the other hand, that it had no idea about the entities undertaking that procurement.[573]

4.518 Korea also states that Korea's General Note 1(b) meant (and means), and what the United States reasonably expected it to mean at the conclusion of GPA negotiations with Korea, was that Annex 1 entities conducting procurements for airports existed (and exist) and that they are MOCT's Regional Aviation Offices. Korea states that during negotiations with Korea, the United States was aware of their existence, their identity, their procurement activity and their inclusion in Korea's offer. It was also aware that Korea did not include KAA in the February 1991 *Supplementary Explanation* as a procuring entity considered covered under Korea's offer by virtue of a relationship with the Ministry of Transportation.[574]

4.519 **In response, the United States** argues that Korea's GPA-inconsistent practices in the procurement of new airport construction projects could not have been reasonably anticipated by the United States at the time of the 1991 negotiations.

4.520 Further, the United States argues that it is completely irrelevant whether the United States knew that KAA was responsible for airport procurement or not. The United States argues that, rather, what is relevant is the fact that KAA is a subsidiary organization of MOCT. Given that it is a subsidiary organization of MOCT, and thus covered under Annex 1 of the GPA, the United States could, therefore, not have reasonably anticipated the lack of GPA coverage for any of KAA's procurements.

4.521 Additionally, in response to a question from the Panel, the United States notes that its reasonable expectation relates not to KAA's status as a project operator, nor to the fact that KAA was operating under its own procurement regulations, but instead it relates to whether the United States reasonably expected new airport construction to be covered under Annex 1 of the GPA. The United States contends that this reasonable expectation did not change despite the shift of procurement authority to KAA, because KAA was (and is) a subordinate unit of MOCT, and a shift of procurement authority within MOCT was of no consequence, for Korea had already assured the United States that all of MOCT would be covered under Annex 1. The United States asserts that a transfer from one subordinate unit of MOCT to another subordinate unit of MOCT is no transfer at all. According to the United States, the procurement authority remained within MOCT.[575]

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[568] Exhibit Kor-118.
[569] US Exhibit 4, Questions 9, 10, 11, 14, 15.
[570] US Exhibit 2, p. 2.
[571] Korea's Response to the US Answer to Question 17 from the Panel, dated 29 November 1999.
[572] Exhibits Kor-61A through Kor-61J.
[573] Korea's Response to the US Answer to Question 17 from the Panel, dated 29 November 1999.
[574] *Ibid.*
[575] US Answer to Question 25(b) from the Panel, dated 3 November 1999.

4.522 The United States contends that, moreover, the US reasonable expectation did not change because KAA was using different procurement regulations at the time. The United States further states that central government entities (including their subordinate units) are only required to come in line with GPA requirements after the GPA enters into force. According to the United States, it was reasonable to expect that Korea would bring KAA's practices into line with the GPA by the time the GPA entered into force for Korea, in January 1997.[576]

(c) Relevant Evidence Before Korea's Accession

(i) Negotiations and Communications

Korea's July 1991 Communication

4.523 **Korea argues** that assignment of responsibility for IIA procurement to what would become a non-covered entity should have been, and in fact was, reasonably anticipated by the United States during negotiations with Korea regarding its GPA commitments. In support of its argument, Korea states that in a 1 July 1991 response to a question from the United States regarding the IIA project, Korea stated that Office of Supply was to be the "responsible organization for procurement" for the IIA project. Immediately following that sentence, however, Korea expressly stated: "But at present, the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage." Korea asserts that it could not have made this qualification with greater clarity.

4.524 According to Korea, Korea argues that, furthermore, there would in July 1991 have existed some uncertainty concerning the entity responsible for IIA procurement was entirely reasonable. Korea notes in this respect that its response to the United States' inquiry was offered six months before the basic plan for IIA was completed, 16 months before site preparation for the IIA project was to begin, two and one-half years before Korea's submission of its final offer list, and nearly five years before ground-breaking for the IIA passenger terminal took place, on 23 May 1996. Korea states that given the express reservation in Korea's July 1991 response, and given that the IIA project was in the infancy of its planning stage when that response was given as stated in the July 1991 response, the United States was on notice that plans regarding the entities responsible for IIA procurement were not yet set. Procurement plans for the IIA project were simply not ready in July 1991, and Korea fully disclosed this fact to the United States.

4.525 **The United States contends in response** that Korea's argument is not persuasive because it fails to explain how the phrase, "procurement plan," can specifically be referring to "plans regarding the entities responsible for IIA procurement." The United States argues that "procurement plan," by its ordinary meaning, could only be referring to "the basic plan for the construction of IIA," which, consistent with Korea's own representation, was not yet fixed at the time of Korea's 1991 response. The United States contends that this basic plan provided for the "general direction of IIA construction, an outline of the construction plan, an estimated duration for the construction, and a financing plan for the project." The United States asserts that it did not provide for any change in entity coverage and it was not announced until 16 June 1992, whereas KAA became responsible for the procurement of airport construction in December 1991. The United States further asserts that if Korea had really wanted to provide "greater clarity," it would have said, "But at present, the procurement entity has not been fixed."

4.526 Further, the United States argues that, as for Korea's argument that the United States was placed on notice that "the entities responsible for IIA procurement were not yet set," the United States contends that Korea's representation that "the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage," referred only to the

[576] *Ibid.*

procurement "plan" and not to the procuring "entity." The United States notes that, furthermore, this condition directly followed plain statements referencing a "basic plan" and a "working plan" to be completed by 1992 and 1993, respectively, as well as a definitive representation regarding the role of MOCT and the Office of Supply as entities responsible for IIA construction. The United States concludes that, therefore, Korea's conditional statement could only be referring to the basic plan or the working plan, and not to the entities conducting the procurement.

4.527 The United States also states that it relied on Korea's representations in 1991, when Korea explicitly stated that the New Airport Development Group of MOCT and the Office of Supply are the only two entities responsible for procurements of new airport construction. The United States also states that it relied on Korea in subsequent years when Korea never again raised the issue of airport procurement.

4.528 **Korea responds** by arguing that even if Korea's July 1991 response did not alone effectively alert the United States to the possibility that IIA procurement responsibility might eventually fall to an entity other than the Office of Supply, there are numerous examples of constructive and actual notice that demonstrate that the United States was very much aware of KAA's role years before the conclusion of the GPA negotiations.

4.529 Korea states that those examples of constructive and actual notice include the following: In December 1991, Korea published in its *Official Gazette* notification of KAA's appointment to implement the IIA project, and the United States is charged with knowledge of this notice; during 1992, Korea and the United States exchanged correspondence regarding KAA's role as the entity responsible for the IIA project; during the period 1992-1994, numerous US companies bid for and secured procurements conducted by KAA for the IIA project; during 1992, KAA broadcast its procurement role in the IIA project to airport and airport construction experts worldwide, including the Port Authority of New York and New Jersey, the Los Angles Department of Airports, the Denver (Stapleton) International Airport, and the Dallas/Fort Worth International Airport; press reports demonstrate that KAA was the entity in charge of IIA procurement; the United States was aware, by virtue of the publication in the *Official Gazette* of the *Korea Airport Corporation Act*, that KAA, like Korea's Annex 3 entities, is a separate "juristic" person; the United States was aware that its own airport authorities, as well as the airport authorities of nearly every GPA signatory, were included on Annex 3 rather than on Annex 1; in July 1998, the United States acknowledged that KOACA, is not covered, and the European Communities stated, in March 1993, that Korea's GPA proposal contained "no offer regarding airports."

4.530 According to Korea, therefore, during the period leading up to its submission of its final GPA offer, the United States was aware that KAA, rather than MOCT or the Office of Supply, was the entity responsible for IIA procurement. At the same time, Korea asserts that the United States was also aware that KAA was not listed on Korea's Annex 1.[577]

Korea's February 1991 *Supplementary Explanation*

4.531 **Korea argues** that the United States was aware that KAA did not feature on the list of subordinate bodies covered by virtue of Korea's offer of the Ministry of Transportation and also was well aware of the inclusion of other MOCT airport-procurement entities – that is, the Regional Aviation Offices - within Korea's offer of the Ministry of Transportation as an Annex 1 entity.[578]

4.532 Korea argues that procurements for construction at "other regional airports" are covered under Korea's Annex 1 not because they are covered projects, but because they are undertaken by covered entities – MOCT's Regional Aviation Offices or the Office of Supply on their behalf. Korea notes in

[577] Korea's Second Written Submission, paragraphs 169-172.
[578] Korea's Answer to Question 21 from the Panel, dated 29 November 1999.

this respect that responsibility for procurements for significant construction for these airports falls to the Regional Aviation Offices or the Office of Supply.[579]

4.533 Korea notes that the United States has claimed in these proceedings that it was not aware that entities other than KAA, KOACA and IIAC – namely, the Regional Aviation Offices and the Office of Supply – conduct procurements for "other regional airports" in Korea. Korea notes that the United States blames this lack of awareness on Korea, arguing that Korea should have disclosed the existence of the Regional Aviation Offices to the United States in its 1 July 1991 response and its response to other questions put to it by the United States in September 1998.[580]

4.534 Korea argues in response that the United States was in fact aware of the existence of the Regional Aviation Offices during negotiations with Korea regarding its accession to the GPA. Korea refers to a document, dated February 1991, and titled "*Supplementary Explanation of the Note by the Republic of Korea dated 29 June 1990 relating to the Agreement on Government Procurement*," which lists on pages 6-14 all 47 Korean central government entities, along with their subordinate linear organizations, special local administrative organs and attached organs. Korea states that page 5 of the *Supplementary Explanation* notes that 35 of those 47 central governments were covered under Korea's June 1990 offer. Korea further notes that page 26 of the document describes the point of what eventually became Note 1 to Korea's Annex 1 – "to clarify the coverage of central government organs which come under 35 of [4]7 purchasing entities."[581]

4.535 Korea notes as an example, page 11 of the *Supplementary Explanation*, lists five bodies as covered by the inclusion of the Korean Ministry of Transportation, including the Regional Aviation Offices or Bureaus. Korea argues that this document confirms that Korea did intend to commit to coverage of procurements by the Regional Aviation Offices. Korea states that it is also noteworthy that KAA is not on this list included at pages 6-14 of the *Supplementary Explanation*, either as a body under the Ministry of Transportation, or as a central government entity in its own right.[582]

4.536 Korea argues that the United States received this document. Korea notes that this is evident from a Korean 25 February 1991 cable report indicating that the *Supplementary Explanation* was in fact delivered to and acknowledged as received by the United States.[583] Korea notes that, moreover, the United States' May 1991 questions to Korea include five citations to Korea's February 1991 *Supplementary Explanation*.[584] Korea also notes that the May 1991 US Department of Commerce cable report includes at least two references to the "ROKG's 2/91 *Supplementary Explanation*" or "the February *Supplementary Explanation*."[585] Korea states that it is evident that the document was provided to the United States, scrutinized by the United States, and used as a starting point for questions put to Korea by the United States.[586]

4.537 Korea states that despite KAA's conspicuous absence from the list of MOCT airport-procurement entities included on page 11 of Korea's February 1991 *Supplementary Explanation*, despite the United States' purported interest in GPA negotiations with Korea, in the transportation sector generally and the "Airport Development Group" more specifically and despite the United States' awareness of KAA's role as the entity responsible for the IIA project, the United

[579] *Ibid.*
[580] *Ibid.*
[581] Korea's Answer to Question 21 from the Panel, dated 29 November 1999. Korea notes that although p. 5 clearly states that 35 of the 47 total central government entities were covered by Korea's offer, p. 26 puts the number at "35 of 37"entities. The statement on p. 26 appears to be a typographical error, since the list on pp. 6-14 actually includes 47 entities.
[582] *Ibid.*
[583] *Ibid.*
[584] Questions 9, 10, 11, 14, 15.
[585] p. 2.
[586] Korea's Answer to Question 21 from the Panel, dated 29 November 1999.

States never once, in the more than two and one-half years remaining in the GPA negotiations with Korea, asked where KAA fit into Korea's offer. Korea cannot be accorded responsibility for the United States' failure.[587]

4.538 In support of its argument, Korea refers to an internal EC Commission note, dated 3 December 1993.[588] Korea states that this document refers to Korea's offer of coverage for "a number of major cities (Seoul, Pusang) [sic]" that "control their airports in co-operation with the Ministry of Transportation." MOCT's two Regional Aviation Offices are, again, the Seoul and the Pusan Regional Aviation Offices. Those are the airport procurement entities included in Korea's offer for Annex 1 GPA coverage of MOCT.[589]

4.539 **In response, the United States argues** that even though the February 1991 document lists all of the "subordinate linear organizations," "special local administrative organs," and "attached organs" of the Ministry of Transportation and the Ministry of Construction, when this document is compared with the 1994 and 1999 MOCT organizational charts[590], there are numerous discrepancies.[591]

4.540 The United States notes, for instance, that the General Affairs Division, the Planning and Management Office, the Construction Affairs Office, the Transportation Policy Office, the National Territory Planning Bureau, the Land Bureau, the Housing and Urban Affairs Bureau, the Surface Transportation Bureau, the Transportation Safety Bureau, the Civil Aviation Bureau, the Waterway Bureau, the Air Traffic Control Center and the Central Land Tribunal from the 1994 MOCT organizational chart are not listed in the February 1991 document. The United States contends that, yet it is uncontested that these entities are covered under Annex 1 of the GPA. In addition, the Construction Economy Bureau, the Technology and Safety Bureau, the Road Bureau and the Water Resources Bureau (entities from the 1999 MOCT organizational chart not found in the 1994 chart) are also not listed in the February 1991 document.[592]

4.541 The United States argues that, moreover, according to this February 1991 document, there are 24 District Construction Offices, five VOR-TAC Stations, and a Flight Inspection Office under the Ministries of Construction and Transportation, yet these entities cannot be found in either the 1994 or 1999 MOCT organizational charts. Similarly, the February 1991 document lists three Flood Control Offices, a National Construction Research Institute, a Central Equipment Management Office, and five Marine Accident Inquiry Offices. However, the organizational charts list five Flood Control Offices, and the 1999 chart excludes the National Construction Research Institute, a Central Equipment Management Office, and five Marine Accident Inquiry Offices (four of which have the exact same name on the 1994 chart). Finally, the United States notes that, in addition to KAA, the New Airport Development Group is not listed in the February 1991 document. Thus, it is not surprising that KAA is not listed in this document.[593]

4.542 The United States argues that what is clear is that the February 1991 document does not represent Korea's GPA commitments; it is not even Korea's final offer. The United States contends that as Korea itself has noted, it is merely "a starting point for questions put to Korea by the United States." The United States contends that this makes sense, because subsequent to receiving this document, the United States in May 1991 asked Korea to "[p]lease identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction." The United States notes that Korea responded in July 1991, "The new airport construction is being

[587] *Ibid.*
[588] Attached as Annex V to the EC's Answer to Questions from the Panel, dated 3 November 1999.
[589] Korea's Response to the EC's Answer to Question 1 from the Panel, dated 3 November 1999.
[590] Exhibit Kor-111.
[591] US Response to Korea's Answer to Question 21 from the Panel, dated 29 November 1999.
[592] *Ibid.*
[593] *Ibid.*

conducted by the New Airport Development Group under the Ministry of Transportation . . . The responsible organization for procurement of goods and services relating to the new airport construction is the Office of Supply."[594]

4.543 The United States argues that it is also clear that whether a non-listed entity should be considered "attached/connected/affiliated" to a listed entity should not be determined by the listed entity's organizational chart, which is subject to unilateral alterations at any time, and was not considered as part of the GPA negotiations. The United States argues that following a textual analysis of the GPA, "control" is the only feasible, objective method in which one can determine whether a non-listed entity is "attached/connected/affiliated" to a listed entity, and therefore is covered under the GPA. The United States further argues that, in fact, at one point in its response, even Korea appears to embrace the "control" concept by claiming that it did not include KAA in the February 1991 document because it "did not consider KAA to be 'controlled' enough by MOCT to include it on the list of MOCT airport-procurement entities."[595]

Legislation

Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction

4.544 **In response to a question from the Panel** as to why Korea did not refer to the 1991 enactments and amendments to IIA legislation in its July 1991 response, **Korea states** that pursuant to *Japan - Film*[596], the United States is charged with knowledge of the enactment of the *Seoul Airport Act*, and the significance thereof, from the date of its publication in the Official Gazette, which came not weeks or months before the conclusion of negotiations regarding Korea's GPA commitments, but instead more than two and one-half years before the conclusion of those negotiations.[597] Korea argues that by virtue of either the publication of the *Act* or otherwise, the United States was aware of the *Act* and its significance. Korea argues that, therefore, it was not incumbent upon Korea to provide an answer to a question that was not even asked of it, in circumstances where the United States had constructive and actual knowledge of the Act.[598]

4.545 Korea also notes that with the enactment of amendments to the *Seoul Airport Act* in December 1991, the National Assembly stated that MOCT would not be responsible for the IIA project and that that job would go to KAA. Korea states that the GPA significance of this fact is not found in the *Act* itself, but instead stems from the fact that KAA is not now and never was listed on any of the Annexes included in Korea's Appendix I.[599]

4.546 **In response, the United States argues** that this assertion is contradicted by the fact that no version of the *Seoul Airport Act* has ever stated that MOCT would not be responsible for the IIA project. The United States contends that, on the contrary, the *Seoul Airport Act* is filled with references to MOCT authority over the project operator and MOCT's role in the IIA project. The United States notes that, significantly, the December 1991 *Seoul Airport Act* amendments did not state that the job of responsibility over the IIA project would go to KAA. The United States notes that the December 1991 amendments merely added KAA to the list of potential project operators of the IIA project. The United States further contends that the December 1991 amendments did not alter

[594] *Ibid.*
[595] *Ibid.*
[596] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[597] Korea's Answer to Question 1 from the Panel, dated 29 November 1999, referring to *Japan - Film*, WT/DS44/R (adopted on 22 April 1998), paragraph 10.80.
[598] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[599] Korea's Answer to Question 5 from the Panel, dated 29 November 1999.

Article 6(2) in any way, the provision which bestows upon MOCT authority to designate any project operator for the IIA project.[600]

4.547 The United States contends that, moreover, Korea's statement gives the impression that the National Assembly was responsible for designating KAA as the IIA project operator. The United States notes that, however, according to Korea, MOCT made the sole "internal decision" to designate KAA as project operator for the 1991-1994 portion of the IIA project. The United States notes further that MOCT then drafted and published the "draft legislation containing proposed amendments to the *Seoul Airport Act*." The United States further states that Korea submitted this draft legislation to the National Assembly, not because the National Assembly "assigned" KAA to this task, but because only the National Assembly can pass laws in Korea. The United States concludes that, thus, the National Assembly merely codified a decision made by MOCT, pursuant to the authority granted to MOCT in the *Seoul Airport Act*.[601]

4.548 **Korea states** that the appointment of KAA, in December 1991, as the entity responsible for IIA procurement occurred "prior to the conclusion of the tariff negotiations at issue." Korea further argues that there is "a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption."[602]

4.549 Korea reiterates that it is the United States that bears the considerable burden of rebutting this presumption. Korea need not demonstrate that the United States did not anticipate to secure coverage of the entities responsible for IIA procurement. To effectively rebut the presumption, it is for the United States to demonstrate, affirmatively, that it "reasonably expected" to obtain the benefit of GPA coverage for IIA procurement by virtue of Korea's inclusion of MOCT and the Office of Supply on its Annex 1 list.[603]

4.550 **In response, the United States argues** that Korea's argument is irrelevant to this case. The United States argues that it does not matter whether the United States had constructive or actual notice of the enactment of the *Seoul Airport Act*, for the significance of the *Act* is simply that it confirms MOCT's statutory authority and control over the IIA project.[604]

4.551 The United States reiterates that the *Seoul Airport Act* is replete with references to MOCT authority over the IIA project. The United States notes that, for example, Article 6 of the *Seoul Airport Act*, while listing a range of possible "operators" (which incidentally includes "state" and "local" governments), grants MOCT ultimate authority to select any entity to be the project operator for the IIA project. This is entirely consistent with the rights granted to MOCT under Article 94(2) of the *Aviation Act*.[605]

4.552 The United States contends that it is important to keep in mind that a "project operator" is distinct and separate from the entity that has ultimate authority over the project. The United States also states that it is important to remember that Korea itself reconfirmed that the Office of Supply and

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[600] US Response to Korea's Answer to Question 5 from the Panel, dated 29 November 1999.
[601] *Ibid.*
[602] *Japan - Film*, WT/DS44/R (adopted on 22 April 1998), paragraph 10.80.
[603] *Ibid*. paragraph 10.72. As further support for this principle, see *EEC - Oilseeds*, BISD 37S/86, 128-129 (paragraphs 147-148); *Operation of the Provisions of Article XVI*, BISD 10S/201, 209 (paragraph 28) (adopted on 21 November 1961); *Other Barriers to Trade*, BISD 3S/222, 224 (paragraph 13) (adopted on 3 March 1955); *Germany - Sardines*, BISD 1S/53, 58-59 (paragraph 16) (adopted on 31 October 1952); *Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39, BISD II/188, 193-194 (adopted on 3 April 1950).
[604] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[605] *Ibid.*

the Ministry of Transportation were responsible for the IIA airport development project when it responded to US questions in July 1991, two months after the enactment of the *Seoul Airport Act*.[606]

Aviation Act

4.553 **The United States notes** that the version of the *Aviation Act* granting statutory authority over airport development projects to MOCT, came into effect as a wholly amended Act on 14 December 1991. Accordingly, the United States argues that it was on notice from December 1991 onwards that MOCT retained statutory authority and control over all airport development projects in Korea, including the IIA project. In light of this, argues the United States, it felt confident that, from 1991 to the time when Korea submitted its final offer in December 1993 and signed the revised GPA at Marrakesh in 1994, MOCT was the proper entity to be covered under the GPA in order for the US to obtain non-discriminatory access to Korea's airport procurement market. The United States notes that to this day, the *Aviation Act* remains unaltered in providing MOCT the statutory authority over the IIA airport development project. The United States argues that this was one of the reasons why it was essential for the United States to negotiate MOCT's coverage under the GPA, and why the United States was not concerned about explicitly covering IIA project operators, which MOCT could change at will at any time (as evidenced by the shift of IIA responsibility from KAA to KOACA and IIAC over a span of eight years), but which would nevertheless remain covered under the GPA because of MOCT's ultimate control over the IIA project.[607]

4.554 **Korea argues in response** that the *Seoul Airport Act* replaces the *Aviation Act* for the purposes of the construction of the IIA.[608] Korea states that the United States, well beyond constructive knowledge of the *Seoul Airport Act*, had actual knowledge of that Act throughout and subsequent to negotiations with Korea regarding accession to the GPA. Korea asserts that the United States' awareness of the passage of the *Seoul Airport Act* and its understanding that the *Seoul Airport Act* rather than the *Aviation Act* regulates IIA construction is illustrated in the United States' First Written Submission, in which it cites 17 Articles from the *Seoul Airport Act* in support of its claims, and no Articles from the *Aviation Act*.[609]

4.555 Korea also argues that the United States' apparent assertion that its expectations regarding which entity would be responsible for IIA construction were formed by the *Aviation Act* presumes ignorance of the *Seoul Airport Act*. Korea argues that it is virtually impossible for one with knowledge of both Acts to have concluded that the question of responsibility for construction of the IIA was and is governed by the *Aviation Act*, rather than the *Seoul Airport Act*.[610] Korea states the purpose of the *Seoul Airport Act* alone – to "specify…the matters necessary for the speedy construction of a new airport in the Seoul Metropolitan area" – should have been enough to signal to any remotely observant reader that the *Seoul Airport Act* would regulate the IIA project.[611]

4.556 Korea also argues that the *Seoul Airport Act*, the *Korea Airport Corporation Act*, the *Korea Airport Construction Authority Act* and the *Law on Inchon International Airport Corporation* are the "other Acts" and "other laws" referred to in the *proviso* in Article 94(1) of the *Aviation Act* which allows an entity other than MOCT to implement IIA construction. Korea argues that the *proviso* in Article 94(1) was triggered on a number of occasions. Specifically, Korea notes that December 1991 amendments to the *Seoul Airport Act* and the *Korea Airport Corporation Act* appointed KAA as the

[606] *Ibid.*
[607] US Answer to Question 18 from the Panel, dated 29 November 1999.
[608] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[609] *Ibid.*
[610] *Ibid.*
[611] *Ibid.*

entity responsible for the IIA project[612], August 1994 amendments to the *Seoul Airport Act* and the September 1994 enactment of the *Korea Airport Construction Authority Act* appointed KOACA to that role[613] and February 1999 amendments to the *Seoul Airport Act*, together with passage of the *Law on Inchon International Airport Corporation*, similarly appointed IIAC to perform this task.[614] Korea argues that the United States is charged with constructive knowledge – and indeed has demonstrated actual knowledge – of the legislative events triggering the *proviso* of Article 94(1).[615]

4.557 **In response, the United States refers** to its arguments in paragraphs 4.111 and 4.114.

4.558 **Korea also submits** that it is not the *Seoul Airport Act* about which the United States was unaware at the time of Korea's 1991 response. Rather, Korea asserts that until its Second Written Submission in these proceedings, it was the *Aviation Act* about which the United States was unaware. Korea argues that any claim by the United States that the *Aviation Act* rather than the *Seoul Airport Act* formed the basis for its expectations regarding coverage of the entities responsible for IIA procurement is nothing more than a convenient post hoc rationalization. Korea states that this is totally apart from the fact that the *Aviation Act* was pre-empted by the *Seoul Airport Act*.[616]

Amendment of the GPA

4.559 Korea argues that the US and all of the Parties to the GPA negotiations knew that the Uruguay Round negotiators had dropped the control test and agreed to that. According to Korea, whatever their expectations might have been prior to rejection of the control test, reality changed in two crucial ways. First, as a matter of law, entities controlled by named entities, but not themselves named, no longer could be covered. Second, from that point forward it was no longer reasonable to believe that controlled entities, not themselves named, would in any way be covered. Korea argues that, thus, a non-violation claim based on control must fail.[617]

4.560 In response to the United States' control arguments, Korea also asserts that the "control" test was, according to the United States, "excluded" from the Uruguay Round GPA, and to the extent it was reinserted elsewhere, can be found in Annex 3. Korea states that whether the "control" test was excluded altogether, or reborn in Annex 3, the United States' purported expectation of coverage for KAA could not reasonably have been expected on the basis of any alleged "control" over it by MOCT. Korea argues that if the "control" test was excluded, any expectation of coverage based on "control" cannot be reasonable. Further, Korea argues that if the "control" test was reborn in Annex 3, then the United States could not have reasonably expected coverage for KAA without inclusion of KAA on Korea's Annex 3.[618]

Communications with the US Government

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[612] 1991 *Seoul Airport Act*, Article 6(1). See also *Korea Airport Corporation Act*, Article 7(5-2) (assigning to KAA the task of "[n]ew airport construction projects as referred to subparagraph 2 of Article 2 of the Act on the Promotion of New Airport Construction in Seoul Metropolitan Area.").

[613] 1997 *Seoul Airport Act*, Article 6(1). See also *Korea Airport Construction Authority Act*, Article 2 (defining project with which KOACA was charged as encompassing activities "stipulated in the subparagraph 2, Article 2, '*Seoul Airport Act*'.").

[614] Korea's Answer to Question 9 from the Panel, dated 29 November 1999, referring to *Seoul Airport Act*, Article 6(1). See also *Law on Inchon International Airport Corporation*, Article 10(1)(1) (charging IIAC with responsibility for "[c]onstruction business of the Metropolitan New Airport (hereinafter referred to as Inchon International Airport) in accordance with the Article 2 of the promotional law on Metropolitan New Airport Construction.").

[615] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[616] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

[617] Korea's Answer to Question 20 from the Panel, dated 29 November 1999.

[618] Korea's Response to US Answer to Question 16 from the Panel, dated 29 November 1999.

4.561 **In support of its argument** that the United States was aware that KAA, rather than MOCT, Office of Supply or any other covered entity, was in fact responsible for IIA procurement, **Korea refers** to a letter, dated 6 October 1992, from a US Senator to the Chairman of KAA, requesting consideration of a constituent company's bid for work on the IIA project.[619] Korea also refers to a letter, dated 22 September 1992, from the Seattle City Council to the Chairman of KAA regarding that same bid.[620] Korea then refers to a letter, dated 8 August 1992, from the Vice Chairman of KAA to (among others) Sung Yong Kim and J.A. Corbett, staff secretaries in the Economic Section of the US Embassy, Seoul, inviting them to attend KAA's International Symposium on Building Metropolitan Airport on 25 August 1992.[621] Korea notes that this letter states that KAA "is designated to construct a metropolitan airport, which shall become hub center of air transportation in east Asia." Finally, Korea states that it had also confirmed that the then-US Ambassador to Korea, the Honorable Donald Gregg, visited KAA during this period, and with other US officials accompanying him on the visit was fully briefed by KAA on the IIA project.

4.562 **In response, the United argues** that nothing in the correspondence cited suggests in any way that KAA would not be a covered entity under the GPA, or that the IIA project would not be covered under the GPA. The United States argues that, furthermore, none of the letters in question were to or by US trade negotiators. The United States asserts that, for example, it is obvious that a US Senator writing on behalf of a company in his State interested in participating in an IIA procurement and a Seattle City Council member writing on behalf of the same company do not represent the United States Government in GPA negotiating matters. The United States contends that by contrast, "responses to the United States' questions" during GPA negotiations by an "employee of the Ministry of Commerce," which were "review[ed] by his superiors in advance of the [July 1991] submission" unquestionably represented Korea's official position in such negotiations and the United States' action in relying on these responses, and assuming that they were made in good faith, was entirely reasonable.[622]

4.563 **Korea also argues** that, as was the case with KAA, the United States was and is aware of KOACA's role in IIA procurement. For support of this argument, Korea refers to a letter from the US Ambassador to Korea, addressed to the Chairman and President of KOACA, requesting consideration of a US company's bid for work on the IIA project.[623]

Communications with US Companies

4.564 In further support of its argument that the United States was aware that KAA was the IIA procuring entity, **Korea also states** that during KAA's tenure as operator of the IIA project, numerous US companies participated in and, in fact, successfully secured procurements conducted by KAA. Korea refers to a list of successful bids submitted by US companies to KAA during the period 1992-1994 to support this statement.[624] Korea argues that even if the United States had not had direct knowledge of KAA's responsibility for the IIA project, were it intent on achieving coverage for IIA procurement it would have asked the numerous US firms actively and successfully bidding for the IIA project for some basic information regarding the entities that would need to be "covered" by Korea's GPA commitments to secure GPA coverage for the IIA project.

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[619] Letter from US Senator Slade Gorton to Mr. Wan-Sik Yook, Chairman, KAA, 6 October 1992.

[620] Letter from Council Member of Seattle City Council to Mr. Wan-Sik Yook, Chairman, KAA, 22 September 1992.

[621] Letter from the Vice Chairman of KAA to Sung Yong Kim and J.A. Corbett, staff secretaries in the Economic Section of the US Embassy Seoul, 8 August 1992.

[622] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[623] Letter from US Ambassador Stephen Bosworth to Mr. Kang, Dong-Suk, Chairman & President, KOACA, dated 3 July 1998.

[624] The list includes successful bids made by US companies during the period 1992-1998. As will be addressed further below, another entity took over IIA procurement from KAA in August 1994. Korea has also attached correspondence between KAA and US firms Greiner International Ltd. and Bechtel Aviation Services.

4.565 Korea also argues that, like the US Government, US firms[625] were aware that KOACA was the entity responsible for IIA procurement as was the case with KAA. For support of this argument, Korea refers to a list of successful bids submitted by US companies to KOACA during the period 1994-1998.[626]

Communications with Major Airports

4.566 **Korea also states** that, coincident with the negotiation of the GPA, KAA's responsibility for the IIA project was communicated to virtually every major airport construction expert and airport or aviation organization in the world. Korea refers to examples of correspondence, from the period 1991-1993, between KAA officials and the International Air Transport Association, the International Civil Aviation Organization, the International Union of Architects, the American Institute of Architects, the Airports Association Council International, the Civil Aviation Authority of Singapore, the Schiphol Airport Authority, the Frankfurt Airport Authority, the Port Authority of New York and New Jersey, the Los Angeles Department of Airports, the Denver (Stapleton) International Airport Office and the Dallas/Fort Worth International Airport. Correspondence between KAA and noted architects and architectural firms is also attached, including correspondence with I.M. Pei, Cesar Pelli & Associates, Richard Meier & Partners, Ricardo Bofill, Sir Norman Foster and Alco Rossi. Korea states that with all of these noted experts aware of KAA's role, it is difficult to imagine that the United States was not also itself aware of KAA's status as the entity responsible for IIA construction.[627]

EC's March 1993 Report and Other EC Communications

4.567 **Korea notes** that in March 1993, the European Communities stated that Korea's GPA proposal contained "no offer regarding airports."[628]

4.568 In response to a question from the Panel regarding a letter from the European Communities to the Korean Director of Multilateral Trade Affairs, dated 24 November 1993, which, according to Korea, allegedly indicates that Korea had offered to cover airports, Korea notes that although the letter presumes that a response was made by Korea, Korea has been unable to locate any reply to the European Communities' letter of 24 November 1993. Korea also notes that until Korea's 15 December 1993 final offer, which "for the first time" included General Note 1(b), the European Communities may have considered procurements by the Regional Aviation Offices to be part of Korea's offer. Korea notes these Offices are mentioned in Korea's February 1991 *Supplementary Explanation*.[629]

4.569 Korea notes that the November 1993 letter could of course mean that, in March 1993, the statement by a subdivision of the European Commission that Korea had made "no offer regarding

[625] Korea refers to press releases by US firms, AT&T, dated 11 March 1997, and ARINC, dated 10 September 1998, announcing the conclusion of contracts with KOACA.

[626] The list includes successful bids made by US companies during the period 1992-1998. Korea notes that KAA was responsible for procurement during the period December 1991 to September 1994.

[627] Korea refers to KAA correspondence with the International Air Transport Association, the International Civil Aviation Organization, the International Union of Architects, the American Institute of Architects, the Airports Association Council International, the Civil Aviation Authority of Singapore, the Schiphol Airport Authority, the Frankfurt Airport Authority, the Port Authority of New York and New Jersey, the Los Angeles Department of Airports, the Denver (Stapleton) International Airport Office, the Dallas/Fort Worth International Airport, I.M. Pei, Cesar Pelli & Associates, Richard Meier & Partners, Ricardo Bofill, Sir Norman Foster and Alco Rossi.

[628] Report from the Commission Concerning Negotiations Regarding Access to Third Countries' Markets in the Fields Covered by Directive 90/531/EEC (the Utilities Directive), COM (93) 80 final, 3 March 1993, p. 7.

[629] Korea's Answer to Question 6 from the Panel, dated 29 November 1999.

airports" was inaccurate.[630] However, Korea argues that whatever its accuracy, this statement spoke to the European Communities' expectations at that time; it expected that Korea's offer would not include procurements by any entities responsible for airport procurement, including IIA procurement. Korea states that if those expectations changed with the European Communities' 24 November 1993 letter, available evidence, in the form of Korea's February 1991 *Supplementary Explanation*, suggest that the reference was to procurements by the Regional Aviation Offices. Korea states that no evidence provided by the European Communities suggests that the entities responsible for IIA procurement were to be included in Korea's Annex 1 offer.[631]

Reciprocal Derogations

4.570 **In response to a question from the Panel, the United States argues** that it interpreted the reciprocal airport derogations between the European Communities and Korea as an indication that Korea and the EC could not agree that each was offering "comparable and effective access [to their] relevant markets."[632] The United States further states that, moreover, it interpreted these derogations as a confirmation that Korea's GPA offer indeed included coverage of "new airport construction" under its Annex 1, consistent with Korea's July 1991 statement regarding the coverage of MOCT and the Office of Supply – as entities responsible for the IIA project under Annex 1. The United States contends that it was able to draw this conclusion because Korea's country-specific derogation, which listed the EC and others, did not include the United States when carving out "procurement for airports by the entities listed in Annex 1."[633]

4.571 **Korea responds** that the reciprocal airport derogations between the European Communities and Korea, recorded for Korea's part in General Note 1(b) to its Appendix I, did not as the United States argues serve as "confirmation that Korea's GPA offer indeed included coverage of 'new airport construction' under its Annex 1."[634] Korea quotes the actual language of its General Note 1(b), which suggests simply that "procurement for airports by the entities listed in Annex 1" would be subject to GPA-consistent terms for US suppliers and service suppliers. According to Korea, there is no specification in General Note 1(b) of Annex 1 procurement by entities engaging in "*new* airport construction."

4.572 Korea then states that the United States was aware of Annex 1 entities – specifically, MOCT's Regional Aviation Offices – undertaking "procurement for airports," whether related to new airport construction or work on existing airports. Korea argues that the United States, therefore, knew that what Korea's General Note 1(b) meant (and means) was that Annex 1 entities conducting procurements for airports exist, and that they are MOCT's Regional Aviation Offices.

(ii) Conduct And Events

Availability of Government Organization Act

4.573 **Korea argues** that the United States knew, or should have known, that KAA was not included on Korea's Annex 1 by virtue of Note 1 thereto - that is, it knew, or should have known, that KAA was not a "subordinate linear organization," as prescribed by the Korean *Government Organization Act*. Korea states that that Act, including the list of "subordinate linear organizations"

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[630] Report from the Commission Concerning Negotiations Regarding Access to Third Countries' Markets in the Fields Covered by Directive 90/531/EEC (The Utilities Directive), COM (93) 80 final, 3 March 1993, p. 7.

[631] Korea's Answer to Question 6 from the Panel, dated 29 November 1999.

[632] See EC General Note 1 and Korea General Note 1 to Appendix I of the GPA.

[633] US Answer to Question 17 from the Panel, dated 29 November 1999.

[634] Korea's Comments on the United States' Answer to Question 17 from the Panel, dated 29 November 1999, *quoting* the United States' Answer to Question 17.

identified at Article 2(3) therein[635], was at the United States' disposal during negotiations with Korea regarding its commitments to the GPA.[636] KAA is not included in the list provided in Article 2(3) to the Act.

Failure to Enquire

4.574 **The United States argues** that the designation of KAA as IIA procurement operator came as a surprise to the United States, which had not been informed by Korea of this action. The United States asserts that, however, even assuming the United States was aware that KAA had been designated the procurement operator at that time, there would have been no need for the United States to take any specific action in response. The United States argues that as a subsidiary organization of MOCT, KAA remains covered under Annex 1 of the GPA because under a reading of the plain text of Annex 1, (1) all subsidiary organizations of "central government entities" are automatically covered under Annex 1 unless otherwise specified and (2) KAA's procurements are, in fact, procurements by MOCT, pursuant to Article I of the GPA.

4.575 The United States argues that. moreover, the United States would not have taken any specific action in response to Korea's designation of KAA as project operator, because MOCT retains statutory authority under Korean law to carry out airport construction projects. The United States notes that the *Aviation Act* states that even though the Minister of Construction and Transportation can grant permission to another government entity to assume the role of project operator for a given project, "airport development projects shall be carried out by the Minister of Construction and Transportation.[637] The United States also notes that the *Aviation Act* defines "airport development projects" as "projects related to new construction, enlargement or improvement of airport facilities, executed under this Act."[638] The United States argues that, thus, because MOCT remained the entity responsible for carrying out airport development projects, there would be no reason for the United States to take any specific action following the designation of KAA as project operator.

4.576 Finally, the United States notes that documents provided by Korea indicate that even after KAA was designated by MOCT to be the project operator for the IIA project, KAA procurements were conducted by the Office of Supply – the entity responsible for procurement for Annex 1 entities and, as Korea's July 1991 responses indicate, the entity "responsible . . . for procurement of goods and services relating to new airport construction. The United States also refers to its arguments in paragraph 4.520.

4.577 **In response, Korea argues** that in the two-year period between December 1991 when KAA's role in the IIA project was publicly announced and December 1993 when Korea submitted its final GPA offer, the United States did not once inquire whether or not KAA was included in Korea's offer. Korea further notes that the United States expressed surprise at the designation of KAA as the responsible IIA entity. Korea states that what is particularly unusual, in view of this surprise, is that at no time during the nearly two and one-half years between this designation and the signing of the GPA, did the United States ever note its surprise and ask where KAA appeared in Korea's Appendix I.

4.578 Korea further argues that even had the United States not been aware of the May 1991 enactment of the *Seoul Airport Act*, it has admitted that in December 1991, a full two years before the completion of negotiations for Korea's accession to the GPA, it was "surprised" at amendments to the *Seoul Airport Act* appointing KAA as the entity responsible for the IIA project.[639] Korea states that to

[635] *Government Organization Act*, Article 2(3).

[636] Reference to the *Government Organization Act* was included in Note 1, Annex 1 to Korea's initial GPA offer. Korea's Initial Offer to Accede to the Tokyo Round Agreement on Government Procurement, 25 June 1990.

[637] *Aviation Act*, Article 1.

[638] *Ibid.* Article 2:8.

[639] US Answer to Question 23 from the Panel, dated 3 November 1999.

be "surprised," it most certainly must actually have been aware of the *Act*, quite apart from the constructive knowledge with which it is charged. Korea argues that whether or not Korea expressly told the United States about the *Seoul Airport Act* in July 1991, therefore, the United States most certainly became aware of the *Act* and its implications in December 1991 - a full two years before the completion of negotiations for Korea's accession to the GPA.[640]

4.579 **In response, the United States argues** that it is clear from the US comment regarding being surprised that the United States never indicated that it was surprised by Korea's action in 1991. The United States contends that this is pure conjecture by Korea; a plain reading of the second sentence confirms this. Indeed, to be surprised by Korea's action, the United States must have been aware of it. Yet the second sentence above begins, "even assuming the United States were aware . . .," which indicates that the United States was not aware at the time, and therefore could not have been surprised at that time.[641]

4.580 **Korea also states** that given the massive effort to publicize KAA's role, no reasonable person would have supposed that a specific overture to the United States was necessary. Further, Korea asserts that given the apparent importance to the United States of attaining coverage for airport procurement entities, and given the absence of KAA from the terms of Korea's offer, the failure of the United States to seek clarification, at any time in the more than two-year period remaining in the GPA negotiations, is fatal to its claim.

4.581 Korea argues that, in these circumstances, the United States' failure to seek clarification can only mean one of two things: either it lost track of its objective, or it understood that it had not secured coverage of the entities responsible for IIA procurement.[642]

4.582 In either case, Korea states that it cannot be accorded responsibility for the United States' failure. Korea states that this does not indicate that Korea acted in bad faith and does not suggest that Korea employed a strategy of negotiation by stealth. Korea states that it is merely recognition that the United States' claim that it anticipated coverage of the entities responsible for IIA procurement was not reasonable.

4.583 Korea further argues that the United States cannot escape from this failure by arguing that it bargained in good faith for the coverage of the IIA project, without regard to which particular entity undertook procurements for the project. Korea observes in this respect that its Annex 1 commits "entities" rather than "projects." Korea argues that neither the United States nor any other party negotiated for coverage of projects under Korea's Annex 1. Korea notes that Annex 1, as opposed to other Korean Annexes, lists entities rather than projects.

4.584 **In response, the United States argues** that this assertion by Korea is contradicted by the very evidence provided in this dispute. The United States argues that during Korea's GPA accession negotiations, the United States specifically asked for "coverage of projects under Annex 1" by requesting Korea to identify "all Ministries that will be responsible for the procurement of goods and services related to new airport construction." The United States contends that Korea conceded that it understood "that the United States' question was about the IIA project," and responded by giving "as much information as was available about what was at the time a fledgling project." The United States concludes that, thus, it is reasonable for the United States to expect that the new airport construction,

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[640] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

[641] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

[642] Letter to Mr. Park, Sang-Kyun, Director, North American Trade Team, Korean Ministry of Foreign Affairs & Trade, from Karen Ware, Deputy Senior Commercial Officer, US Embassy Seoul, 6 July 1998, p. 2 ("During the period before KOACA formally is brought under the GPA, we propose that it agree to measures that would bring its procurement policies and practices de facto into conformity with the internationally-acceptable provisions of the GPA . . .").

i.e., the Inchon airport development project, is covered under Korea's Annex 1 of the GPA. Indeed, the EC also considered it reasonable to expect coverage for the IIA project under the GPA.[643]

4.585 The United States contends that it would not have taken any specific action in response to Korea's designation of KAA as project operator, because MOCT retains statutory authority under Korean law to carry out airport construction projects. The United States notes that the *Aviation Act* of the Republic of Korea states that even though the Minister of Construction and Transportation can grant permission to another government entity to assume the role of project operator for a given project, "airport development projects shall be carried out by the Minister of Construction and Transportation."[644] The United States further notes that the *Aviation Act* defines "airport development projects" as "projects related to new construction, enlargement or improvement of airport facilities, executed under this Act."[645] The United States contends that, thus, because MOCT remained the entity responsible for carrying out airport development projects, there would be no reason for the United States to take any specific action following the designation of KAA as project operator.[646] The United States also notes that this version of the *Aviation Act* includes amendments through December 1997, and, therefore, also applied when KOACA was designated as the operator of the IIA construction project.[647]

4.586 Further, the United States notes that documents provided by Korea indicate that even after KAA was designated by MOCT to be the project operator for the Inchon Airport project, KAA procurements were conducted by the Office of Supply - the entity responsible for procurement for Annex 1 entities, and, as Korea's July 1991 responses indicate, the entity "responsible . . . for procurement of goods and services relating to the new airport construction." The United States also asserts that Korea's exhibits show that the Office of Supply at times administered procurements for KAA and the Seoul and Pusan Regional Aviation Offices which Korea admits are covered under Korea's Annex 1 through MOCT's status as a central government entity, jointly on a single procurement notice. The United States asserts that this further reflects the fact that KAA procurement, like that of the Seoul and Pusan Regional Aviation Offices, is actually procurement by MOCT.[648] The United States also submits that if KAA had independent procurement authority, then presumably the Office of Supply would not have been issuing KAA procurement notices, let alone issuing them together with entities Korea agrees are covered under Annex 1 because of their relationship to MOCT.[649]

4.587 Further, in response to a question from the Panel, the United States notes that even assuming that US negotiators had been informed by private US companies or state and local aviation officials that KAA was now the operator of the project, it is unlikely that the United States would have requested clarification of the status of IIA procurements. In support of this argument, the United States notes it was not relevant that KAA was operating under its own procurement regulations. The United States argues that within a given "central government entity," subordinate entities often issue their own internal regulations that apply only to that entity. The United States notes that, for example, there are separate regulations that relate solely to the New Airport Development Group. The United States further notes that, moreover, the regulations of KAA (like all other subordinate units of covered central government agencies) would be required to come into conformity with the GPA only after the Agreement entered into force for Korea.[650] More specifically, the United States notes that these

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[643] US Response to Korea's Answer to Question 4 from the Panel, dated 29 November 1999, referring to the European Communities' Answer to Question 5 from the Panel, dated 3 November 1999.

[644] *Aviation Act*, Act. No. 4435, 14 December 1991, Articles 94-95.

[645] *Ibid.* Article 2:8.

[646] US Answer to Question 23 from the Panel, dated 3 November 1999.

[647] US Answer to Question 26 from the Panel, dated 3 November 1999.

[648] US Answer to Question 23 from the Panel, dated 3 November 1999.

[649] US Answer to Question 26 from the Panel, dated 3 November 1999.

[650] US Answer to Question 25(a) from the Panel, dated 3 November 1999. The United States further notes that, in fact, the four primary enforcement decrees and regulations relating to the Act Relating to Contracts

central government regulations did not come into existence until 1997 when Korea implemented the GPA, so the fact that KAA did not utilize the central government regulations for IIA procurement would not be of concern to the United States in 1991-1993.[651]

4.588 **In response, Korea notes** that it is not true that KAA's use of its own Contract Administration Regulations for IIA procurements during the period 1991-1994 was merely a result of the fact that "central government [procurement] regulations did not come into existence until 1997." Korea states that the government procurement regulations in effect during this period were included in the *Korean Budget and Accounting Act*. Korea notes that rather than being required to follow those rules, KAA drafted and adopted its own regulations.

4.589 Korea also notes that although it is true that the Office of Supply has procured for KAA, this does not mean that those procurements are covered by the GPA since Office of Supply procurements are only covered when made for entities listed on Annex 1. KAA is not, Korea asserts, included on Annex 1.[652] Korea also states that the Office of Supply has not in fact procured for the IIA[653], and that the procurements cited by the United States[654], were not for the IIA, which is exclusively the subject of the Panel's terms of reference.[655]

Failure to Inform

4.590 **The United States contends** that despite Korea's claim that "virtually every major airport construction expert and airport or aviation organization in the world" was aware that MOCT shifted IIA procurement from the New Airport Development Group to KAA, Korea did not once inform its GPA negotiating partners of this supposed change in its negotiating position. The United States argues that Korea cannot expect to alter its concessions offer during international trade negotiations without directly and officially notifying the relevant government representatives involved.

4.591 The United States also states that it remains very concerned about Korea's assertions that if a country makes an express material representation to its negotiating partner, but then later it changes its mind, it is under no obligation to inform its negotiating partner, yet it can still expect its express representation to be no longer valid. The United States argues that by making express commitments which Korea should have expected its negotiating partners would rely on, and then refraining from informing them when it acted to change the status quo to which it had committed, Korea created a legitimate expectation among its GPA negotiating partners that its airport procurement was covered through its listing of MOCT and the Office of Supply.

4.592 **Korea argues in response** that the United States implicitly asserts that Korea altered its offer during negotiations without directly and officially notifying the United States and other concerned governments. Korea states that there are a number of reasons why this assertion is not applicable. First, it assumes that Korea's "concessions offer" was altered during negotiations. Korea notes that the only "evidence" put forward by the United States to support this argument is Korea's July 1991 response to the US inquiry. Korea argues that this is hardly a "concessions offer." According to Korea, this was a response to an inquiry.

4.593 Korea states that, second, even if the July 1991 response is deemed to be a "concessions offer," and even if it is interpreted as the United States would interpret it, Korea, through the formal

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to Which a State is a Party—Korea's primary procurement law implementing its GPA commitments, entered into effect on 31 December 1996, one day before Korea's GPA commitments took effect.

[651] US Answer to Question 26 from the Panel, dated 3 November 1999.

[652] Korea's Statement for the Second Meeting of the Panel, paragraph 47.

[653] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[654] Exhibits Kor-61D and Kor-61E.

[655] Korea's Comments on the United States' Answer to Question 22 from the Panel, dated 29 November 1999.

designation of KAA as the responsible entity, by action of the National Assembly in December 1991, did notify the United States of its position. This was more than constructive notice. Korea asserts that the United States had actual notice and that the United States was even "surprised" by it.

(d) Evidence Following Korea's Accession

(i) The US July 1998 Communications

4.594 **Korea argues** that the United States was also aware of KOACA's role in IIA procurement. Korea argues that in a July 1998 letter from the US Embassy in Seoul to the Korean Ministry of Foreign Affairs & Trade, the United States acknowledged that KAA's successor for the IIA project, KOACA, was not covered.[656]

4.595 Korea notes that in the July 1998 letter, the United States proposed that "[d]uring the period before KOACA formally is brought under the GPA," Korea "agrees to measures that would bring its procurement policies and practices de facto into conformity with the internationally-acceptable provisions of the GPA . . ."[657] Korea argues that if KOACA is not yet "formally brought under the GPA," it is not a covered entity, thus necessitating the US request that KOACA bring its practices "de facto into conformity with the . . . GPA." Korea further argues that had the United States considered that KOACA was a covered entity, it would surely not have requested de facto compliance with the GPA; it would have demanded *de jure* compliance.

(ii) MOCT's Website

4.596 **Korea notes** that the events to which the United States points to support its claimed expectations all date after the signing of the GPA. Korea states that this is particularly true of MOCT's website, which was not created until 1997. Korea argues that regardless of what claims MOCT makes on that website, those claims could in no way have influenced the United States three years earlier in April 1994, when the GPA was signed.

V. ARGUMENTS OF THIRD PARTIES (EUROPEAN COMMUNITIES)[658]

A. ENTITIES COVERED UNDER KOREA'S APPENDIX I OF THE GPA

1. Interpretation of Appendix I and Notes

5.1 **The European Communities argues** that, in accordance with Article 18 of the *Vienna Convention on the Law of Treaties*, regard must be had to the common intentions of the Parties in determining the content and scope of their respective obligations under the GPA.

5.2 In support, the European Communities referred to the Appellate Body decision in the LAN case where it was stated that[659]:

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[656] Letter to Mr. Park, Sang-Kyun, Director, North American Trade Team, Korean Ministry of Foreign Affairs & Trade, from Karen Ware, Deputy Senior Commercial Officer, US Embassy Seoul, 6 July 1998, p. 2 ("During the period before KOACA formally is brought under the GPA, we propose that it agree to measures that would bring its procurement policies and practices de facto into conformity with the internationally-acceptable provisions of the GPA . . .").

[657] Letter to Mr. Park, Sang-Kyun, Director, North American Trade Team, Korean Ministry of Foreign Affairs & Trade, from Karen Ware, Deputy Senior Commercial Officer, US Embassy Seoul, 6 July 1998, p. 2.

[658] While Japan also reserved its rights as a Third Party to this dispute, it did not make any submissions for this case.

[659] AB-1998-2, WT/DS62/AB/R-WT/DS67/AB/R-WT/DS68/AB/R of 5 June 1998, paragraph 84.

> "The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of one of the parties to a treaty. Tariff concessions provided for in a Member's Schedule -- the interpretation of which is at issue here -- are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members."

5.3 The European Communities argues that the same reasoning, *mutatis mutandis*, should apply to this case.

5.4 The European Communities further argues that the issue of what was the intention of Korea during the negotiations is legally irrelevant. According to the European Communities, the only matter that counts is how the common intention of the GPA Contracting Parties were expressed in the actual text of the agreement, having regard to the ordinary meaning of its terms in their context and the object and purpose of the Agreement.[660]

2. Annex 1, Appendix I: The Scope of "Central Government Entities"

(a) The Ordinary Meaning of "Central Government Entities"

5.5 **The European Communities believes** that the definition in Korea's GPA concession which includes the Ministry of Transport and Construction implies the inclusion of all entities hierarchically under that Ministry. The European Communities argues that the entities responsible for IIA's construction remained hierarchically subject to MOCT after 1991, and, further, were so on 15 April 1994.[661]

(b) The "Control" Test

5.6 **The European Communities argues** that the "control" test proposed by the United States to determine whether certain entities are covered by Annex 1 of the GPA is an incorrect yardstick in order to measure the extent of Korea's obligations under the GPA.

5.7 **The European Communities discusses**, by way of illustrative argument, the hypothetical case of procurement in the United States in similar circumstances to that which exist for the IIA project. Specifically, the European Communities considers, for example, the case of construction of a new North Dakota International Airport where the US Government transfers responsibility for the project to one of the authorities of a state which is not covered by the GPA. The European Communities states that, in such a case, the issue would not be, as the US suggests, whether that procurement is 'guided', 'supervised', 'inspected' or 'directed' by any covered entity. The European Communities further argues that, in fact, the relations between the federal government's covered entities and North Dakota's authorities would probably not correspond to those definitions.

5.8 The European Communities states that, in its view, the US would not be able to escape its obligations under the GPA which it undertook in 1994 by merely transferring responsibility to a non-covered entity in such a case. Rather, the United States would be obliged to duly notify the other GPA Contracting Parties of the transfer under Article XXIV:6 and to follow entirely the procedures laid down in that provision.

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[660] EC's Answers to Panel's Questions, dated 29 November 1999, Preliminary Observations citing Article 31 of the *Vienna Convention*.

[661] EC's Answer to Question 5 from the Panel, dated 29 November 1999.

3. Annex 1, Appendix I: Note 1

(a) Ordinary Meaning of Note 1 to Annex 1

5.9 **The European Communities refers** to what it calls a "novel" interpretation by Korea of its Note 1 to Annex 1. The European Communities quotes the Korean argument as follows:

> "(...) Note 1 to Korea's Annex 1 provides the exclusive means by which to identify as Annex 1 covered entities those entities that, while not literally listed on Annex 1, are nonetheless considered Annex 1 covered entities by virtue of their relationships with entities listed on Annex 1. Under the ordinary meaning of Note 1 to Korea's Annex 1, the Panel is directed, exclusively, to the Government Organization Act of the Republic of Korea to determine whether particular entities not specifically included in Annex 1 are nonetheless considered covered entities by virtue of their status as subordinate linear organizations, special local administrative organs or attached organs."

5.10 The European Communities argues that the interpretation of Note 1 suggested by Korea does not correspond to its ordinary meaning. The European Communities asserts that according to the ordinary meaning and the syntax of the English language, the part of the sentence in Note 1 "as prescribed in the *Government Organization Act* of the Republic of Korea" can in fact only be a reference to the preceding words "attached organs" and not also to the earlier part – that is, "subordinate linear organizations" and to "local administrative organs." The European Communities further argues that, in fact, in order for this latter interpretation to apply, the text should have included a comma after the word "organ." However, the European Communities notes that the comma does not appear in the text.

5.11 The European Communities argues that the only correct reading of Note 1 is as follows: "The above central government entities include their subordinate linear organizations [like KAA, KOACA or IIAC]; special local administrative organs; and attached organs as prescribed in the *Government Organization Act* of the Republic of Korea."

5.12 The European Communities argues that this interpretation is confirmed by the text of Article 2(3) of the Korean *Government Organization Act* and by comments made by Korea:

> "(...) Article 2(3) [of the Government Organization Act of the Republic of Korea]– both in its current form and as it existed during the negotiations leading up to the submission by Korea of its final offer list for accession to the GPA – identifies not entities, but officials within a ministry's hierarchy."

5.13 The European Communities states that, thus, the words "as prescribed in the *Government Organization Act* of the Republic of Korea" logically cannot refer to "their subordinate linear organizations" since the Act identifies, according to Korea's own interpretation, officials, not organizations.

5.14 **In response, Korea states** that the European Communities arguments regarding interpretation of Article 2(3) of the *Government Organizations Act* are erroneous. Korea states that the modification of Note 1 offered by the European Communities, itself proves the point. Korea states that had it meant the reference to the *Government Organization Act* to modify only the term "attached organs," it would have used the semi-colons inserted by the European Communities after the terms "subordinate linear organizations" and "special local administrative organs." Korea notes that it did not do so.

5.15 Korea notes that, moreover, the fact that the rather unusual and unique English terms "subordinate linear organizations" and "special local administrative organs" are used and are specifically defined in the first three articles of the *Government Organization Act* is more than coincidence. Korea states that it confirms that the reference to the *Government Organization Act* in Note 1 is to modify those terms of art as well as the term "attached organs," defined in Article 4 of the *Government Organization Act*. Korea further states that all three of the terms in Note 1 to Korea's Annex 1 are defined "as prescribed in the *Government Organization Act* of the Republic of Korea." Korea concludes that no other reading of that language is sensible.

(b) Are the IIA Procuring Entities Subordinate Linear Organizations?

5.16 **The European Communities argues** that there is clear evidence indicating that KAA, KOACA and IIAC are "subsidiary organizations" within the meaning of the *Government Organization Act*.

5.17 The European Communities notes that at the time of the entry into force of the GPA, MOCT was in charge of aviation construction works.

5.18 The European Communities states that by Korea's own admission:

> KAA itself was established (under the name "Korea International Airports Authority") on 30 May 1980 as an independent public corporation pursuant to the International Airport Management Corporation Act, as enacted on 28 December 1979…[662]
>
> The chairman, deputy chairmen and auditor [of KAA] are [were] appointed by MOCT…[663] KAA is [was] subject to the 'direction and supervision' of the MOCT, which as stated in Article 28(1) of the Korea Airport Corporation Act permits MOCT to require KAA to submit to certain reporting and inspection requirements concerning activities of the Corporation. Specifically, pursuant to Article 28(2) of the Korea Airport Corporation Act, MOCT is to ensure that KAA officials do not commit 'unlawful or unreasonable acts.[664]

5.19 The European Communities argues that it follows that, at the time of the signature of the GPA, Korea itself admits that KAA was a "subordinate linear organization" within the meaning of the *Government Organization Act* (i.e., a subsidiary or subordinate body) of MOCT which had a very large degree of control over KAA. In the view of the European Communities, Korea's own statements confirms this. The European Communities also claim that the clear understanding of the entire business community and of all the other GPA Contracting Parties on 15 April 1994 was that MOCT was in fact running the entire Inchon Airport business and that KAA was nothing more than an articulation of such Ministries.

5.20 The European Communities concludes that KAA should be considered as "'attached/connected/affiliated' etc." to MOCT because of the control or decisive influence that the MOCT has over the KAA and, thus, over its procurement procedures. According to the European Communities, the KAA is, therefore, covered by the definition of "subordinate linear organizations" in Appendix I, Note 1 to Annex 1, of the Korean concession.[665]

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[662] Korea's First Written Submission, paragraph 23.
[663] *Ibid.* paragraph 24.
[664] *Ibid.* paragraph 25.
[665] EC's Answer to Question 7 from the Panel, dated 29 November 1999.

4. Appendix I: Note 1(b)

5.21 The European Communities asserts that procurement for airports is covered by the original GPA Korean obligations. The European Communities argues that this is confirmed by the text of General Note 1(b) in Appendix I, which expressly subjects "procurement for airports by the entities listed in Annex 1" to a reciprocity clause *vis-à-vis* the European Communities and some other European Contracting Parties.

5.22 **In response, Korea notes** that in March 1993 the European Communities stated that Korea had made "no offer regarding airports." Korea states that the EC now asserts that this March 1993 statement was in reference to Korea's exclusion of the EC from airport procurement via General Note 1(b).[666] Korea further states that, however, this assertion follows acknowledgement by the European Communities that General Note 1(b) was added "for the first time" in Korea's third offer, dated 14 December 1993.[667] Korea argues that by its own chronology, the European Communities could not have known of Korea's General Note 1(b) until December 1993. In Korea's view, its statement concerning "no offer regarding airports" nine months earlier, in March, could not have referred to General Note 1(b). Korea states that, more importantly, the EC's statement in March 1993 that Korea made "no offer regarding airports" means all airports, which, according to Korea, includes the IIA. Korea argues that, whatever the accuracy of the EC statement in March 1993, it demonstrates that the EC did not expect coverage for all airports, including the IIA.

5.23 **In response to a question from the Panel, the European Communities argues** that during bilateral meetings between Korea and the European Communities in November and December 1993, Korea "declared" that airports were covered. In support of this argument, the European Communities produced a letter from the Commission of the European Communities to the Korean Ministry of Trade and Industry, dated 24 November 1993, which stated:

> "With regard to the inclusion of airports in your offer, you and your colleagues pointed out that generally they depend on the Ministry of Transportation, which is offered. I would be most grateful if you could provide me with some more detail about which airports are included in your offer by virtue of the inclusion of the Ministry of Transportation, or are otherwise included. Furthermore, if airports under the Ministry of Transportation are covered, does that imply that OSROK carries out their procurement on their behalf? Does that also apply to ports which are under the authority of the Korea Maritime and Port Administration?"[668]

5.24 In responding to the Panel's question, the European Communities also refers to an internal Commission document, dated 3 December 1993, which stated:

> "Airports
>
> The Korean side has explained that a number of major cities (Seoul, Pusang), which are offered, control their airports in co-operation with the Ministry of Transportation. We have requested confirmation in writing."[669]

5.25 **Korea responds** that its February 1991 *Supplementary Explanation* indicates that the 24 November 1993 EC letter was referring to procurements by MOCT's Seoul and Pusan Regional Aviation Offices. Moreover, according to Korea, the 3 December 1993 internal EC note supports this conclusion. The 3 December 1993 note refers to Korea's offer of coverage for "a number of major

[666] EC Answer to Question 4 from the Panel, dated 3 November 1999.
[667] EC Answer to Question 3 (point 5) from the Panel, dated 3 November 1999.
[668] Annex IV to EC Answers to Question 3 from the Panel, dated 3 November 1999.
[669] Annex V to EC Answers to Question 3 from the Panel, dated 3 November 1999.

cities (Seoul, Pusang) [sic]" that "control their airports in co-operation with the Ministry of Transportation." Korea notes that MOCT's two Regional Aviation Offices are in fact the Seoul and the Pusan Regional Aviation Offices, and that these two Offices are in fact covered under Korea's Annex 1 commitment to coverage of MOCT.[670]

5. Amendments to the Appendix under Article XXIV:6

(a) The Obligations Under Article XXIV:6

5.26 **The European Communities argues** that Korea attempted to modify its obligations under the GPA and in so doing, failed to comply with Article XXIV:6 of the GPA.

5.27 The European Communities argues that Article XXIV:6(a) of the GPA is expressly based on the principle of the maintenance of the balance of concessions. According to the European Communities, it corresponds, *mutatis mutandis*, to the fundamental provision of Article XXVIII GATT 1994[671] and is the expression in the GPA of the general principle of public international law codified in Article 26 of the *Vienna Convention on the Law of Treaties*.

5.28 The European Communities states that, according to Article XXIV:6 of the GPA, no GPA Contracting Party is allowed to alter in any way, either in form or in substance, its concessions as specified in the Appendices to the GPA, unless and until the procedures thereunder have been duly and entirely followed.

5.29 For support of its argument, the European Communities relies upon the following statement by the Appellate Body[672]:

> "The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."

5.30 The European Communities states that in cases under both Article XXIV:6(a) and (b), a procedure is foreseen with ultimately the necessity of 'compensatory adjustments.' According to the European Communities, if the word 'shall' in either paragraph could be interpreted as anything less than a binding obligation, both paragraphs would become redundant. The European Communities states, in the words of the Appellate Body:

> "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[673]

(b) Application of Article XXIV:6 to the Present Case

5.31 **The European Communities argues** that, notwithstanding these clear and indisputable obligations, Korea did not follow the procedures under Article XXIV:6.

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[670] Korea's Response to the European Communities' Answer to Question 1 from the Panel, dated 29 November 1999.

[671] The European Communities refers in particular to Article XXVIII.2.

[672] *European Communities - Measures Affecting The Importation Of Certain Poultry Products*, AB-1998-3, WT/DS69/AB/R of 13 July 1998 at § 165.

[673] *United States - Reformulated Gas*, WT/DS2/9, Appellate Body report, p. 23. See also Appellate Body report in *Japan - Alcohol*, WT/DS8/AB/R at section D.

5.32 The European Communities argues that Korea failed to notify the creation of KOACA, the alleged transfer of the authority for airport construction procurement to that entity, the alleged separation of that entity from the Ministry of Transport, and the transformation of KOACA into IIAC under Article XXIV:6.

5.33 The European Communities argues that Korea cannot claim now that KOACA and/or IIAC are not covered alleging *ex post* that they are separate from those covered in the original concession because it will automatically admit that it did not offer to the other GPA Contracting Parties, as it was unconditionally compelled, compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage.

5.34 In the view of the European Communities, the only relevant date that determines the point of reference for the implementation of Article XXIV:6 procedures is 15 April 1994 being the date of the official conclusion of the Uruguay Round and of signature of the GPA by all Contracting Parties, including Korea.

5.35 In support of its argument, the European Communities refers to Article 18 of the *Vienna Convention on the Law of Treaties* which states as follows:

> "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

5.36 The European Communities refers to the Appellate Body decision in the LAN[674] case where it stated that:

> "A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty."

5.37 The European Communities argues that the same conclusion must be drawn from Article XXIV:12 of the GPA.

5.38 The European Communities further argues that the relevant date for Korean legislation and practice to be in conformity with the 1994 GPA was the date of entry into force of the 1994 GPA (for Korea: 1 January 1997), and thereafter. The European Communities states that Korea was, in its view, entitled to change its legislation before its entry into force, as long as it ensured that it complied from 1 January 1997 onwards with its obligations as they were undertaken on 15 April 1994.[675]

5.39 The European Communities argues that, as from 1 January 1997[676], pursuant to Article XXIV:6(a) and (b), Korea is unconditionally obliged to notify any change of its concessions as specified in the Appendices to the GPA - in particular Appendix I - that may have taken place since 15 April 1994. The European Communities notes further that if the modifications go beyond a mere

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[674] AB-1998-2, WT/DS62/AB/R-WT/DS67/AB/R-WT/DS68/AB/R of 5 June 1998, paragraph 84.
[675] EC's Answer to Question 5 from the Panel, dated 29 November 1999.
[676] Date of application of the Agreement to Korea.

formal correction of the text, it is unconditionally obliged to offer compensatory adjustment for those changes, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in the GPA prior to the notification. The European Communities asserts that Korea clearly failed to do so.

5.40 **Korea responds** that its decision not to notify the "transfers of authority" for IIA procurement to and between KAA, KOACA and IIAC on the basis that those entities are not covered under the GPA does not constitute admission that "compensatory adjustments" were due to other GPA signatories. According to Korea, since neither KAA, KOACA nor IIAC are covered, "transfers" between them did not trigger the notification requirement of Article XXIV:6(a). Moreover, the "transfer" of IIA procurement authority to KAA took place in December 1991, at which time Korea was not bound by any GPA obligations, including those contained in Article XXIV:6(a).

(c) Shifting of an Entity from Annex 1 to Annex 3

5.41 **In response to a question from the Panel, the European Communities notes** that there is an explicit provision allowing for Korean National Railway Administration (NRA) to be moved from Annex 1 to Annex 3 (once that it adopts the form of a public corporation) without any consultation and/or compensation.

5.42 The European Communities argues that this implies, *a contrario*, that, in the absence of a similar provision, a Party to the GPA can not even move an entity from one GPA Appendix I annex to another without following the appropriate consultation procedure. The European Communities asserts that this also implies, *a fortiori*, that a Party of the GPA cannot unilaterally remove an entity from all the annexes of the GPA without following the appropriate procedures (and offering adequate compensation) under Article XXIV:6 of the GPA.[677]

5.43 The European Communities states that, as a matter of fact, NRA was in a situation similar to that of KOACA, i.e., it simply changed its legal form but remained under government control. However, the European Communities goes on to state that (a) contrary to NRA, the GPA does not provide for an explicit exception applying to KOACA and (b) in any event, the solution adopted for NRA was not at all the exclusion of this entity from GPA coverage, but its transferral to another annex.[678]

VI. INTERIM REVIEW[679]

6.1 In letters dated 13 March 2000, the United States and Korea requested an interim review by the Panel of certain aspects of the Interim Report issued to the parties on 3 March 2000. The United States made several further comments regarding the Descriptive Part of the Report. Both parties requested review and amendments with respect to certain portions of the Findings. Neither party requested an Interim Review Meeting. On 24 March 2000, the United States requested that the Panel permit it to submit further comments regarding Korea's Interim Review comments. The Panel granted the request and, in the interests of fairness, also permitted Korea to make further comments, which Korea did on 29 March 2000.

6.2 Korea made several specific comments on a number of paragraphs which we will address below. However, Korea also submitted a covering letter noting that the Panel has appeared critical of Korea's actions with respect to events that occurred in mid to late-1991 regarding one of the questions

[677] EC's Answer to Question 1 from the Panel to Third Parties, dated 3 November 1999, p. 2.
[678] *Ibid.*
[679] Pursuant to Article 15.3 of the DSU, the findings of a panel report shall include a discussion of the arguments made at the interim review stage. Consequently, the following section entitled Interim Review is part of the Findings of this Panel Report.

submitted by the United States and Korea's response thereto. The facts are clear and we stand by our assessment of them.[680] We also find Korea's arguments in their covering letter misplaced. Korea appears to have mis-read the Findings.

6.3 First, we must note what we did not do in the Findings. We specifically did not make a finding that Korea acted in bad faith, or attempted to mislead or deceive the United States as Korea claims in its letter of 13 March 2000. We did not delve into the motivations of the Korean Government. We did not make a finding that the Korean Government was trying to conceal information from the United States. It is entirely possible that simple errors took place. We will add a footnote to paragraph 7.80 reiterating that we are not making a determination that Korea acted in bad faith. We will also make some minor modifications to the language in paragraphs 7.80 and 7.119 without altering the sense of our conclusions.

6.4 Second, we are concerned by the substantive comments made by Korea in this regard. The thrust of Korea's argument in their covering letter to their comments is that the answer provided to the United States in July 1991 was drafted by the Ministry of Commerce. Korea argues that the Korean Government is not a monolith and that the Ministry of Commerce should not be charged with knowledge about actions taken by the Ministry of Transportation when answering such questions. The impression given by Korea in its Interim Review comments is that the only piece of written and documented evidence before us of the negotiations between Korea and the United States[681] was the responsibility of a single individual in a single Ministry without actual or imputed knowledge of the subject-matter of the questions put to the Korean Government by the US Government. We do not find this at all compelling.

6.5 We note that this argument was previously made by Korea during the course of the proceedings and was fully taken into account by us in coming to our Findings. Furthermore, in our view, Korea is simply wrong in making such an argument. The Parties to the GPA did not expect incomplete or even possibly inaccurate answers from one portion of the Korean Government speaking only for itself. The answers *must* be on behalf of the whole of the Korean Government. Negotiations would be impossible otherwise. The Korean Government chose who was tasked with answering the questions and the Korean Government cannot avoid responsibility for the result. It cannot be a justifiable excuse for incomplete answers that an applicant for accession to the GPA gave responsibility to Ministry A to answer questions, but the projects and procurement responsibilities were really the concern of Ministry B and Ministry A was ignorant of the true situation when it provided answers. In our view, and as we stated in the Findings, there is an affirmative duty on the part of a Party or prospective Party to the GPA to answer such questions fully, comprehensively and on behalf of the whole government.[682] This conclusion is supported by the long established

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[680] See, among others, paragraphs 7.76-7.81, 7.104-7.110 and 7.121-7.122 and cross-references contained therein.

[681] In its covering letter for its Interim Review comments, Korea stated that it took a series of public actions that would have contradicted any implication that the United States was misled. Korea cites, among other things, "the preparation of communications to the European Communities clear enough to convince the EC that the entity responsible for IIA procurement was not covered by Korea's offer." Aside from repeating that we made no findings regarding Korea's motivations or intent, we recall our statement in paragraph 7.116 of the Findings that the United States is not charged with knowledge of bilateral communications between Korea and the European Communities. Furthermore, while we note that Korea is drawing a conclusion from the EC's response to Korea's communication of November or December 1993 that such communication was clear and convincing, we will refrain from agreeing with that characterization ourselves because Korea was unable to produce the document when requested.

[682] The Panel never dealt with a question of attributing information from one official to another. This is a construct of Korea's later taken up by the United States in its second Interim Review comments. The Panel's point is much more straightforward. In the context of negotiations, a communication from a Member government is considered to be on behalf of the government as a whole and cannot later be disavowed as the actions of a mere individual or Ministry.

international law principles of State responsibility. The actions and even omissions of State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law.[683]

6.6 One further anomaly of Korea's position is that it implies that other GPA Parties are charged with a higher degree of knowledge of Korean legislation than the Korean Government itself. Korea argues that the United States was charged with knowledge of its laws, including the *Seoul Airport Act* which came into effect on 31 May 1991, at least one month prior to Korea's response to the US questions.[684] On the other hand, Korea now strenuously argues that another Ministry of the Korean Government should not also be charged with such knowledge. This is a double standard we clearly do not accept.

6.7 Finally, we must also note our doubts about the position taken by Korea on this issue for purposes of this dispute. Korea asserts that the official at the Ministry of Commerce who answered the questions simply did not know about the actions underway at the Ministry of Transportation regarding the IIA project. However, aside from the fact that this supposedly ill-informed official replied to the US questions with 29 pages of extensive answers, as stated by Korea in its Interim Review comments of 13 March 2000, we note that the answer on the particular question at issue did provide some specific details. For example, it was stated that the New Airport Development Group was conducting airport construction. Even more specifically, the answer identified by name a US company taking part in the basic plan projects. It is not clear how such details could be known to the Ministry of Commerce officials who Korea now says were ignorant of the actions of the Ministry of Transportation. Had an inquiry into the motivations or lack thereof on the part of the Korean Government regarding the answer provided to the United States been relevant or probative, we would have followed up this issue in detail. We did not and we decline to do so now.

6.8 In making the above statements, we recall our determination that our inquiry in this matter could not stop with the events of 1991 and our Findings rest upon a weighing of all the facts of the dispute. Other than the addition noted in paragraph 6.3 above, we decline to make any of the changes requested by Korea in its covering letter to the Panel.

6.9 As noted, Korea made some specific technical comments on the Interim Report. We have made technical changes and corrections as requested in paragraphs 7.28, 7.33, 7.45, 7.66 (footnote 726), 7.110, 7.115, 7.120 and 7.125 (footnote 768).

6.10 With respect to paragraph 7.55, Korea states that it is its position that the "control" test contained in the Tokyo Round GPA was eliminated during the Uruguay Round and that it was the United States that argued that the new annexes to the GPA made the test redundant. However, Korea did make the following statement in its Second Submission to the Panel:

> "If the United States "control" test were to prevail, Annex 3 would in such instances become redundant; entities listed on Annex 3 are subject to a degree of control by Annex 1 entities that would subject them, under the United States' test, to coverage under Annex 1."[685]

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[683] See the draft articles on State Responsibility drafted by the International Law Commission, Articles 5 and 6 and Commentary, *Yearbook of the International Law Commission* (1973), Vol. II, p. 173 *et seq.* See also *Corfu Channel Case*, 1949 ICJ Reports, p. 23; *US Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, pp. 30-31 and 33. These principles of attributability of actions of organs of the State must also function where it concerns communications of a State organ, particularly in the context of negotiations of a plurilateral agreement such as the GPA. Otherwise Parties to the GPA could not rely upon each other's communications, which ultimately could result in the breakdown of the treaty system itself.

[684] Paragraph 4.544.

[685] Second Written Submission of Korea at paragraph 159.

This statement implies the argument that the Panel attributed to Korea. However, we do note that it was made in the context of a broader argument made to rebut the US position. Therefore, we will clarify the language in paragraph 7.55.

6.11 With respect to paragraph 7.125, Korea requests that we add an additional reference to the parenthetical reference to evidence that the US Government and industry was aware of KAA's role in IIA procurement. Korea argues that we made such a reference in paragraph 7.115. We note that there is already a cross-reference in the previous sentence (by way of footnote 767) to paragraphs 7.104-7.116. Also, the use of the term "such as" indicates that the parenthetical phrase is illustrative and not comprehensive. Therefore, we see no need to expand the parenthetical phrase further.

6.12 With respect to the Factual Aspects section of the Report, the United States requests that paragraph 2.64 be further clarified to remove any possible implication that any version of the *Seoul Airport Act* designated KAA or its successors as the operators of the IIA project. It is the case that other laws made the specific designations, so we will change paragraph 2.64 accordingly.

6.13 With respect to paragraph 2.87, the United States requests that it would be appropriate to refer to the language of the original version of the *Korea Airport Corporation Act* when discussing the constitution of KAA.[686] We have made a change to clarify that the quoted provision is from the 1994 version of the Act.

6.14 With respect to paragraphs 2.95 and 2.113, the United States objects to including in this section a statement to the effect that KAA and KOACA employees and directors are not government employees. The United States considers this an unsubstantiated assertion made by Korea. Aside from the point that we do not have any reason to doubt this representation, we also note that, for example, Article 30 of the *Korean Airport Corporation Act* provides that KAA employees shall be considered government employees for specific limited purposes relating to certain criminal acts. The clear implication of this is that they are not considered government employees for all other purposes. Further, we note that the footnotes to paragraphs 2.95 and 2.113 clearly indicate that Korea's submissions are the source for these paragraphs. Thus, we think it is appropriate to leave these paragraphs as part of the Factual Aspects of the Panel's Report and in relevant portions of the Findings.

6.15 With respect to the Arguments of the Parties section, the United States asserts that this section represents an incomplete summary of arguments presented by the parties. We cannot agree with this assertion. All the arguments and rebuttals are fully reflected in the Report in essentially their original form.[687] We also arranged the parties' arguments under headings and in a sequence such that the arguments raised by the parties were addressed in the most logical and coherent way. In so doing, the Panel did its utmost to ensure that the context in which the arguments and rebuttals were raised by the parties was preserved. Additionally, the Panel sought to avoid unnecessary duplication of arguments. Since the parties often repeated arguments in their submissions, sometimes verbatim, we considered that it was sufficient to state those arguments in the most relevant section or sections and to include cross-references to those arguments in other sections where necessary. For example, this approach was adopted in relation to the additions proposed by the United States to paragraphs 4.232 and 4.239. In summary, in our view, the Descriptive Part of the Report contains a fair and accurate presentation

[686] We note that the United States referred us to US Exhibit 20 for the 1979 version of the Act, but such version does not appear to be contained in that or any other exhibit.

[687] In this dispute, the United States recommended that the Panel dispense with the conventional Descriptive Part and append the parties' submissions to the Report. We indicated our willingness to adopt this approach as long as Korea agreed. In the event, Korea was unable to agree to such an approach and, therefore, we have undertaken the task to provide an extensive summary of the parties' arguments. It follows that we have not inserted the arguments verbatim in precisely the form originally submitted.

of the parties' arguments and we cannot agree with the assertion by the United States that the Descriptive Part of the Report is skewed.

6.16 A further comment made by the United States is that this section of the Report separates textual arguments from supporting evidence which, according to the United States, results in the removal of such evidence from its context and its logical order. Again, we cannot agree with this comment. The United States argued, and the Panel agrees, that Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* applies to this case. According to those Articles, regard must be had first to textual arguments in determining the meaning of Korea's Schedule. Supporting evidence in the form of preparatory work and the circumstances of the conclusion of the GPA should only be referred to in cases where a textual interpretation leads to a meaning that is ambiguous or obscure or would lead to a manifestly absurd result. Recourse also may be had to such materials to confirm the ordinary meaning of the text. Accordingly, the Panel believes that the separation of textual arguments from supporting non-textual evidence is appropriate. As an example, we note that this approach was adopted in relation to the addition proposed by the United States to paragraph 4.58. Finally, we note that we have made the amendments requested by the United States in relation to paragraph 4.45 but not in relation to paragraph 4.434 since the proposed amendment is already included in the next paragraph.

6.17 With respect to paragraph 7.17, the United States requests an amendment noting that control was but one aspect of the test it proposed. We recognize that the United States asserted more than just "control" and, indeed, we have throughout the Findings taken a very broad approach in our analysis as we explicitly stated in paragraph 7.57 and then followed-up fully in the subsections following that paragraph. What we are focusing on in paragraph 7.17 is the question of control which was the element most strongly emphasized by the United States. Then we proceeded to the broader examination. Thus, we think paragraph 7.17 is appropriate in context and decline to amend it.

6.18 With respect to paragraph 7.18, the United States requests that we eliminate the portion of the first sentence concerning transfer of authority to KAA because the United States does not agree that any such transfer took place. We agree that the sentence should be amended to remove any implication that the United States agreed with such an interpretation of the *Seoul Airport Act*. The United States also requested several additions to its arguments. We will expand the reference to the US position, but recall that the full explanation of the US position is found in its submissions which are reflected in the Descriptive Part of this Report. The Findings are not the place to re-introduce such arguments in extensive detail.

6.19 With respect to paragraph 7.29, the United States requests that we amend the paragraph to reflect that MOCT has been directly responsible. If the United States means that MOCT was directly responsible throughout the period in question, obviously we disagree and decline to make the requested change. However, we will amend the paragraph to reflect that KAA, KOACA and IIAC have been responsible for the IIA project subsequent to enactment of the *Seoul Airport Act*.

6.20 With respect to paragraph 7.47, the United States requests that we include a number of other bureaus that were not included in the list provided in the portion of the *Supplementary Explanation* quoted in paragraph 7.46. However, our observation in paragraph 7.47 is limited to the subject of aviation bureaus and offices. This was significant in light of the fact that KAA was responsible for 10 regional airports. Such a significant element of Korea's offer surely would have been referenced in the *Supplementary Explanation*. Furthermore, we note that there was no evidence presented indicating that any party to the negotiations considered the 10 KAA-administered regional airports as part of Korea's offer. The evidence was to the contrary. We will amend paragraph 7.47 to clarify this point. We also will add a footnote to paragraph 7.61 in this regard.

6.21 With respect to paragraph 7.50, the United States requests we amend the paragraph to reflect that its arguments were not limited to "control". As noted above, we deal with the broader issues elsewhere and therefore decline to make the change requested by the United States.

6.22 With respect to paragraph 7.53, the United States requests that we drop any reference to the employment status of employees of KAA, KOACA and IIAC. The statements in this paragraph reflect our conclusions in this regard and we, therefore, decline to make the requested change.

6.23 With respect to paragraphs 7.60 and 7.61, the United States argues that the Panel has ignored evidence presented by the United States. This statement by the United States, of course, is incorrect. We fully considered all evidence presented by the parties. When we state our conclusions in the Findings, we summarize the evidence we found most persuasive without each time repeating all of the counter-arguments made by the party that disagrees with the conclusion. To do otherwise would render the Findings opaque and unreadable. Specifically, with regard to paragraph 7.60, the United States argues that KAA's by-laws are implemented upon approval of MOCT and that senior management appointments also are subject to such approval. We considered these matters and found them part of the oversight functions of MOCT.

6.24 The United States also reiterates its arguments about whether KAA's employees are properly considered government employees or not. We have explained our position elsewhere in this regard. Further, the United States argues implicitly that the non-governmental funding is minimal. In some years, it has been. However, KAA and its successors have provided other funds. The reference in footnote 720 in this regard was inaccurate and we have corrected it accordingly.

6.25 With respect to paragraph 7.61, the United States highlights again elements of what it considers "control" of KAA by MOCT. On these issues, as with others, we took into consideration the various aspects of control or authority between MOCT and KAA and its successors. We do not wish to imply that this was an easy factual assessment by any means. We weighed these and the other facts and, on balance, made our assessments as stated in the Findings. We have made a minor clarification of the language in paragraph 7.61, but otherwise, we decline to make the changes requested by the United States in this regard.

6.26 With respect to paragraph 7.63, the United States argues that: "it is inaccurate to portray the United States as relying 'heavily' on the Korean *Aviation Act* alone." We did not say that the United States relied on the *Aviation Act* "alone." If we had, we would not have used the term "heavily;" we would have used "exclusively" or a synonym for it. Our statement in paragraph 7.63 is accurate and we decline to change it.

6.27 We will change footnote 724 in paragraph 7.62 as requested by the United States to reflect the fact that Korea raised the question of the applicability of Article I:3 of the GPA.

6.28 With respect to paragraph 7.66, the United States argues that the Panel does not discuss the other cross-references between the *Aviation Act* and the *Seoul Airport Act*. We spent considerable time reviewing this question of cross-references and discussed in most detail the one that we felt of particular importance in light of the US arguments. We will amend the paragraph to note that we have taken into account the various cross-references before reaching our conclusions.

6.29 With respect to paragraph 7.67, the United States requests an amendment to reflect that the *Seoul Airport Act* does not relate to the relationship between KAA and MOCT but between MOCT and various other state, local or designated entities. KAA and its successors were designated later as entities to operate the project and, therefore, the Act does cover their relationship, even if it may cover others as well. We decline to make the change requested by the United States.

6.30 With respect to paragraphs 7.67 and 7.68, the United States requests that the Panel re-state further evidence that the United States argues that the relationship between MOCT and KAA beyond just oversight. As noted above, we have fully taken into account the references cited by the United States and have not found them, on balance, to be persuasive. We decline to make the changes requested by the United States in these paragraphs.

6.31 The United States requests several changes to paragraph 7.69. We agree that the reference to bid requests in the second sentence was more than a mere mention. We will amend the sentence accordingly. The United States requests we change the reference in the third sentence to the ratio of employees of KAA to MOCT rather than between IIAC and MOCT. We believe the reference to the current state of affairs is relevant and decline to change it. We requested information regarding the number of employees of IIAC but did not specifically request information on the number of employees of KAA in 1991. This is because KAA was an entity founded over 12 years earlier with responsibility for 10 regional airports. As such, it would have been impossible to separate the employees dedicated to the IIA project from those responsible for other activities of KAA. We also find it unlikely that KAA would have been an empty shell either given its other responsibilities. The US objects to our use of the term "empty shell" as a mis-characterization of its arguments concerning alleged Korean "shell games." The reference to an empty shell was ours and not related to the US point which was on another issue. We will make only the requested change to the first sentence of paragraph 7.69.

6.32 The United States objects to our reference to other bid documents in footnote 732 in paragraph 7.69 to the effect that they showed no relationship with MOCT. The United States argues that bid documents are not intended to show such relationships. However, that is precisely what the United States wished to establish with bid documents that indicated a role for MOCT or the Office of Supply. We were merely noting that of all the bid documents presented in evidence, the vast majority show no role for MOCT or the Office of Supply. We decline to make the change requested.

6.33 With respect to paragraph 7.70, the United States reminds the Panel of the references in the MOCT website to the role of NADG in the IIA project and argues that more than just oversight by MOCT was involved. We have acknowledged this evidence elsewhere and took it fully into consideration. We reiterate that it is not only not required, but would be counter-productive to recite every piece of evidence at every stage of the Findings.

6.34 With respect to paragraph 7.106, the United States argues that the date of the Korean response has not been established as 1 July 1991, only that Korea has asserted it. The relevance of the US point has not been established. In light of our extensive discussion about Korea's response and our views about its inadequacy, we do not think it would change our conclusions if the actual date was a week or two later. Therefore, we see no need to change our reference.

6.35 With respect to paragraph 7.115, the United States notes its strong objection to Korea's claim that the United States Government knew that KAA was in charge of the IIA project. However, the statement that the United States objects to is one of a list of factors considered by us as evidence of the wide knowledge of the fact that KAA was operating the IIA project and this reference was already qualified by noting that it was evidence submitted by Korea. We have amended paragraphs 7.115 and 7.119 to clarify the point.

6.36 The United States also claims that the only legally relevant officials with respect to knowledge of relevant factors are those within a particular government entity in a position to decide whether to go forward with the negotiated result. The United States has provided no legal support for this sweeping assertion.[688] While the US comment was directed at the issue of actual notice, it is

[688] Indeed, the contrary would appear to be the case. See our discussion in paragraph 6.5 above, and the footnotes thereto.

difficult to see how it could have any legal relevance in a setting where constructive notice is sufficient.

6.37 With respect to paragraph 7.125, the United States requests that we qualify the statement by noting that at least one month of the four-month period was for verification. We agree that this is more accurate and will make the requested change.

6.38 We have corrected grammatical and typographical errors in paragraphs 7.4, 7.34, 7.46, 7.48, 7.61, 7.93 (footnote 751) and 7.100 and made a minor clarification in paragraph 7.48.

VII. FINDINGS

A. CLAIMS OF THE PARTIES

7.1 The United States requested the Panel to make the following findings[689]:

> "That Ministry of Construction and Transportation ("MOCT") (including the New Airport Development Group ("NADG") under MOCT), the Korean Airport Authority ("KAA"), the Korean Airport Construction Authority ("KOACA"), and the Inchon International Airport Authority ("IIAC"), all of which are or have been in the past Korean Government entities involved in procurement for the Inchon International Airport ("IIA") project, are covered under Korea's Appendix I of the WTO Agreement on Government Procurement ("GPA") and:
>
> (a) That by imposing bid deadlines for the receipt of tenders that are shorter than the GPA-required 40 days, Korea is in violation of Article XI:1(a) and XI:2(a) of the GPA.
>
> (b) That by imposing qualification requirements specifying that an interested foreign supplier must have a licence that in turn requires that supplier to build or purchase manufacturing facilities in Korea, just so the supplier may be eligible to bid as a prime contractor, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.
>
> (c) That by imposing domestic partnering requirements that force foreign firms to partner with, or act as subcontractors to, local Korean firms, just so the foreign firms may participate in tendering procedures, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.
>
> (d) That by not establishing effective domestic procedures enabling foreign suppliers to challenge alleged breaches of the GPA for procurements related to the IIA project, Korea is in violation of Article XX of the GPA."

7.2 The United States also requested the Panel to make the following finding[690]:

> "That should the Panel determine that the above measures do not violate the GPA, the measures nevertheless nullify or impair benefits accruing to the United States under the GPA, pursuant to Article XXII:2 of the GPA."

7.3 Korea requested the Panel to reject the complaints to the United States on the basis of the following finding[691]:

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[689] Paragraph 3.1.
[690] Paragraph 3.2.

"That the entities conducting procurement for the IIA are not covered entities under Korea's Appendix I of the GPA."

B. GPA COVERAGE OF THE INCHON INTERNATIONAL AIRPORT PROJECT

1. General

7.4 As discussed above, the United States has claimed that the procurement practices with respect to the IIA are not consistent with the provisions of the GPA. Specifically, the United States argues that the bid deadlines have been too short, there are improper qualification and local partnering requirements and there are not adequate challenge procedures. Korea has taken no position with respect to these allegations; rather, Korea argues that the entities responsible for IIA procurement are not covered by Korea's GPA commitments contained in Appendix I to the GPA and that, therefore, Korea is under no obligation to conduct IIA procurement in a manner consistent with the provisions of the GPA.

7.5 The question that we must address at the outset, therefore, is whether procurement for the IIA is covered by Korea's GPA commitments. Since Korea's final offer of concessions on 14 December 1993 and the Members' agreement to the WTO GPA and Korea's accession to it on 15 April 1994[692], three entities have been responsible for IIA procurement: KAA, KOACA and IIAC. It is undisputed between the parties that these three entities occupy similar situations, the transfer of authority between them being largely irrelevant to our analysis. Both parties agree that Korea has never utilized the procedures contained in GPA Article XXIV:6 for modification of its Schedules with respect to airport construction. The issue, therefore, is whether KAA was a covered entity[693] at the time that Korea concluded its accession negotiations. We will, however, also look at the activities of KOACA and IIAC, to the extent necessary, as well as the relationship of MOCT and the Office of Supply to the three entities, to see what impact, if any, that will have on our analysis.

7.6 Article I of the GPA provides as follows:

"This Agreement applies to any law, regulation, procedure or practice regarding any procurement by an entity covered by this Agreement, as specified in Appendix I."

A footnote to Article I further provides that for each Party to the GPA, its Schedule is divided into five annexes covering different types of procuring entities. For our purposes, the most relevant annexes are: Annex 1 containing central government entities; Annex 2 containing sub-central government entities; and, Annex 3 containing other entities that procure in accordance with the provisions of the GPA. Generally, there are different procurement thresholds for each Annex.

7.7 The question arises as to how to interpret these Schedules in the event of a disagreement. In a recent dispute, the issue of the approach to take in interpreting Schedules under Article II of GATT 1994 was taken up by the Appellate Body. In particular, the Appellate Body addressed the question of whether and how to apply the normal rules of treaty interpretation contained in the *Vienna Convention* to the interpretation of the language contained in a Member's tariff schedule. In this dispute, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, WT/DS67, WT/DS68, ("*European Communities – Computer Equipment*"), the question involved the appropriate tariff treatment for certain electrical products such as local area network ("LAN") equipment. The United States claimed that the products should have been treated by the

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[691] Paragraph 3.3.

[692] The effective date of Korea's accession was 1 January 1997.

[693] We note that the GPA does not use the term "covered entity" as such, rather it refers to entities covered by this Agreement. Both parties used the term "covered entity" as shorthand for this and we will continue in this manner as well.

European Communities in its schedule as automatic data-processing machines. Some EC member States treated LAN equipment as telecommunications equipment. The panel found for the United States, among other things, on the basis that the United States had a legitimate expectation as to how the products would be treated.

7.8 The panel finding was reversed by the Appellate Body. In the Appellate Body's view, the panel had incorrectly based its findings on the unilateral and subjective expectations of the exporting party. Instead, the Appellate Body provided the following views:

> "Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*."[694]

7.9 Like GATT Article II:7 which refers to the tariff Schedules as "integral" parts of the Agreement, Article XXIV:12 of the GPA states that: "The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof." Thus, it follows that we should consider the Schedules appended to the GPA as treaty language. Accordingly, we will refer to the customary rules of interpretation of public international law as summarized in the *Vienna Convention* in order to interpret Korea's GPA Schedule.

7.10 Article 31 of the *Vienna Convention* reads as follows:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
>
> 2. The context for the purpose of a treaty interpretation shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions;
>
> (b) any subsequent practice in application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

[694] Appellate Body Report on *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, WT/DS67, WT/DS68, adopted on 22 June 1998, at paragraph 84. See also Appellate Body Report on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103 and WT/DS113, adopted on 27 October 1999, at paragraph 131.

4. A special meaning shall be given to a term if it is established that the parties so intended."

7.11 Article 32 of the *Vienna Convention* provides guidance on supplementary means of interpretation. It reads as follows:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

7.12 The first step of the analysis, therefore, will be to examine Korea's Schedule and determine whether, within the ordinary meaning of the terms therein, the entity responsible for IIA procurement is covered. This will include a review of all relevant Annexes and Notes.

7.13 If the meaning is ambiguous or obscure, or would lead to a result which is manifestly absurd, then, in accordance with Article 32, recourse may be had to the preparatory work and the circumstances of the conclusion of the treaty. Such recourse could include reference to matters such as the questions asked of Korea by GPA members during the accession process and Korea's responses thereto. Reference to the negotiating history is also appropriate to confirm the Panel's understanding of the ordinary meaning of the terms in the treaty.

2. Covered Entities under Korea's Annex 1

(a) Arguments of the Parties

7.14 Listed in Annex 1 of Korea's Appendix I Schedule are, *inter alia*, the MOCT[695] and the Office of Supply. The Office of Supply is covered with respect to procurements made for entities listed in Annex 1. An important element in construing the coverage of Annex 1 is Note 1 to that Annex. It reads as follows:

> "The above central government entities include their subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the Government Organization Act of the Republic of Korea."

7.15 The United States has argued that the interpretation of "central government entity" in Annex 1 includes branch offices and subsidiary organizations. According to the United States, proper treaty interpretation of this term must result in the inclusion of the subdivisions of listed entities and such subdivisions could include branch offices and subsidiary organizations or other such entities. The United States argues that this interpretation is wholly consistent with Note 1 because that Note states that Annex 1 entities "include" certain other organizations. "Include" is a broadening term, not a limiting one. Thus, the organizations described in Note 1 are in addition to the central government entities themselves. These other organizations include branch and subsidiary organizations.

7.16 The United States argues that NADG is a part of MOCT, or at least a branch or subsidiary organization of MOCT.[696] The United States further argues that, even though NADG has not been

[695] MOCT was formed in December 1994 through the merger of the Ministries of Construction and Transportation. Generally we will refer to the covered entity as MOCT for simplicity, recognizing that this may be anachronistic at points.

[696] See paragraphs 4.13, 4.15 and 4.436.

expressly listed in Korea's Schedule, it is nevertheless covered under the GPA by virtue of MOCT's listing. The United States argues that NADG is the organization responsible for IIA construction and that, therefore, the IIA is a project of a covered entity. Alternatively, the United States argues that KAA and its successors are branch offices or subsidiary organizations of MOCT and the IIA project would, therefore, also be covered under that line of analysis.

7.17 The United States urges the Panel to look closely at the element of "control" over the organizations in question, particularly in regard to the specific project in question and argues that given the degree of control exercised by MOCT over KAA and its successors, procurements by those entities are actually procurements by MOCT. The United States argues that, therefore, the GPA requirements apply to those procurements.

7.18 The United States points to the *Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction* ("*Seoul Airport Act*") as evidence. Article 4(1) of that Act provides, among other things, that MOCT will establish a "master plan" for the IIA project. This plan is to include general direction of construction, outline of the construction plan, the construction period, a financing plan and other matters deemed necessary. The United States also refers to Article 7(1) which requires MOCT's approval of the project operator's "execution plan" and Article 12 which requires the project operator to submit reports to MOCT. Article 13 permits MOCT to cancel permission to operate or suspend or alter the work. Article 14 requires that the project operator permit MOCT inspection of its office and workplace and other places relevant to the new airport development project.

7.19 The United States also argues that the Korean *Aviation Act* is the controlling statutory authority for airport construction. Under Article 95 of the *Aviation Act*, KAA would have been a "project operator". The United States then refers to the numerous provisions in the *Aviation Act* which require the project operator to work under the supervision of MOCT. The United States also refers to the obligation of the project operator to report to the MOCT under the *Seoul Airport Act*.

7.20 The United States further notes that General Note 1of Korea's Appendix reads as follows:

> "Korea will not extend the benefits of this Agreement
>
> (a) as regards the award of contracts by the National Railroad Administration,
>
> (b) as regards procurement for airports by the entities listed in Annex 1,
>
> (c) as regards procurement for urban transportation (including subways) by the entities listed in Annexes 1 and 2
>
> to suppliers and service providers of member States of the European Communities, Austria, Norway, Sweden, Finland and Switzerland, until such time as Korea has accepted that those countries give comparable and effective access for Korean undertakings to their relevant markets."

7.21 The United States argues that the reference to "procurement for airports" in paragraph (b) of the General Note confirms that there are, in fact, entities listed in Annex 1 of Korea's Schedule that are responsible for procurement for airports. The United States further argues that since MOCT, the NADG, KAA, KOACA and IIAC are the only entities Korea has held out as being responsible for procurements for airports, these are the entities that must be covered under Annex 1 for all countries not referred to in the General Note.

7.22 The United States points to MOCT's website which listed the NADG as responsible for IIA construction, along with other press and business group reports that also referred to MOCT or NADG responsibility for the IIA project. According to the United States, all of these factors showed that

MOCT was in control of KAA and its successors, or, at the very least, was in control of the IIA project.

7.23 Korea responds that there is no textual basis for the US arguments about branch offices and subsidiary organizations. According to Korea, Note 1 to Annex 1 defines the scope of the coverage of central government entities under Annex 1. Korea argues that this is the most reasonable interpretation of the phrase "as prescribed in the *Government Organization Act*" that is contained in Note 1. In any event, Korea disagrees that KAA or its successors could be properly described as branch or subsidiary organizations of MOCT. While Korea disagrees that there was a "control" test contained in the WTO GPA, Korea also argues that KAA was independent both overall and with respect to the IIA project. This is because, among other things, KAA was established by law as an independent juristic entity; it authored and adopted its own by-laws; it had its own management and employees who were not government employees; it authored and adopted its own procurement rules distinct from the general government rules; it published bid announcements and requests for proposals of its own accord; it concluded contracts with successful bidders on its own behalf; and it funded portions of the IIA with its own monies.

7.24 Korea points out that Article 94(1) of the *Aviation Act* states that it is the controlling provision of law unless "otherwise provided by law." According to Korea, in this case, the *Seoul Airport Act* "otherwise provided by law." Therefore, the *Seoul Airport Act* was the controlling law and it explicitly authorized an entity other than MOCT to have the responsibility for the IIA project. Korea acknowledges that there were elements of supervision by MOCT of the IIA project as it is an important national project. However, Korea argues, this sort of general oversight is very typical for projects that are closely linked to public welfare, safety and finance and ensures accountability. Korea argues that this sort of oversight does not involve the surrender of the supervised entity's status as a separate legal entity.

7.25 Korea further argues that the indicia of independence, as listed above, clearly indicated that KAA was an independent entity for purposes of coverage by the GPA. Korea notes that other entities such as KAA were typically Annex 3 entities both in Korea and in other GPA signatories, if the negotiators agreed to their coverage at all.

7.26 In regard to General Note 1(b), Korea responds that, in fact, procurement for some airports is conducted by covered Annex 1 entities. Specifically, the Seoul and Pusan Regional Airport Authorities are local administrative organs as provided in the *Government Organization Act* and are therefore covered by reason of Note 1 to Annex 1. Thus, there is nothing inconsistent about General Note 1(b) and Korea's position that KAA and its successors, and therefore the IIA project, are not covered.

7.27 With respect to MOCT's website, Korea argues that this was a product of MOCT's public relations department and was not a binding classification of responsibilities. Korea also argues that in July 1998, around the time the website evidence is cited, the US Commercial Officer in Seoul sent a letter to the Korean Government which implicitly acknowledged that KOACA was not a covered entity. The letter requested, among other things, that KOACA be considered de facto covered until actual GPA coverage took place.

7.28 The United States responds to this last point by providing a series of other US Government letters from this time-period, including some from more senior US officials, which the United States maintains made very clear the full and accurate position of the United States which was different from that of the above-mentioned Commercial Officer. In the US view, the July 1998 letter does not lead to the conclusion proposed by Korea, in any event, because in stating that there should be de facto coverage it did not imply that there was no *de jure* coverage.

(b) Evaluation of the Parties' Arguments

7.29 As noted in paragraph 7.5 above, three entities (KAA, KOACA and IIAC) have been directly responsible for IIA procurement following the designation of a project operator in December 1991.[697] In evaluating the parties arguments in regard to the claim of a violation of Korea's commitments under the GPA, there are two aspects which must be addressed. The first issue is the interpretation of Korea's Schedule of commitments. Is the entity conducting the procurement for the IIA project listed in the Annexes or the Notes thereto? This requires an interpretation of Annex 1 to Korea's Schedule and the Notes thereto, as well as other relevant portions of the Schedule.[698] The second issue is whether there is some other test that we should apply to determine if the entity in question is covered by Korea's GPA commitments even if not listed. The United States has generally argued in this regard that the proper test should be whether the procuring entity is "controlled" by a listed entity. Korea has contested the validity of that proposed test. The question becomes whether there are some criteria exogenous to the lists and Notes in the Schedules that, when applied to an entity, would lead to the conclusion that its procurement should be covered by a GPA signatory's commitments.[699]

(i) Interpretation of Annex 1 of Korea's Schedule

7.30 A critical question we must first address is determining what is explicitly contained in Korea's Schedule. A preliminary issue is the status of Note 1 to Annex 1, in particular the extent to which Parties can qualify the coverage of listed entities through such Notes. In our view, Members determine, pursuant to negotiation, the scope of the coverage of their commitments as expressed in the Schedules. In this regard, we take note of the panel finding in *United States - Restrictions on Imports of Sugar* ("*United States - Sugar*") wherein the panel observed that Headnotes could be used to qualify the tariff concessions themselves. [700]

7.31 The implication of the Findings in *United States - Sugar* for the present case would be that a GPA signatory could use Notes to its Schedules to qualify the entity coverage itself. However, as will be discussed in subsequent sections, questions have been raised as to whether an entity not mentioned in a Schedule, either through an affirmative listing or an explicit exclusion, may still be covered due to the nature of its relationship with another entity which is covered.

7.32 Our first step, therefore, is to examine what entities are actually listed in Korea's Schedule. We note that MOCT is included in the list of central government entities. KAA and its successors are not listed either there or elsewhere.

7.33 Note 1 to Annex 1 states that the "central government entities include their subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act* of the Republic of Korea." To begin with, we agree with Korea that the phrase "as prescribed in" means that the *Government Organization Act* defines the terms listed in the Note. The relevant definition of the verb prescribe is to: "limit, restrict, confine within bounds."[701] In our view, this concept of limiting or confining within bounds means that "prescribed" does provide definition to the preceding terms in Note 1. Indeed, one of the definitions of the verb "define" is to: "determine, *prescribe*, fix precisely, specify."[702] We think that the definitions of "prescribe" and "define" are so close as to make the words virtually synonymous. Thus, we will look to the cited Act for the definitions of the terms listed in Note 1.

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[697] *Seoul Airport Act* as amended by Act No. 4436 (14 December 1991) Exhibit Kor-12; *Korea Airport Corporation Act* as amended by Act Nos. 4435 and 4436 (14 December 1991) Exhibit Kor-14.

[698] See subsections (i) and (ii), below.

[699] See subsection (iii), below.

[700] Report of the Panel on *United States - Restrictions on Imports of Sugar*, adopted on 22 June 1989, (BISD 36S/331) at paragraphs 5.2-5.3 and 5.7.

[701] *New Shorter Oxford English Dictionary*, (Clarendon Press, 1993) Vol. 2 at p. 2339.

[702] *Ibid.*, Vol. 1 at p. 618. (emphasis added)

7.34 Article 2(3) of the *Government Organization Act* states: "The subordinate linear organizations of the central administrative organs shall be Cha-Gwan (Vice-Minister), Cha-Jang (Deputy Administrator), Sil-Jang (Office Director) . . ."[703] Thus, the subordinate linear organizations are defined as individual offices rather than organizations as such. In response to a question from the Panel, Korea states that this means that coverage would be with respect to areas of responsibility of those officials. We accept the explanation by Korea and, therefore, cannot agree with the US assertion that Article 2(3) of the *Government Organization Act* does not really provide a definition of "subordinate linear organizations." In our view, there is no doubt that Article 2(3) defines "subordinate linear organizations" by reference to the entities (ministries, divisions, units, etc.) which fall under the responsibility of one of these offices. It has not been argued that KAA falls within any of these offices. Therefore, we shall proceed on the basis that KAA is not a subordinate linear organization.

7.35 Article 3(1) provides that: "Each central administrative organ may have local administrative organs as prescribed by the Presidential Decree except those especially prescribed by laws, in case they are necessary for the implementation of the duties under its jurisdiction."[704] Examples of such organizations are the Seoul and Pusan Regional Airport Authorities. KAA and its successors are not considered local administrative organs.[705]

7.36 In addition, Article 4 of the Act provides as follows:

> "(Establishment of Attached Organs) In an administrative organ, there may be established by the Presidential Decree organizations for experiment, research, education and training, culture, medicine, manufacturing or advice, respectively, if necessary for the fulfilment [of] duties under its jurisdiction."[706]

There is no dispute that KAA is not an "attached organ" within the meaning of this definition.

7.37 As demonstrated above, KAA does not fall within the terms of Articles 2(3), 3(1) or 4 of the *Government Organization Act*. We, therefore, conclude that prima facie KAA does not fall within the terms of Note 1 to Annex 1 of Korea's Schedule. We note, however, that there are diverging views on whether this should be the end of the analysis of Korea's Schedule. Korea is of the view that it should be, while the United States urges us to interpret Note 1 (and, in particular, the word "include") in such a way as to permit us to look beyond Annex 1 itself.

(ii) Further Evaluation of the Extent of Korea's Commitment

7.38 In effect, Korea argues for a narrow reading of the list in Annex 1 by using Note 1 as a definition. The implication of this is that because KAA and its successors are not prescribed in the *Government Organization Act*, they cannot be covered under Annex 1. On the other hand, the United States focuses on the term "include" and argues that Note 1 broadens the coverage beyond the central government entities listed in Annex 1 itself to also encompass additional entities described in the *Government Organization Act*.

7.39 A reference to Note 1 of Annex 2 (sub-central government entities) would tend to support the narrower interpretation. Note 1 to Annex 2 reads in relevant part as follows:

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[703] Exhibit Kor-58. All translations of legislative materials have been provided by Korea.
[704] *Ibid.*
[705] Korea states that this is the case. The United states merely notes in response that the *Government Organization Act* does not identify the Seoul and Pusan Regional Aviation Offices as "special local administrative organs."
[706] *Ibid.*

> "1. The above sub-central administrative government entities include their *subordinate organizations* under *direct control* and offices as prescribed in the Local Autonomy Law of the Republic of Korea."

7.40 There are two important observations to make in regard to this Note to Annex 2. First, there is a term "subordinate organizations" as opposed to "subordinate linear organizations." This would support an interpretation with respect to Note 1 to Annex 1 that subordinate linear organizations is a term of art and does not have a broader meaning inclusive of subordinate organizations (or, for that matter, "branch offices" or "subsidiary organizations"). Furthermore, it implies the negative that subordinate organizations in general are not meant to be included unless specifically stated as in Note 1 to Annex 2. We do note, however, that the translation from the original Korean may have added some ambiguity with respect to this issue.

7.41 The second observation is that when Korea wished to make reference to entities under direct control of the listed entities, it made the reference explicit. The absence of such a reference in Note 1 to Annex 1 implies that "direct control" is not a criteria there. This issue of control will be discussed further in subsection (iii), below.

7.42 However, we must note that the reading of Note 1 to Annex 1 as a definitional provision is that it implies a peculiar structure of the Annex 1 Schedule where one set of *organizations* is defined in terms of offices rather than entities. Another unusual aspect of Note 1 is that the comprehensiveness of the list of offices defining subordinate linear organizations could lead to a conclusion that the individual entities listed in Annex 1 are virtually without substance except as provided in the *Government Organization Act*. The problem raised by this observation is that the Note states that the central government entities in Annex 1 **include** subordinate linear organizations, local administrative organs and attached organs. We agree with the United States that the term "include" is normally not a limiting or defining term. The relevant definition of "include" is: "contain as *part* of a whole or as a subordinate element."[707]

7.43 In our view, this use of the term "include" along with the unusual use of a list of individuals to define subordinate linear organizations results in ambiguity regarding the interpretation of Note 1 and therefore the meaning of the whole of Annex 1 including the Notes. While we will examine further the other aspects of Korea's Schedule and the relevant Notes, we find it helpful in accordance with paragraph (a) of Article 32 of the *Vienna Convention* to examine at this point the negotiating history of Korea's GPA accession to provide some clarity to Note 1. In this particular case, there is some very specific evidence in this regard which will assist in interpretation.[708]

7.44 Korea's original offer in 1990 provided for GPA coverage of 35 central government entities. In February 1991, Korea provided to the Tokyo Round Agreement signatories a *Supplementary Explanation of the Note by the Republic of Korea dated 29 June 1990 relating to the Agreement on Government Procurement*.[709] Section 3 of the *Supplementary Explanation* provided a "Clarification of Notes in Korea's Offer." Note 1 at that time was essentially the same as it appeared in Korea's Schedule. The clarification of Note 1 reads in relevant part:

> "o Note 1 is established to clarify the coverage of central government organs which come under 35 of 37[710] purchasing entities.

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[707] *New Shorter Oxford English Dictionary, supra*., Vol. 1 at p. 1337.

[708] We will return to the overall negotiating history of Korea's Schedule below.

[709] Exhibit Kor-117.

[710] Elsewhere in the *Supplementary Explanation* the figure of 35 out of 47 is given. *Ibid.* at p. 5. This may be a typographical error, but is not of relevance to our discussion.

o The meaning and categories of subordinate linear organizations, special local administrative organs and attached organs are prescribed in the Government Organization Act of the Republic of Korea as follows:

- Subordinate linear organizations: office of the minister, vice-minister, assistant minister, director general, director, etc."[711]

7.45 This provides insight on two aspects of the interpretation of Note 1. First, the *Supplementary Explanation* by its terms was intended to *clarify* the coverage of central government organs. That is, it is a clarification of the scope of the list in Annex 1. Note 1 was not in itself intended as an extension of coverage to entities other than those listed in Annex 1. Secondly, the coverage based on offices is made explicit. This goes to the observation in paragraph 7.42 above, that Annex 1 is virtually without substance except as provided in the *Government Organization Act*. The answer is that this is precisely the case because, in fact, Note 1 defines the scope of the coverage by listing components of the central government entities themselves; it was not meant to denote something exterior to the central government entities as might be implied by the term "include."

7.46 The *Supplementary Explanation* also provided a list of central government entities which it described as the "total central government entities." With respect to the Ministry of Transportation, it provided as follows:

"o Ministry of Transportation

- Regional Aviation Bureaus (2)

- CHEJU Regional Aviation Office

- Flight Inspection Office of the Director-General – VOR-TAC Stations (5)

- Marine Accident Inquiry Offices"[712]

7.47 As noted above, Korea has maintained that the entities for which coverage is provided under Annex 1 of its Schedule are the Seoul and Pusan Regional Aviation offices. The reference to two Regional Aviation Bureaus in the *Supplementary Explanation* supports this assertion. This corresponds with the evidence arising later from the EC's inquiries of Korea in late 1993 which leads to the conclusion that the Regional Aviation Bureaus listed under the Ministry of Transport were the Seoul and Pusan Regional Airport Authorities which are included by Note 1 as local administrative organs. KAA is not included in the list contained in the *Supplementary Explanation*. We note that KAA was responsible for 10 regional airports (although apparently it was not itself localized in one region in its responsibilities and therefore was not "regional") and, as such, it would have been a major element of Korea's offer. In light of this, we find its omission from the list significant.

[711] *Ibid.* at p. 26.

[712] *Ibid.* at p. 11. We also note that this piece of negotiating history also adds clarity to the meaning of General Note 1(b) and permits a consistent and coherent reading of Annex 1 in light of this General Note. We recall that the United States argued that General Note 1(b) did not make any sense if the IIA project was not covered because it would then refer to nothing at all and the treaty should not be read in a manner which renders any of it meaningless. However, the *Supplementary Explanation* confirms the meaning otherwise derived from a reading of the *Government Organization Act* as referred to in Note 1 to Annex 1. That is, Korea withheld coverage of airport procurement for the European Communities and certain other signatories, but this does not necessarily imply coverage of the IIA project under Note 1 of Annex 1. Rather, it implicitly refers to the regional airport authorities. We will discuss this further below in the context of the broader negotiating history of Korea's accession to the GPA.

7.48 Thus, Note 1 provides a clarification of the scope of the coverage of the central government entities contained in the list in Annex 1. Obviously, even in light of this conclusion regarding the relationship between the list of entities in Annex 1 and the clarification in Note 1, the term "include" does nonetheless remain a part of Note 1. Also, while it is the case that the definitions of "subordinate linear organizations, local administrative organs, and attached organs" are virtually coterminous with the "central government entities" in Annex 1, there may be a gap. Based on the evidence before us, the office of the Minister is not included in the offices specified in the *Government Organization Act*, but it would evidently fall under the remit of the Ministry. This means, for example, that tasks or projects specifically designated by law or decree as the responsibility of the Minister are covered by the list in Annex 1, even though not "included" by virtue of the definition provided by the *Government Organization Act*. We note, in this regard, that NADG as an ad hoc task force is not contained in the definitions found in the *Government Organization Act*, but is assigned its tasks by regulations issued by the Minister of Construction and Transportation (paragraph 4.14). Thus, NADG would seem to be covered by the list in Annex 1 (as acknowledged by Korea), but not included by reason of Note 1. In contrast, KAA is not assigned its tasks by the Minister; is not listed in Annex 1; nor does Note 1 explicitly include KAA in coverage.

7.49 Therefore, we next will examine whether the relationship between MOCT and KAA was such that KAA's procurement is covered (at least with respect to the IIA, if not more broadly) even though KAA is not explicitly included. As noted in paragraph 7.29 above, there is a remaining question as to whether there exists the possibility of the inclusion of certain procurements of an entity which is not listed, due to its relationship with a listed entity. These arguably are general issues which arise with respect to any Member's Schedule regardless of the structure and content of the Schedule and any qualifying Notes.

(iii) Evaluation of the Parties Arguments: The Issue of "Control"

7.50 The United States argues that KAA may be considered a part of MOCT because it is controlled, at least for the purposes of the IIA project, by MOCT. As noted in paragraph 7.29 above, a question is raised whether, regardless of what is specifically in a Schedule, an entity which is deemed "controlled" by a listed entity is also covered by the Member's GPA commitments?[713] If so, as a follow-on to this second question, does KAA fall within this category?

7.51 Korea has discussed this issue in a slightly different manner. Korea has argued that if we were to adopt the US proposed control test, it would cause a number of entities included within Korea's (and other Members') Annex 3 commitments to be put by operation of law under Annex 1 because such entities would arguably be under the "control" of Annex 1 entities. This is important because it would change the threshold levels negotiated with respect to the Annex 3 entities.

"Control" Generally

7.52 First, we must recall our observation made earlier in regard to Note 1 to Annex 2 of Korea's Schedule. Among other things, we observed that the term "direct control" arose in that Note as a means of describing the scope of the concessions in Annex 2. Arguably, because Korea used the term explicitly with respect to Annex 2, its absence in Note 1 to Annex 1 implies that it has no applicability to Annex 1. While this negative implication cannot be overlooked, we also recall that we are reviewing in this section the question of whether GPA coverage can result from the control relationship between two entities regardless of the Schedules and the way in which Parties seek to define them. Obviously, however, the more explicit the Schedule, the narrower the scope for any such coverage to exist.

[713] In our view, the US arguments regarding branch offices and subsidiary organizations, to the extent not already dealt with in the previous subsections, are subsumed within this general discussion regarding "control."

7.53 The United States has referred us to the Appellate Body decision in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ("*Canada – Dairy*") for guidance on the question of what constitutes "control" of an entity. However, the focus of that dispute was whether or not the Canadian milk marketing boards were "government agencies."[714] In our view, that is a different question than we are facing in the present dispute. While the employees of KAA, KOACA and IIAC are not government employees (except for a "legal fiction" created by statute with respect to certain criminal actions), neither party has argued that these are not "government" agencies. We agree that they are. The question here is narrower. Are these "government" agencies actually a part of or an agent for *covered* government entities?

7.54 Indeed, the United States has acknowledged that there are different tests involved in answering these questions. There was considerable discussion regarding the implication we should draw, if any, from the exclusion in the current GPA of the relevant language contained in Article I of the Tokyo Round Agreement. That read:

"Article I

Scope and Coverage

1. This Agreement applies to:

[. . .]

(c) procurement by the entities under the direct or substantial control of Parties and other designated entities, with respect to their procurement procedures and practices. Until the review and further negotiations referred to in the Final Provisions, the coverage of this Agreement is specified by the lists of entities, and to the extent that rectifications, modifications or amendments may have been made, their successor entities, in Annex I."

7.55 Korea argued that the coverage of the current GPA now is defined exclusively by the Schedules and did not even arguably include another normative rule relating to direct control.[715] In response to a question from the Panel regarding the implications of the existence of this language for understanding the negotiations between the parties in 1991-1993, the United States answered that this language was irrelevant to the Panel's analysis of the US response to Korean legislation implemented in 1991. The United States went on to make the following statement:

> "With regard to the expansion of coverage to procurements by "entities under the direct or substantial control of Parties", the 1979 USITC report states that "[t]he broader language 'direct or substantial control' apparently is intended to encompass not only governmental units but quasi-governmental purchasing agents as well". In other words, this control reference is not related to the control of "central government entities" over their subdivisions. Instead it is referring to the control of Code parties (*i.e.*, the governments themselves) over their "quasi-governmental purchasing agents"."[716]

[714] Appellate Body Report on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, (WT/DS103 and WT/DS113), adopted on 27 October 1999, at paragraphs 96-102.

[715] Korea referred to a United States International Trade Commission report with respect to the nature of the language in Article I:3 of the Tokyo Round Code. See Exhibit Kor-73.

[716] US Responses to Second Set of Panel Questions at p. 10.

7.56 We agree with this statement both as to the nature of the language in Article I:1(c) of the Tokyo Round Agreement and the distinction between the two types of "control" questions. Article I:1(c) was referring to the broader question of whether an entity was "governmental" or not rather than to the relationship between two "governmental" entities for purposes of the GPA. However, the panel and Appellate Body in *Canada – Dairy* also were referring to that broader question. Indeed, it seems to us that the GPA is virtually *sui generis* in this regard. It is an important question under the GATT/WTO Agreements as to whether an action is being taken by a "governmental" entity or a private person for the covered agreements are considered to apply to "governmental" action only. However, once it is determined that there are "governmental" measures at issue, it is not generally of legal relevance which "governmental" entity is applying the measures. But within the GPA this is a critical question. There are obligations on the part of certain government entities but not others.

7.57 There is no use of the term "direct control" or even "control" in the sense that the United States wishes to use it.[717] It has not been defined in this manner either in the context used in the Tokyo Round Agreement or elsewhere. We cannot agree with the overall US position that a "control" test should be read into the GPA. However, we also do not think that it is an entirely irrelevant question. We think the issue of "control" of one entity over another can be a relevant criterion among others for determining coverage of the GPA, as discussed below.

(iv) Evaluation of the Relationship of the Entities Concerned

7.58 As discussed above, we do believe that entities that are not listed in an Annex 1 to the GPA whether in the Annex list or through a Note to the Annex, can, nevertheless, be covered under the GPA. We believe that this flows from the fact that an overly narrow interpretation of "central government entity" may result in less coverage under Annex 1 than was intended by the signatories. On the other hand, an overly broad interpretation of the term may result in coverage of entities that were never intended to be covered by signatories.

7.59 In the present case, our view is that the relevant questions are: (1) Whether an entity (KAA, in this case) is essentially a part of a listed central government entity (MOCT) – in other words, are the entities, legally unified? and (2) Whether KAA and its successors have been acting on behalf of MOCT. The first test is appropriate because if entities that are essentially a part of, or legally unified with, listed central government entities are not considered covered, it could lead to great uncertainty as to what was actually covered because coverage would be dependent on the internal structure of an entity which may be unknown to the other negotiating parties. The second test is appropriate because procurements that are genuinely undertaken on behalf of a listed entity (as, for example, in the case where a principal/agent relationship[718] exists between the listed entity and another entity) should properly be covered under Annex 1 because they would be considered legally as procurements by MOCT. In our view, it would defeat the objectives of the GPA if an entity listed in a signatory's Schedule could escape the Agreement's disciplines by commissioning another agency of government, not itself listed in that signatory's Schedule, to procure on its behalf.

Are the Entities Legally Unified?

7.60 With respect to the first question, in our view, KAA is not legally unified with or a part of MOCT. There are a number of factors leading to this conclusion. Among them are: KAA was established by law as an independent juristic entity; it authored and adopted its own by-laws; it had

[717] The term "control" does appear in Article XXIV:6(b), but it is referring there to privatization. That is, it is used in the same manner as per the analysis in *Canada – Dairy* for determining whether an entity is "governmental" or not rather than for examining the relationship between entities.

[718] The parties at various times referred to a concept of "agency." The term "agency" does not appear in the GPA, but could be used in a very general sense of one entity legally acting on behalf of another.

its own management and employees who were not government employees[719]; it published bid announcements and requests for proposals of its own accord; it concluded contracts with successful bidders on its own behalf; and it funded portions[720] of the IIA project with its own monies.[721]

7.61 There are, nonetheless, some indicia of a relationship between MOCT and KAA and its successors. The senior members of KAA's board of directors are appointed by MOCT and the rest of the directors are appointed by these senior members. There are indicia of control, at least with respect to the IIA project, that indicate some level of oversight or monitoring of KAA by MOCT. We will discuss this in more detail below with respect to the second question, but, in our view, these levels of "control" relate to oversight or monitoring and not to the common identity of the entities. These sorts of relationships exist throughout the public sector. Without them, it would be difficult for governmental functions to be coordinated effectively. But not all such relationships lead to a finding that one entity is, in effect, a part of another entity. Certainly for purposes of the GPA, such a result would lead to a great deal of uncertainty in the coverage of the Schedules. The GPA has always been based on what is affirmatively included in Schedules[722] and extending the coverage further without clear indicia of effective unity between entities is not warranted by the structure and purpose of the GPA. On balance, we are persuaded by the indicia of independence of KAA and its successors and find that these entities are not a part of MOCT.[723]

Legal responsibility for the IIA project

7.62 The second question is whether or not KAA and its successors were acting on behalf of MOCT, at least with respect to the IIA project. That is, was the IIA project really the legal responsibility of MOCT. In answering these questions, we must review the laws governing construction of the IIA.[724]

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[719] This, as noted above, is a different question from whether such employee status means KAA is not a "governmental" entity.

[720] See paragraphs 2.61, 2.101 and 2.130.

[721] Korea also argued that the fact that KAA authored and adopted its own procurement rules distinct from the general government rules indicated KAA's independence. We recognize that it is arguable that it is an indicia of independence that there was pre-existing authority for procurement regulations separate from the entity that KAA was asserted to be a part of. However, we also note that the question of separate and non-conforming procurement regulations is the core of the complaint in this regard and the inconsistency at issue should not generally be considered a justification for itself. Thus, this aspect of alleged independence is of sufficiently questionable probative value that we have not relied upon it.

[722] See USITC Report, Exhibit Kor-73.

[723] If KAA were to be considered a part of MOCT, then the 10 regional airports administered by KAA would also have been included in Annex 1 coverage. As noted in paragraph 7.47 above, even though the Panel requested that the parties (particularly the United States) address this issue, no evidence was presented that KAA's 10 regional airports were considered part of Korea's offer.

[724] We note that Korea raised the question of the applicability of GPA Article I:3 to the present situation. This provision reads as follows:

> "Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply mutatis mutandis to such requirements."

This provision applies "in the context of procurement covered by this Agreement." This implies that it is already agreed that there is a covered entity with procurement under its responsibility. Here the question is whether the entity in question, KAA, is covered. The provision also refers to a covered entity requiring a particular *enterprise* to award contracts for a project. It is unclear what guidance this provides when reviewing the relationship of two entities. Thus, we do not think this provision provides guidance in the present situation.

7.63 The United States relies heavily on the Korean *Aviation Act* for support for its position that MOCT has the legal responsibility for the IIA project. Paragraphs (1) and (2) of Article 94 read as follows:

> "(1) The airport development projects shall be carried out by the Minister of Construction and Transportation: *Provided*, that this shall not apply in case (of) provided otherwise [sic] by this Act or other Acts and subordinate statutes. (*emphasis in original*)
>
> (2) Any person other than the Minister of Construction and Transportation, who desires to operate the airport development projects, shall obtain the permission of the Minister of Construction and Transportation, under the conditions as prescribed by the Presidential Decree."[725]

7.64 Paragraph (3) of Article 94 provides that the land and airport facilities will revert to the State upon completion of the project. Article 95 then continues on with a statement of the requirements that the "project operator" as prescribed in Article 94 must fulfill regarding drawing up project plans and getting approval from the Minister before beginning work as provided in the Presidential Decree.

7.65 Korea has responded that the proviso in Article 94(1) means that the *Seoul Airport Act* is the ultimate controlling statute rather than the *Aviation Act*.

7.66 We agree with Korea's reading of these statutes. It seems clear to us that the *Aviation Act* provides for at least two methods of airport construction. One is by MOCT, in which case the whole of the *Aviation Act* applies. A second is by other entities as provided otherwise by law. The *Seoul Airport Act* is such a law.[726] The United States argues[727] that the cross-reference to Article 95(1) of the *Aviation Act* in Article 8(1)16 of the *Seoul Airport Act* proves that the *Aviation Act* is still the controlling statutory authority. We do not think this aids the US case. Indeed, if anything, it would tend to support the opposite conclusion. Article 8(1)16 cross-references only the requirement in Article 95 of the *Aviation Act* regarding the submission of an operational plan by a project operator. Article 95(1) of the *Aviation Act* requires approval of an operational plan by MOCT; Article 7 of the *Seoul Airport Act* requires the project operator to draw up an "execution plan" for approval. Article 8(1)16 operates to create the presumption (legal fiction) that the Article 7(1) approval is equated with the approval given by Article 95(1) of the *Aviation Act*. One of the aspects that implies the contrary of the US assertion is the very limited cross-reference to Article 95(1) in the context of a series of cross-references in Article 96. These cross-references in Article 96 are made redundant by Article 8 of the *Seoul Airport Act*. As Korea has pointed out[728], the redundancies in these two Acts would not be necessary if, in fact, the *Aviation Act* were still the controlling statutory authority for the IIA project. Furthermore, we also note that Article 95(3) of the *Aviation Act* appears to make a distinction between operational plans made directly by MOCT and such plans merely approved by MOCT.[729]

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[725] Exhibit Kor-115. The version of the law in effect in 1991 is included in Exhibit Kor-114 where Article 94(1) is phrased somewhat differently from the later version. The difference is not material to our purposes and it is unclear whether the difference is merely one of translation.

[726] *Seoul Airport Act*, Act No. 4383 (31 May 1991) as amended by Act No. 4436 (14 December 1991) Exhibit Kor-12; *Korea Airport Corporation Act* as amended by Act Nos. 4435 and 4436 (14 December 1991) Exhibit Kor-14.

[727] Paragraphs 4.90-4.94, 4.101-4.104 and 4.114-4.116.

[728] Paragraphs 4.95-4.100. See also paragraphs 4.86-4.89, 4.105-4.108 and 4.112-4.113.

[729] While we consider the cross-reference discussed in the text the most salient for purposes of our Findings, we do note that the United States cited other cross-references. For example, the United States cited cross-references in Articles 2:1 and 2:2(a) of the *Seoul Airport Act* to definitions contained in the *Aviation Act*.

7.67 The *Seoul Airport Act* has many provisions relating to the relationship between KAA and MOCT. These provisions, as noted in the previous paragraph, would be at the very least unnecessary if the *Aviation Act* were the controlling statutory authority. Moreover, Article 4 of the *Seoul Airport Act* provides for MOCT to draw up a master plan of the project including the *general direction* of construction, an *outline* of the construction plan, the construction period and a financing plan, as well as other matters deemed necessary by MOCT.[730] These issues of a general nature are not uncommon elements of a Ministry's oversight of a project but do not render the other entity its agent.

7.68 Article 6 of the *Seoul Airport Act* provides that the master plan shall be implemented by the state and local governments and by what was later designated as KAA. Article 7 then required KAA to develop an execution plan and have it approved by MOCT along with any alterations other than minor ones.[731] There obviously is a relationship of some degree between MOCT and KAA. MOCT has specific responsibilities of continued oversight. However, we are not persuaded that this oversight was such that KAA was acting as a mere agent of MOCT on a project that was still within the procurement responsibility of MOCT.

7.69 Importantly for purposes of analysis under the GPA, procurement appears to be the responsibility of KAA. The United States has provided examples of bid requests that identify MOCT or the Office of Supply, but we do not find these isolated instances that have been shown to us as sufficient evidence that MOCT is responsible for procurement for the IIA.[732] We note that the currently responsible entity, IIAC, has 557 employees and the NADG is staffed by 30 MOCT officials.[733] While we recognize that a smaller entity can utilize a larger agent, it does not appear that IIAC is a mere empty shell. We also take note of Korea's statement that MOCT has no role in IIA procurements.[734] We see no evidence that would cast doubt on this statement.

7.70 The United States has pointed out that the MOCT website states that NADG has responsibility for the IIA project. As discussed previously, we also take note of Korea's caution that a Ministry's website is not a legal document and that in this case it was prepared by the public relations department of MOCT which might have other motivations in describing the Ministry's business other than technical accuracy. There certainly is a role under Korean law for MOCT in the IIA project. It appears to be a role of oversight. We do not think oversight by one governmental entity of a project which has been delegated by law to another entity (which we have already found to be independent and not covered by GPA commitments) results in a conclusion that there is an agency relationship between them.

Conclusion

7.71 In our view, after reviewing the issues raised in this subsection, we return to our previous conclusion that the answer must be that Members generally may, pursuant to negotiations, decide which entities (and procurement covered by those entities) are included in their Schedules and in which Annex they will be included. The question of "control" or other indicia of affiliation is not an explicit provision of the GPA. Rather, it is a matter of interpretation for the content of the Schedules themselves. Therefore, the issue of whether a Party can use a Note to exclude an entity which would otherwise appear to be covered within the concession contained in a particular Annex is precisely the

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We find such citations unpersuasive in support of the US point. It only makes sense that two statutes referring to aviation matters should operate from common definitions.

[730] Exhibit Kor-12(a).

[731] *Ibid.*

[732] US Exhibits 25, 75 and 76. We also note that several examples of such documents submitted by the United States to support the allegations of procurements inconsistent with the requirements of the GPA show no relationship with MOCT. See US Exhibits 34-43. See also Exhibit Kor-48 (A-N).

[733] Paragraph 2.82.

[734] Paragraphs 4.50, 4.69, 4.77 and 4.78. Exhibit Kor-116.

sort of issue appropriate for qualifications through Notes as found by the panel in *United States – Sugar*, as discussed in paragraphs 7.30-7.31, above.

7.72 We must also note, however, that this ability to define the scope of commitments is not absolute. The United States pointed out that procurement by NADG was unarguably covered by the GPA even though it was neither listed explicitly nor directly within the definition of a subordinate linear organization or otherwise in Note 1 to Annex 1. Korea responded that NADG was merely an ad hoc task force within MOCT. But this response of Korea somewhat avoids the challenge of this example. There can be something else beyond the strict confines of the language of the Schedule which must be examined. If a Party explicitly excludes an entity in a Note, that is conclusive. A Member may also affirmatively put entities in another Annex from an affiliated entity. But if the Schedule is completely silent on an entity, it may be necessary to look somewhat further to see if there is an affiliation of two entities such that they could be considered legally the same entity (which appears to be the case between MOCT and NADG) or one could be acting on behalf of another.

7.73 In this dispute, we cannot so far conclude from the language of Korea's Appendix I and the Notes contained therein that KAA and its successors as entities are covered by Korea's Schedule commitments or that the IIA project is somehow otherwise included. We must still note, however, the ambiguities in the wording of Note 1 to Annex 1 which were not fully resolved by a textual analysis and led us to refer already to one piece of the negotiating history of Korea's accession to the GPA. We, therefore, will complete our examination of the scope of Korea's Annex 1 through a more thorough discussion of the relevant aspects of negotiating history of Korea's accession to the GPA.

3. Negotiations for Korea's GPA Accession

7.74 As we noted above, Korea's Note 1 to Annex 1 leaves room for ambiguity. As an aid in interpreting Note 1 and Annex 1 we reviewed one particularly relevant piece of negotiating history. At that point we did not undertake a broader review of the negotiating history because it was a limited point we were examining and one piece of evidence was particularly relevant to its interpretation. Clearly, there are difficulties in interpreting the Schedule language, some aspects of which are ambiguous, and we wish to ensure that there are not other aspects of the negotiating history which might change the conclusions we reached with respect to Note 1. Also, the United States has specifically argued that the understanding of the parties at the time of the negotiations was that there was a concession with respect to the IIA project, regardless of which entity was responsible. Therefore, we consider it appropriate to engage in a further review of the overall negotiating history.

7.75 At the outset of our analysis of this issue, we must address some relevant issues relating to use of negotiating history which arose in the *European Communities – Computer Equipment* dispute. In that dispute, the Appellate Body specifically found that the standard of reasonable expectation or legitimate expectation existing with respect to non-violation cases had no role in reviewing negotiating history in order to aid in resolving the issues pertaining to a violation case. One of the reasons is that in a non-violation case the relevant question is what was the reasonable expectation of the complaining party. However, if it is necessary to go beyond the text in a violation case, the relevant question is to assess the objective evidence of the mutual understanding of the negotiating parties.[735] This involves not just the complaining and responding parties, but also involves possibly other parties to the negotiations. It is also important to note that there is a difference in perspectives of the reasonable expectations of one party as opposed to the mutual understanding of all the parties. The information available at the time of the negotiations may be available to some parties but not all. In other words, the evidence before the panel may be different in the two analyses and the weighting and probative value may also differ.

[735] *European Communities – Computer Equipment* at paragraphs 81-84, 93.

7.76 We start by noting again that Korea provided in February 1991 a *Supplementary Explanation* to its initial 1990 offer.[736] The United States then began bilateral negotiations with Korea regarding its accession bid on 22 April 1991. During the course of these negotiations, the United States put a series of questions to Korea regarding its offer.[737] Question 6 asked:

> "How does the Airport Development Group relate to the Ministry of Communications? Does Korea's offer of coverage of the Ministry of Communications include purchases for the Airport Development Group? Please identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction."

7.77 In response, Korea answered:

> "The new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation. The new airport construction project is scheduled to be completed by 1997 after the completion of the basic plan by 1992 and the working plan by 1993. The US company, Bechtel, is taking part in the basic plan projects.
>
> The responsible organization for procurement of goods and services relating to the new airport construction is the Office of Supply. But at present, the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage."[738]

7.78 On 14 December 1993, Korea made its final offer. The final offer also introduced General Notes that applied to all the Annexes. General Note 1 provides:

> "Korea will not extend the benefit of this Agreement
>
> (a) as regards the award of contracts by National Railroad Administration,
>
> (b) as regards procurement for airports by the entities listed in Annex 1,
>
> (c) as regards procurement for urban transportation (including subways) by the entities listed in Annexes 1 and 2
>
> to the suppliers and service providers of member states of the European Community, Austria, Norway, Sweden, Finland and Switzerland, until such time as Korea has accepted that those countries give comparable and effective access for Korean undertakings to their relevant markets."

7.79 The European Communities had made an inquiry of Korea in late November 1993 as to the coverage of airports.[739] There apparently was no written response. However, an internal EC note does indicate that Korea responded that there was airport coverage, but in parenthesis noted "Seoul, Pusan" as examples of the airports that would be covered. This implies that they are therefore the airports covered by reason of Note 1 to Annex 1. That is, this evidence is consistent with our conclusion reached in paragraph 7.47. There was no mention of KAA or the IIA project in the EC internal note.[740] Then the European Communities and several other countries introduced reservations

[736] See paragraph 7.44.
[737] Paragraphs 2.51 and 4.328.
[738] Paragraphs 2.52 and 4.330.
[739] EC Response to First set of Panel Questions, Annex IV.
[740] *Ibid.*, Annex V.

excluding coverage of airports for Korea. Apparently, this is what prompted Korea's derogation quoted above in General Note 1(b) to Appendix I.

7.80 As will be discussed more fully in the following two sections, the Korean answer to the US question clearly was not as full and thorough a response as would normally be appropriate for GPA negotiations.[741] At the time Korea provided its answer it had already enacted legislation designating another entity (other than MOCT) as responsible for the IIA project. Further legislation to designate KAA as that entity was already in the planning stages. Korea has stated that it knew that the IIA project was the subject of the US inquiry.[742] The Korean answer can, at best, be described as inadequate.

7.81 Nonetheless, we do note that Korea's July 1991 answer to the US question was qualified by the reference to the fact that the procurement plans were not finalized. And this qualification was preceded by the linking word "but" which clearly means the previous statement should not have been taken as an absolute. We recognize that the "but" qualification refers to the procurement plan while the question and the previous portion of the answer refer to the responsible procuring entities. However, the Korean answer was sufficiently qualified so that it should have raised questions. And, importantly, the United States (we have no evidence that any Parties other than the United States were aware of this particular Korean response) had over two and a half years before reaching a final agreement during which time this ambiguity could have been cleared up. The European Communities and other negotiating parties did act in 1993 to clarify the coverage of airports and received answers that contribute to the overall picture that there was no mutual understanding of the parties that a covered entity was procuring for the IIA project. In fact, it seems that negotiating parties other than the United States were clear that the IIA project was not covered.[743] In light of the lapse of time and the actions of other Members, the United States should not have rested upon the conclusions they now tell this Panel they reached based on this qualified response from Korea in 1991.

7.82 In summary, with respect to the interpretation of the negotiating history of Korea's accession to the GPA, we recall our conclusion that this information clarifies that Note 1 to Annex 1 was meant to be definitional in nature and that the text of Korea's Schedule does not include coverage of KAA and its successors. In our view, the full negotiating history reflecting what the several parties to the negotiations understood with respect to Korea's offer, confirms our conclusion that there was no mutual understanding on the coverage of KAA.

7.83 Therefore, we conclude that the IIA construction project was not covered as the entities engaged in procurement for the project are not covered entities within the meaning of Article I of the GPA. Furthermore, the kind of affiliation that we have concluded is necessary to render an unlisted entity subject to the GPA is not present in this case. Therefore, we do not need to proceed further and make specific findings with respect to the alleged inconsistencies of Korea's procurement practices in this regard.[744]

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[741] The Panel notes that it has not made any finding at any point in this Report that Korea acted in bad faith during any portion of the negotiations for its accession to the GPA.

[742] Paragraph 4.343.

[743] The fact that the United States alone received an answer from Korea that may have resulted in a reasonable expectation on the US part of some different situation will be discussed below with respect to the non-violation claim.

[744] We note that had such Findings been required, Korea took no position in response to the US allegations and offered no evidence to refute that provided by the United States.

C. ALLEGATION OF NON-VIOLATION NULLIFICATION OR IMPAIRMENT

1. General

(a) Asserted Basis of the Claim

7.84 We note at the outset that the basis for the non-violation claim that the United States has made in the context of this case is different from the basis that usually exists in relation to such claims.[745] In order to explain this difference clearly, it is necessary first to note the bases of a traditional non-violation claim.

7.85 The panel in *Japan – Measures Affecting Consumer Photographic Film and Paper* (WT/DS44) ("*Japan – Film*") summarized the traditional test for non-violation cases in the following manner:

> "The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure."[746]

To this we would add the notion that has been developed in all these cases that the nullification or impairment of the benefit as a result of the measure must be contrary to the reasonable expectations of the complaining party at the time of the agreement.

7.86 So, normal non-violation cases involve an examination as to whether there is: (1) an application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit due to the application of the measure that could not have been reasonably expected by the exporting Member.

7.87 In this case, the United States has asserted that measures it claimed violated the GPA (that is, the imposition of inadequate bid-deadlines; the imposition of certain qualification requirements; the imposition of certain domestic partnering requirements; and the failure to establish effective domestic challenge procedures engaged in by KAA and its successors in relation to the IIA project) nullify or impair benefits accruing to the United States under the GPA, pursuant to Article XXII:2 of the GPA. A key difference between a traditional non-violation case and the present one would seem to be that, normally, the question of "reasonable expectation" is whether or not it was reasonably to be expected that the benefit under an existing concession would be impaired by the measures. However here, if there is to be a non-violation case, the question is whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued pursuant to the *negotiation* rather than pursuant to a *concession*.

(b) Arguments of the Parties

7.88 The United States slightly re-arranges the test enunciated by the *Japan – Film* panel and proposes that a successful determination of a non-violation nullification and impairment in the GPA requires the finding of the following three elements: (1) a concession was negotiated and exists; (2) a measure is applied that upsets the established competitive relationship; and (3) the measure could not

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[745] The allegations made by the United States are pursuant to a portion of GPA Article XXII:2 which is equivalent to Article XXIII:1(b) of GATT 1994.

[746] *Japan - Film*, at paragraph 10.41, citing, *EEC - Oilseeds*, BISD 37S/86, paragraphs 142-152; *Australian Subsidy on Ammonium Sulphate*, BISD II/188, 192-193.

have been reasonably anticipated at the time the concession was negotiated.[747] The United States argues that of the three elements of a non-violation claim, the only outstanding issue in this case is the first element – that is, whether or not there is a concession.

7.89 The United States contends that, similarly, during Korea's GPA accession negotiations, the United States bargained for and received from Korea the coverage of all government entities responsible for the procurement of products and services related to new airport construction projects under Annex 1. According to the United States, Korea subsequently engaged in, and continues to engage in, measures in procurement that could not have reasonably been anticipated by the United States at the time the coverage of new airport construction was negotiated. The United States argues that these measures result in the upsetting of the established competitive relationship between US products, services, and suppliers and Korean products, services, and suppliers in the IIA construction project, a competitive relationship worth potentially US$6 billion. On this basis, the United States argues that Korea is nullifying or impairing benefits accruing to the United States under the GPA.

7.90 In response, Korea argues that the burden placed upon the United States to support its non-violation claim under Article XXII:2 of the GPA is substantial. Korea notes that under DSU Article 26:1(a), "the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."

7.91 Korea argues that the United States must demonstrate, by virtue of the requirement in Article XXII:2 that it identify a "benefit accruing" to it under the GPA, that it "reasonably expected" to obtain the benefit of GPA coverage for IIA procurement.[748] Korea further argues that "for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated."[749] Korea asserts that this requirement is self-evident and quotes for support: "If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures."[750]

7.92 Korea argues that the requirement that the measure at issue has upset the competitive relationship created by the Agreement implies that an "agreement" is necessary. Korea further argues that the essence of a non-violation claim is that some action of a party, after an agreement is concluded, which could not have been reasonably anticipated at the time of the agreement, nullifies or impairs a concession made by another party. Korea asserts that the United States has not specified what agreement was made by the parties that was nullified or impaired by action taken by Korea after that agreement was entered into. Korea further asserts that it could not have been an agreement to include KAA and KOACA and IIAC in Korea's GPA coverage given that Korea never agreed to include these entities in any of its offers.

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[747] The United States cites: Report of the Working Party on *The Australian Subsidy on Ammonium Sulphate* (adopted on 3 April 1950), BISD II/188-196, paragraph 12; Panel Report on *Treatment by Germany of Imports of Sardines* (adopted on 31 October 1952), G/26, BISD 1S/53-59, paragraph 16; Panel Report on *European Economic Community -Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes*, 20 February 1985 (unadopted), L/5778, paragraph 51; and Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (adopted on 25 January 1990), L/6627, BISD 37S/86, paragraphs 142-152.

[748] *Japan - Film* at paragraph 10.72. As further support for this principle, Korea cites *EEC - Oilseeds*, BISD 37S/86, 128-129 (paragraphs 147-148); *Operation of the Provisions of Article XVI*, BISD 10S/201, 209 (paragraph 28) (adopted on 21 November 1961); *Other Barriers to Trade*, BISD 3S/222, 224 (paragraph 13) (adopted on 3 March 1955); *Germany - Sardines*, BISD 1S/53, 58-59 (paragraph 16) (adopted on 31 October 1952); *Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39, BISD II/188, 193-194 (adopted on 3 April 1950).

[749] *Japan - Film* at paragraph 10.76.

[750] *Ibid.*

2. Non-violation Claims in the Context of Principles of Customary International Law

7.93 In our view, the non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law. As noted above, the basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. This has traditionally arisen in the context of actions which might undermine the value of negotiated tariff concessions. In our view, this is a further development of the principle of *pacta sunt servanda* in the context of Article XXIII:1(b) of the GATT 1947 and disputes that arose thereunder, and subsequently in the WTO Agreements, particularly in Article 26 of the DSU. The principle of *pacta sunt servanda* is expressed in Article 26 of the *Vienna Convention*[751] in the following manner:

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

7.94 It seems clear that good faith performance has been agreed by the WTO Members to include subsequent actions which might nullify or impair the benefits reasonably expected to accrue to other parties to the negotiations in question. The consistency of such an interpretation with the general principles of customary international law is confirmed by reference to the negotiating history of the *Vienna Convention*. According to the Report of the International Law Commission to the General Assembly, this issue was considered by the members negotiating the Convention in the following manner:

> "Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible."[752]

7.95 The non-violation doctrine goes further than just respect for the object and purpose of the treaty as expressed in its terminology. One must respect actual provisions (i.e., concessions) as far as their material effect on competitive opportunities is concerned. It is an extension of the good faith requirement in this sense.

7.96 We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law.[753] However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

7.97 As Korea has argued, non-violation is an exceptional concept within the WTO dispute settlement system. Article 26:1(a) of the DSU requires that:

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[751] A reference to the rule of *pacta sunt servanda* also appears in the preamble to the Vienna Convention.

[752] *Yearbook of the International Law Commission* (1966), Vol. II at p. 211.

[753] We should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply. The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law.

> "[T]he complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."

7.98 As stated by the panel in *Japan – Film:*

> "Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been "on the books" for almost 50 years, we note that there have been only eight cases in which panels or working parties have substantially considered Article XXIII:1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached the remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC - Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[754]

Despite this caution, however, the panel in *Japan – Film* was of the view that the non-violation remedy had an important role - that of protecting the reasonable expectations of competitive opportunities through negotiated concessions.

7.99 In our view, these observations by previous panels are entirely in line with the concept of *pacta sunt servanda*. The vast majority of actions taken by Members which are consistent with the letter of their treaty obligations will also be consistent with the spirit. However, upon occasion, it may be the case that some actions, while permissible under one set of rules (e.g., the Agreement on Subsidies and Countervailing Measures is a commonly referenced example of rules in this regard), are not consistent with the spirit of other commitments such as those in negotiated Schedules. That is, such actions deny the competitive opportunities which are the reasonably expected effect of such commitments. However, we must also note that, while the overall burden of proof is on the complainant, we do not mean to introduce here a new requirement that a complainant affirmatively prove actual bad faith on the part of another Member. It is fairly clear from the history of disputes prior to the conclusion of the Uruguay Round that such a requirement was never established and there is no evidence in the current treaty text that such a requirement was newly imposed. Rather, the affirmative proof should be that measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom.

7.100 One of the issues that arises in this dispute is whether the concept of non-violation can arise in contexts other than the traditional approach represented by *pacta sunt servanda.* Can, for instance the question of error in treaty negotiation be addressed under Article 26 of the DSU and Article XXII:2 of the GPA? We see no reason why it cannot. Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith. It is clear to us (as discussed in paragraphs 7.110 and 7.121 below) that it is necessary that negotiations in the Agreement before us (the GPA) be conducted on a particularly open and forthcoming basis.

7.101 Thus, on the basis of the ample evidence provided by both parties to the dispute, we will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation.[755] To do otherwise potentially would leave a gap in the applicability of the

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[754] *Japan - Film* at paragraph 10.36.

[755] We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type

law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments (and one might add, in tariff and services commitments under other WTO Agreements), then nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable. As was argued above, that would not be in conformity with the normal relationship between international law and treaty law or with the WTO Agreements.

7.102 If non-violation represents an extension of the good faith requirements in the implementation of a treaty and can also be applied to good faith and error in negotiations under the GPA, and we think it can, then the special remedies for non-violation contained in DSU Article 26 should also be applied rather than the traditional remedies of treaty law which are not apposite to the situation of the GPA (see the discussion in footnote 769, below).

(a) The Traditional Approach: Extended *pacta sunt servanda*

7.103 Because the United States raised the non-violation issue in this dispute at least nominally under the traditional approach, we will examine the facts of the dispute in that context first. In our view, there is a slightly different cast to traditional non-violation claims with respect to the GPA than under previous GATT non-violation cases. Here the analysis would run as follows: (1) there was an agreed concession on entities; (2) resulting from that there was a reasonable expectation of enjoying competitive bidding opportunities; (3) an action which does not violate GPA rules is taken by the Member that made the concession, including the concessions on entities; and (4) resulting from that, the expected competitive bidding opportunities are not available and the benefits of the concession have been nullified and impaired.

7.104 In light of these elements, we will now turn to the facts of this case. In 1990, Korea made its initial offer of coverage when it requested accession to the Tokyo Round Agreement. In February 1991, Korea provided a *Supplementary Explanation*. As we discussed above, that February 1991 explanation noted airport coverage under the Ministry of Transportation.[756] It showed two unnamed regional airport authorities and one named airport entity. The IIA project was not mentioned nor was KAA. As we have also discussed above, the meaning of the proposed Note 1 to Annex 1 was clarified in a manner which clearly indicated it was intended as a guide to the scope of the coverage under Annex 1.

7.105 On 1 May 1991, the United States sent a series of questions to Korea including a question regarding coverage of airport construction. On 31 May 1991, the Korea National Assembly enacted the *Seoul Airport Act* which Korea has told the panel was the legal basis for the shift of authority away from MOCT. Otherwise the *Aviation Act* would have required that the Minister of Transportation build the facility. On 26 June 1991, the Ministry of Transportation began the preparatory legislative work that would result in KAA being designated in December 1991 as the responsible entity for the IIA project.

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we are following here, for the GPA would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of *pacta sunt servanda*. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel's review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.

[756] See paragraph 7.44.

7.106 On 1 July 1991, Korea provided its response to the US questions. We will quote again at this point both the US question and Korea's answer because we think it is very important to review them in light of the facts described in the preceeding two paragraphs. The United States asked:

> "How does the Airport Development Group relate to the Ministry of Communications? Does Korea's offer of coverage of the Ministry of Communications include purchases for the Airport Development Group? Please identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction."

In response, Korea answered:

> "The new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation. The new airport construction project is scheduled to be completed by 1997 after the completion of the basic plan by 1992 and the working plan by 1993. The US company, Bechtel, is taking part in the basic plan projects.
>
> The responsible organization for procurement of goods and services relating to the new airport construction is the Office of Supply. But at present, the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage."

7.107 Following this answer, on 10 July 1991, the MOT published a public notice of draft legislation containing proposed amendments to the *Seoul Airport Act.* Then extensive internal governmental consultations took place and, on 21 October 1991, the draft legislation was transferred to the National Assembly. It was adopted by the National Assembly on 20 November 1991 and signed by the President and published in the *Official Gazette* on 14 December 1991.

7.108 We find it very difficult to understand how Korea could have made the response that it did on 1 July 1991, state nothing else at that time or in the succeeding months and bring none of this to the attention of the United States. The enabling legislation was already passed on 31 May 1991 removing MOCT's direct authority for the project and this was at least one month before Korea provided its response to the question posed by the United States. Furthermore, at that time, plans were under way already to name a specific entity (KAA) as the entity responsible for the IIA. Yet Korea's response in July 1991 was that MOCT (through NADG) was currently responsible for the IIA project. Korea's answer was qualified by stating that procurement plans were not fixed, but much more than this was known by Korea at the time and should have been reported to the United States in the answer. Korea has offered no valid reason for why it did not do so.

7.109 We do not agree with Korea's argument that there is nothing to the GPA but the question of whether entities are covered. It is true that the Schedules are structured in terms of entities, but that is not the basis for the negotiations. Members do not negotiate to get coverage of entities as such. They do not bargain for names on a list. Rather, they negotiate to achieve coverage of the procurements which are the responsibility of the covered entities. As previous panels have noted, the object of negotiations on Schedule commitments is to achieve competitive opportunities and, in the context of the GPA, that comes with access to projects, not just a list of names of government entities.

7.110 In our view, an agreement such as the GPA requires full, timely and complete responses to questions. Negotiations for coverage of government procurement markets are difficult. Each market has its own characteristics which are fully understood only by the responding party. We recall how difficult it is to understand fully the structure of the Korean Government coverage pursuant to the *Government Organization Act* as an illustration of the difficulties in this regard. Korea has stated that in its view it had no obligation to try to guess what the United States was interested in and supply

further information. However, Korea also stated that it did not mention in its answer the regional airport authorities that it had offered to include because it knew the United States was really interested in the IIA. Clearly the latter answer was correct. It was objectively clear what the US question was about. And Korea, knowing that, then had an obligation to make a full and frank response. The integrity of the negotiating system requires no less. In our view, Korea's actions fell short of the conduct expected of parties negotiating accession to the GPA.

7.111 However, having stated that Korea's answer was not satisfactory in various ways, that is not the end of our review of the facts. The next issue which we must address is the fact that Korea's answer to the US question was provided about two and a half years before submission of Korea's final offer and that responsibility for the IIA project was assigned to KAA two years before that 14 December 1993 offer. Indeed, the Agreement was not actually finalized until 15 April 1994. We note that in a previous dispute involving a tariff Schedule where there was an agreed concession, it was found possible to base a non-violation claim on measures taken prior to the close of negotiations that later impaired the benefits reasonably expected to accrue from the concessions. The panel in *Japan – Film* stated:

> "In the case of measures shown by Japan to have been introduced prior to the conclusion of the tariff negotiations at issue, it is our view that Japan has raised a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption. In this connection, it is our view that the United States is charged with knowledge of Japanese Government measures as of the date of their publication. We realize that knowledge of a measure's existence is not equivalent to understanding the impact of the measure on a specific product market. For example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. However, where the United States claims that it did not know of a measure's relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect . . . A simple statement that a Member's measures were so opaque and informal that their impact could not be assessed is not sufficient."[757]

7.112 In one situation that arose in that dispute, the United States showed that the relevant measure (a Cabinet Decision) was only published nine days before the conclusion of the Kennedy Round of negotiations. The panel made the following finding:

> "Because of the short time period between this particular measure's publication and the formal conclusion of the Kennedy Round, we consider it difficult to conclude that the United States should be charged with having anticipated the 1967 Cabinet Decision since it would be unrealistic to expect that the United States would have had an opportunity to reopen tariff negotiations on individual products in the last few days of a multilateral negotiating round."[758]

7.113 On the other hand, when the measure pre-dated the conclusion of the Round by a month and a half, the panel reached a different conclusion:

> "As we noted earlier, the United States is charged with knowledge of Japanese regulations on publication. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a

[757] *Japan - Film, supra.*, at paragraph 10.80.
[758] *Ibid.* at paragraph 10.103.

> measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here."[759]

7.114 We recall that even though Korea's answer in July 1991 was almost two and a half years prior to Korea's final offer, it appears from evidence and statements from the parties that the Korean and US Governments had no further discussions on the subject. The United States has told us that they did not inquire further about that subject because they were reasonably convinced that they knew MOCT was covered and they believed that MOCT retained statutory authority under Korean law to carry out airport construction projects.

7.115 However, as pointed out by the panel in *Japan – Film* and quoted above, the United States is charged with knowledge of Korean legislation. The United States, therefore is presumed to have known of the *Seoul Airport Act* and the pieces of legislation enacted in December 1991 which actually put KAA in charge of the project. It is up to the United States to provide a persuasive explanation for why it did not know either about the legislation or the significance of it. Further, Korea has submitted evidence to show that US industry and Government had actual knowledge that KAA was in charge of the project.[760] Furthermore, while Korea's answer in July 1991 was not full and complete, it did contain a qualification. Over the course of about two and a half years, with knowledge that an entity other than MOCT was in charge of the project and in light of the qualification contained in the Korean answer upon which it was relying, at the very least, further inquiries should have been made by the United States.

7.116 Furthermore, the European Communities and several other Members did pursue the question of Korea's airport coverage. The United States is not charged with knowledge of the bilateral communications between these negotiating parties and Korea; however, more than that occurred here. The European Communities along with several other Members at some point in December 1993 added a derogation with respect to Korea's airport coverage in their GPA Schedules. Korea responded in kind with its derogation in its General Note 1(b). The United States certainly should have known from these circumstances that further clarifications from Korea were in order with respect to the US understanding of the Korean offer. We further note that the WTO GPA was not finalized until four months after Korea's final offer. At least one month of this period was to be used for verification with consultations to resolve the matter to follow if necessary.[761] We have seen no evidence that the United States made any effort to use this verification period to clarify the situation.

7.117 At this point, we will review the elements of a traditional non-violation case, applied in the context of the GPA, that we listed in paragraph 7.103 above, but we will do it in reverse order to illustrate a particular problem with this case. With respect to step four, the United States believes it has lost competitive opportunities on bidding for the IIA project. With respect to step three, the United States alleges that this is a result of actions taken by Korea. (However, these actions are identical to the actions alleged under the US violation complaint.) With respect to step two, the United States claims that it had reasonable expectations with respect to bidding opportunities on the IIA project (as discussed in paragraphs 7.104-7.107, above). But, with respect to step one, this was based on reasonable expectations derived from the negotiations, not from the concessions because we have found in section VII:B, above, that there were in fact no concessions given by Korea.

7.118 As discussed above, the United States bases its argument on the claim that it had a reasonable expectation that it had received a commitment with respect to a particular project, but the concessions themselves are based on covered entities. Thus, unlike traditional non-violation claims there is no

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[759] *Ibid.* at paragraph 10.111.

[760] See paragraphs 4.561, 4.563-4.566.

[761] Minutes of the Meeting of the Committee on Government Procurement Held on 15 December 1993, Annex 1, GPR/M/50, 21 January 1994. US Exhibit 65.

actual Schedule commitment in this case.[762] If there were a commitment, the case would properly be a violation case because the measures cited by the United States as the basis for the non-violation nullification case (e.g., inadequate bid deadlines and insufficient challenge procedures) would, if they were substantiated, result in a violation. A traditional non-violation case could, therefore, not be sustained in this situation.

7.119 In sum, Korea's answer to the US question in July 1991 was insufficient. Members have a right to expect full and forthright answers to their questions submitted during negotiations, particularly with respect to Schedules of affirmative commitments such as those appended to the GPA. However, Members must protect their own interests as well and in this case the United States did not do so. It had a significant amount of time to realize, particularly in light of the wide knowledge of KAA's role, that its understanding of the Korean answer was not accurate. Therefore, we find that, even if the principles of a traditional non-violation case were applicable in this situation the United States has failed to carry its burden of proof to establish that it had reasonable expectations that a benefit had accrued.

(b) Error in Treaty Formation

7.120 It is clear from the discussion above that the traditional claim of non-violation does not fit well with the situation existing in this dispute. Non-violation claims, as the doctrine has developed over the course of GATT and WTO disputes, have been based on nullification or impairment of benefits reasonably expected to flow from negotiated concessions. In this case, it was the negotiations which allegedly gave rise to the reasonable expectations rather than any concessions.

7.121 Therefore, we will continue with our analysis and first recall our finding that there is a particular duty of transparency and openness on the "offering" party in negotiations on concessions under the GPA. The negotiations between the Parties under the GPA do not benefit from a generally accepted framework such as the Harmonized System with respect to goods or even the Central Product Classification in services. The Annexes to the GPA which contain the entities whose procurement is covered by the Agreement are basically self-styled Schedules whose interpretation may require extensive knowledge of another country's procurement systems and governmental organization. Therefore, we believe that transparency and forthright provision of all relevant information are of the essence in negotiations on GPA Schedules.[763]

7.122 In our view, as discussed fully in the previous section, Korea's response to the US question was not as forthright as it should have been. Indeed, the response could be characterized as at best incomplete in light of existing Korean legislation and ongoing plans for further legislation. However, when addressing this problem, rather than asking whether there was a nullification or impairment of expectations arising from a concession, it might be better to inquire as to whether the United States was induced into error about a fact or situation which it assumed existed in the relation to the agreement being negotiated regarding Korea's accession to the GPA. In this case, it clearly appears that the United States was in error when it assumed that the IIA project was covered by the GPA as a result of the entity coverage offered by Korea.

7.123 Error in respect of a treaty is a concept that has developed in customary international law through the case law of the Permanent International Court of Justice[764] and of the International Court

[762] At best, the United States could argue that the relevant commitment was the coverage of MOCT. However, this does not really change the analysis, for we have already found that KAA was the responsible entity for IIA procurement and KAA was independent. It comes back again to the fact that the United States is arguing that it thought it had a commitment which it did not.

[763] We do not imply by this paragraph or other similar portions of our Findings that parties to negotiations in other areas do not owe each other an obligation of transparency and openness.

[764] *Legal Status of Eastern Greenland* (1933) PCIJ, series A/B, No. 53, p. 22, at p. 71 and dissenting opinion of Judge Anzilotti, at pp. 91-92.

of Justice.[765] Although these cases are concerned primarily with the question in which circumstances of error *cannot* be advanced as a reason for invalidating a treaty, it is implicitly accepted that error can be a ground for invalidating (part) of a treaty. The elements developed by the case law mentioned above have been codified by the International Law Commission in what became the *Vienna Convention on the Law of Treaties of 1969*. The relevant parts of Article 48 of the Convention read as follows:

"Article 48

Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error related to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error."

Since this article has been derived largely from case law of the relevant jurisdiction, the PCIJ and the ICJ, there can be little doubt that it presently represents customary international law and we will apply it to the facts of this case.

7.124 As the Appellate Body has pointed out in *European Communities – Computer Equipment* and in *Canada - Dairy*, schedules are an integral part of a treaty. Hence negotiations about schedules, in this case GPA Annexes, are fundamentally treaty negotiations. In these treaty negotiations, we have noted that the United States believed that the IIA project was covered. As we have found in section VII:B of these Findings, that was not correct. The IIA project procurement was the responsibility of a non-covered entity. Hence the US error related to a fact or situation which was assumed by the US to exist at the time when the treaty was concluded. In our view, it also appears from the behaviour of the United States that this purported concession arguably formed an essential basis of its consent to be bound by the treaty as finally agreed. Hence the initial conditions for error under Article 48(1) of the *Vienna Convention* seem to us to be satisfied.

7.125 This raises the question of whether the exclusionary clause of the second paragraph of Article 48 can be overcome. Although we have indicated above that the duty to demonstrate good faith and transparency in GPA negotiations is particularly strong for the "offering" party, this does not relieve the other negotiating partners from their duty of diligence to verify these offers as best as they can.[766] Here again the facts already recounted in the previous sub-section[767] demonstrate that the United States has not properly discharged this burden. We do not think the evidence at all supports a finding that the United States has contributed by its own conduct to the error, but given the elements mentioned earlier (such as the two and a half year interval between Korea's answer to the US question and its final offer, the actions by the European Community in respect of Korea's offer[768], the subsequent four-month period, of which at least one month was explicitly designated for verification, etc.), we conclude that the circumstances were such as to put the United States on notice of a possible

[765] Case concerning the *Temple of Preah Vihear*, ICJ Reports 1962, p. 6, at pp. 26-27.
[766] See Appellate Body report in *European Communities - Computer Equipment* at paragraphs 109-110.
[767] See Paragraphs 7.104-7.116, above.
[768] Note that the importance of the actions of a third State in avoiding error was already considered important in the case on the *Legal Status of Eastern Greenland*, loc. cit. PCIJ, p. 71 (the reaction of the US to the Danish request not to make any difficulties in the settlement of the Greenland question compared to the Norwegian reaction).

error. Hence the error should not have subsisted at the end of the two and a half year gap, at the moment the accession of Korea was "concluded." Therefore, the error was no longer "excusable" and only an excusable error can qualify as an error which may vitiate the consent to be bound by the agreement.

7.126 For these reasons, on balance, we are of the view that the US has not demonstrated error successfully as a basis for a claim of non-violation nullification or impairment of benefits.[769]

VIII. CONCLUSIONS

8.1 In light of our findings in Section VII, above, we conclude that the entities which have been conducting procurement for the IIA project are not covered entities under Korea's Appendix I of the GPA and are not otherwise covered by Korea's obligations under the GPA.

8.2 In light of our findings in Section VII, above, we conclude that the United States has not demonstrated that benefits reasonably expected to accrue under the GPA, or in the negotiations resulting in Korea's accession to the GPA, were nullified or impaired by measures taken by Korea (whether or not in conflict with the provisions of the GPA) within the meaning of Article XXII:2 of the GPA.

[769] A finding of justifiable error in treaty formation might normally be expected to lead to the application of Article 65 of the *Vienna Convention*. However, Article 65 on the specific procedure for invoking invalidity of a treaty does not seem to belong to the provisions of the *Vienna Convention* which have become customary international law. See also the European Court of Justice in Case C-162/69 (Racke v. Hauptzollampt Mainz), 1998 ECR, I-3655, at point 59. The Article on separability (Article 44) raises the possibility that provisions may be separated, such as e.g. separate reciprocal concessions in schedules, if they do not form an essential basis for the consent of the other party of the treaty as a whole (though the fact or the circumstance to which the error related was an essential factor in the consent to be bound by the treaty (Art. 48(1)). We do not think that any of these provisions would be required with respect to non-violation under the WTO Agreements because Article 26 of the DSU clearly provides for the appropriate remedy.

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS163/4
11 May 1999
(99-2009)

Original:

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Request for the Establishment of a Panel by the United States

The following communication, dated 11 May 1999, from the Permanent Mission of the United States to the Permanent Mission of the Republic of Korea and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 6.2 of the DSU.

The Government of Korea is engaging in government procurement practices, in the construction of the new Inchon International Airport, that are inconsistent with Korea's obligations under the WTO Agreement on Government Procurement (GPA). These practices include:

- Qualification requirements: In order to be eligible to bid as a prime contractor, an interested supplier must have a license that in turn requires the supplier to have manufacturing facilities in Korea.

- Domestic partnering requirements: Foreign firms must partner with or act as subcontractors to local Korean firms in order to participate in tendering procedures.

- Absence of access to challenge procedures: The GPA requires that member countries provide effective procedures enabling suppliers to challenge alleged breaches of the GPA arising in the context of procurements. However, such procedures do not exist for Inchon International Airport and other airport construction procurements.

- Inadequate bid deadlines: There are impositions of deadlines for the receipt of tenders that are shorter than the GPA-required 40 days, such as when tendering procedures are cancelled without explanation and immediate re-bidding takes place with a shortened deadline for tendering.

On 16 February 1999, the United States Government requested consultations with the Government of Korea pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the GPA with respect to the above measures. The United States and Korea held consultations in Geneva on 17 March 1999, but failed to settle the dispute.

During consultations, Korea asserted that the entities responsible for Inchon International Airport procurements are not within Korea's obligations under the GPA, and therefore not subject to the provisions of the GPA. The United States notes, however, that these entities are in fact within the

scope of Korea's list of central government entities, as specified in Annex 1 of Korea's coverage of obligations in Appendix I of the GPA. The United States bargained in good faith for the coverage of all airport construction in Korea during negotiations for Korea's accession to the GPA; the United States' GPA commitments with respect to Korea and its acceptance of Korea as a party to the Agreement were based on a balance of rights and obligations that included this coverage. Korea's subsequent assertion that the entities responsible for the procurement of the Inchon International Airport are not covered by the GPA seriously disrupts this mutually-agreed balance.

Pursuant to Article I.1 of the GPA, Korea's obligations under the GPA apply in full with respect to government procurements for the Inchon International Airport. Consequently, the above measures are inconsistent with Articles III, VIII, XI, XVI and XX of the GPA. In addition, pursuant to Article XXII:2 of the GPA, whether or not these measures conflict with the provisions of the GPA, they nullify or impair benefits accruing to the United States under the GPA.

The United States continues to be interested in settling this dispute. However, in the absence of a settlement at this time, the United States, in order to preserve its rights, respectfully requests the establishment of a panel pursuant to Article XXII of the GPA, with standard terms of reference as set out in Article XXII.4 of the GPA. The United States further asks that this request for a panel be placed on the agenda for the next meeting of the Dispute Settlement Body, to be held on 26 May 1999.

Annex 625

Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000, RIAA, Vol. XXIII, p. 1

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)

4 August 2000

VOLUME XXIII pp. 1-57

NATIONS UNIES - UNITED NATIONS
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PART I

Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility

Decision of 4 August 2000

Affaire du thon à nageoire bleue entre l'Australie et le Japon et entre la Nouvelle-Zélande et le Japon, sentence sur la compétence et la recevabilité

Décision du 4 août 2000

SOUTHERN BLUEFIN TUNA CASE BETWEEN AUSTRALIA AND JAPAN AND BETWEEN NEW ZEALAND AND JAPAN, AWARD ON JURISDICTION AND ADMISSIBILITY, DECISION OF 4 AUGUST 2000

AFFAIRE DU THON À NAGEOIRE BLEUE ENTRE L'AUSTRALIE ET LE JAPON ET ENTRE LA NOUVELLE-ZÉLANDE ET LE JAPON, SENTENCE SUR LA COMPÉTENCE ET LA RECEVABILITÉ, DÉCISION DU 4 AOÛT 2000

First Arbitral Tribunal constituted under Part XV ("Settlement of Disputes"), Annex VII ("Arbitration") of the United Nations Convention of the Law of the Sea (UNCLOS).

Mootness: resolution of one salient aspect of a dispute is not sufficient to dispose of the dispute and render the case moot.

Jurisdiction: claims must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty; the Tribunal must decide whether the "real dispute" reasonably (and not just remotely) relates to the obligations set forth in the treaties whose breach is alleged; *lex specialis* versus parallelism of treaties both in their substantive content and their dispute settlement provisions; conclusion of an implementing convention does not necessarily vacate or exhaust the obligations imposed by a framework convention; a single dispute arises under both UNCLOS and the 1993 Convention for the Conservation of Southern Bluefin Tuna consistent with UNCLOS (article 311(2) and (5)) and the Vienna Convention on the Law of Treaties (article 30(3); the 1993 Convention excludes any further dispute settlement procedure under UNCLOS; the Tribunal is without jurisdiction to rule on the merits of the dispute.

Premier tribunal arbitral constitué conformément à l'annexe VII (« Arbitrage ») de la partie XV (« Règlement des différends ») de la Convention des Nations Unies sur le droit de la mer.

Défaut d'objet : La résolution d'un aspect important d'un différend ne suffit pas pour régler ce dernier et rendre l'affaire sans objet.

Compétence : Les demandes doivent présenter un lien raisonnable avec les normes juridiques énoncées dans le traité ou pouvoir être appréciées par rapport à ces normes; le Tribunal doit décider si le « véritable différend » entretient un rapport raisonnable (et non pas simplement lointain) avec les obligations énoncées dans les conventions dont la violation est alléguée; la *lex specialis* contre le parallélisme des traités, tant en ce qui concerne leur contenu spécifique qu'en ce qui concerne leurs dispositions relatives au règlement des différends; la conclusion d'une convention d'application n'annule ou n'éteint pas nécessairement les obligations imposées par une convention-cadre; un seul et même différend relève à la fois de la Convention des Nations Unies sur le droit de la mer et de la Convention de 1993 pour la conservation du thon à nageoire bleue, conformément à la Convention des Nations Unies sur le droit de la mer [art. 311(2) et (5)] et à la Convention de Vienne sur le droit des traités [art. 30(3)]; la Convention de 1993 exclut toute nouvelle procédure de règlement du différend sur le fondement de la Convention des Nations Unies sur le droit de la mer; le Tribunal n'est pas compétent pour se prononcer sur le fond du différend.

Southern Bluefin Tuna Case
Australia and New Zealand v. Japan
Award on Jurisdiction and Admissibility
August 4, 2000
rendered by
the Arbitral Tribunal
constituted under Annex VII of the
United Nations Convention on the Law of the Sea

the Arbitral Tribunal being composed of:

Judge Stephen M. Schwebel, President
H.E. Judge Florentino Feliciano
The Rt. Hon. Justice Sir Kenneth Keith, KBE
H.E. Judge Per Tresselt
Professor Chusei Yamada

I. *Procedural History*

1. On August 31, 1998, Australia and New Zealand delivered to Japan identical diplomatic notes formally notifying Japan of the existence of a dispute between Australia and New Zealand on the one hand, and Japan on the other, concerning the conservation and management of Southern Bluefin Tuna. On July 15, 1999, Australia and New Zealand each delivered to Japan a Statement of Claim and Grounds on Which it is Based. Australia and New Zealand thereby commenced these arbitration proceedings against Japan under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS").[1]

2. Pending the constitution of this Arbitral Tribunal under Annex VII of UNCLOS, Australia and New Zealand, on July 30, 1999, each filed a request for the prescription of provisional measures with the International Tribunal for the Law of the Sea ("ITLOS").

3. On August 9, 1999, at the invitation of the President of ITLOS, Japan filed a single statement in response to Australia's and New Zealand's requests. Japan's statement raised objections to the jurisdiction of ITLOS on the basis that this Arbitral Tribunal would not, once constituted, have jurisdiction *prima facie* to decide the dispute.

4. On August 16, 1999, ITLOS issued an Order joining the two requests for provisional measures, thus permitting common oral argument and a

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[1] "UNCLOS" initially referred to the United Nations Conference on the Law of the Sea, but the term has come to be used to refer to the United Nations Convention on the Law of the Sea, prepared by UNCLOS III, and is so used in this Award.

common order to be issued in regard to both requests. A hearing on the requests for provisional measures was held by ITLOS in Hamburg on August 18, 19 and 20, 1999.

5. On August 27, 1999, ITLOS issued an Order finding that, *prima facie*, this Arbitral Tribunal would have jurisdiction and prescribing certain provisional measures.

6. Following appointments in due course, this Arbitral Tribunal was constituted, composed as indicated above.

7. On January 19, 2000, the Parties met on procedural matters with the President of the Tribunal at The Hague. As a result of these consultations, agreement was reached on a schedule for filing of pleadings on preliminary objections to jurisdiction raised by Japan, and a hearing on jurisdiction was scheduled in Washington, D.C. in early May 2000, at the facilities of the World Bank.[2] Following consultation with the other members of the Arbitral Tribunal, the President subsequently set the hearing on jurisdiction for May 7 through May 11, 2000, to which the Parties agreed.

8. At the January 19, 2000 meeting with the President of the Tribunal, the Parties agreed that the Tribunal would appoint a Registrar, who would supervise the provision of services of a secretariat. The Parties stated that they would welcome the appointment for this purpose of an appropriate official of the International Centre for Settlement of Investment Disputes ("ICSID"). Following consultations with the Secretary-General of ICSID, the President of the Tribunal wrote to ICSID's Secretariat[3] on February 3, 2000 to ask whether ICSID would be prepared to make its officials and facilities available for the proceeding. By letter of that same day, ICSID replied with its acceptance. Mrs. Margrete L. Stevens and Messrs. Alejandro A. Escobar and Antonio R. Parra were the ICSID officials who were designated to serve as co-secretaries of the Tribunal.

9. In subsequent correspondence between ICSID and the Parties, the tasks that ICSID was to perform in connection with the proceeding were elaborated. ICSID would serve as Registrar; be the official channel of communication between the Parties and the Arbitral Tribunal; make arrangements for keeping a record (including verbatim transcripts) of the hearing on jurisdiction; make other arrangements as necessary for the hearing on jurisdiction; and, from the funds advanced to it by the Parties, pay the fees of the members of the Arbitral Tribunal, reimburse their travel and other expenses in connection with the proceedings, and make other payments as required.

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[2] The Parties also agreed at their January 19, 2000 meeting with the President that the language of the proceeding shall be English, and on the distribution between them of the costs of the proceeding and on the remuneration to be offered to the members of the Arbitral Tribunal.

[3] All further references herein to ICSID refer to the ICSID Secretariat.

10. On February 11, 2000, Japan filed its memorial on its preliminary objections to jurisdiction. By letter of that same day, ICSID forwarded copies of Japan's memorial to the members of the Arbitral Tribunal.

11. Upon the filing of Japan's memorial on preliminary objections, the Parties exchanged correspondence expressing their disagreement about the title to be given to the proceedings. Australia and New Zealand proposed the title, "Southern Bluefin Tuna Cases." Japan initially proposed the title, "Cases concerning the Convention for the Conservation of Southern Bluefin Tuna" or, in the alternative, "Australia and New Zealand v. Japan." On February 17, 2000, the President of the Tribunal informed the Parties that, until the Tribunal had had the opportunity to meet to consider and dispose of the matter, both the title proposed by Australia and New Zealand and the alternative title proposed by Japan would be used together. At the opening of the hearing on jurisdiction on May 7, 2000, the President announced that, in view of the wish of Australia and New Zealand to be considered as a single party in the proceeding, of Japan's lack of objection, and of the Parties' agreement to continue using the provisional title of the proceeding, the title would be: "Southern Bluefin Tuna Case – Australia and New Zealand v. Japan."

12. On February 22, 2000, Australia and New Zealand filed copies of a dossier of documents used in the proceedings on provisional measures before the ITLOS. Copies were transmitted to Japan and to each member of the Arbitral Tribunal under cover of ICSID's letter to the parties of February 23, 2000.

13. On March 31, 2000, Australia and New Zealand filed a joint Reply on Jurisdiction. Copies of the Reply were transmitted to the members of the Tribunal and to Japan under cover of ICSID's letter of April 3, 2000.

14. On April 3, 2000, an agenda on preliminary matters was distributed to the Parties in anticipation of the hearing on jurisdiction. Observations on the draft agenda were received from Australia and New Zealand and from Japan.

15. A hearing on jurisdiction was held at the seat of ICSID at the World Bank headquarters in Washington, D.C., from May 7 through May 11, 2000. The President announced certain preliminary procedural matters agreed to by the Parties, including the name of the case, public access to the hearing, release of the provisional transcript of the hearing on ICSID's web site, and video recording of the hearing.

16. Japan presented its oral arguments on its objections to jurisdiction and on issues of admissibility on May 7. Australia and New Zealand then presented their oral arguments on jurisdiction and admissibility on May 8. Following a one-day interval, Japan presented its rebuttal arguments on May 10. Australia and New Zealand then presented their surrebuttal arguments on May 11, 2000. Simultaneous interpretation into Japanese was provided at the hearing.

17. The Agent and counsel of Japan who addressed the Tribunal were as follows:

Shotaro Yachi, Agent for Japan, Director-General of the Treaties Bureau, Ministry of Foreign Affairs, Tokyo

Nisuke Ando, Professor of International Law, Doshisha University and Professor Emeritus, Kyoto University

Sir Elihu Lauterpacht, Q.C., C.B.E.

Shabtai Rosenne, Member of the Israel Bar, Member of the Institute of International Law

Vaughan Lowe, Chichele Professor of Public International Law, All Souls College, University of Oxford.

18. The Agents and counsel of Australia and New Zealand who addressed the Tribunal were as follows:

Bill Campbell, Agent for Australia, First Assistant Secretary, Office of International Law, Attorney-General's Department, Canberra

Tim Caughley, Agent for New Zealand, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, Wellington

James Crawford, Whewell Professor of International Law, University of Cambridge

Bill Mansfield, Barrister, Wellington

Henry Burmester Q.C., Chief General Counsel, Office of the Australian Government Solicitor, Canberra

Mark Jennings, Senior Adviser, Office of International Law, Attorney-General's Department, Canberra

Elana Geddis, Legal Adviser, Legal Division of the Ministry of Foreign Affairs and Trade, Wellington

Rebecca Irwin, Principal Legal Officer, Office of International Law, Attorney-General's Department, Canberra

Andrew Serdy, Executive Officer, Sea Law, Legal Branch, Department of Foreign Affairs and Trade, Canberra.

19. At the hearing on jurisdiction, each Party submitted copies of a binder of materials for assistance of the members of the Arbitral Tribunal. Japan, in addition, submitted a single set of four binders containing the texts of the treaties referred to in Annex 47 of Japan's memorial on jurisdiction. The provisional verbatim transcript for each day of hearings was on the same day distributed electronically to the Parties and ICSID. On the morning following

each day of hearings, each Party received from ICSID a paper copy of the verbatim transcript and audio recordings for that day. Copies of the transcript were likewise provided by ICSID to each member of the Tribunal, and they were posted on ICSID's website.

20. On May 10, 2000, the Arbitral Tribunal addressed a number of questions to the Parties arising from their pleadings and oral presentations. Both Parties indicated that they would subsequently answer the Tribunal's questions in writing. On May 26, 2000, each Party submitted to ICSID its respective answers to the questions of the Arbitral Tribunal, together with their respective corrections to the verbatim transcript made of the hearing. By letter of that same date, ICSID forwarded copies of the Parties' answers and corrections to the members of the Tribunal and copies of each Party's answers and corrections to the other Party.

II. *Background to the Current Proceedings*

21. Southern Bluefin Tuna (*Thunnus maccoyi*, hereafter sometimes designated "SBT") is a migratory species of pelagic fish that is included in the list of highly migratory species set out in Annex I of the United Nations Convention on the Law of the Sea. Southern Bluefin Tuna range widely through the oceans of the Southern Hemisphere, principally the high seas, but they also traverse the exclusive economic zones and territorial waters of some States, notably Australia, New Zealand and South Africa. They spawn in the waters south of Indonesia. The main market for the sale of Southern Bluefin Tuna is in Japan, where the fish is prized as a delicacy for sashimi.

22. It is common ground between the Parties that commercial harvest of Southern Bluefin Tuna began in the early 1950s and that, in 1961, the global catch peaked at 81,000 metric tons ("mt"). By the early 1980s, the SBT stock had been severely overfished; it was estimated that the parental stock had declined to 23-30% of its 1960 level. In 1982, Australia, New Zealand and Japan began informally to manage the catching of SBT. Japan joined with Australia and New Zealand in 1985 to introduce a global total allowable catch (hereafter, "TAC") for SBT, initially set at 38,650 mt. In 1989, a TAC of 11,750 tons was agreed, with national allocations of 6,065 tons to Japan, 5,265 tons to Australia and 420 tons to New Zealand; Japan, as the largest harvester of SBT, sustained the greatest cut. But the SBT stock continued to decline. In 1997, it was estimated to be in the order of 7-15% of its 1960 level. Recruitment of SBT stock – the entry of new fish into the fishery – was estimated in 1998 to be about one third of the 1960 level. The institution of total allowable catch restrictions by Japan, Australia and New Zealand to some extent has been offset by the entry into the SBT fishery of fishermen from the Republic of Korea, Taiwan and Indonesia, and some flag-of-convenience States. Whether, in response to TAC restrictions, the stock has in fact begun to recover is at the core of the dispute between Australia and New

Zealand, on the one hand, and Japan, on the other. They differ over the current state and recovery prospects of SBT stock and the means by which scientific uncertainty in respect of those matters can best be reduced.

23. In 1993, Australia, Japan and New Zealand concluded the Convention for the Conservation of Southern Bluefin Tuna (hereafter, the "1993 Convention" or "CCSBT"). The provisions most pertinent to these proceedings are the following:

"Recalling that Australia, Japan and New Zealand have already taken certain measures for the conservation and management of southern bluefin tuna;

"Paying due regard to the rights and obligations of the Parties under relevant principles of international law;

"Noting the adoption of the United Nations Convention on the Law of the Sea in 1982;

"Noting that States have established exclusive economic or fishery zones within which they exercise, in accordance with international law, sovereign rights or jurisdiction for the purpose of exploring and exploiting, conserving and managing the living resources;

"Recognising that southern bluefin tuna is a highly migratory species which migrates through such zones;

"... Recognising that it is essential that they cooperate to ensure the conservation and optimum utilization of southern bluefin tuna;"

The Parties agreed *inter alia* that:

Article 3

The objective of this Convention is to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.

Article 4

Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea.

Article 5

1. Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under paragraph 7 of Article 8.

2. The Parties shall expeditiously provide to the Commission for the Conservation of Southern Bluefin Tuna scientific information, fishing catch and effort statistics and other data relevant to the conservation of southern bluefin tuna and, as appropriate, ecologically related species.

3. The Parties shall cooperate in collection and direct exchange, when appropriate, of fisheries data, biological samples and other information relevant for scientific research on southern bluefin tuna and ecologically related species.

4. The Parties shall cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents and vessels of any State or entity not party to this Convention.

Article 6

1. The Parties hereby establish and agree to maintain the Commission for the Conservation of Southern Bluefin Tuna (hereinafter referred to as "the Commission").

* * *

Article 7

Each Party shall have one vote in the Commission. Decisions of the Commission shall be taken by a unanimous vote of the Parties present at the Commission meeting.

Article 8

1. The Commission shall collect and accumulate information described below:

a. scientific information, statistical data and other information relating to southern bluefin tuna and ecologically related species;

b. information relating to laws, regulations and administrative measures on southern bluefin tuna fisheries;

c. any other information relating to southern bluefin tuna.

2. The Commission shall consider matters described below:

a. interpretation or implementation of this Convention and measures adopted pursuant to it;

b. regulatory measures for conservation, management and optimum utilisation of southern bluefin tuna;

c. matters which shall be reported by the Scientific Committee prescribed in Article 9;

d. matters which may be entrusted to the Scientific Committee prescribed in Article 9;

e. matters which may be entrusted to the Secretariat prescribed in Article 10;

f. other activities necessary to carry out the provisions of this Convention.

3. For the conservation, management and optimum utilisation of southern bluefin tuna:

a. the Commission shall decide upon a total allowable catch and its allocation among the Parties unless the Commission decides upon other appropriate measures on the basis of the report and recommendations of the Scientific Committee referred to in paragraph 2(c) and (d) of Article 9; and

b. the Commission may, if necessary, decide upon other additional measures.

4. In deciding upon allocations among the Parties under paragraph 3 above the Commission shall consider:

a. relevant scientific evidence;

b. the need for orderly and sustainable development of southern bluefin tuna fisheries;

c. the interests of Parties through whose exclusive economic or fishery zones southern bluefin tuna migrates;

d. the interests of Parties whose vessels engage in fishing for southern bluefin tuna including those which have historically engaged in such fishing and those which have southern bluefin tuna fisheries under development;

e. the contribution of each Party to conservation and enhancement of, and scientific research on, southern bluefin tuna;

f. any other factors which the Commission deems appropriate.

5. The Commission may decide upon recommendations to the Parties in order to further the attainment of the objective of this Convention.

6. In deciding upon measures under paragraph 3 above and recommendations under paragraph 5 above, the Commission shall take full account of the report and recommendations of the Scientific Committee under paragraph 2(c) and (d) of Article 9.

7. All measures decided upon under paragraph 3 above shall be binding on the Parties.

8. The Commission shall notify all Parties promptly of measures and recommendations decided upon by the Commission.

9. The Commission shall develop, at the earliest possible time and consistent with international law, systems to monitor all fishing activities related to southern bluefin tuna in order to enhance scientific knowledge necessary for conservation and management of southern bluefin tuna and in order to achieve effective implementation of this Convention and measures adopted pursuant to it.

10. The Commission may establish such subsidiary bodies as it considers desirable for the exercise of its duties and functions.

Article 9

1. The Parties hereby establish the Scientific Committee as an advisory body to the Commission.

2. The Scientific Committee shall:

a. assess and analyse the status and trends of the population of southern bluefin tuna;

b. coordinate research and studies of southern bluefin tuna;

c. report to the Commission its findings or conclusions, including consensus, majority and minority views, on the status of the southern bluefin tuna stock and, where appropriate, of ecologically related species;

d. make recommendations, as appropriate, to the Commission by consensus on matters concerning the conservation, management and optimum utilisation of southern bluefin tuna;

e. consider any matter referred to it by the Commission. ...

5.

a. Each Party shall be a member of the Scientific Committee and shall appoint to the Committee a representative with suitable scientific qualifications who may be accompanied by alternates, experts and advisers. ...

* * *

Article 13

With a view to furthering the attainment of the objective of this Convention, the Parties shall cooperate with each other to encourage accession by any State to this Convention where the Commission considers this to be desirable.

* * *

Article 16

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a

view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

* * *

Article 20

Any Party may withdraw from this Convention twelve months after the date on which it formally notifies the Depositary of its intention to withdraw.

24. In May 1994, the Commission established by the 1993 Convention set a TAC at 11,750 tons, with the national allocations among Japan, Australia and New Zealand set out above. There has been no agreement in the Commission thereafter to change the TAC level or allotments. Japan from 1994 sought an increase in the TAC and in its allotment but any increase has been opposed by New Zealand and Australia. While the Commission initially maintained the TAC at existing levels due to this impasse, since 1998 it has been unable to agree upon any TAC. In the absence of a Commission decision, the Parties in practice have maintained their TAC as set in 1994. At the same time, Japan pressed in the Commission not only for a TAC increase, initially of 6000 tons and then of 3000 tons in its allotment, but also for agreement upon a joint Experimental Fishing Program ("EFP"), whose particular object would be to gather data in those areas where fishing for SBT no longer took place, with a view to reducing scientific uncertainty about recovery of the stock. Japan sought agreement upon its catching 6000 EFP tons annually, for three years, for experimental fishing, in addition to its commercial allotment; it subsequently reduced that request to 3000 tons, also the same amount that it sought by way of increase in its TAC. While the Commission in 1996 adopted a set of "Objectives and principles for the design and implementation of an experimental fishing program," it proved unable to agree upon the size of the catch that would be allowed under the EFP and on modalities of its execution. However, Australia, Japan and New Zealand are agreed on the objective of restoring the parental stock of Southern Bluefin Tuna to its 1980 level by the year 2020.

25. At a Commission meeting in 1998 Japan stated that, while it would voluntarily adhere to its previous quota for commercial SBT fishing, it would commence a unilateral, three-year EFP as of the summer of 1998. Despite vigorous protests by Australia and New Zealand over pursuance of any unilateral EFP, Japan conducted a pilot program with an estimated catch of 1,464 mt. in the summer of 1998.

26. In response, Australia and New Zealand formally requested urgent consultations and negotiations under Article 16(1) of the 1993 Convention. Despite intensive efforts within this framework to reach agreement on an experimental fishing program for 1999, an accord was not achieved. At a meeting in Canberra May 26-28, 1999, Australia was advised that, unless it accepted Japan's proposal for a 1999 joint experimental fishing program, Japan would recommence unilateral experimental fishing on June 1; and New Zealand was similarly so informed. Neither Australia nor New Zealand found Japan's proposal acceptable. While differences about the dimension of EFP tonnage had narrowed, they maintained that Japan's EFP was misdirected and that its design and analysis were fundamentally flawed. In their view, Japan's EFP did not justify what they saw as the significant increased risk to the SBT stock. They informed Japan that, if it recommenced unilateral experimental fishing on June 1, 1999 or thereafter, they would regard such action as a termination by Japan of negotiations under Article 16(1) of the 1993 Convention. Japan, which resumed its EFP on June 1, 1999, replied that it had no intention of terminating those negotiations. It maintained that independent scientific opinion had advised the Commission that Japan's EFP proposals were soundly conceived.

27. On June 23, 1999, Australia restated its position that the dispute did not relate solely to Japan's obligations under the 1993 Convention, but also involved its obligations under UNCLOS and customary international law. It considered that there had been a full exchange of views on the dispute for the purposes of Article 283(1) of UNCLOS, which provides that, "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

28. Also on June 23, 1999, Japan stated that it was ready to have the dispute resolved by mediation under the provisions of the 1993 Convention. Australia replied that it was willing to submit the dispute to mediation, provided that Japan agreed to cease its unilateral experimental fishing and that the mediation was expeditious. Japan responded that the question of its unilateral EFP could be discussed in the framework of mediation. On July 14, 1999, Japan reiterated its position that its experimental fishing was consistent with the 1993 Convention and that it could not accept the condition of its cessation in order for mediation to proceed. Japan declared that it was ready to have the dispute resolved by arbitration pursuant to Article 16(2) of the 1993 Convention, indicating however that it was not prepared to halt its unilateral EFP during its pendency though it was prepared to resume consultations about it. Thereafter Australia notified Japan that it viewed Japan's position as a rejection of Australia's conditional acceptance of mediation, and that Australia had decided to commence compulsory dispute resolution under Part XV of UNCLOS. It followed that it did not accept Japan's proposal for arbitration pursuant to Article 16(2) of the Convention. Australia emphasized

the centrality of Japan's obligations under UNCLOS and under customary international law to the dispute and the need for those obligations to be addressed if the dispute were to be resolved. Australia reiterated its view that the conduct of Japan under the 1993 Convention was relevant to the issue of its compliance with UNCLOS obligations and may be taken into account in dispute settlement under Part XV of UNCLOS. Pending the constitution of the arbitral tribunal to which the dispute was being submitted under UNCLOS's Annex VII, Australia announced its intention to seek prescription of provisional measures under Article 290(5) of UNCLOS, including the immediate cessation of unilateral experimental fishing by Japan.

29. As the preambular references in the 1993 Convention quoted above confirm, the 1993 Convention was prepared in light of the provisions of the 1982 United Nations Convention on the Law of the Sea and the relevant principles of international law. UNCLOS had not come into force in 1993, and in fact did not come into force for the three Parties to the instant dispute until 1996, but the Parties to the 1993 Convention regarded UNCLOS as an umbrella or framework Convention to be implemented in respect of Southern Bluefin Tuna by the adoption of the 1993 Convention.

30. In reliance upon provisions of UNCLOS and of general international law, including UNCLOS provisions for settlement of disputes (Part XV of UNCLOS), Australia and New Zealand thus sought in 1999 to interdict pursuance of Japan's unilateral EFP. They requested the establishment of an arbitral tribunal pursuant to Annex VII of UNCLOS, and sought provisional measures under Article 290(5) of UNCLOS, which provides:

> "Pending constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... may prescribe ... provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures ..."

31. The Applicants' Statement of Claim filed in invoking arbitration under UNCLOS Annex VII maintained that the dispute turned on what the Applicants described as Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock, as manifested, *inter alia*, by its unilateral experimental fishing for SBT in 1998 and 1999. The Applicants stated that the dispute concerned the interpretation and application of certain provisions of UNCLOS, and that the arbitral tribunal will be asked to take into account provisions of the 1993 Convention and the Parties' practice thereunder, as well as their obligations under general international law, "in particular the precautionary principle."

32. The provisions of UNCLOS centrally invoked by Australia and New Zealand were the following:

Article 64
Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

Article 116
Right to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

(a) their treaty obligations;

(b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and

(c) the provisions of this section.

Article 117
Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas

All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 118
Cooperation of States in the conservation and management of living resources

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Article 119
Conservation of the living resources of the high seas

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis

through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

33. In seeking provisional measures, Australia and New Zealand among other contentions argued that Article 64, read in conjunction with other provisions of UNCLOS, imposes an obligation on Japan, as a distant water State whose nationals fish for SBT, to cooperate with Australia and New Zealand, as coastal States, in the conservation of SBT. The Commission established under the 1993 Convention is "the appropriate international organization" for the purposes of Article 64. Japan's unilateral actions defeat the object and purpose of the 1993 Convention. In such a case, the underlying obligations of UNCLOS remain. While the 1993 Convention was intended as a means of implementing the obligations imposed by UNCLOS in respect of highly migratory fish species, it is not a means of escaping those obligations. Australia and New Zealand contended that Japan's conduct also placed it in violation of Articles 116, 117, 118, and 119, *inter alia* by failing to adopt necessary conservation measures for its nationals so as to maintain or restore SBT stock to levels which can produce the maximum sustainable yield, by ignoring credible scientific evidence presented by Australia and New Zealand and by pursuing a course of unilateral action in its exclusive interest contrary to their rights as coastal States while enjoying the benefits of restraint by Australia and New Zealand, with discriminatory effect upon nationals of the Applicants. They requested the prescription of provisional measures requiring that Japan immediately cease experimental fishing for SBT; that Japan restrict its SBT catch to its national allocation as last agreed in the Commission, subject to reduction by the amount of catch taken in pursuance of its unilateral EFP; that the Parties act consistently with the precautionary principle pending a final settlement of the dispute; and that the Parties ensure that no action is taken to aggravate their dispute or prejudice the carrying out of any decision on the merits.

34. Japan challenged the contentions of Australia and New Zealand on the facts and the law. It contended that it was Australia and New Zealand who had frustrated the functioning of the CCSBT Commission and regime. It maintained that the gravamen of the claims asserted concern the 1993 Convention, not UNCLOS, and that those claims turned not on issues of law but matters of scientific appreciation. Article 290(5) of UNCLOS contemplates the imposition of provisional measures by the International Tribunal for the Law of the Sea ("ITLOS") only if the arbitral tribunal would have *prima facie* jurisdiction over the underlying dispute. Article 288(1) of UNCLOS gave an arbitral tribunal jurisdiction over any dispute concerning the interpretation or application of UNCLOS, a treaty not actually the basis of the Applicants' claims. The Applicants in August 1998 specifically invoked dispute resolution under the 1993 Convention, not UNCLOS; they had treated the dispute as one arising under the CCSBT, and sought consultations not

under UNCLOS but under Article 16 of the 1993 Convention. The procedures under the 1993 Convention had not been exhausted; the Parties were required to continue to seek resolution of their dispute pursuant to those procedures. Nor had the procedural conditions for arbitration under UNCLOS been met; Australia and New Zealand had not attempted to reach a settlement in good faith, or even exchange views, in accordance with the provisions of UNCLOS Part XV. No irreparable damage threatened. Article 64 of UNCLOS merely created an obligation of cooperation, and prescribed no specific principles of conservation or concrete conservation measures. It was doubtful that the precautionary principle had attained the status of a rule of customary international law. The Applicants' actions to thwart settlement under Article 16 of the CCSBT were "abusive" and "redolent of bad faith". For all these reasons, Japan argued that the proposed Annex VII arbitral tribunal lacked jurisdiction *prima facie* and that hence ITLOS lacked authority to prescribe provisional measures. The only remedy that made sense, if there were to be any, would be to call on Australia and New Zealand to resume negotiations under the 1993 Convention with a view to reaching agreement on the TAC, annual quotas, and the continuation of the EFP on a joint basis, with the assistance of independent scientific advice. In the event that ITLOS should make a finding of *prima facie* jurisdiction, Japan asked for counter-provisional measures prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000.

III. *Provisional Measures Prescribed by ITLOS*

35. Australia and New Zealand requested provisional measures on July 30, 1999. The International Tribunal for the Law of the Sea held initial deliberations on August 16 and 17 and noted points and issues that it wished the Parties specially to address; oral hearings were conducted at five public sittings on August 18, 19 and 20. On August 27, 1999, ITLOS issued an Order prescribing provisional measures. Its salient *consideranda* and conclusions merit quotation:

> 40. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction;
>
> 41. *Considering* that Australia and New Zealand have invoked as the basis of jurisdiction of the arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:
>
> > *A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;*
>
> 42. *Considering* that Japan maintains that the disputes are scientific rather than legal;

43. *Considering* that, in the view of the Tribunal, the differences between the parties also concern points of law;

44. *Considering* that, in the view of the Tribunal, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 11), and "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328);

45. *Considering* that Australia and New Zealand allege that Japan, by unilaterally designing and undertaking an experimental fishing programme, has failed to comply with obligations under articles 64 and 116 to 119 of the Convention on the Law of the Sea, with provisions of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (hereinafter "the Convention of 1993") and with rules of customary international law;

46. *Considering* that Japan maintains that the dispute concerns the interpretation or implementation of the Convention of 1993 and does not concern the interpretation or application of the Convention on the Law of the Sea;

47. *Considering* that Japan denies that it has failed to comply with any of the provisions of the Convention on the Law of the Sea referred to by Australia and New Zealand;

48. *Considering* that, under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

* * *

50. *Considering* that the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea;

51. *Considering* that the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna;

52. *Considering* that, in the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;

53. *Considering* that Japan argues that recourse to the arbitral tribunal is excluded because the Convention of 1993 provides for a dispute settlement procedure;

54. *Considering* that Australia and New Zealand maintain that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea;

55. *Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea;

56. *Considering* that Japan contends that Australia and New Zealand have not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of the Convention, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of the Convention;

57. *Considering* that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by Australia and New

Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea;

58. *Considering* that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations;

59. *Considering* that Australia and New Zealand have stated that the negotiations had terminated;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled;

62. *Considering* that, for the above reasons, the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes;

63. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;

64. *Considering*, therefore, that the Tribunal must decide whether provisional measures are required pending the constitution of the arbitral tribunal;

65. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

66. *Considering* that Japan contends that there is no urgency for the prescription of provisional measures in the circumstances of this case;

67. *Considering* that, in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

68. *Considering* that Australia and New Zealand contend that by unilaterally implementing an experimental fishing programme Japan has violated the rights of Australia and New Zealand under articles 64 and 116 to 119 of the Convention;

69. *Considering* that Australia and New Zealand contend that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights;

70. *Considering* that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment;

71. *Considering* that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern;

72. *Considering* that Australia and New Zealand contend that, by unilaterally implementing an experimental fishing programme, Japan has failed to comply with its obligations under articles 64 and 118 of the Convention, which require the parties to cooperate in the conservation and management of the southern bluefin tuna stock, and that the actions of Japan have resulted in a threat to the stock;

73. *Considering* that Japan contends that the scientific evidence available shows that the implementation of its experimental fishing programme will cause no further threat to the southern bluefin tuna stock and that the experimental fishing programme remains necessary to reach a more reliable assessment of the potential of the stock to recover;

74. *Considering* that Australia and New Zealand maintain that the scientific evidence available shows that the amount of southern bluefin tuna taken under the experimental fishing programme could endanger the existence of the stock;

75. *Considering* that the Tribunal has been informed by the parties that commercial fishing for southern bluefin tuna is expected to continue throughout the remainder of 1999 and beyond;

76. *Considering* that the catches of non-parties to the Convention of 1993 have increased considerably since 1996;

77. *Considering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna;

78. *Considering* that the parties should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

79. *Considering* that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

80. *Considering* that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock;

81. *Considering* that, in the view of the Tribunal, catches taken within the framework of any experimental fishing programme should not result in total catches which exceed the levels last set by the parties for each of them, except under agreed criteria;

82. *Considering* that, following the pilot programme which took place in 1998, Japan's experimental fishing as currently designed consists of three annual programmes in 1999, 2000 and 2001;

83. *Considering* that the Tribunal has taken note that, by the statement of its Agent before the Tribunal on 20 August 1999, Japan made a "clear commitment that the 1999 experimental fishing programme will end by 31 August";

84. *Considering*, however, that Japan has made no commitment regarding any experimental fishing programmes after 1999;

85. *Considering* that, for the above reasons, in the view of the Tribunal, provisional measures are appropriate under the circumstances;

86. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

87. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;

***

90. *For these reasons*,

THE TRIBUNAL,

1. *Prescribes*, pending a decision of the arbitral tribunal, the following measures:

By 20 votes to 2,

(a) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal;

* * *

By 20 votes to 2,

(b) Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;

* * *

By 18 votes to 4,

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

* * *

By 20 votes to 2,

(d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c);

* * *

By 21 votes to 1,

(e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

* * *

By 20 votes to 2,

(f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.

***

36. It should be observed that, while the Order of ITLOS was not unanimous, no Member of the Tribunal disputed "the view of the Tribunal" that "the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded" (paragraph 52). It so held despite Japan's contention that recourse to the arbitral tribunal "is excluded because the Convention of 1993 provides for a dispute settlement procedure" (paragraph 53). It noted the position of Australia and New Zealand "that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea" (paragraph 54). It held that, "in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2 of

the Convention on the Law of the Sea" (paragraph 55). For the above and other reasons quoted, "the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes" (paragraph 62).

37. It is these holdings of the International Tribunal for the Law of the Sea that were the particular focus of controversy in these proceedings. The Agents and counsel of Australia, New Zealand and Japan plumbed the depths of these holdings with a profundity that the time pressures of the ITLOS processes did not permit. In any event, the ITLOS holdings upheld no more than the jurisdiction *prima facie* of this Tribunal. It remains for it to decide whether it has jurisdiction to pass upon the merits of the dispute.

IV. *Japan's Position on the Lack of Jurisdiction and Inadmissibility*

38. In its written and oral pleadings, Japan has advanced a multiplicity of reasons why, in its view, this Tribunal lacks jurisdiction over the merits of the dispute. Its contentions may be summarized as follows:

(a) The core of the dispute lies in disagreement concerning, as the Applicants' Statement of Claim puts it, "Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock, as manifested, *inter alia*, by its unilateral experimental fishing for SBT in 1998 and 1999". Neither customary international law nor UNCLOS requires Japan or any other State to proceed with an EFP only with the agreement of the other two States Parties to the 1993 Convention. Any such obligation can only be derived from the CCSBT itself. The dispute necessarily is one concerning the interpretation and implementation of the CCSBT and not a dispute concerning the interpretation or application of UNCLOS. The question of an EFP has been in dispute for five years within the CCSBT Commission. Urgent consultations about Japan's unilateral EFP were requested by the Applicants within the framework of the CCSBT. The negotiations to resolve that dispute took place within the framework of the CCSBT, as did their claimed termination. Any other international rights and obligations asserted are relevant only because of their bearing upon a dispute under the CCSBT, as the Applicants themselves recognized. Belated invocation of UNCLOS and customary international law by the Applicants is an artifice to enable the Applicants to seek provisional measures from ITLOS and to evade the consensual requirements of Article 16 of the 1993 Convention. It is not sustained by the factual history of the dispute. It is significant that, when the dispute first arose, the Applicants protested in the context only of the CCSBT and made no mention of UNCLOS; their original characterization of the dispute is the clearest indication of what the Parties themselves really thought. The Statement of Claim, while cast in terms of UNCLOS, in substance depends upon allegations of breach of the CCSBT; the relief sought by the Applicants in respect of the EFP and TAC is intelligible only within the framework of the CCSBT. The Applicants claiming the dispute to fall within UNCLOS does not

make it so; rejection of that claim by Japan does not give rise to a dispute under UNCLOS; "whether there exists an international dispute is a matter for objective determination" as the International Court of Justice has repeatedly held. In the words of the Court, "the complaint should indicate some genuine relationship between the complaint and the provisions invoked ..." The Statement of Claim does not.

(b) While UNCLOS was concluded in 1982 and the CCSBT in 1993, UNCLOS did not come into force until 1994 and was not ratified by all three of the Parties to these proceedings until 1996. It follows that the CCSBT alone regulated relations among Australia, New Zealand and Japan in respect of SBT for some 26 months. The advent of UNCLOS could not have increased the density of treaty relations between the Parties in respect of SBT in as radical a manner as Australia and New Zealand now assert. Rather the governing treaty in respect of SBT is not UNCLOS but the CCSBT.

(c) However, if UNCLOS is regarded as the earlier treaty and as the framework or umbrella convention that sets out broad principles that in practice are to be realized by the conclusion and application of specific implementing agreements, then the CCSBT is the exemplar of such an implementing agreement. It then is not only the *lex posterior* but the *lex specialis*. In accordance with generally accepted principles, the provisions of a *lex specialis* not only specify and implement the principles of an anterior framework agreement; they exhaust and supplant those principles as long as the implementing agreement remains in force. The provisions of UNCLOS on which the Applicants rely, Article 64 and 116-119, are fully covered by the more specific provisions of the CCSBT. The function of the CCSBT is to fulfill and implement UNCLOS and discharge its obligations in respect of SBT by providing the necessary institutional structure which UNCLOS contemplates and the substantive detail that amplifies the outlines laid down in UNCLOS. "There is no penumbra of obligation under UNCLOS that extends beyond the circle of commitment established by CCSBT." The *lex specialis* prevails substantively and procedurally, and hence it – i.e., Article 16 of the 1993 Convention – determines jurisdiction. While it is in theory possible that a given act may violate more than one treaty, on the facts of this case, that is not possible.

(d) The failure of Australia and New Zealand to bring suit against Korea, Taiwan and Indonesia under UNCLOS suggests that the real dispute at issue is under the 1993 Convention, to which none of those States are, at any rate, yet, party. It demonstrates the realization of the Applicants that the CCSBT is the only effective legal link between them and Japan in relation to SBT.

(e) Article 311 of UNCLOS, concerning its relation to other conventions and international agreements, is consistent with Japan's analysis.[4] The 1993 Convention is compatible with UNCLOS and does not detract from the enjoyment of rights thereunder; the 1993 Convention is expressly permitted by Article 64 of UNCLOS.

(f) Article 282 of UNCLOS gives no nourishment to the Applicants' position, since the instant dispute concerns not the interpretation or application of UNCLOS but the interpretation and implementation of the 1993 Convention.[5]

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[4] Article 311 provides:

> Article 311
> *Relation to other conventions and international agreements*
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> 1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.
>
> 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.
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> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.
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> 6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

[5] UNCLOS Article 282 provides:

> Article 282
> *Obligations under general, regional or bilateral agreements*
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> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

(g) In accordance with Article 280 of UNCLOS,[6] the Parties to these proceedings are free to settle a dispute between them concerning the interpretation or application of UNCLOS by any peaceful means of their own choice; if it is assumed for the sake of argument that the instant dispute arises under UNCLOS as well as the CCSBT (which Japan denies), the Parties have chosen the means set out in Article 16 of the CCSBT. The Parties may so agree "at any time", either before or after a dispute has arisen.

(h) The terms of Article 281 of UNCLOS are also consistent with the position of Japan.[7] If, *arguendo*, it were to be assumed that a dispute under the CCSBT could also be a dispute under UNCLOS, then Article 16 of the CCSBT fits precisely into Article 281(1). The Parties to the CCSBT have agreed to settlement by a peaceful means of their own choice, namely, whatever method indicated in Article 16 they agree to pursue. Such agreement excludes any further procedure, because the Parties to the 1993 Convention have made it clear in Article 16(2) that no dispute shall be referred to the International Court of Justice or to arbitration without their consent.

(i) A very large number of treaties that relate to the law of the sea have dispute settlement provisions which have no compulsory element. If the approach of Australia and New Zealand in espousing the governance of the dispute settlement provisions of UNCLOS were to apply to these treaties, parties to those treaties who had no intention of entering into compulsory jurisdiction would find themselves so bound. Japan cited among a number of examples the International Convention for the Regulation of Whaling. An old but still important convention, it contains no dispute settlement provisions. If the approach of the Applicants were to be accepted, it would be open to any Party to UNCLOS to bring proceedings against a whaling State under UNCLOS Part XV by alleging that an action was a breach of an UNCLOS

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[6] UNCLOS Article 280 provides:

> Article 280
> *Settlement of disputes by any peaceful means chosen by the parties*
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> Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

[7] UNCLOS Article 281 provides:

> Article 281
> *Procedure where no settlement has been reached by the parties*
>
> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
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> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

provision. It is improbable that in becoming party to UNCLOS, States so intended. Other treaties, entered into after UNCLOS came into force, have dispute settlement clauses similar to that in Article 16 of the CCSBT, or, at any rate, clauses that lack compulsory sanction. Clearly the parties chose to avoid, and not implicitly to undertake, obligations for compulsory adjudication or arbitration, i.e., the intention was to exclude recourse to the compulsory jurisdiction of UNCLOS. It cannot reasonably be presumed that States concluded treaties containing such clauses which are useless because they are overridden by UNCLOS Part XV. But where States intend UNCLOS procedures of peaceful settlement to govern, they so provide, notably in the Agreement of 1995 for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. If this Tribunal were to find that UNCLOS Part XV overrides the specific terms of Article 16 of the CCSBT, it would profoundly disturb the host of dispute settlement provisions in treaties – whether antedating or postdating UNCLOS – that relate to matters embraced by UNCLOS.

(j) The Applicants argue that UNCLOS establishes a "new and comprehensive legal regime for all ocean space", a vital element of which is "mandatory" settlement of disputes. But in fact the peaceful settlement provisions of UNCLOS are flexible and are designed to afford Parties great leeway in their choice of means of peaceful settlement.

39. Japan in the alternative argued that, if, contrary to its view, the Tribunal were to find that the dispute is one concerning the interpretation or application of UNCLOS, it should nevertheless decline to pass upon the merits of the case because the Applicants had failed to meet the conditions governing such recourse set out in UNCLOS. Its principal contentions may be summarized as follows:

(a) Article 280 of UNCLOS [8] empowers the Parties to a dispute concerning the interpretation or application of UNCLOS to agree "at any time'' to settle their dispute by any peaceful means of their own choice. "At any time" means just that, i.e., it embraces not only disputes that have arisen but disputes that may arise. By adhering to Article 16 of the CCSBT, the Parties to the instant case had chosen the peaceful means listed therein, which do not include compulsory arbitration pursuant to Part XV of UNCLOS.

(b) Article 281 of UNCLOS[9] is critical. Since the Parties had agreed by Article 16 to seek settlement of their dispute by their chosen peaceful means, UNCLOS recourse was open "only where no settlement had been reached by recourse to such means". But in this case, the Applicants had failed to exhaust such means, namely, Japan's proposals for mediation and arbitration under the 1993 Convention. They failed to continue to seek resolution of the dispute in

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[8] Quoted above
[9] Quoted above

accordance with Article 16. Instead they resorted to "abusive exploitation" of the compulsory procedures of UNCLOS. Moreover, Article 281 further conditions access to UNCLOS procedures; access applies only where "the agreement between the parties does not exclude any further procedure". Japan maintains that, "The agreement between the parties, Article 16 of CCSBT, does exclude further procedure beyond what is stipulated in paragraph 1 without the consent of all the parties to the dispute. This means that CCSBT excludes further procedures, including the compulsory procedures of UNCLOS without the consent of the parties." Indeed the Applicants' request to ITLOS for provisional measures was itself a violation of the 1993 Convention, which excludes recourse to compulsory settlement procedures without the consent of all parties to the dispute.

(c) Article 282 of UNCLOS[10] provides that, if there is a procedure open to the parties that entails a binding decision, that procedure shall apply in lieu of UNCLOS procedures. The phrase in Article 282 "or otherwise" was understood when drafted and adopted to relate to reference to the International Court of Justice pursuant to declarations adhering to its jurisdiction under the Optional Clause. Japan, Australia and New Zealand all are bound by such declarations, but the Applicants have not applied to the Court. That is inconsistent with their obligations under Article 282 (even though, Japan acknowledged, it would have objected to the Court's jurisdiction had Australia and New Zealand invoked it, on grounds of reservations to the Optional Clause.)

(d) Article 283 of UNCLOS requires the Parties to a dispute to proceed expeditiously to an exchange of views regarding its settlement.[11] In all the diplomatic correspondence exchanged between the Parties to this dispute, there is no mention of conducting negotiations in accordance with Article 283. Nothing in Article 283 moreover envisages as conclusive a unilateral determination by one Party that negotiations (which actually took place under Article 16 of the CCSBT) are terminated.

40. Japan further argued, again in the alternative, that, should the Tribunal find that it has jurisdiction over the instant dispute, and should it find that

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[10] Quoted above.

[11] Article 283 provides:

> Article 283
> *Obligation to exchange views*
>
> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Australia and New Zealand have complied with the conditions for recourse under UNCLOS (both of which findings Japan contests), it should nevertheless hold that the dispute is inadmissible. The grounds for challenging admissibility were as follows:

(a) Article 16 was fashioned to deal with the kinds of disputes likely to arise under the 1993 Convention, namely, questions of scientific judgment. Such questions are not justiciable. While an ad hoc reference to arbitration such as Japan proposed within the framework of the CCSBT would have permitted the agreed identification of the precise matters over which the Parties differ, and the construction of a tribunal and a procedure specially adapted to deal with such scientific questions, that proposal was immediately rejected by Australia and New Zealand. The essentially scientific character of the instant dispute is apparent from the remedies sought. It is also shown by the reasons cited by Australia and New Zealand for contesting Japan's experimental fishing program. All turn on matters of scientific, not legal, judgment. There is no controversy about general conservation duties. The dispute is only over the accuracy of particular scientific predictions and judgments concerning SBT. That is why it is not susceptible of legal judgment.

(b) The Applicants' Statement of Claim fails to specify precisely what the case against Japan is. Its vague and elusive reference to articles of UNCLOS is insufficient. There is a failure to identify a cause of action.

(c) The dispute is in any event moot. Japan has now accepted a catch limit for its EFP of 1500 mt. That is the exact figure proposed by Australia in 1999. The Applicants' complaints center upon contentions that Japan is taking an EFP catch above the level of the national quotas agreed in the CCSBT for 1997. But now they are in agreement on what that EFP catch should be, so the case is moot. Not only has Japan committed itself to observe a limit of 1500 mt. in its EFP for the remaining two experimental fishing programs. It has undertaken to pay back all excess catches above the 1500 limit. It has also committed itself to a reduction in catch limits if the results of the EFP show that a reduction is required to safeguard the SBT stock. Japan, as the largest fisher and by far the largest consumer of Southern Bluefin Tuna, has the strongest interest in ensuring the survival of a healthy SBT stock.

V. *The Position of Australia and New Zealand on the Presence of Jurisdiction and the Admissibility of Their Claims*

41. The arguments of Australia and of New Zealand in support of this Tribunal's jurisdiction and of the admissibility of their claims were no less multifaceted than were those of Japan to the contrary. The following contentions were made, among others.

(a) The International Tribunal for the Law of the Sea was unanimous in its finding that this Tribunal has *prima facie* jurisdiction. The Applicants accept that this Tribunal is not bound to hold in favor of its jurisdiction over the merits by the finding of ITLOS concerning jurisdiction *prima facie*. Yet there was not a trace of doubt in the reasoning of ITLOS that such *prima facie* jurisdiction exists. The conclusion of 22 judges of ITLOS cannot be summarily disregarded, and their reasoning and holdings are significant in several respects. ITLOS found that the dispute is not only one of scientific appreciation: "the differences between the parties also concern points of law". ITLOS, in holding that "the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993 ... is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea" and in concluding that "... the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna ..." did not accept Japan's central substantive contention that the dispute is solely one under the CCSBT. Moreover, ITLOS rejected Japan's principal procedural contention by holding that: "... the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea ..." ITLOS observed that negotiations between the Parties were considered by Australia and New Zealand as being under the 1993 Convention "and also under the Convention on the Law of the Sea ..." As to their treating those negotiations as terminated, ITLOS held that "... a State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the possibilities of settlement have been exhausted ..." It concluded that "the requirements for invoking the procedures under Part XV, section 2 of the Convention have been fulfilled."

(b) UNCLOS established a new and comprehensive legal regime for all ocean space. The importance of the obligations it contains were such "that their acceptance was seen as critically dependent upon the establishment of an effective, binding and compulsory system for resolving all disputes concerning the interpretation and application of the Convention as a whole." As the first President of the Third United Nations Conference on the Law of the Sea put it, "The provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention. Dispute settlement procedures will be the pivot upon which the delicate equilibrium must be balanced." That dispute settlement system is set out in Part XV of the Convention, under which these proceedings have been brought. Part XV is mandatory and comprehensive. Section 2 of Part XV is entitled "Compulsory Procedures Entailing Binding Decisions," and framed so as to "not permit evasion". The key provision in respect of fisheries is Article 297(3), which specifies that, "Disputes concerning the interpretation or application of the provisions of this

Convention with regard to fisheries shall be settled in accordance with section 2 ..." with only one exception, concerning the sovereign rights of a coastal State in its exclusive economic zone.[12] That exception is not in point in these proceedings. Thus UNCLOS seeks to establish "an overarching, mandatory regime for the regulation of, and resolution of disputes concerning, the law of the sea, which itself includes conservation and management of fisheries, which in turn includes highly migratory species such as SBT." When the drafters wanted to exclude any provision of UNCLOS from the scope of compulsory dispute settlement under Part XV, they did so expressly by exclusions which do not apply in the instant case. These provisions indicate that this Tribunal should sustain the effectiveness and comprehensive character of the UNCLOS dispute settlement regime, and reject arguments lending themselves to evasion of its provisions.

(c) It is common ground between the Parties that there is a dispute, and that it concerns the conservation and management of Southern Bluefin Tuna. Japan however contends that it is purely a scientific dispute over questions of scientific judgment. But the dispute involves questions of principle and of the legal obligations of the Parties as well. Article 297(3) of UNCLOS would be devoid of meaning if disputes concerning questions of scientific fact and opinion were not justiciable. Nor is the dispute only about scientific disagreement. It is about the way a party to UNCLOS and to a regional fishing agreement may behave in circumstances of scientific uncertainty or management disagreement. The Applicants maintain that Japan has not only failed to take the necessary action to conserve the SBT stock; it has endangered that stock by an experimental fishing program that was unilateral, contained a high component of commercial fishing and did not comply with agreed guidelines for experimental fishing. The dispute is about the primacy of conservation over exploitation of a seriously depleted stock. The Applicants consider that Japan is exploiting the stock with unnecessary risk and is thereby in breach of its obligations under Articles 64 and 116-119 of UNCLOS. Such a dispute, on the meaning and content of the obligations

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[12] Article 297(3) provides:

> 3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

contained in those articles, in Article 300[13], and on relevant underlying principles of international law, is a legal dispute. It is a dispute over obligations to cooperate set out in those UNCLOS articles, obligations that comprise serious, substantive obligations which cannot be, or at any rate, have not been, overridden by the 1993 Convention. These obligations of conduct are, in the view of Australia and New Zealand, being violated by Japan, whereas Japan has consistently denied that claim. Since the two sides "hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", there is a legal dispute between the Parties over the interpretation and application of UNCLOS (and the Applicants cited a number of judgments and opinions of the International Court of Justice in support of the quoted phrase, found in *Interpretation of Peace Treaties with Bulgaria,Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 74).

(d) There is a dispute over the interpretation or application of a given treaty if the actions complained of can reasonably be measured against the standards or obligations prescribed by that treaty. The International Court of Justice has repeatedly analyzed the issue by comparing the substance of the dispute with the terms of the obligations set out in the treaty. It has also held that the fact that a party did not refer to that treaty in exchanges with another party does not debar it from invoking the compromissory clause of that treaty before the Court. That one party maintains that a dispute falls within the scope of the treaty and the other denies it is not enough to bring the dispute within the treaty and its compromissory clause; it is for objective judicial or arbitral process to determine whether the dispute falls within the provisions of the treaty. Whether a treaty is applicable may however be a question concerning its interpretation or application provided that the treaty crosses the threshold of potential applicability.

(e) In fact, the present dispute does concern the interpretation or application of UNCLOS. The essence of the Applicants' claim is that Japan has failed to conserve and cooperate in the conservation of SBT stock, as particularly shown by its unilateral EFP. In so doing, Japan has placed itself in breach of its obligations under international law, specifically those of Articles 64 and 116-119 of UNCLOS. Those provisions lay down norms applicable to this case, by which the lawfulness of Japan's actions can be evaluated. Article 64 imposes an obligation on Japan to cooperate in achieving the conservation

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[13] Article 300 provides:

> Article 300
> *Good faith and abuse of rights*
>
> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

and sustainable management of SBT. Article 118 requires Japan to cooperate with the Commission established by the Convention on the Conservation of Southern Bluefin Tuna. Where that Commission is at an impasse, the underlying obligations of UNCLOS provide a standard by which the lawfulness of unilateral conduct can be evaluated. Similarly Article 117 imposes on Japan the obligation to take and cooperate with other States in taking such measures for their nationals as may be necessary for the conservation of the living resources of the high seas. By the import of Article 119, a State may not engage in unilateral additional fishing of a seriously depleted stock where scientific evidence indicates that so doing may threaten its recovery. The right of the nationals of a State to fish on the high seas, expressed by Article 116, is there conditioned by their treaty obligations, including those of UNCLOS (and the Applicants cite the authoritative *University of Virginia Commentary on the United Nations Convention on the Law of the Sea*, Part VIII, p. 286 for the conclusion that "treaty obligations" as used in Article 116 includes obligations under the 1982 Convention). The meaning of Article 116 is that the right of high seas fishing is qualified. But the effect of Japan's argument is that it alone can decide whether there is to be a TAC, it alone can decide how much it will fish, and it alone can decide what limits it will accept. The effect of Japan's argument is that once a State becomes party to a regional agreement, it has, in so doing, effectively fulfilled and discharged its UNCLOS obligations regarding co-operation in the conservation of the relevant high seas resource. The Applicants contend that, "This is the old anarchy returned in procedural guise." They reject Japan's reading of the meaning of the pertinent provisions of UNCLOS, from which it follows that there is a dispute between the Parties over the interpretation and application of provisions of UNCLOS.

(f) Australia and New Zealand invoked provisions of UNCLOS in the course of the dispute. Their formal notices to Japan of the existence of a legal dispute on August 31, 1998 cited the 1993 Convention, UNCLOS and customary international law, including the precautionary principle. Australia's diplomatic note of September 11, 1998 declared that it was not possible or ever contemplated that matters concerning the 1993 Convention should be isolated from related international obligations; indeed those of UNCLOS are recognized in the preamble to the 1993 Convention. Allegations of Japan's breach of obligations under UNCLOS recur in the subsequent diplomatic exchanges.

(g) Australia and New Zealand had made the required efforts to settle the dispute by peaceful means. Article 281 of UNCLOS affords arbitral jurisdiction "only where no settlement has been reached by recourse to such means". No settlement has in fact been reached. Negotiations over the best part of a year had been extensive and intensive as indicated above and in detail in the pleadings. Those negotiations embraced not only the substance of the dispute but procedures for resolving it. The nature and manner of Japan's ultimatum of May 1999, and its insistence on resuming unilateral

experimental fishing on its own terms a few days later, was unacceptable and, when implemented, were rightly regarded as tantamount to termination of negotiations. The Applicants invoked the holding of ITLOS that "... a State Party is not obliged to pursue procedures under Part XV, Section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted." A Party whose unilateral action is the subject of dispute cannot block recourse to compulsory dispute settlement by continuing to offer negotiations when all reasonable efforts have shown that such negotiations will not resolve the issue. Japan's proposals for mediation and arbitration pursuant to Article 16 of the CCSBT had not been accepted because they contained no undertaking to suspend experimental fishing during their pendency and no specific proposal for the procedure or powers of the proposed arbitration. Without suspension of the EFP the arbitration would have been precluded effectively from dealing with the issue at the center of the dispute. Australia and New Zealand had no choice but to seek a definitive solution of the dispute through arbitral proceedings under UNCLOS. Article 282 of UNCLOS does not mean that this dispute shall be submitted to an alternative procedure, because that article refers only to a procedure "that entails a binding decision", as the circular procedure – or "menu" of settlement options – set out in CCSBT Article 16 does not. Moreover Article 16 deals with disputes under the CCSBT, not with disputes under UNCLOS.

(g) [sic] The Japanese argument that the CCSBT, as the subsequent treaty that implements UNCLOS, has exhausted and eclipsed the obligations of UNCLOS, is unpersuasive. The 1993 Convention does not "cover" the relevant obligations of the Parties under UNCLOS. The mere existence of the sort of appropriate international organization referred to in UNCLOS Article 64 – such as the CCSBT – does not discharge relevant UNCLOS obligations, which rather require the Members of the organization to participate and cooperate in that organization's work. Or, to take Article 117, nothing in the 1993 Convention imposes the duty to cooperate with other parties that is established by Article 117. Nor are the obligations of Article 119 "covered" by clauses of the CCSBT; there is nothing in the latter which requires the parties to ensure that conservation measures and their implementation do not discriminate against the fishermen of any State. The 1993 Convention was intended to be a means of implementing UNCLOS obligations in respect of highly migratory species, not a means of escaping those obligations. The CCSBT was not intended to derogate from UNCLOS, in particular from Part XV; nothing in the terms of the 1993 Convention or its preparatory work so indicate. It is true that Japan declined to accept proposals made during the drafting of the CCSBT for compulsory arbitration under that Convention. But nothing was ever said about derogating from the comprehensive and binding procedures of Part XV of UNCLOS in relation to UNCLOS obligations. Reliance on the principles of *lex posterior* and *lex specialis* is misplaced, not only because those principles apply only when two legal instruments conflict, but because Article 311 of UNCLOS itself regulates relationships with

implementing conventions such as the 1993 Convention. The terms of paragraph 4 of Article 311 do not affect international agreements "expressly permitted" by other articles of UNCLOS; and Article 64 calls for the conclusion of instruments such as the CCSBT. But an organization cannot be "permitted" by Article 64 if it gives any single State a veto over decision-making which extends to the performance of UNCLOS obligations themselves. The purpose of establishing international organizations under Article 64 is to ensure conservation and promote optimum utilization of highly migratory species, not to prejudice those objectives. The better view is that the 1993 Convention is covered not by paragraph 4 but by paragraph 2 of Article 311; it is clearly "compatible" with UNCLOS (the latter conclusion is common ground between the Parties). That is the normal interpretation of one treaty that refers to an earlier one that it purports to implement. Nor does Article 16 of the 1993 Convention opt out of Part XV of UNCLOS for any dispute concerning the interpretation or application of the 1993 Convention even if the dispute is also one concerning the interpretation or application of UNCLOS. Article 16 does not say so; there is no indication in its *travaux* that this was intended; and such an interpretation would be inconsistent with the presumption of parallelism of compromissory clauses.

(h) Just as there may be more than one treaty among the same States relating to the same subject matter, there may be compromissory clauses in more than one treaty that are not necessarily inconsistent. Such jurisdictional clauses do not cancel out one another; rather they are cumulative in effect. It is common for a particular dispute to be covered by several bases of jurisdiction, e.g., under the Optional Clause of the International Court of Justice, under a bilateral treaty and under a multilateral treaty, and each may provide for a distinct dispute settlement body. The presumption of parallelism of jurisdictional clauses is of long standing, it is entrenched in the case-law of that Court, and was not challenged before Japan's counsel thought of so pleading in the current case.

(i) Article 16 of the CCSBT cannot be viewed as a choice of means under Article 280 of UNCLOS. Properly interpreted, Article 280 refers to an agreement between parties to "a" dispute, after that dispute has arisen, to settle it by a peaceful means that they choose. In any event, Article 16 is not an agreement covering disputes concerning the interpretation or application of UNCLOS. Even if it were, the preconditions of Article 281 are not met by Article 16. It does not in terms exclude further recourse to Part XV, an explicit requirement of Article 281. The precondition cannot be met impliedly and it certainly is not met expressly by the language of paragraph 2 of Article 16.

(j) Thus Section 1 of Part XV of UNCLOS gives States complete control over the means of settlement of any dispute arising under UNCLOS provided that they agree to effective alternate means. If they do not, Section 2 comes into operation. Article 286 provides that, "... any dispute concerning the interpretation or application of this Convention shall, where no settlement has

been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." Pursuant to Article 287, as neither the Applicants nor Japan have accepted a particular settlement procedure, they are taken to have accepted arbitration in accordance with Annex VII. This Tribunal accordingly has been constituted pursuant to that Annex.

(k) UNCLOS, with the WTO, is one of the great general regulatory treaties of our time. Both treaties provide for mandatory dispute resolution. Both foster specialized arrangements and regional agreements. This case confronts the workability of mandatory dispute settlement in giving effect to the essential principles of the general treaty. If Japan is right, the provisions of UNCLOS for mandatory dispute settlement are "a paper umbrella which dissolves in the rain". If Japan is right, by entering into the 1993 Convention, the Parties opted out of the dispute settlement provisions of UNCLOS, and indeed UNCLOS as a whole in its governance of SBT, without putting any secure equivalent in its place. That cannot be so. Article 311 of UNCLOS asserts the primacy of UNCLOS over other treaties; UNCLOS is a regime; and disputes arising under that regime are governed by Part XV. Part XV does not override dispute settlement provisions of other treaties, but this Tribunal does have jurisdiction over claims concerning the interpretation and application of UNCLOS. The dispute settlement provisions of UNCLOS afford parties considerable flexibility. The one thing that they cannot do is to exclude Part XV in advance of a dispute without substituting another form of settlement entailing a binding decision. As to the substance of the relationship between UNCLOS and the CCSBT, the former expressly imposes obligations to co-operate in the conservation of migratory fish, the latter subjects any implied obligation of co-operation to the veto of one State. The contention that the 1993 Convention "covers" and thus eclipses the obligations in respect of SBT of UNCLOS is wrong in fact, and the principle of "coverage" is unknown to international law. The array of modern standards of international law has been achieved by a process of accretion and cumulation, not by erosion and reduction. Only where there is actual inconsistency between two treaties do questions of exclusion arise, and that is not the instant case. Even if the 1993 Convention completely covered all relevant obligations of UNCLOS, it would not supersede them; there would simply be a parallelism of obligations, not unusual in international practice. Moreover the 1993 Convention is meant to implement UNCLOS not supplant it; and the presumption that implementing agreements should suppress head agreements cannot be right as a matter of legislative policy. The same approach applies to peaceful settlement clauses. Article 16 of the 1993 Convention is not a procedure for peaceful settlement but a menu of options. Far from excluding any other procedure, it excludes no possible procedure at all. Moreover Article 16 does not address disputes under UNCLOS; it simply says that disputes under the 1993 Convention may be solved in any way on which the parties agree. It is not a negative dispute clause in respect of UNCLOS itself.

To so read it would conflict with the terms of Article 4 of the 1993 Convention, because it would prejudice the standing position of Australia and New Zealand favoring compulsory dispute settlement.[14] Each party to the 1993 Convention has a double veto. It can veto the TAC or the adoption of other binding measures, and it can veto any form of dispute settlement. In such event, the Parties are thrown back on to UNCLOS itself, onto its express provisions for co-operation and for binding dispute settlement in respect of fisheries. If Japan is right, then the parties to implementation agreements will be accountable to third parties for breach of governing general principles of the head agreement but not to each other. If Japan is right, the three States concerned cooperating informally would be accountable to each other for breach of UNCLOS principles but not accountable once they conclude a treaty embodying the principles of their cooperation. It follows for these and other reasons that the analysis of Japan cannot be right. The Applicants do not argue that the dispute settlement provisions of UNCLOS govern those of other agreements, including the 1993 Convention. But if it is accepted that there is a dispute under UNCLOS, then they have the right to have that dispute resolved by UNCLOS dispute settlement procedures.

(l) The reason why legal procedures under UNCLOS have been brought against Japan alone is that there is dispute with Japan alone. Negotiations are in train with third States about reducing their catch of Southern Bluefin Tuna, and progress is being made. It would not be politic at this juncture to turn to legal procedures. The Applicants' difficulties with Japan are ripe for dispute settlement whereas differences with third parties are not. Third States are not necessary parties in the proceedings against Japan; no finding as to their legal obligations is needed for decision on claims against Japan.

(m) While welcoming the new spirit of compromise accompanying Japan's latest proposal for an experimental fishing program, that proposal does not make the proceedings moot. The differences between the Parties are not limited to tonnage of tuna taken in an EFP. The quality of the EFP is a central issue. There has as yet been no agreement between the Parties nor a binding unilateral commitment on the part of Japan that resolves the issues between them.

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[14] Article 4 of the CCSBT provides:

> Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea.

VI. *The Final Submissions of the Parties*

42. Japan, as Respondent, in maintaining its Preliminary Objections on jurisdiction and admissibility, made the following final Submissions:

> This Tribunal should adjudge and declare,
> first, that the case has become moot and should be discontinued; alternatively,
> second, that the Tribunal does not have jurisdiction over the claims made by the Applicants in this case; alternatively,
> third, that the claims are not admissible.

43. Australia and New Zealand, as Applicants, in rejecting the Respondent's Preliminary Objections, made the following final Submissions:

> one, that the Parties differ on the question whether Japan's EFP and associated conduct is governed by UNCLOS;
> two, that a dispute thus exists about the interpretation and application of UNCLOS within the meaning of Part XV;
> three, that all the jurisdictional requirements of that Part have been satisfied; and
> four, that Japan's objections to the admissibility of the dispute are unfounded.

VII. *The Paramount Questions and the Answers of the Tribunal*

44. The Preliminary Objections raised by Japan and the arguments advanced in support of them, and the rejection of those Preliminary Objections by Australia and New Zealand and the arguments advanced in support of that rejection, present this Tribunal with questions of singular complexity and significance. The Tribunal is conscious of its position as the first arbitral tribunal to be constituted under Part XV ("Settlement of Disputes"), Annex VII ("Arbitration") of the United Nations Convention on the Law of the Sea. The Parties, through their written pleadings and the oral arguments so ably presented on their behalf by their distinguished Agents and counsel, have furnished the Tribunal with a comprehensive and searching analysis of issues that are of high importance not only for the dispute that divides them but for the understanding and evolution of the processes of peaceful settlement of disputes embodied in UNCLOS and in treaties implementing or relating to provisions of that great law-making treaty.

45. Having regard to the final Submissions of the Parties, the Tribunal will initially address the contention that the case has become moot and should be discontinued. The relevant arguments of the Parties have been set forth above (in paragraphs 40(c), 41(m)). In short, Japan maintains that the essence of the dispute turns on its pursuance of a unilateral experimental fishing program; that the contentious element of that program is its proposal to fish 1800 mt. of Southern Bluefin Tuna; that in the course of exchanges between the Parties in that regard, Australia had in 1999 proposed an EFP limit of 1500 mt.; that Japan is now prepared to limit its EFP catch to 1500 mt.; hence that the Parties are in accord on what had been the focus of their dispute, with the result that it has been rendered moot. Australia and New Zealand reply that the proposed acceptance of an EFP of 1500 tons of tuna was an offer made in

the course of negotiations which is no longer on the table; and that in any event their dispute with Japan over a unilateral EFP is not limited to the quantity of the tonnage to be fished but includes the quality of the program, i.e., the design and modalities for its execution, which they maintain is flawed.

46. In the view of the Tribunal, the case is not moot. If the Parties could agree on an experimental fishing program, an element of which would be to limit catch beyond the de facto TAC limits to 1500 mt., that salient aspect of their dispute would indeed have been resolved; but Australia and New Zealand do not now accept such an offer or limitation by Japan. Even if that offer were today accepted, it would not be sufficient to dispose of their dispute, which concerns the quality as well as the quantity of the EFP, and perhaps other elements of difference as well, such as the assertion of a right to fish beyond TAC limits that were last agreed. Japan now proposes experimentally to fish for no more than 1500 mt., but it has not undertaken for the future to forego or restrict what it regards as a right to fish on the high seas for Southern Bluefin Tuna in the absence of a decision by the Commission for the Conservation of Southern Bluefin Tuna upon a total allowable catch and its allocation among the Parties.

47. The Tribunal will now turn to the fundamental and multifaceted issues of jurisdiction that divide the Parties. Putting aside the question of mootness, it is common ground that there is a dispute, and that the core of that dispute relates to differences about the level of a total allowable catch and to Japan's insistence on conducting, and its conduct of, a unilateral experimental fishing program. What profoundly divides the Parties is whether the dispute arises solely under the 1993 Convention, or whether it also arises under UNCLOS.

48. The conflicting contentions of the Parties on this question are found in paragraphs 38 (a) (d) and 41 of this Award. An essential issue is, is the dispute with which the Applicants have seized the Tribunal a dispute over the interpretation of the CCSBT, or UNCLOS, or both? That the Applicants maintain, and the Respondent denies, that the dispute involves the interpretation and application of UNCLOS does not of itself constitute a dispute over the interpretation of UNCLOS over which the Tribunal has jurisdiction. In the words of the International Court of Justice in like circumstances, "in order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty ... pleaded ... do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain ..." (*Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, para. 16.) In this and in any other case invoking the compromissory clause of a treaty, the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the

legal standards of the treaty in point, as determined by the court or tribunal whose jurisdiction is at issue. "It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both Parties ... The Court will itself determine the real dispute that has been submitted to it ... It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence ..." (*Fisheries Jurisdiction Case (Spain v. Canada), I.C.J. Reports 1998*, paragraphs 30-31.) In the instant case, it is for this Tribunal to decide whether the "real dispute" between the Parties does or does not reasonably (and not just remotely) relate to the obligations set forth in the treaties whose breach is alleged.

49. From the record placed before the Tribunal by both Parties, it is clear that the most acute elements of the dispute between the Parties turn on their inability to agree on a revised total allowable catch and the related conduct by Japan of unilateral experimental fishing in 1998 and 1999, as well as Japan's announced plans for such fishing thereafter. Those elements of the dispute were clearly within the mandate of the Commission for the Conservation of Southern Bluefin Tuna. It was there that the Parties failed to agree on a TAC. It was there that Japan announced in 1998 that it would launch a unilateral experimental fishing program; it was there that that announcement was protested by Australia and New Zealand; and the higher level protests and the diplomatic exchanges that followed refer to the Convention for the Conservation of Southern Bluefin Tuna and to the proceedings in the Commission. The Applicants requested urgent consultations with Japan pursuant to Article 16(1) of the Convention, which provides that, "if any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved ..." Those consultations took place in 1998, and they were pursued in 1999 in the Commission in an effort to reach agreement on a joint EFP. It was in the Commission in 1999 that a proposal by Japan to limit its catch to 1800 mt. under the 1999 EFP was made, and it was in the Commission that Australia indicated that it was prepared to accept a limit of 1500 mt. It was in the Commission that Japan stated, on May 26 and 28, 1999 that, unless Australia and New Zealand accepted its proposals for a joint EFP, it would launch a unilateral program on June 1. Proposals for mediation and arbitration made by Japan were made in pursuance of provisions of Article 16 of the CCSBT. In short, it is plain that all the main elements of the dispute between the Parties had been addressed within the Commission for the Conservation of Southern Bluefin Tuna and that the contentions of the Parties in respect of that dispute related to the implementation of their obligations under the 1993 Convention. They related particularly to Article 8(3) of the Convention, which provides that, "For the conservation, management and optimum utilization of southern bluefin tuna: (a) the Commission shall decide upon a total allowable catch and its allocation

among the Parties ..." and to the powers of a Party in a circumstance where the Commission found itself unable so to decide.

50. There is in fact no disagreement between the Parties over whether the dispute falls within the provisions of the 1993 Convention. The issue rather is, does it also fall within the provisions of UNCLOS? The Applicants maintain that Japan has failed to conserve and to cooperate in the conservation of the SBT stock, particularly by its unilateral experimental fishing for SBT in 1998 and 1999. They find a certain tension between cooperation and unilateralism. They contend that Japan's unilateral EFP has placed it in breach of its obligations under Articles 64, 116, 117, 118 and 119 of UNCLOS, for the specific reasons indicated earlier in this Award (in paragraphs 33 and 41). Those provisions, they maintain, lay down applicable norms by which the lawfulness of Japan's conduct can be evaluated. They point out that, once the dispute had ripened, their diplomatic notes and other demarches to Japan made repeated reference to Japan's obligations not only under the 1993 Convention but also under UNCLOS and customary international law.

51. Japan for its part maintains that such references were belated and were made for the purpose of permitting a request to ITLOS for provisional measures. It contends that the invoked articles of UNCLOS are general and do not govern the particular dispute between the Parties. More than that, Japan argues that UNCLOS is a framework or umbrella convention that looks to implementing conventions to give it effect; that Article 64 provides for cooperation "through appropriate international organizations" of which the Commission is an exemplar; that any relevant principles and provisions of UNCLOS have been implemented by the establishment of the Commission and the Parties' participation in its work; and that the *lex specialis* of the 1993 Convention and its institutional expression have subsumed, discharged and eclipsed any provisions of UNCLOS that bear on the conservation and optimum utilization of Southern Bluefin Tuna. Thus Japan argues that the dispute falls solely within the provisions of the 1993 Convention and in no measure also within the reach of UNCLOS.

52. The Tribunal does not accept this central contention of Japan. It recognizes that there is support in international law and in the legal systems of States for the application of a *lex specialis* that governs general provisions of an antecedent treaty or statute. But the Tribunal recognizes as well that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention. The

broad provisions for the promotion of universal respect for and observance of human rights, and the international obligation to co-operate for the achievement of those purposes, found in Articles 1, 55 and 56 of the Charter of the United Nations, have not been discharged for States Parties by their ratification of the Human Rights Covenants and other human rights treaties. Moreover, if the 1993 Convention were to be regarded as having fulfilled and eclipsed the obligations of UNCLOS that bear on the conservation of SBT, would those obligations revive for a Party to the CCSBT that exercises its right under Article 20 to withdraw from the Convention on twelve months notice? Can it really be the case that the obligations of UNCLOS in respect of a migratory species of fish do not run between the Parties to the 1993 Convention but do run to third States that are Parties to UNCLOS but not to the 1993 Convention? Nor is it clear that the particular provisions of the 1993 Convention exhaust the extent of the relevant obligations of UNCLOS. In some respects, UNCLOS may be viewed as extending beyond the reach of the CCSBT. UNCLOS imposes obligations on each State to take action in relation to its own nationals: "All States have the duty to take ... such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas" (Article 117). It debars discrimination "in form or fact against the fishermen of any State" (Article 119). These provisions are not found in the CCSBT; they are operative even where no TAC has been agreed in the CCSBT and where co-operation in the Commission has broken down. Article 5(1) of the CCSBT provides that, "Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding ..." But UNCLOS obligations may be viewed not only as going beyond this general obligation in the foregoing respects but as in force even where "measures" being considered under the 1993 Convention have not become binding thereunder. Moreover, a dispute concerning the interpretation and implementation of the CCSBT will not be completely alien to the interpretation and application of UNCLOS for the very reason that the CCSBT was designed to implement broad principles set out in UNCLOS. For all these reasons, the Tribunal concludes that the dispute between Australia and New Zealand, on the one hand, and Japan on the other, over Japan's role in the management of SBT stocks and particularly its unilateral experimental fishing program, while centered in the 1993 Convention, also arises under the United Nations Convention on the Law of the Sea. In its view, this conclusion is consistent with the terms of UNCLOS Article 311(2) and (5), and with the law of treaties, in particular Article 30(3) of the Vienna Convention on the Law of Treaties.[15]

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[15] Article 30(3) of the Vienna Convention on the Law of Treaties provides:

> When all the parties to an earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty

53. This holding, however, while critical to the case of the Applicants, is not dispositive of this case. It is necessary to examine a number of articles of Part XV of UNCLOS. Article 286 introduces section 2 of Part XV, a section entitled, "Compulsory Procedures Entailing Binding Decisions". Article 286 provides that, "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section". Article 286 must be read in context, and that qualifying context includes Article 281(1) as well as Articles 279 and 280. Under Article 281(1), if the States which are parties to a dispute concerning the interpretation or application of UNCLOS (and the Tribunal has just held that this is such a dispute) have agreed to seek settlement of the dispute "by a peaceful means of their own choice", the procedures provided for in Part XV of UNCLOS apply only (a) where no settlement has been reached by recourse to such means and (b) the agreement between the parties "does not exclude any further procedure".

54. The Tribunal accepts Article 16 of the 1993 Convention as an agreement by the Parties to seek settlement of the instant dispute by peaceful means of their own choice. It so concludes even though it has held that this dispute, while centered in the 1993 Convention, also implicates obligations under UNCLOS. It does so because the Parties to this dispute – the real terms of which have been defined above – are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.

55. Article 16 is not "a" peaceful means; it provides a list of various named procedures of peaceful settlement, adding "or other peaceful means of their own choice." No particular procedure in this list has thus far been chosen by the Parties for settlement of the instant dispute. Nevertheless – bearing in mind the reasoning of the preceding paragraph – the Tribunal is of the view that Article 16 falls within the terms and intent of Article 281(1), as well as Article 280. That being so, the Tribunal is satisfied about fulfillment of condition (a) of Article 281(1). The Parties have had recourse to means set out in Article 16 of the CCSBT. Negotiations have been prolonged, intense and serious. Since in the course of those negotiations, the Applicants invoked UNCLOS and relied upon provisions of it, while Japan denied the relevance of UNCLOS and its provisions, those negotiations may also be regarded as fulfilling another condition of UNCLOS, that of Article 283, which requires that, when a dispute arises between States Parties concerning UNCLOS' interpretation or application, the parties to the dispute shall proceed

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applies only to the extent that its provisions are compatible with those of the later treaty.

expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. Manifestly, no settlement has been reached by recourse to such negotiations, at any rate, as yet. It is true that every means listed in Article 16 has not been tried; indeed, the Applicants have not accepted proposals of Japan for mediation and for arbitration under the CCSBT, essentially, it seems, because Japan was unwilling to suspend pursuance of its unilateral EFP during the pendency of such recourse. It is also true that Article 16(2) provides that failure to reach agreement on reference of a dispute to the International Court of Justice or to arbitration "shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above". But in the view of the Tribunal, this provision does not require the Parties to negotiate indefinitely while denying a Party the option of concluding, for purposes of both Articles 281(1) and 283, that no settlement has been reached. To read Article 16 otherwise would not be reasonable.

56. The Tribunal now turns to the second requirement of Article 281(1): that the agreement between the parties "does not exclude any further procedure". This is a requirement, it should be recalled, for applicability of "the procedures provided for in this Part," that is to say, the "compulsory procedures entailing binding decisions" dealt with in section 2 of UNCLOS Part XV. The terms of Article 16 of the 1993 Convention do not expressly and in so many words exclude the applicability of any procedure, including the procedures of section 2 of Part XV of UNCLOS.

57. Nevertheless, in the view of the Tribunal, the absence of an express exclusion of any procedure in Article 16 is not decisive. Article 16(1) requires the parties to "consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice." Article 16(2), in its first clause, directs the referral of a dispute not resolved by any of the above-listed means of the parties' "own choice" for settlement "to the International Court of Justice or to arbitration" but "with the consent in each case of all parties to the dispute". The ordinary meaning of these terms of Article 16 makes it clear that the dispute is not referable to adjudication by the International Court of Justice (or, for that matter, ITLOS), or to arbitration, "at the request of any party to the dispute" (in the words of UNCLOS Article 286). The consent in each case of all parties to the dispute is required. Moreover, the second clause of Article 16(2) provides that "failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above". The effect of this express obligation to continue to seek resolution of the dispute by the listed means of Article 16(1) is not only to stress the consensual nature of any reference of a dispute to either judicial settlement or arbitration. That express obligation equally imports, in the Tribunal's view, that the intent of Article 16 is to remove proceedings under

that Article from the reach of the compulsory procedures of section 2 of Part XV of UNCLOS, that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute. Article 16(3) reinforces that intent by specifying that, in cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided for in an annex to the 1993 Convention, which is to say that arbitration contemplated by Article 16 is not compulsory arbitration under section 2 of Part XV of UNCLOS but rather autonomous and consensual arbitration provided for in that CCSBT annex.

58. It is plain that the wording of Article 16(1) and (2) has its essential origins in the terms of Article XI of the Antarctic Treaty; the provisions are virtually identical. In view of the States that concluded the Antarctic Treaty – divided as they were between some States that adhered to international adjudication and arbitration and a Great Power that then ideologically opposed it – it is obvious that these provisions are meant to exclude compulsory jurisdiction.

59. For all these reasons, the Tribunal concludes that Article 16 of the 1993 Convention "exclude[s] any further procedure" within the contemplation of Article 281(1) of UNCLOS.

60. There are two other considerations that, to the mind of the Tribunal, sustain this conclusion. The first consideration is the extent to which compulsory procedures entailing binding decisions have in fact been prescribed by Part XV of UNCLOS for all States Parties to UNCLOS. Article 286, in providing that disputes concerning the interpretation or application of UNCLOS "shall ... where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under [Article 287]", states that that apparently broad provision is "subject to section 3" of Part XV. Examination of the provisions comprising section 3 (and constituting interpretive context for sections 1 and 2 of Part XV) reveals that they establish important limitations and exceptions to the applicability of the compulsory procedures of section 2.

61. Article 297 of UNCLOS is of particular importance in this connection for it provides significant limitations on the applicability of compulsory procedures insofar as coastal States are concerned. Paragraph 1 of Article 297 limits the application of such procedures to disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction in certain identified cases only, i.e.: (a) cases involving rights of navigation, overflight, laying of submarine cables and pipelines or other internationally lawful uses of the sea associated therewith; and (b) cases involving the protection and preservation of the marine environment. Paragraph 2 of Article 297, while providing for the application of section 2 compulsory procedures to disputes concerning marine scientific research, exempts coastal States from the obligation of submitting to such procedures in cases involving exercise by a coastal State of its rights or discretionary authority in its exclusive economic zone (EEZ) or its

continental shelf, and cases of termination or suspension by the coastal State of a research project in accordance with article 253. Disputes between the researching State and the coastal State concerning a specific research project are subject to conciliation under annex V of UNCLOS. Under paragraph 3 of Article 297, section 2 procedures are applicable to disputes concerning fisheries but, and this is an important "but", the coastal State is not obliged to submit to such procedures where the dispute relates to its sovereign rights or their exercise with respect to the living resources in its EEZ, including determination of allowable catch, harvesting capacity, allocation of surpluses to other States, and application of its own conservation and management laws and regulations. Complementing the limitative provisions of Article 297 of UNCLOS, Article 298 establishes certain optional exceptions to the applicability of compulsory section 2 procedures and authorizes a State (whether coastal or not), at any time, to declare that it does not accept any one or more of such compulsory procedures in respect of: (a) disputes concerning Articles 15, 74 and 83 relating to sea boundary delimitations or historic bays or titles; (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities by a coastal State. Finally, Article 299 of UNCLOS provides that disputes excluded by Article 297 or exempted by Article 298 from application of compulsory section 2 procedures may be submitted to such procedures "only by agreement of the parties to the dispute".

62. It thus appears to the Tribunal that UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions. This general consideration supports the conclusion, based on the language used in Article 281(1), that States Parties that have agreed to seek settlement of disputes concerning the interpretation or application of UNCLOS by "peaceful means of their own choice" are permitted by Article 281(1) to confine the applicability of compulsory procedures of section 2 of Part XV to cases where all parties to the dispute have agreed upon submission of their dispute to such compulsory procedures. In the Tribunal's view, Article 281(1), when so read, provides a certain balance in the rights and obligations of coastal and non-coastal States in respect of settlement of disputes arising from events occurring within their respective Exclusive Economic Zones and on the high seas, a balance that the Tribunal must assume was deliberately established by the States Parties to UNCLOS.

63. The second consideration of a general character that the Tribunal has taken into account is the fact that a significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures. Many of these agreements effect such exclusion by expressly requiring disputes to be resolved by mutually agreed procedures, whether by negotiation and

consultation or other method acceptable to the parties to the dispute or by arbitration or recourse to the International Court of Justice by common agreement of the parties to the dispute. Other agreements preclude unilateral submission of a dispute to compulsory binding adjudication or arbitration, not only by explicitly requiring disputes to be settled by mutually agreed procedures, but also, as in Article 16 of the 1993 Convention, by requiring the parties to continue to seek to resolve the dispute by any of the various peaceful means of their own choice. The Tribunal is of the view that the existence of such a body of treaty practice – postdating as well as antedating the conclusion of UNCLOS – tends to confirm the conclusion that States Parties to UNCLOS may, by agreement, preclude subjection of their disputes to section 2 procedures in accordance with Article 281(1). To hold that disputes implicating obligations under both UNCLOS and an implementing treaty such as the 1993 Convention – as such disputes typically may – must be brought within the reach of section 2 of Part XV of UNCLOS would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties' choice.

64. The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of UNCLOS. While Australia and New Zealand in the proceedings before ITLOS invoked Article 300, in the proceedings before this Tribunal they made clear that they do not hold Japan to any independent breach of an obligation to act in good faith.

65. It follows from the foregoing analysis that this Tribunal lacks jurisdiction to entertain the merits of the dispute brought by Australia and New Zealand against Japan. Having reached this conclusion, the Tribunal does not find it necessary to pass upon questions of the admissibility of the dispute, although it may be observed that its analysis of provisions of UNCLOS that bring the dispute within the substantive reach of UNCLOS suggests that the dispute is not one that is confined to matters of scientific judgment only. It may be added that this Tribunal does not find the proceedings brought before ITLOS and before this Tribunal to be an abuse of process; on the contrary, as explained below, the proceedings have been constructive.

66. In view of this Tribunal's conclusion that it lacks jurisdiction to deal with the merits of the dispute, and in view of the terms of Article 290(5) of UNCLOS providing that, "Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures ...", the Order of the International Tribunal for the Law of the Sea of August

27, 1999, prescribing provisional measures, shall cease to have effect as of the date of the signing of this Award.

67. However, revocation of the Order prescribing provisional measures does not mean that the Parties may disregard the effects of that Order or their own decisions made in conformity with it. The Order and those decisions – and the recourse to ITLOS that gave rise to them – as well as the consequential proceedings before this Tribunal, have had an impact: not merely in the suspension of Japan's unilateral experimental fishing program during the period that the Order was in force, but on the perspectives and actions of the Parties.

68. As the Parties recognized during the oral hearings before this Tribunal, they have increasingly manifested flexibility of approach to the problems that divide them; as the Agent of Japan put it, "strenuous efforts which both sides have made in the context of the CCSBT have already succeeded in narrowing the gap between the Parties." An agreement on the principle of having an experimental fishing program and on the tonnage of that program appears to be within reach. The possibility of renewed negotiations on other elements of their differences is real. Japan's counsel, in the course of these hearings, emphasized that Japan remained prepared to submit the differences between the Parties to arbitration under Article 16 of the 1993 Convention; Japan's Agent observed that, "That would allow the Parties to set up procedures best suited to the nature and the characteristics of the case." Japan's counsel affirmed Japan's willingness to work with Australia and New Zealand on the formulation of questions to be put to a CCSBT Arbitration Tribunal, and on the procedure that it should adopt in dealing with those questions. He restated Japan's willingness to agree on the simultaneous establishment of a mechanism in which experts and scientists can resume consultation on a joint EFP and related issues. The agent of Japan stated that, not only is its proposal to cap its EFP at 1500 mt. on the negotiating table; negotiations on the appropriate design for the EFP are already underway.

69. Counsel for Australia pointed out that the ITLOS Order already had played a significant role in encouraging the Parties to make progress on the issue of third-party fishing. The Agents of Australia and of New Zealand declared that progress in settling the dispute between the Parties had been made. They expressed the hope that progress would continue and stated that they will make every attempt to ensure that it does; they "remain ready to explore all productive ways of finding solutions".

70. The Tribunal recalls that Article 16(2) prescribes that failure to reach agreement on reference to arbitration shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1; and among those means are negotiation, mediation and arbitration. The Tribunal further observes that, to the extent that the search for resolution of the dispute were to resort to third-party procedures, those listed in Article 16 are labels that conform to

traditional diplomatic precedent. Their content and *modus operandi* can be refined and developed by the Parties to meet their specific needs. There are many ways in which an independent body can be configured to interact with the States party to a dispute. For example, there may be a combination or alternation of direct negotiations, advice from expert panels, benevolent supervision and good offices extended by a third-party body, and recourse to a third party for step-by-step aid in decision-making and for mediation, quite apart from third-party binding settlement rendered in the form of an arbitral award. Whatever the mode or modes of peaceful settlement chosen by the Parties, the Tribunal emphasizes that the prospects for a successful settlement of their dispute will be promoted by the Parties' abstaining from any unilateral act that may aggravate the dispute while its solution has not been achieved.

71. Finally, the Tribunal observes that, when it comes into force, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which was adopted on August 4, 1995 and opened for signature December 4, 1995 (and signed by Australia, Japan and New Zealand), should, for States Parties to it, not only go far towards resolving procedural problems that have come before this Tribunal but, if the Convention is faithfully and effectively implemented, ameliorate the substantive problems that have divided the Parties. The substantive provisions of the Straddling Stocks Agreement are more detailed and far-reaching than the pertinent provisions of UNCLOS or even of the CCSBT. The articles relating to peaceful settlement of disputes specify that the provisions relating to the settlement of disputes set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between States Parties to the Agreement concerning its interpretation or application. They further specify that the provisions relating to settlement of disputes set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between States Parties to the Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks.

72. FOR THESE REASONS

The Arbitral Tribunal

By vote of 4 to 1,

1. Decides that it is without jurisdiction to rule on the merits of the dispute; and,

Unanimously,

2. Decides, in accordance with Article 290(5) of the United Nations Convention on the Law of the Sea, that provisional measures in force by

Order of the International Tribunal for the Law of the Sea prescribed on August 27, 1999 are revoked from the day of the signature of this Award.

73. Justice Sir Kenneth Keith appends a Separate Opinion.

(*Signed*)
Stephen M. Schwebel
President of the Arbitral Tribunal

(*Signed*)
Margrete L. Stevens
Co-Secretary of the Arbitral Tribunal

Washington, D.C.
August 4, 2000

SEPARATE OPINION OF JUSTICE SIR KENNETH KEITH

1. While I agree with much of the Award, I have the misfortune to disagree with my colleagues on one critical issue. I have accordingly prepared this opinion.

Each of the treaties in issue in this case sets up substantive obligations and obligations relating to peaceful settlement. The parallel and overlapping existence of the obligations arising under each treaty is fundamental in this case. I conclude that the one has not excluded or in any relevant way prejudiced the other.

2. This Tribunal has jurisdiction under section 2 of Part XV of UNCLOS "where no settlement has been reached by recourse to section 1" (article 286). Section 1 begins by imposing an obligation on States Parties:

> Article 279
> *Obligation to settle disputes by peaceful means*
>
> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

3. Section 1 then saves the rights of States Parties to choose their own means of peaceful settlement and to settle the dispute by that means:

Article 280
Settlement of disputes by any peaceful means chosen by the parties

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

That provision, like article 281, depends on the Parties first agreeing to and then using a "peaceful means of their own choice". Article 281 however proceeds on the basis that the agreed procedure has failed:

Article 281
Procedure where no settlement has been reached by the parties

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

4. The two main issues which this provision raises in the circumstances of this case are:

(a) Have the Parties "agreed to seek settlement of the dispute by a peaceful means of their own choice" – that is by way of article 16 of the CCSBT or some other agreed means?

(b) Does article 16 "exclude any further procedure"? (Japan invoked no other basis for its "exclusion" contention.)

5. While my answer to question (a) is No so far as article 16 is concerned, I agree that there is a good argument that in their diplomatic exchanges the Parties did agree to attempt to settle the dispute by negotiation.

6. I do not however take that latter aspect of question (a) any further. Rather, I give my primary attention to question (b) on the assumption (rejected in paragraph 8 below) that article 16 is an "agreement" in terms of article 281(1). I answer question (b) No. The consequence is that, to my mind, that bar to the tribunal's jurisdiction is not established.

7. Article 16 of the CCSBT is as follows:

Article 16

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

8. Paragraph (1) requires the parties to consult about methods of dispute resolution – those listed or others of their own choice – but it does not itself oblige them to apply any particular method. In that it is like articles 283 and 284 of UNCLOS, which require an exchange of views about methods and empower the making of an invitation to conciliation. Like article 280 (a savings provision), article 283, article 284 and in particular article 16(1), do not of themselves amount to an "agree[ment] to seek settlement of the dispute by a peaceful means of their own choice". Paragraph (2) of article 16 is also not an agreement on a method. Reference to the International Court or to arbitration must be separately agreed to in respect of the particular dispute, and the final part of the paragraph too does not itself amount to an agreement on one of the methods referred to in paragraph 1. Further, as discussed in paragraphs 15 and 16, article 16 applies only to disputes concerning the CCSBT and does not necessarily extend to disputes concerning UNCLOS.

9. The Parties in their written and oral submissions have given greater attention to the second issue – whether article 16 "excludes" any further procedure, including the compulsory binding procedures under section 2 of Part XV. As already indicated, I give my principal attention to that issue.

10. My reasons for concluding that article 16 does not exclude any further procedure and in particular the compulsory binding procedures under section 2 of Part XV are to be found in the ordinary meaning of the terms of the two treaties read in their context and in the light of their objects and purposes.

11. Part of the context is provided by the distinct and overlapping substantive obligations of UNCLOS and the CCSBT, a matter recognised by the Award. That parallelism and lack of full coincidence also exists for the two sets of procedures for the peaceful means for the settlement of disputes concerning each treaty which they each set up. The Award indeed recognises a longstanding and widespread parallelism of dispute settlement obligations as well as of substantive obligations. Three relevant categories of substantive obligations can be usefully distinguished:

> (1) those which exist under both treaties;
>
> (2) those which exist only under the CCSBT (such as the obligation to meet Secretariat budget obligations); and
>
> (3) those which do or may exist only under UNCLOS; the Award mentions, for instance, the obligations of (a) each State, under article 117, to take such measures for their nationals as may be necessary for the conservation of the living resources of the high seas; and of (b) the three CCSBT Parties owed to third States.

Australia and New Zealand invoke UNCLOS procedures in respect of 1 and 3. Their contention is that the disputes between them and Japan concern "the interpretation or application of [the specified provisions of] this Convention [UNCLOS]".

12. That the disputes may or may not also concern the interpretation or implementation of the CCSBT is beside the point. Subject to the critical

question stated in paragraph 4(b) – does article 16 "exclude" further procedures - the separate set of UNCLOS peaceful settlement obligations exists along with and distinct from the provisions of article 16.

13. But does article 16 "exclude" the UNCLOS set of obligations? It does not say that it does. It could have, given the timing of the drafting of the two treaties as the preamble reflects. Next, it does not say that disputes concerning the CCSBT must be resolved *only* by procedures under it and *must not* be referred to any tribunal or other third party for settlement. Again it could have said that, as treaty parties have. But does it impliedly exclude the UNCLOS procedures?

14. To do that, article 16 would have to be capable of dealing with *all* the disputes relating to Southern Bluefin tuna arising between CCSBT parties and concerning the interpretation and application of the relevant provisions of UNCLOS. And, as well, it would have to *exclude* (impliedly) the UNCLOS procedures. I consider those two points in turn.

15. If it is the case, as the Award indicates, that Australia and New Zealand have appropriately invoked obligations which are not covered by the CCSBT it would be surprising were procedures for settlement of disputes *concerning that Convention* to be able to apply to disputes arising beyond it. To recall its terms, article 16 is about a "dispute ... between two or more parties concerning the interpretation or implementation of this Convention". The parties are obliged under paragraph 1 of article 16 to "consult ... with a view to having *the dispute* resolved" in one of the listed ways or through other peaceful means of their own choice. Under paragraph 2 of the article "any dispute of *this character*" – to repeat, concerning the interpretation or implementation of the CCSBT – not so resolved may then be referred to the International Court of Justice or to arbitration in accordance with the Annex if all parties agree. Finally, if the parties do not agree, they are not absolved from "the responsibility of continuing to seek to resolve *it*" – again the dispute as characterised – "by any of the various peaceful means referred to in paragraph 1 ...". On their face, those provisions, which, to repeat, do not in any event themselves amount to an agreed choice one or more of peaceful means of settlement, do not exclude means to which the parties have separately agreed in respect of disputes concerning the interpretation or application of *other* treaties. What they do say is that the binding or indeed any non-binding procedures listed apply only if the parties agree. If any procedure is agreed to, that procedure applies to disputes concerning the interpretation or implementation (perhaps a wider word than "application") *of the CCSBT*.

16. It is important to consider the possible scope of such an agreed procedure under the CCSBT. Take as an example a failure by the Commission to meet its obligation to fix the total allowable catch. In that situation, the issue of "implementation" which Parties might agree to put to the arbitral tribunal, given the objective (stated in article 3) of conservation and optimum

utilisation through appropriate management, would be that the Tribunal decide, in place of the Commission, the TAC and its allocation among the parties (article 8(3)). They might also agree that the decisions would be binding on them, as are the decisions of the Commission (see articles 8(7) and 5). In the course of the current dispute the Japanese authorities have indeed appeared to be willing to contemplate such a binding reference to scientific experts, this too in the context of a failure by the Commission to fix the TAC. Such a reference appears to fall clearly within the scope of article 16 and the arbitration annex. It can be compared with the power of UNCLOS Parties to agree that a court or tribunal *which already has jurisdiction under Part XV(2)* may decide *ex aequo et bono* (article 293(2)). As with that very broad power, so too with a power to make decisions about the TAC and its allocation, a matter at the heart of "the implementation" of the CCSBT, it is hardly remarkable that the Parties did not give a general open ended consent to binding arbitration in advance. To anticipate a matter mentioned later, judicial or arbitral powers in respect of the interpretation or application of the relevant provisions of UNCLOS invoked in this case would be more confined. By retaining that freedom in respect of such matters as fixing the TAC under the CCSBT the parties are not, in my view, expressing any purpose at all in relation to their quite distinct obligations under UNCLOS. The same point could probably be made about many, if not all, of the many dispute settlement provisions of maritime treaties to which the tribunal was referred. The provisions do not appear to me to help in the interpretation of article 281(1). In terms of their possible interpretative role, those adopted since 1982 do not for instance meet the strict standard reflected in article 31(3)(b) of the Vienna Convention on the Law of Treaties. The essential point is that the two treaty regimes (including their settlement procedures) remain distinct. The UNCLOS provisions are not to be seen in any sense as being part of, or being read into the other treaty system. The UNCLOS dispute means have no application to it – unless of course the Parties through the other treaty have so agreed : article 288(2).

17. I return to the wording of article 281(1) of UNCLOS. The requirement is that the Parties have agreed to *exclude any* further procedure for the settlement of the dispute concerning UNCLOS. The French and Spanish texts have the same wording and structure. They require opting out. They do not require that the Parties positively agree to the binding procedure by opting in, by contrast to other provisions of Part XV: articles 282, 284(2) and (4) and 288(2).

18. The word *any* in the final phrase of article 281(1) is also significant since it requires the exclusion to be of any other procedure available between the Parties such as those under the compulsory jurisdiction of the International Court or other treaties for the peaceful settlement of disputes. As the Virginia Commentary (para 281.5) puts it, the phrase "envisages the possibility that the Parties, in their agreement to resort to a particular procedure, may also specify that this procedure shall be an exclusive one and that no other procedure

(including those under Part XV) may be resorted to". Such strong and particular wording would appear to be required, given the presumption of the parallel and overlapping existence of procedures for the peaceful settlement of disputes appearing in international judicial practice and the general law of treaties, as stated for instance in article 30(3) of the Vienna Convention on the Law of Treaties.

19. The need for clear wording to exclude the obligations to submit to the UNCLOS binding procedure, beyond the wording found in article 16, is further supported by other particular provisions of Part XV and by the pivotal role compulsory and binding peaceful settlement procedures played and play in the preparation and scheme of UNCLOS.

20. Article 282, the very next provision to that at centre stage, does indeed give preference to another agreed peaceful settlement procedure over Part XV, but it gives that preference only if that procedure "entails a binding decision"; and of course the terms of article 16 by themselves do not. As well, that preference can be reversed if the parties to the dispute so agree. As already mentioned, that requirement to agree to opt into the UNCLOS process is to be contrasted with the opting out for which article 281(1) calls.

21. The structure of Part XV and three elements of section 3 of that Part also contribute to an understanding of article 281(1) and the compulsory binding procedures of section 2 of Part XV. They too are part of the relevant context. Section 1, "General Provisions", begins with the obligation of the State Parties to settle UNCLOS disputes by peaceful means (article 279). Within that overall obligation, which is supported by obligations to exchange views about means of settlement (article 283) and the availability of a conciliation procedure (article 284 and Annex V), the emphasis of the section is on the Parties' freedom of choice of means (articles 280-282). If the Parties' chosen means does not lead to a settlement then one Party can submit the dispute to "Compulsory Procedures Entailing Binding Decisions", to quote the heading to section 2 (article 286). That power is however in turn subject to section 3 of the Part, "Limitations and Exceptions to Applicability of Section 2".

22. That structure itself supports the need for States to include clear wording in their agreements if they are to remove themselves from their otherwise applicable compulsory obligations arising under section 2 to submit to procedures entailing binding decisions. So, too, does the detail of section 3 which (1) enables States to opt out of certain otherwise compulsory, binding processes, (2) provides for non-binding processes in certain circumstances, and (3) limits the extent of the third party review of certain State actions. States may opt out of the binding section 2 procedures – for example in respect of military activities (article 298(1)(b)) and certain maritime delimitation disputes (article 298(1)(a)), with the qualification in the latter case (but not the former) that compulsory (non-binding) conciliation is then available. Conciliation, rather than binding adjudication or arbitration, is also

available in respect of the exercise by a coastal State of rights and discretions in relation to marine scientific research in its exclusive economic zone and on its continental shelf. Further, in considering those matters, the conciliation commission cannot call in question the exercise of two specific discretions exercisable by the coastal State (article 297(2)). Coming closer to the subject matter of the present dispute, a coastal State is not obliged to accept the submission to settlement under section 2 of fisheries disputes relating to its sovereign rights with respect to living resources within its exclusive economic zone, but again compulsory conciliation is available, although only on the limited basis that coastal state has "manifestly" failed to comply with its conservation and management obligations or has "arbitrarily" refused to determine the TAC or its allocation. But, significantly, the general run of fisheries disputes, such as the present, is not subject to those limitations and exceptions. Section 2, it is expressly said, *continues to apply* to them in full (article 297(3)).

23. Finally, in terms of the object and purpose of UNCLOS as a whole, I refer to the widely stated and shared understanding, expressed throughout all the stages of the Conference which prepared the Convention, about the critical central place of the provisions for the peaceful settlement of disputes. The States at that Conference moved decisively away from the freedom which they generally have in their international relations not to be subject in advance to dispute settlement processes, especially processes leading to binding outcomes. The processes in significant part were not to be optional and, in general, third party binding decisions were to be available at the request of any party to the dispute.

24. At its first session the Conference had before it a paper containing drafts, among other things, on (i) the obligation to settle disputes under the Convention by peaceful means; (ii) the settlement of disputes by means chosen by the parties; (iii) the obligation to resort to a means resulting in binding decisions (the alternatives being arbitration, a Law of the Sea Tribunal, or the International Court of Justice); (iv) the possibility of special procedures in functional areas such as fishing, seabed, marine pollution or scientific research; and (v) possible exceptions or reservations. A co-chair of the working group which prepared the paper made the following points in introducing it to the Conference:

> (i) that the settlement of disputes by effective legal means would be necessary in order to avoid political and economic pressures; (ii) that uniformity in the interpretation of the Convention should be sought; (iii) while the advantages of obligatory settlement of disputes are thus recognized, a few carefully defined exceptions should be allowed; (iv) that the system for the settlement of disputes must form an integral part and an essential element of the Convention, an optional protocol being totally inadequate; and (v) with well-defined legal recourse, small countries have powerful means available to prevent interference by large countries, and the latter in turn could save themselves trouble, both groups gaining by the principle of strict legality which implies the effective application of the agreed rules. (Virginia Commentary XV.4)

25. The President of the Conference, Ambassador H S Amerasinghe, in 1976 prepared an informal single negotiating text on the Settlement of Disputes. He explained his initiative in this way:

> Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise [embodied in the whole UNCLOS text] will disintegrate rapidly and permanently. I should hope that it is the will of all concerned that the prospective convention should be fruitful and permanent. Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of a treaty will be interpreted both consistently and equitably. (A/CONF.62/WP.9/Add.1, 31 March 1976, para 6)

26. Throughout the negotiating process there were to be seen the essential elements of what became Part XV: the basic obligation of peaceful settlement, the freedom of parties to choose their own means (both in section 1), the backstop of compulsory, binding procedures (section 2), and precise limits on, and exceptions to, those procedures (section 3).

27. Ambassador T T B Koh, who succeeded to the Presidency of the Conference, in speaking at the final session in 1982 answered in the affirmative his question whether the Conference had produced a comprehensive constitution for the oceans which would stand the test of time. Among his reasons was the following:

> The world community's interest in the peaceful settlement of disputes and the prevention of use of force in the settlement of disputes between States have been advanced by the mandatory system of dispute settlement in the Convention.

He also stressed that the Convention forms an integral whole. States cannot pick what they like and disregard what they do not like. (Published in United Nations, *The Law of the Sea. Official Text of the United Nations Convention on the Law of the Sea*; from statements made on 6 and 11 December 1982.)

28. The Japanese delegation had no doubt spoken for many when, early in the process, it similarly

> Emphasize[d] the necessity of making the general obligation to settle disputes an integral part of the future convention. In his delegation's view, the solution adopted at the First United Nations Conference on the Law of the Sea in 1958, in the form of an Optional Protocol of Signature, was insufficient and unacceptable. (6 April 1976, 60th meeting, paragraph 56).

29. The authoritative Virginia Commentary captures the essence, by introducing its discussion of Part XV with this sentence:

> One of the significant achievements of the Third United Nations Law of the Sea Conference was the development of a comprehensive system for the settlement of the disputes that may arise with respect of the interpretation or application of the 1982 UN Convention on the Law of the Sea. (paragraph XV.1)

The Commentary goes on to contrast earlier "less successful" attempts, in the 1930 League of Nations codification process and at the 1958 Conference also criticised by the Japanese delegation in 1976.

30. The objects and purposes of UNCLOS in general and its comprehensive, compulsory and where necessary, binding dispute settlement provisions in particular, along with the plain wording of its article 281(1) and of article 16 of the CCSBT lead me to the conclusion that the latter does not "exclude" the jurisdiction of this tribunal in respect of disputes arising under UNCLOS.

31. The possibly quite different subject matter of an arbitration under article 16 of the CCSBT relating to the "implementation" of that Convention (see paragraph 15 above) both supports that conclusion and suggests the possible limits on an assessment by a tribunal of a State's actions by reference to its obligations under articles 64 and 117-119 of UNCLOS and on any relief which might be available were a breach to be established. But such limits do not at this stage, to my mind, affect this tribunal's jurisdiction.

32. I have accordingly voted in favour of holding that this Tribunal has jurisdiction and against the contrary decision of the Tribunal. Given the majority position, I agree of course with the revocation of the order for provisional measures.

Annex 626

Air Canada v Bolivarian Republic of Venezuela, Award, 13 September 2021, ICSID Case No. ARB(AF)/17/1

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Air Canada

v.

Bolivarian Republic of Venezuela

(ICSID Case No. ARB(AF)/17/1)

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Dr. Charles Poncet, Arbitrator
Ms. Deva Villanúa, Arbitrator

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13 September 2021

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TABLE OF ABBREVIATIONS

AAD request	Application for an Authorization for Foreign Currency Acquisition (*Solicitud de Autorización de Adquisición de Divisas*)
15 AAD requests or 15 AADs or Controverted AADs or AADs in dispute	15 AAD requests filed by Air Canada between September 2013 to January 2014 for ticket sales corresponding to October 2012 to December 2013 and for a total amount of approximately U.S.$ 50 million
Additional Facility Rules or AF Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, 2006
AF Arbitration Rules	Arbitration (Additional Facility) Rules
ALAV	Venezuelan Airlines Association (*Asociación de Líneas Aéreas de Venezuela*)
ALD	Authorization to Liquidate Foreign Currency (*Autorización de Liquidación de Divisas*)
ATA	Air Transport Agreement between the Government of Canada and the Government of the Republic of Venezuela, signed in Caracas on 26 June 1990
BASSA	Bassa Business, Aviation & Services, S.A.
BCV	Central Bank of Venezuela (*Banco Central de Venezuela*)
BIT or Canada-Venezuela BIT	Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, signed in Caracas on 1 July 1996
CADIVI	Commission for the Administration of Foreign Currency (*Comisión de Administración de Divisas*)

CENCOEX	National Centre of Foreign Trade (*Centro Nacional de Comercio Exterior*)
Chicago Convention	Chicago Convention on International Civil Aviation, signed on 7 December 1944
Civil Code	Venezuelan Civil Code, published in Extraordinary Official Gazette No. 2.990, dated 26 July 1982
Claimant or Air Canada	Air Canada Inc.
Designated Airlines	Airlines designated under the ATA
DR-CAFTA	Dominican Republic–Central America Free Trade Agreement
Exchange Agreement No. 1	Agreement entered into between the Ministry of Finance and the Central Bank on 5 February 2003
Exchange Agreement No. 2	Agreement entered into between the Ministry of Finance and the Central Bank on 9 February 2003
Forex	Foreign exchange control
GSA	Passenger General Sales Agreement between Air Canada and Business Aviation & Services, S.A. BASSA
IATA	International Air Transport Association
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965
ILC	International Law Commission

ILC Articles	International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts
INAC	National Institute for Civil Aviation / National Institute for Civil Aeronautics (*Instituto Nacional de Aviación Civil / Instituto Nacional de Aeronáutica Civil*)
IVSS	Venezuelan Institute for Social Security (*Instituto Venezolano de los Seguros Sociales*)
IVSS Certificates	Certificates of Good Standing issued by the IVSS
LOPA	Organic Law of Administrative Procedures (*Ley Orgánica de Procedimientos Administrativos*)
MFN	Most Favored Nation
MPPDP	Ministry of the Popular Power for the Office of the Presidency and Government Administration Oversight (*Ministerio del Poder Popular del Despacho de la Presidencia y Seguimiento de la Gestión de Gobierno*)
NAFTA	North America Free Trade Agreement
NAFTA Interpretation	NAFTA Notes of Interpretation of Certain Chapter 11 Provisions
Parties	Air Canada and the Republic
PDVSA	Petróleos de Venezuela, S.A.
Providencia No. 23	*Providencia* No. 23 issued by CADIVI, published in Official Gazette No. 37.667, dated 8 April 2003
Providencia No. 124	*Providencia* No. 124 issued by CADIVI, published in Extraordinary Official Gazette No. 6.122, dated 23 January 2014
RAV 108	Venezuelan Aviation Regulation No. 108 (*Regulación Aeronáutica Venezolana*)

RUSAD	Users Registry of the Currency Administration System (*Registro de Usuarios del Sistema de Administración de Divisas*)
SICAD	Alternative System for the Acquisition of Currency (*Sistema Complementario de Administración de Divisas*)
SOTI	Sold Outside Ticked In
SOTI tickets	Tickets ticketed in the Republic but sold outside of the Republic
Suspension Notice	Air Canada's notice of suspension of its flights to Caracas dated 17 March 2014
The Republic or Venezuela	The Bolivarian Republic of Venezuela
VCLT	Vienna Convention on the Law of the Treaties
VEF	Bolivar Fuerte
Toronto-Caracas-Toronto route	Non-stop route between Lester B. Pearson International Airport in Toronto, Canada, and *Aeropuerto Internacional de Maiquetía Simón Bolívar* in Caracas, Venezuela, began in 2004

TABLE OF SUBMISSIONS AND TRIBUNAL DECISIONS

Request for Arbitration	Request for Access to the Additional Facility and Request for Arbitration, dated 16 December 2016
PO No. 1	Procedural Order No. 1, dated 12 January 2018
Memorial	Memorial on the Merits submitted by Air Canada, dated 22 March 2018
Application for Bifurcation	Respondent's Application for Bifurcation, dated 15 June 2018
Response to Application for Bifurcation	Response to Respondent's Application for Bifurcation, dated 28 June 2018
PO No. 2	Procedural Order No. 2, dated 10 July 2018
Counter-Memorial	Counter-Memorial on Jurisdiction and Merits, dated 3 August 2018
PO No. 3	Procedural Order No. 3, dated 14 September 2018
PO No. 4	Procedural Order No. 4, dated 29 October 2018
PO No. 5	Procedural Order No. 5, dated 20 November 2018
PO No. 6	Procedural Order No. 6, dated 29 November 2018
Reply	Reply Memorial on the Merits and Counter-Memorial on Jurisdiction submitted by Air Canada, dated 14 December 2018
PO No. 7	Procedural Order No. 7, dated 28 May 2019
Rejoinder	Rejoinder on Jurisdiction and Merits submitted by the Bolivarian Republic of Venezuela, dated 25 October 2019
PO No. 8	Procedural Order No. 8, dated 24 February 2020

PO No. 9	Procedural Order No. 9, dated 3 April 2020
PO No. 10	Procedural Order No. 10, dated 7 July 2020
R-PHB	Respondent's Post-Hearing Brief, dated 5 June 2020
C-PHB	Claimant's Post-Hearing Brief, dated 5 June 2020
Reply R-PHB	Respondent's Reply Post-Hearing Brief, dated 14 September 2020
Reply C-PHB	Claimant's Reply Post-Hearing Brief, dated 14 September 2020
C-Costs	Respondent's Submission on Costs, dated 8 January 2021
R-Costs	Claimant's Submission on Costs, dated 8 January 2021

A. SUMMARY OF THE FACTS AND PROCEDURE

I. The Parties and other concerned entities

1. Claimant is ***Air Canada Inc.***, a Canadian airline headquartered in Montreal, Canada ("Claimant" or "Air Canada").

2. Air Canada has been a wholly private company since 1989 and is publicly traded on the Toronto Stock Exchange. It is one of the 20 largest airlines in the world, operating an average of 1,600 scheduled flights per day and flying directly to 222 airports around the world.[1]

3. Respondent is the ***Bolivarian Republic of Venezuela*** ("Republic" or "Venezuela").

4. ***Other entities concerned*** are the following:

   (a) The *Commission for the Administration of Foreign Currency* or *Comisión de Administración de Divisas* ("CADIVI");

   (b) The *National Institute for Civil Aviation*, later renamed *National Institute for Civil Aeronautics* ("INAC");

   (c) The *Venezuelan Airlines Association* or *Asociación de Líneas Aéreas de Venezuela* ("ALAV");

   (d) The *International Air Transport Association* ("IATA"); and

   (e) *Banco Mercantil*, an exchange agency ("Banco Mercantil").

II. Overview of the factual background

5. The following Section is a general summary of the facts of the dispute and does not purport to be exhaustive. To the extent that a more detailed statement of the essential facts is necessary, it is given in connection with the various claims and defenses.

[1] Memorial, para. 17.

1. Air Canada's presence in Venezuela until 1 July 2004

6. Air Canada began service in Venezuela in the late 1970s.[2] It established a local subsidiary in the late 1980s with U.S.$ 50,000 in capital.[3]

7. From 1989 to 2004, Air Canada's operations in Venezuela consisted mainly of promoting Canada as a travel destination and marketing Air Canada flights between North American destinations.[4]

8. On 26 June 1990, the Government of Canada and the Government of Venezuela entered into the ***Air Transport Agreement*** ("ATA"). The ATA granted Air Canada the right to operate international air services in Venezuela, including overflying Venezuelan territory, landing in Venezuela for non-traffic purposes, and landing in Venezuela for picking up and dropping off international passengers, cargo and mail when serving certain routes.[5]

9. In 2004, to further expand its presence in Latin America by operating flights to and from the region, Air Canada decided to launch a non-stop service between Lester B. Pearson International Airport in Toronto, Canada, and *Aeropuerto Internacional de Maiquetía Simón Bolívar* in Caracas, Venezuela, i.e., the *Toronto-Caracas-Toronto route*.[6]

10. On 4 March 2004, Air Canada applied to the INAC, for authorization under the ATA to operate scheduled air services between Toronto and Caracas as of 1 June 2004.[7]

11. On 22 May 2004, Air Canada signed a renewable *General Sales Agreement* with a *Business, Aviation & Services S.A.* ("BASSA") – a Venezuelan company selling air transportation – by which it organized its operations within the Republic.[8]

12. On 25 June 2004, INAC issued ***Providencia No. 60***, an administrative order that permitted Air Canada to operate as a commercial air carrier in Venezuela and to provide regular transportation services between Caracas and Toronto.[9]

13. On the same day, Air Canada entered into a service contract with *GlobeGround Venezuela* – a Venezuelan company – for the ground handling of its aircraft at Maiquetía airport in Caracas.[10]

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[2] Exh. C-7, Certificate issued by the Registry of Commerce domiciling Air Canada's Venezuela's branch, dated 25 June 2005 ("Certificate"); Memorial, para. 20.
[3] Exh. C-7 (Certificate); RfA, para. 10; Memorial, para. 20.
[4] RfA, para. 10; Memorial, para. 24.
[5] Exh. C-5, Air Transportation Agreement between the Government of Canada and the Government of Venezuela, dated 14 September 1990 ("ATA"), Art. XXI(2); RfA, para. 8; Memorial, paras 6 and 22.
[6] RfA, para. 1; Memorial, para. 24.
[7] Exh. R-5, Letter from Air Canada to INAC, dated 4 March 2004; Counter-Memorial, para. 29.
[8] Exh. R-2, Passenger General Sales Agency Agreement between Air Canada and BASSA for the period 2012-2014, dated 22 May 2012 ("Passenger General Sales Agency Agreement").
[9] Exh. C-8, INAC *Providencia Administrativa No. 60*, dated 2 May 2003; see also RfA, para. 12; Counter-Memorial, para. 33.
[10] Exh. R-6, Standard Ground Handling Agreement between Air Canada and GlobeGround Venezuela valid as from 15 June 2004, dated 30 April 2004; Counter-Memorial, para. 30; see also Memorial, para. 28.

14. On 30 June 2004, INAC approved the operation of Air Canada.[11]

15. On 1 July 2004, Air Canada began operating the Toronto-Caracas-Toronto route under *Providencia No. 60*, with three weekly flights, usually with a 120-seat Airbus 319.[12]

2. The Venezuelan currency exchange regime

16. On 5 February 2003, President Hugo Chávez created the ***Commission for the Administration of Foreign Currency*** or ***Comisión de Administración de Divisas*** ("CADIVI"), a government entity attached to the former Ministry of Finance (now the Ministry of Popular Power for Planning and Finance), to administer the legal exchange of currency in Venezuela.[13]

17. On the same date, the Ministry of Finance and the Central Bank entered into ***Exchange Agreement No. 1***, pursuant to which: (i) the purchase and sale of foreign currency in Venezuela was centralized in the Central Bank; and (ii) the Central Bank and the Ministry of Finance would determine the applicable official exchange rate in connection with CADIVI requests.[14]

18. On 9 February 2003, the Ministry of Finance and the Central Bank entered into ***Exchange Agreement No. 2***, which established the official exchange rates for the purchase and sale of U.S. dollars.[15]

19. On 8 April 2003, CADIVI issued ***Providencia No. 23***, an administrative order that regulated the ***Authorizations for Currency Acquisition*** or ***Autorización de Adquisición de Divisas*** ("***AADs***") by foreign carriers in Venezuela which were processed at an exchange rate of 6.3 bolivars to 1 U.S. dollar.[16]

3. The filing of the *Autorizacíon de Adquisición de Divisas*

20. As of July 2004, when the Toronto-Caracas-Toronto route began operating (see *supra* para. 15), Air Canada regularly submitted AAD applications to CADIVI, through Banco Mercantil, in order to exchange the bolivar proceeds generated from ticket sales in Venezuela to U.S. dollars and repatriate them.[17] Through November 2012, Air Canada

[11] Exh. C-106, Fax from INAC authorizing Air Canada Operations.
[12] RfA, para. 13; Memorial, para. 27; Counter-Memorial, para. 34.
[13] Exh. C-10, Decree No. 2,302, 5 February 2003 ("Decree No. 2,302"); RfA, para. 21; Memorial, para. 3.
[14] C-31 / RL- 52, Exchange Agreement No. 1, originally published in Official Gazette No. 37.625, dated 5 February 2003, reprinted in Official Gazette No. 37.653, dated 19 March 2003 ("Exchange Agreement No. 1"); Memorial, para. 35.
[15] Exh. C-94, Exchange Agreement No. 2, published in Official Gazette No. 37.875, dated 9 February 2004; Memorial, para. 325.
[16] Exh. C-9 / Exh. R-11, CADIVI *Providencia Administrativa No. 23*, published in Official Gazette No. 37.667, dated 8 April 2003 ("Providencia No. 23"); see also RfA, para. 22 and Counter-Memorial, para. 43.
[17] RfA, para. 24; Memorial, para. 40.

submitted 91 AAD requests totaling approximately U.S.$ 91 million, which were approved by CADIVI ("91 AAD requests").[18]

21. From September 2013 through January 2014, Air Canada submitted 15 additional AAD requests corresponding to the ticket sales of October 2012 to December 2013, totaling approximately U.S.$ 50 million ("15 AADs" or "15 AAD requests" or "Controverted AADs" or "Disputed AADs").[19] Specifically:

- On 20 September 2013, Air Canada submitted 10 AAD requests for ticket sales covering the period from October 2012 through July 2013.[20]
- On 11 October 2013, Air Canada submitted one AAD request for ticket sales for August 2013.[21]
- On 29 October 2013, Air Canada submitted one AAD request for ticket sales for September 2013.[22]
- On 14 January 2014, Air Canada submitted one AAD request for ticket sales for October 2013.[23]
- On 15 January 2014, Air Canada submitted one AAD request for ticket sales for November 2013.[24]
- On 22 January 2014, Air Canada submitted one AAD request for ticket sales for December 2013.[25]
- It is undisputed that all of the above AAD requests were not processed.

22. Between November 2013 and March 2014, the issue of the remittance of funds related to AAD requests by foreign airlines, including Air Canada, was the subject of discussions between INAC, IATA, ALAV, and the Venezuelan government.[26]

[18] Memorial, para. 47.
[19] Memorial, para. 5; Counter-Memorial, para. 63.
[20] Exh. C-75, Currency Acquisition Request No. 17319004, dated October 2012; Exh. C-76, Currency Acquisition Request No. 17319142, dated November 2012; Exh. C-77, Currency Acquisition Request No. 17319325, dated December 2012; Exh. C-78, Currency Acquisition Request No. 17319490, dated January 2013; Exh. C-79, Currency Acquisition Request No. 17319683, dated February 2013; Exh. C-80, Currency Acquisition Request No. 17319919, dated March 2013; Exh. C-82, Currency Acquisition Request No. 17320990, dated April 2013; Exh. C-82, Currency Acquisition Request No. 17321189, dated May 2013; Exh. C-83, Currency Acquisition Request No. 17321350, dated June 2013; Exh. C-84, Currency Acquisition Request No. 17321425, dated July 2013; Memorial, para. 58.
[21] Exh. C-85, Currency Acquisition Request No. 17415372, dated August 2013; RfA, para. 26; Memorial, para. 58.
[22] Exh. C-86, Currency Acquisition Request No. 17494025, dated September 2013; Memorial, para. 58.
[23] Exh. C-87, Currency Acquisition Request No. 17779096, dated October 2013; Memorial, para. 58.
[24] Exh. C-88, Currency Acquisition Request No. 17781897, dated November 2013; Memorial, para. 58.
[25] Exh. C-89, Currency Acquisition Request No. 17807874, dated December 2013; Memorial, para. 58.
[26] See, for example, RfA, para. 27, Memorial, para. 65 and Exh. C-39, ALVA Press Release, dated 7 March 2014.

23. On 22 January 2014, CADIVI issued ***Providencia No. 124***, an administrative order that became effective on 24 January 2014. Pursuant to Providencia No. 124, Venezuela would thereafter process foreign airlines' AADs at a different exchange rate, i.e., approximately 11 bolivars for 1 U.S. dollar.[27]

4. The suspension of Air Canada's flights to Caracas

24. On 23 January 2014, Air Canada informed the public that its "*flights continue operating as normal*" but that "*the issuance of tickets* [has been] *temporarily suspended*".[28]

25. On 17 March 2014, Air Canada informed INAC of its ***decision to suspend its flights to Caracas*** (the "Suspension Notice") from that date until further notice, due to the unrest and challenges of conducting business in Venezuela, including the possibility of repatriating its funds from Venezuela. It indicated that its office in Caracas would remain open to assist passengers with tickets out of Venezuela. Air Canada further stated that it would monitor the situation and reassess the reprogramming of its flights with a view to resuming operations on this route once the situation in Venezuela had stabilized.[29]

26. On 19 March 2014, INAC acknowledged receipt of the Suspension Notice. It stated that relations between Air Canada and Venezuela were subject to the ATA which provided for a specific termination regime. INAC also stated that Air Canada's motivations for terminating the flights could be resolved through the dispute settlement mechanism of Article XVIII of the ATA. Finally, INAC reminded Air Canada that being air transport a public service, it was up to the State to decide when a private entity ceases to provide such a service. In particular, it stressed that foreign companies that comply with the Venezuelan legal framework will be protected and their investments encouraged, but those that choose to break the law will not benefit from exemptions or privileged treatment.[30]

27. On 26 March 2014, Air Canada clarified to INAC that it had provided the Suspension Notice, but that as a private company, it could not terminate the ATA because it was an intergovernmental treaty.[31]

28. In late March 2014, Venezuela announced that it would allow airlines to repatriate their revenues.[32]

[27] Memorial, para. 59.
[28] Exh. R-45, Printout if Air Canada Venezuela's Twitter webpage, dated 23 January 2014.
[29] Exh. C-49, Letter from Air Canada to the President of INAC, dated 17 March 2014; RfA, para. 29; Memorial, para. 67.
[30] Exh. C-45, Letter from INAC to Air Canada, dated 19 March 2014; Memorial, para. 75.
[31] Exh. C-46, Letter from Air Canada to INAC, dated 26 March 2014; Memorial, para. 75.
[32] Memorial, para. 78.

29. On 28 April 2014, Air Canada wrote to the President of INAC requesting a meeting to clarify any misunderstandings regarding Air Canada's Suspension Notice (see *supra* para. 25), the future of its operations in Venezuela, and the repatriation of its funds.[33]

30. On 28 May 2014, Air Canada wrote to the Venezuelan Vice President to clarify any misunderstandings further to the Suspension Notice (see *supra* para. 25). Air Canada explained that it had never been involved in domestic or foreign affairs and therefore had not publicly commented on the restriction to transfer its funds necessary to maintain operations. Air Canada emphasized that despite the suspension, it remained committed to its operations and investments in Venezuela and intended to resume its services once the situation was regularized. Finally, Air Canada confirmed its willingness to meet with government officials to resolve the issue and negotiate a plan for moving forward.[34]

31. On 13 June 2014, IATA's Director General and CEO sent a letter to the President of Venezuela "*on behalf of the airline members of the* [IATA] *that operate flights to Venezuela*" stating the following:

> *Over the past weeks, foreign airlines flying to and from Venezuela have been in negotiations with the Minister of Transport, Mr. Hebert Garcia Plaza, regarding the blocked monies from airline ticket sales in Venezuela. IATA and the carriers recognize the efforts made by the government to find a solution to this long standing issue. While a few airlines have agreed to the terms, the majority of our members have chosen not to accept them. Particularly given the government's insistence that our members agree not to pursue other available legal remedies, the airlines have cited a number of serious concerns:*
>
> *1. Lack of guarantees regarding compliance with or enforceability of the proposed two-year payment plan.*
>
> *2. Proposed reductions in the amounts owed, unilaterally decided by CAA, appear to be based on inaccuracies and inconsistencies.*
>
> *3 No provision for remittances relating to sales executed during the first half of 2014.*
>
> *4. No details provided regarding the regulation of fare calculations and payment processes applicable as of July 1st under the SICAD II scheme.*
>
> *Furthermore, IATA is very alarmed that airlines have been asked to provide detailed and sensitive information on their inventories and fare structures for the Venezuelan market. Such requests are inconsistent with applicable bilateral air services agreements, raise concerns about competition law compliance, and run contrary to the airlines' expectation that they will be able to set prices based on prevailing market conditions.*

[33] Exh. C-91, Letter from Air Canada to the President of INAC, dated 28 April 2014; Memorial, para. 83.
[34] Exh. C-56, Letter from Air Canada to the Vice-President of Venezuela, dated 28 May 2014; Memorial, para. 84.

> *IATA's main objective on behalf of its 240 member airlines is the promotion of robust international air transport in the service of national economies everywhere. My sole purpose in writing this letter is to find a way to sustain the basis for viable air transportation to and from Venezuela in the interest of the Venezuelan people.*
>
> *As previously communicated, IATA stands by its offer to provide our expertise to assist the government in understanding airline pricing and distribution principles and finding a viable solution for our members.*[35]

32. On 10 July 2014, Air Canada wrote to the Minister for Popular Power, Air and Water Transport. It noted that it had contacted the Vice President but had not received a response (see *supra* para. 30). Air Canada also referred to agreements reached on 3 July 2014 between the Government and 14 airlines regarding their requests for currency exchange in connection with their operations in Venezuela. It described these agreements as encouraging and reaffirmed its intention to move Air Canada's operations forward in Venezuela. Air Canada reiterated that it was unable to maintain its operations without the repatriation of its funds and restated its willingness to meet and negotiate a mutually acceptable agreement.[36]

33. On 3 October 2014, Air Canada wrote to the Minister for Popular Power of Economic, Finance and Public Banks. It repeated what had already been written to the Vice President (see *supra* para. 30) and noted its willingness to meet and resolve the issue of fund repatriation. Air Canada also noted that while its proposal to negotiate remained the preferred option, it would continue to consider and examine all other options, including legal ones.[37]

34. On 15 June 2016, Air Canada provided Venezuela with a ***written notice of dispute*** pursuant to Article X(II) of the *Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments* ("BIT" or "Canada-Venezuela BIT").[38]

[35] Exh. C-55, Letter from IATA to the President of Venezuela, dated 13 June 2014; Memorial, para. 87.
[36] Exh. C-57, Letter from Air Canada to the Minister of Popular Power, Air and Water Transport, dated 10 July 2014; Memorial, para. 85.
[37] Exh. C-58, Letter from Air Canada to the Minister of Popular Power of Economy, Finance and Public Banks, dated 3 October 2014; Memorial, para. 86.
[38] Exh. C-14, Notice Letter, dated 15 June 2015 ("Notice Letter"). See also Exh. C-1, the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, dated 20 December 1992 ("BIT" or "Canada-Venezuela BIT").

III. The arbitral proceedings

1. The commencement of the proceedings

35. On 16 December 2016, Claimant filed with the International Centre for Settlement of Investment Disputes ("ICSID") a ***Request for Access to the Additional Facility and Notice of Arbitration***, together with Exhibits C-1 to C-18 ("Request for Arbitration").

36. On 13 January 2017, the ICSID Secretary-General approved access to the Additional Facility pursuant to Article 4 of the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID* ("AF Rules") and registered the Request for Arbitration pursuant to Articles 4 and 5 of the *Arbitration (Additional Facility) Rules* ("AF Arbitration Rules").

37. On 26 September 2017, ICSID notified the Parties of the constitution of the Tribunal and the commencement of the proceedings pursuant to Article 13 of the AF Arbitration Rules. The Tribunal is composed of Prof. Pierre Tercier (Swiss), President, appointed by the Chairman of the Administrative Council in accordance with Article 10 of the AF Arbitration Rules; Mr. Charles Poncet (Swiss), appointed by Claimant; and Ms. Deva Villanúa (Spanish), appointed by Respondent.

38. On 14 December 2017, further to the Parties' agreement to extend the 60-day deadline provided for in Article 21 of the AF Arbitration Rules, the Tribunal held a ***First Session*** with the Parties by telephone conference.

39. On 12 January 2018, the Tribunal issued ***Procedural Order No. 1*** ("PO No. 1"). PO1 provided, *inter alia,* that the applicable AF Arbitration Rules would be those in force as of 10 April 2006; that the place of the arbitration proceeding would be Paris, France, and that the procedural languages would be English and Spanish.

40. PO No. 1 also set out the *Procedural Calendar*. Pursuant to the Procedural Calendar, Respondent could file an Application for Bifurcation either before or with the filing of its Counter-Memorial.

2. The written procedure

41. On 22 March 2018, Claimant filed its ***Memorial on the Merits*** ("Memorial"), together with two witness statements, one expert report, factual exhibits C-19 to C-101 and legal authorities CL-1 to CL-76.

42. On 15 June 2018, Respondent filed its ***Application for Bifurcation*** ("Application for Bifurcation"), together with legal authorities RL-1 to RL-48.

43. On 18 June 2018, the Tribunal invited Claimant to reply to Respondent's Application for Bifurcation by 28 June 2018.

44. On 28 June 2018, Claimant filed its ***Response to Respondent's Application for Bifurcation*** ("Response to Application for Bifurcation"), together with factual exhibit C-102 and legal authorities CL-77 to CL-92.

45. On 10 July 2018, the Tribunal issued ***Procedural Order No. 2*** ("PO No. 2"), rejecting Respondent's Application for Bifurcation. It also deferred to a later stage of the proceedings its decision on the Parties' costs in connection with the Application for Bifurcation.

46. On 3 August 2018, Respondent filed its ***Counter-Memorial on Jurisdiction and Merits*** ("Counter-Memorial"), together with two witness statements, one expert report, factual exhibits R-1 to R-46 and legal authorities RL-1 to RL-122.[39]

47. On 10 August 2018, the Parties filed their ***document production requests*** in the form of Redfern Schedules.

48. On 24 August 2018, the Parties filed their ***objections to the other Party's document production requests*** and produced documents the request of which they did not object.

49. Also on 24 August 2018, the Tribunal confirmed that, as agreed by the Parties, the language of the arbitration shall be *only* English, as opposed to English *and* Spanish as was originally foreseen in PO No. 1.

50. On 31 August 2018, the Parties filed their ***replies to the objections to the other Party's document production requests***. With their replies, the Parties also set out their general remarks on the other Party's document production requests and objections.

51. On 14 September 2018, the Tribunal issued ***Procedural Order No. 3*** ("PO No. 3") together with Annexes A and B, deciding on the document production requests. In PO No. 3, the Tribunal also directed the Parties as follows:

> *55. In relation to Claimant's Redfern Schedule:*
>
> *a.* ***Respondent*** *shall confirm or clarify Claimant's understanding in relation to Claimant's Request No. 3* ***by 20 September 2018***. ***Claimant*** *shall reply, if needed,* ***by 28 September 2018***. ***The Tribunal*** *shall decide, if necessary,* ***by 5 October 2018*** *(Claimant's Redfern Schedule, page 9, Request No. 3).*
>
> *b.* ***The Parties*** *shall enter into a confidentiality agreement in relation to confidential documents responding to Claimant's Requests Nos 6, 14, 16, 23, 24, 25 and 26* ***by 20 September 2018*** *(Claimant's Redfern Schedule, page 13, Request No. 6; pages 36-38, Requests Nos 23 to 25).*
>
> […]

[39] Exhibits RL-1 to RL-42 are the same as those submitted with Respondent's Application for Bifurcation on 15 June 2018.

56. In relation to Respondent's Redfern Schedule:

a. ***Claimant*** *shall, in relation to Respondent's Requests Nos 4 and 6, submit a privilege log in relation to documents that may be protected by legal privilege in line with the principles of Article 9(2)(b) and 9(3) of the IBA Rules* ***by 20 September 2018****.* ***Respondent*** *shall provide its comments to such log* ***by 28 September 2018****.* ***The Tribunal*** *shall decide* ***by 5 October 2018*** *(Respondent's Redfern Schedule, page 12, Request No. 4 and page 16, Request No. 6).*

b. ***Claimant*** *shall provide a list describing documents responsive to Respondent's Requests Nos 17, 18, 20, 21 and 22 that were already disclosed or shared with Respondent* ***by 20 September 2018****.* ***Respondent*** *shall reply, if needed,* ***by 28 September 2018****.* ***The Tribunal*** *shall decide, if necessary,* ***by 5 October 2018*** *(Respondent's Redfern Schedule, pages 33 to 35, Requests Nos 17 and 18; pages 37 to 39, Requests Nos 20 to 22).*

c. ***Claimant*** *shall respond to Respondent's explanations in relation to Respondent's Requests Nos 36 and 37* ***by 20 September 2018****.* ***Respondent*** *shall reply, if needed,* ***by 28 September 2018****.* ***The Tribunal*** *shall decide, if necessary,* ***by 5 October 2018*** *(Respondent's Redfern Schedule, pages 55 to 57, Requests Nos 36 and 37).*

[…]

57. For these reasons, the Tribunal orders the following:

[…]

4. The Parties shall take the necessary steps to comply with the Tribunal's directions set forth in paragraphs 55 and 56 above.

52. On 19 and 20 September 2018, the Parties requested leave to address the Tribunal's specific instructions under paragraphs 55 and 56 of PO No. 3 and to complete the production of documents. The Tribunal granted such leave on 21 September 2018.

53. On 4 October 2018, the Parties made their respective submissions addressing the Tribunal's directions set out in paragraphs 55 and 56 of PO No. 3

54. On the same date, the Parties informed the Tribunal that they continued to negotiate a confidentiality agreement ("Confidentiality Agreement") pursuant to paragraph 55 of PO No. 3. The Parties confirmed that they would either provide to the Tribunal an executed version or seek the latter's intervention if they could not reach an agreement.

55. On 11 October 2018, the Parties informed the Tribunal that they had made progress in respect of the Confidentiality Agreement, but that they sought the Tribunal's intervention on two matters on which they were still in disagreement. In the same communication, they enclosed the draft Confidentiality Agreement and noted that they would provide the Tribunal with their positions on the disputed points.

56. On 12 October 2018, Respondent submitted its further position concerning the Tribunal's directions of paragraph 56 of PO No. 3.

57. On 15 October 2018, the Parties submitted their respective positions on the disputed points in the draft Confidentiality Agreement.

58. On 24 October 2018, Claimant submitted its reply to Respondent's position of 12 October 2018. It argued, among other things, that Respondent's production of documents was deficient because it comprised of non-responsive, illegible, and duplicate documents. Claimant also argued that Respondent had not produced any documents issued or generated by its relevant government entities and that it had failed to produce any documents in response to Claimant's Requests Nos 1 and 2. Claimant therefore requested the Tribunal to order Respondent to comply with PO No. 3 and to produce all documents responsive to Claimant's requests.

59. On 29 October 2018, the Tribunal issued ***Procedural Order No. 4*** ("PO No. 4"), deciding on document production, including matters relating to the execution of the Confidentiality Agreement. Specifically, it decided the following:

> *51. For these reasons, the Tribunal orders the following:*
>
> […]
>
> *2. Concerning the dispute resolution provision of the draft Confidentiality Agreement, the Tribunal invites the Parties to confer and agree on a text along Claimant's proposal.*
>
> […]
>
> *9. Respondent shall respond to Claimant's objection on the alleged deficient production of documents by Respondent* ***by 5 November 2018****. The Tribunal will decide* ***by 12 November 2018****.*

60. On 4 November 2018, Respondent informed the Tribunal that it had fully complied with the document production ordered in PO No. 3. It also confirmed that, to the extent it identified any document responsive to Claimant's requests which had not previously been produced during the pendency of the arbitration, it would produce such document. Moreover, it noted that it was conducting a detailed review and that it would be contacting counsel for Claimant directly with its particularized concerns.

61. On 7 November 2018, the Tribunal took note of Respondent's letter of 4 November 2018 and the fact that Respondent would contact Claimant to address any concerns. The Tribunal stated that it would decide if the Parties were unable to resolve the pending disagreements.

62. On 12 November 2018, Claimant requested the Tribunal to resolve its application of 24 October 2018, concerning the alleged deficiency of Respondent's document production.

It also informed the Tribunal that the Parties had failed to agree on the dispute resolution provision of the Confidentiality Agreement pursuant to PO No. 4. Thus, Claimant submitted its proposal in an Annex and requested the following:

> "*that the Tribunal invites Venezuela to enter into the Confidentiality Agreement in the form attached hereto as Annex 2 by no later than November 16, 2018 and to order Venezuela to produce responsive documents that same date to avoid any further delay. In the alternative, and should Venezuela refuse to enter into the Confidentiality Agreement, Air Canada respectfully asks that the Tribunal enters into a confidentiality order in the same or similar terms to the ones contained in the Confidentiality Agreement.*"

63. On 13 and 14 November 2018, the Tribunal invited the Parties to comment on the other Party's position concerning (i) the dispute resolution provision of the Confidentiality Agreement and (ii) the status of the Parties' cooperation (if any) concerning the alleged deficiency of Respondent's document production.

64. On 16 November 2018, Claimant informed the Tribunal that it did not understand Respondent to offer to correct its deficient production of documents: while Respondent acknowledged its obligation of ongoing production of documents, Claimant had not received any supplemental production or indication that it would produce further documents. Further, concerning Respondent's allegations on the supposed deficiencies in Claimant's production, Respondent had not contacted Claimant to raise any issues.

65. Also on 16 November 2018, Respondent noted that it had fully complied with the Tribunal's decisions in PO No. 3 and PO No. 4. Specifically, its proposed dispute resolution provision for the Confidentiality Agreement was in line with Claimant's proposal and satisfied the requirement of neutrality. By contrast, Claimant's proposal did not reflect the Parties' agreement on the draft Confidentiality Agreement as it was missing Respondent's proposed edits concerning the number of arbitrators, the languages of the arbitration and the languages of potential evidence. Moreover, while noting that it could not consent to creating jurisdiction for this Tribunal under the Confidentiality Agreement, Respondent submitted its own proposal in an Annex and requested the following:

> "*that the Arbitral Tribunal (i) deny Air Canada's request of 12 November 2018 and (ii) declare that the Republic's proposed terms, as reflected in the Confidentiality Agreement in the form attached hereto as Annex 1 are reasonable and in accordance with the Arbitral Tribunal's directions set forth in P.O. No. 4.*"

Respondent also noted that it intended to contact Claimant concerning Respondent's concern on the latter's document production.

66. On 20 November 2018, the Tribunal rendered ***Procedural Order No. 5*** ("PO No. 5"), deciding, among other things, the following:

> *1. The Parties shall endeavour and enter into a Confidentiality Agreement in the terms proposed in para. 14 above,* ***by 23 November 2018****. Failing an agreement between the Parties, the Tribunal shall issue an order to this effect.*

In paragraph 14 of PO No. 5, the Tribunal stated the following:

> *Accordingly, the Tribunal considers that, in line with its considerations of neutrality set out in PO No. 4, and in view of the Parties' positions, the appropriate dispute resolution provision of the Confidentiality Agreement should comprise the following elements:*
>
> – *During the pendency of the present proceedings, any dispute concerning the Confidentiality Agreement shall be resolved by the present Tribunal;*
>
> – *Following the end of the present proceedings, any dispute concerning the Confidentiality Agreement shall be resolved as follows:*
>
> - *Arbitration under the Rules of Arbitration of the International Chamber of Commerce;*
> - *Sole arbitrator;*
> - *French law;*
> - *English and Spanish language of the arbitration;*
> - *English and Spanish fluency of the sole arbitrator;*
> - *Documents in the arbitration may be submitted in their original language.*

67. On 23 November 2018, Respondent informed the Tribunal that it was not in a position to enter into a Confidentiality Agreement in the terms proposed by PO No. 5 because this would confer jurisdiction to the Tribunal.

For Respondent, neither of the Tribunal's considerations in PO No. 5 took into account that the jurisdiction that would be created were to cover a potential liability claim against Air Canada for breach of contract under French law – clearly not a procedural matter. This was a distinct consent to the one allegedly given by the Republic under the BIT. The Republic would not be granting it freely were it to follow the Tribunal's order.

Further, the Tribunal's proposed procedural order was inadequate because it still left unanswered the question of the appropriate forum for the Republic's potential action for a breach of confidentiality, and its confidential information was without protection upon termination of the arbitration.

68. On 29 November 2018, the Tribunal issued ***Procedural Order No. 6*** ("PO No. 6"), deciding on the confidentiality terms that would govern the production of documents, as set out in an Annex to said Order. It also ordered the Parties to:

> "*enter into enter into a Confidentiality Agreement* ***by 3 December 2018*** *concerning only the timeframe following the termination of the present arbitration. The Confidentiality Agreement shall comprise the agreed text of the draft Confidentiality Agreement, including the dispute resolution provision providing for an ICC arbitration.*"

69. On 14 December 2018, Claimant filed its ***Reply Memorial on the Merits and Counter Memorial on Jurisdiction*** ("Reply Memorial"), together with two witness statements, one expert report, factual exhibits C-34, C-35, C-64, and C-103 to C-160, and legal authorities CL-6 (updated), CL-52 (updated), and CL-93 to CL-135.

70. On 12 February 2019, Respondent requested the suspension of the Procedural Calendar, specifically, the filing of its Rejoinder by the due date. Respondent based its request on the political situation in Venezuela at the time and the possible travel disruptions of Respondent's expert to the country.

71. On 15 February 2019, after being invited by the Tribunal to clarify its request, Respondent confirmed that it was requesting the stay of the entire proceeding.

72. On 22 February 2019, Claimant commented on and objected to Respondent's request for a stay.

73. On 26 February 2019, the Tribunal granted Respondent an extension of one month to file its Rejoinder but rejected its request for a suspension or stay of the proceeding.

74. On 28 March 2019, ICSID transmitted to the Tribunal and the Parties (i) a letter from Mr. José Ignacio Hernández G., *Procurador Especial de la República Bolivariana de Venezuela*, to ICSID, dated 27 March 2019, and (ii) a letter from ICSID to Mr. Hernández, acknowledging receipt of his correspondence, dated 28 March 2019 (both in the Spanish language).

In his letter, Mr. Hernández noted that the judicial representation of the Republic, including in arbitration proceedings, was vested exclusively on him, as *Procurador Especial de la República*. Consequently, any notice or communication from ICSID to the Republic had to be addressed to him and not to any other individual claiming to act on behalf of the Republic. In addition, ICSID should not consider valid any instruction or communication submitted as of 5 February 2019 by any other person that claims to act on behalf of the Republic.

75. On 29 March 2019, Respondent renewed its requested for a stay of the proceedings and reiterated the circumstances preventing it from adequately preparing its Rejoinder. It also enclosed a letter from its economic expert explaining how the U.S. sanctions on Venezuela were impacting his ability to provide expert services in this arbitration.

76. On 2 April 2019, the Tribunal invited Claimant to confirm whether it objected to Respondent's request for a stay.

77. On 3 April 2019, Claimant communicated its preliminary observations on (i) the letter of Mr. Hernández to ICSID, dated 27 March 2019, and (ii) Respondent's request for a stay, dated 29 March 2019.

Claimant reiterated its objection to "*an indefinite stay or suspension of the arbitration*" but suggested nonetheless that the Tribunal should extend the date by which Respondent would file its Rejoinder by six months and that new Hearing dates be fixed for the first quarter of 2020. Claimant suggested this course of action for the following reasons: (a) it was no longer clear who was empowered to represent Venezuela in this arbitration and Venezuela should be ordered to clarify this issue immediately through further submissions from Mr. Hernández and the De Jesús law firm; (b) Claimant would be prejudiced if the Hearing is maintained in the face of further delays from Venezuela and procedural surprises and uncertainty; and (c) the proposed six-month extension of the deadline for filing the Rejoinder would give Venezuela ample time to submit a competent legal opinion and retain a replacement expert if necessary.

78. On the same date, the Tribunal informed the Parties that the deadline for Respondent's Rejoinder had been now postponed and that it would communicate further instructions.

79. On 4 April 2019, the Tribunal notified the Parties and Mr. Hernández its decision on (i) the suspension of the Procedural Calendar and (ii) the procedure to address the question of Respondent's representation. Specifically, the Tribunal decided:

(a) to extend the filing of the Rejoinder by six months, i.e., 4 October 2019, and postpone the Hearing until the first quarter of 2020, respectively. The suspension of the Procedural Calendar would be subject to the procedure on the question of Respondent's representation; and

(b) to address the question of Respondent's representation as a preliminary matter *via* the filing of two rounds of submissions and, if necessary, a hearing on the matter, following which it would render its decision.

80. On 5 April 2019, ICSID communicated to the Tribunal and the Parties (i) a letter from Mr. Reinaldo Enrique Muñoz Pedroza, *Procurador General de la República*, to ICSID (in the Spanish language), dated 4 April 2019, and (ii) a letter from ICSID to Mr. Muñoz Pedroza, acknowledging receipt of his correspondence, dated 5 April 2019.

Mr. Muñoz Pedroza, referred to the letter from Mr. Hernández to ICSID of 27 March 2019, and noted that arbitral tribunals did not have any authority or jurisdiction to question or decide on the functions or authority of the President or Attorney General. He

contested the authority relied on by Mr. Hernández to present himself as *Procurador Especial de la República*. He concluded that the representation of the Republic's interest before arbitral tribunals fell within the authority of the Republic's Attorney General.

Mr. Muñoz Pedroza announced that he would issue instructions to the attorneys representing the Republic to request the dismissal in *limine litis* of the incident raised by the letter from Mr. Hernández for lack of jurisdiction or competence.

81. On 8 April 2019, ICSID informed the Tribunal and the Parties that it had requested from Mr. Hernández and Mr. Muñoz Pedroza the English translations of their letters of 27 March 2019 and 4 April 2019, respectively. ICSID communicated the English translation of Mr. Muñoz Pedroza's letter on 10 April 2019 and of Mr. Hernández's letter (as well as of the *Estatuto que Rige la Transición a la Democracia para Restablecer la Vigencia de la Constitución de la República Bolivariana de Venezuela*, hereinafter the "*Estatuto*") on 12 April 2019.

82. On 12 April 2019, following the Tribunal's instructions of 4 April 2019, the Parties communicated their agreed revisions to the Procedural Calendar.

83. On 16 April 2019, the Tribunal informed the Parties and Mr. Hernández that its decision of 4 April 2019 concerning the next steps on the question of Respondent's representation was maintained.

84. On the same date, the Tribunal amended the Procedural Calendar (on Jurisdiction and Merits), reflecting the Parties' agreements that the filing of the Rejoinder would be due by 4 October 2019 and that the Hearing would take place on one of the following dates: 2-5, 3-6 or 10-13 March 2020.

85. On 19 April 2019, the Parties and Mr. Hernández filed their comments on the question of Respondent's representation in the form of letters and exhibits thereto.

86. On 23 April 2019, the Tribunal reminded the Parties and Mr. Hernández of the deadline for the reply comments on the question of Respondent's representation and asked them whether a meeting *in persona* or *via* video conference would be requested.

87. On 29 April 2019, the Parties and Mr. Hernández filed their reply comments on the question of Respondent's representation in the form of letters and exhibits thereto.

In reply to the Tribunal's instructions of 23 April 2019, Claimant noted that no hearing was necessary but that a telephone or video hearing might suffice if the Tribunal believed that a hearing would be useful. Respondent also confirmed that no hearing was necessary. Mr. Hernández did not express any request in relation thereto.

88. On 30 April 2019, the Tribunal informed the Parties and Mr. Hernández that it had decided not to hold a hearing on the representation issue.

89. On 28 May 2019, the Tribunal issued ***Procedural Order No. 7*** ("PO No. 7"), deciding that the proceedings would continue with the representatives of Respondent on record in this case.

90. On 12 September 2019, Respondent requested a time-extension for the filing of its Rejoinder. Respondent referred to the issuance of *Executive Order 13884 "Blocking Property of the Government of Venezuela"* by the President of the United States of America on 5 August 2019 and noted that this measure impacted the Republic's ability to finalize its Rejoinder, in particular from obtaining the economic expert report that was to accompany its submission.

91. On 20 September 2019, following an invitation from the Tribunal, Claimant commented on Respondent's further request for an extension of time to file its Rejoinder and urged the Tribunal to deny such request.

92. On 26 September 2019, the Tribunal rejected Respondent's request for an extension to file its Rejoinder. It also decided that Respondent could file its expert reports at any time up to one month before the Hearing so that Respondent could take the necessary measures to tackle any difficulties it still faced. Moreover, the Tribunal decided that it would deal with any procedural difficulties that could arise from such filing at a later stage of the proceedings. Finally, the Tribunal noted that the Hearing would take place as agreed.

93. On 16 October 2019, Respondent sought another extension to file its Rejoinder by 31 October 2019.

94. On 22 October 2019, following an invitation from the Tribunal, Claimant objected to Respondent's request for an extension to file its Rejoinder.

95. On the same date, the Tribunal granted Respondent an extension to file its Rejoinder by 25 October 2019.

96. On 25 October 2019, Respondent filed its ***Rejoinder on Jurisdiction and Merits*** ("Rejoinder"), together with factual exhibits R-47 to R-91 and legal authorities RL-123 to RL-166.

3. The Hearing

97. On 14 January 2020, the Parties notified the fact witnesses and experts they intended to cross-examine during the Hearing.

98. On 21 January 2020, the Tribunal requested that the Parties liaise and attempt to agree on a Hearing schedule.

99. On 29 January 2020, the Parties filed jointly a ***Hearing Schedule***.

100. On 3 February 2020, the Tribunal held a ***Pre-Hearing Conference Call*** with the Parties. During the Pre-Hearing Conference Call, the Parties confirmed their agreements on several items indicated in their joint Hearing Schedule. Respondent informed the Tribunal

and Claimant that Dr. Flores, Respondent's quantum expert, would not be available for examination during the Hearing due to the continuing effect of the U.S. sanctions. In this connection, the Parties presented their positions on the consequences of Dr. Flores's absence, including the admissibility of his expert report, the time allocation to each Party during the Hearing, and the sequestration of Mr. Rosen, Claimant's quantum expert. The Tribunal invited the Parties to indicate their respective positions in writing and that it would decide on this matter thereafter.

101. On 4 February 2020, the Tribunal invited the Parties to discuss the questions of the admissibility of Dr. Flores' report, of the influence on the sequestration, and of the allocation of Hearing time.

102. On 10 February 2020, Respondent sent a letter to the Tribunal, arguing that Dr. Flores's impossibility to participate in the Hearing affected, *inter alia*, the total time allocated to each Party at the Hearing: 60% for Respondent and 40% for Claimant, resulting in 7 hours allocated to Claimant and 10 hours to the Respondent with 2.5 hours reserved per Party for opening statements.

Respondent further argued that Dr. Flores was prevented from attending the Hearing due to unilateral and illegitimate U.S. sanctions and that the situation was beyond the control of Dr. Flores and the Republic. These "extraordinary circumstances" made his expert report of 3 August 2018 admissible.

Moreover, Dr. Flores's "legitimate impossibility" to participate in the Hearing generated an imbalance between the Parties that required an adjustment of the rule of sequestration. Mr. Rosen should not be authorized to attend the Hearing prior to giving evidence and would be sequestered until he testified.

103. On 17 February 2020, Claimant sent a letter to the Tribunal setting out its position in relation to Dr. Flores's absence. Claimant argued that the Tribunal should not reward Respondent's failure to present its quantum expert at the Hearing by allocating additional time to it for cross-examination. The Tribunal should maintain the 50/50 time allocation agreed between the Parties.

Claimant further argued that Dr. Flores's expert report should be excluded or given no weight by the Tribunal. Specifically, Respondent had ample opportunity to support its case with an opinion from an expert who is not subject to such sanctions and could appear to defend his or her own report but had failed to do so.

In addition, Claimant's quantum expert should not be sequestered or prevented from attending any other portions of the Hearing before he testifies. Sequestering Claimant's expert would infringe on Claimant's rights of defense.

104. On 21 February 2020, the Parties communicated their list of participants to the Hearing.

105. On 24 February 2020, the Tribunal issued ***Procedural Order No. 8*** ("PO No. 8"), confirming the Parties' agreement on the organization of the Hearing and deciding on the Parties' disagreement in relation to Dr. Flores's absence from the Hearing as follows:

> […]
>
> *The Tribunal decides that the equal allocation of time as originally agreed between the Parties shall be maintained. The fact that a witness or an expert will not attend the Hearing should not affect this repartition.*
>
> *In any event, the time allocated will be applied with a good faith standard and will remain flexible generally and if technical delays and/or interruptions materially reduce a Party's allocated time.*
>
> […]
>
> *The Tribunal decides that, in light of the exceptional circumstances, the expert report of Dr. Flores is admissible. However, it also notes that Respondent could have avoided the present procedural incident had it chosen an expert unaffected by the US sanctions. Therefore, when deciding on the evidentiary weight accorded to Dr. Flores' report, the Tribunal will take into consideration that Dr. Flores will not ratify its content, nor will it be subject to Claimant's cross-examination.*
>
> […]
>
> *The Tribunal decides that, in order to avoid any imbalance between the Parties in their presentations and examinations, Mr. Rosen shall be sequestrated both during the opening statements and the witness examinations.*

106. On 2 March 2020, Respondent sent a letter to the Tribunal, referring to the COVID-19 outbreak across the world and requesting that the Tribunal reconsider the manner in which Respondent's witnesses would be examined during the Hearing. Respondent suggested that the witnesses be examined *via* videoconference from Caracas and sought guidance from the Tribunal as to the procedural adjustments that could be required beyond the physical presence of such witnesses.

107. On 3 March 2020, and after being invited by the President of the Tribunal to do so, Claimant noted that it would not oppose Respondent's request in relation to the manner of hearing its own witnesses. In connection with the remaining participants to the Hearing, Claimant noted that, subject to the Tribunal's views, it did not believe that any further procedural adjustments were necessary.

108. On the same date, the Tribunal confirmed that Respondent's witnesses would testify *via* videoconference and noted that the Hearing Schedule was maintained.

109. On 6 and 7 March 2020, the Tribunal and the Parties exchanged further correspondence on the possible impact of the COVID-19 outbreak on the Hearing.

110. On 7 March 2020, the Tribunal ultimately decided to maintain the Hearing but reserved the right to change its decision at any time in case circumstances required it to do so.

111. Between 10 and 12 March 2020, a ***Hearing*** was held at the World Bank premises in Paris, France.

On Day 1, the Parties delivered their Opening Statements ("C-Opening" for Claimant and "R-Opening" for Respondent).

On Day 2, the examinations of Claimant's witnesses, Mr. Alfredo Sebastián Babún Sabat and Mr. Alex Pittman, and Respondent's witnesses, Mr. Yhonatan Rafael Blanco and Ms. Anira Dinorys Padrón Barito took place. As it had been agreed, the examinations of Mr. Blanco and Ms. Padrón took place *via* videoconference.

On Day 3, the examination of Claimant's expert, Mr. Howard Rosen, took place. Further, the Tribunal and the Parties discussed certain procedural matters, in particular, the next steps of the proceedings.

112. On 16 March 2020, the Tribunal sent a letter to the Parties, summarizing the decisions taken at the end of the Hearing in relation to the next steps of the proceedings.

113. On 3 April 2020, the Parties communicated their agreed corrections to the Hearing transcript ("Tr. [date];[reference]").

114. On the same date, the Tribunal issued ***Procedural Order No. 9*** ("PO No. 9"), deciding on the content of the Parties' Post-hearing Briefs, and providing a list of questions that the Parties should address in relation to jurisdiction, the merits and the quantum aspects of the case.

4. The steps following the Hearing

115. On 2 June 2020, Claimant requested leave to submit three new legal authorities with its Post-Hearing Brief.

116. On 4 June 2020, following an invitation from the Tribunal, Respondent objected to Claimant's request of 2 June 2020.

117. On the same date, the Tribunal decided to admit Claimant's three additional legal authorities as follows:

> *1. In Procedural Order No. 9, the Tribunal noted that "[t]he Parties may not submit any new legal or factual exhibits (subject to Article 41(2)…)."*
>
> *2. Article 41(2) of the Arbitration (Additional Facility) Rules provide that "[t]he Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts".*

3. Claimant's request to file the three additional legal authorities for use in its Post- Hearing Brief is very belated. This is particularly so as Respondent's position on the lex specialis derogat a generali maxim has been pleaded in depth from the outset of the present case.

4. Nevertheless, because of the connection with the Tribunal's question in Procedural Order No. 9, the Tribunal decides to admit the three additional legal authorities.

5. To ensure equal treatment and no prejudice caused to Respondent, Respondent may, if it so requests, submit new legal authorities in response to Claimant's three additional legal authorities together with a short comment.

118. On 5 June 2020, the Parties filed, simultaneously, their respective ***Post-Hearing Briefs*** ("C-PHB" and "R-PHB"). Claimant's Post-Hearing Brief was accompanied by legal authorities CL-157 to CL-159 pursuant to the Tribunal's decision of 4 June 2020.

119. On 17 June 2020, the Tribunal acknowledged receipt of the Parties' Post-Hearing Briefs and reminded them that, in case of need, either Party could make an application for a second round of Post-Hearing Briefs by 22 June 2020. The Tribunal also noted that it would pursue its deliberations and invited the Parties to liaise and agree on the format and procedure of the Statement of Costs.

120. On 22 June 2020, Respondent requested the Tribunal (i) to exclude part of Claimant's Post-Hearing Brief from the record; and (ii) leave to comment on the remaining parts of Claimant's Post-Hearing Brief which was produced, according to Respondent, in breach of PO No. 9. In the alternative, were the Tribunal to deny its request, Respondent sought leave to comment on Claimant's Post-Hearing Brief by 11 September 2020 and to produce additional legal authorities in connection with the issue of *lex specialis* and Claimant's three new legal authorities.

121. On 23 June 2020, Claimant confirmed that it would not request a second round of Post-Hearing Briefs. It nevertheless requested leave to respond to any submission from Respondent.

122. On 24 June 2020, the Tribunal invited the Parties to comment, if they wished so, on the other Party's communications of 22 and 23 June 2020.

123. On 1 July 2020, Claimant requested the Tribunal, to deny Respondent's requests of 22 June 2020 (see *supra* para. 120). Claimant also stated that "[i]*f the Tribunal were somehow minded to give Venezuela a further opportunity to argue its case beyond simply submitting new legal authorities in response to Air Canada's three additional authorities together with "a short comment," Air Canada would request a right to respond.*"

124. On 2 July 2020, Respondent confirmed that, "*the Bolivarian Republic of Venezuela has no observation on Air Canada's decision not to answer the Republic's post-hearing submission.*"

125. On 8 July 2020, the Tribunal issued ***Procedural Order No. 10*** ("PO No. 10"), deciding as follows:

> *1. Paragraphs 100-153 of Claimant's Post-Hearing Brief are admissible.*
>
> *2. Respondent shall have an opportunity to respond to paragraphs 100-153 of Claimant's Post-Hearing Brief as set out in the present Procedural Order (see para. 41).*
>
> *3. Respondent shall have an opportunity to file a short comment with legal authorities as set out in the present Procedural Order (see para. 41). The possibility for a short reply from Claimant is reserved (see para. 30).*
>
> *4. The Parties shall have an opportunity to file simultaneously Reply Post-Hearing Briefs by 11 September 2020 and in the manner explained in the present Procedural Order (see para. 41).*

126. On 11 September 2020, the Parties filed, simultaneously, their respective ***Reply Post-Hearing Briefs*** ("Reply C-PHB" and "Reply R-PHB").

127. On 8 December 2020, the Tribunal informed the Parties that it was deliberating and preparing the Award. It invited the Parties to liaise and agree, if possible, on the format, procedure and timing for their Submissions on Costs. The Parties agreed to file them by 8 January 2021.

128. On 8 January 2021, the Parties filed their respective ***Submissions on Costs*** ("C-Costs" and "R-Costs").

129. On 12 August 2021, the Tribunal declared the proceedings closed pursuant to Article 44 of the AF Arbitration Rules.

B. LEGAL CONSIDERATIONS

I. In general

1. The arbitration agreement

130. Claimant commenced the present arbitration against Respondent pursuant to the ***Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments*** ("BIT" or "Canada-Venezuela BIT"), signed on 1 July 1996 and in force since 28 January 1998, and the AF Rules.[40]

131. Article XII of the BIT provides as follows:

> *1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach, shall to the extent possible, be settled amicably between them.*
>
> *2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph; a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.*
>
> *3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:*
>
> *(a) the investor has consented in writing thereto;*
>
> *(b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;*
>
> *(c) if the matter involves taxation, the conditions specified in paragraph 14 of this Article have been fulfilled; and*

[40] Exh. C-1 (BIT).

(d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

The dispute may, by the investor concerned, be submitted to arbitration under:

(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March. 1965 (lCSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or

(b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

6. (a) The consent given under paragraph (5), together with either the consent given under paragraph (3), or the consents given under paragraph (12), shall satisfy the requirements for:

(i) written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention and for purposes of the Additional Facility Rules; and

(ii) an "agreement in Writing" for purposes of Article II of the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, done at New York. June 10, 1958 ("New York Convention").

(b) The venue for any arbitration under this Article shall be such so as to ensure enforceability under the New York Convention, and claims submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of that Convention.

7. A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. ***An interpretation of this Agreement to which both Contracting Parties have agreed shall be binding upon the tribunal.***

A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach of this Agreement. For purposes of this paragraph. An order includes a recommendation.

A tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

Where an investor brings a claim under this Article regarding loss or damage suffered by an enterprise the investor directly or indirectly owns or controls any award shall be made to the affected enterprise.

10. An award of arbitration shall be final and binding. Each Contracting Party shall provide for the enforcement of an award in its territory.

11. Nothing in this Article shall deprive a Contracting Party of its right to seek compliance by the other Contracting Party with its obligations under this Agreement, including through use of the procedures set forth in Articles XIII and XIV.

12. (a) Where an investor brings a claim under this Article regarding loss or damage suffered by an enterprise the investor directly or indirectly owns or controls, the following provisions shall apply:

(i) both the investor and the enterprise shall be required to give the consent referred to in subparagraph (3)(a);

(ii) both the investor and the enterprise must give the waiver referred to in subparagraph (3)(b); and

(iii) the investor may not make a claim if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.

(b) Notwithstanding subparagraph 12(a), where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required of the enterprise:

(i) the consent referred to in subparagraph (3)(a); and

(ii) the waiver referred to in subparagraph (3)(b).

13. Where an investor submits a claim to arbitration and the disputing Contracting Party alleges as a defense that the measure in question is

(a) a reasonable measure for prudential reasons of the kind referred to in Article X, or

(b) a measure to limit or prevent transfers by a financial institution under paragraph 6 of Article VIII, the tribunal, at the request of such Contracting Party, shall request both Contracting Parties to submit a joint report in writing as to whether the defence is a valid one in that particular case. The Contracting Parties shall consult through their financial services authorities on the matter.

The tribunal may proceed to decide the matter if it does not receive, within 70 days of its referral, either

(a) the joint report requested, or written notification that the matter has been submitted to arbitration between the Contracting Parties under Article XIV.

If the joint report or, as the case may be, the decision of the arbitral tribunal under Article XIV finds that the defence is valid, the tribunal shall be bound by this finding.

Tribunals for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service in dispute.

14. Subject to Article XI, a claim by an investor that:

(a) a taxation measure of a Contracting Party is in breach of an investment agreement between the central government authorities of that Contracting Party and the investor, or

(b) a taxation measure of a Contracting Party constitutes an expropriation under of Article VII, may be subjected to arbitration under this Article unless the Contracting Parties, through the competent taxation authorities designated by each, determine jointly, within six months of being notified of the claim by the investor, that the measure in question, as the case may be, is not in breach of the investment agreement or does not constitute an expropriation.

(emphasis as in the original)

132. Respondent contests the jurisdiction of the Tribunal. It submits, in the first place, that the present dispute arises from the ***Transport Agreement signed on 26 June 1990 between the Government of Canada and the Government of Venezuela*** ("ATA") and not from the BIT. According to the ATA, disputes are to be resolved by State-to-State negotiations.

The relevant provision of the ATA, i.e., Article XVIII on "Settlement of Disputes", provides as follows:[41]

> *1. If any dispute arises between the Contracting Parties relating to the interpretation or application of this Agreement, the Contracting Parties shall endeavor to settle it by negotiations.*
>
> *2. Such negotiations shall commence as soon as practicable but in any event not later than forty-five (45) days from the date of receipt of the request for negotiations, unless otherwise agreed by the Contracting Parties.*
>
> *3. Failure to reach a satisfactory settlement within a further one hundred and eighty (180) days shall constitute grounds for the application of Article VII of this Agreement, unless otherwise agreed by the Contracting Parties.*

133. Also, Article VII of the ATA, on "Revocation and Limitation of Authorization", provides as follows:

> *1. The aeronautical authorities of each Contracting Party shall have the right to withhold the authorizations referred to in Article V of this Agreement with respect to an airline designated by the other Contracting Party, to revoke or suspend such authorizations or impose conditions, temporarily or permanently:*
>
> *a) in the event of failure by such airline to qualify before the aeronautical authorities of that Contracting Party under the laws and regulations normally and reasonably applied by these authorities in conformity with the Convention;*
>
> *b) in the event of failure by such airline to comply with the las and regulations of that Contracting Party;*
>
> *c) in the event that they are not satisfied that substantial ownership and effective control of the airline are vested in the Contracting Party designating the airline or its nationals; and*
>
> *d) in case the airline otherwise fails to operate in accordance with the conditions prescribed under this Agreement.*
>
> *2. Unless immediate action is essential to prevent infringement of the las and regulations referred to above, the rights enumerated in paragraph 1 of this Article shall be exercised only after consultations with the aeronautical authorities of the other Contracting Party in conformity with Article XVI of this Agreement.*

[41] Exh. C-5 (ATA).

Respondent submits that, in the alternative, this Tribunal does not have jurisdiction as Claimant failed to meet the waiver and statutory period requirements of the BIT. In the further alternative, Respondent argues that Claimant failed to meet the requirements for the existence of an investor and an investment under the BIT. The Tribunal will discuss these objections further on (see *infra* paras 148 *et seq.*).

2. The constitution of the Tribunal

134. The Tribunal was validly constituted on 26 September 2017 (see *supra* para. 37). The Parties did not object to the appointment of the Members of the Tribunal.[42]

3. The arbitral procedure

135. The details of the arbitral procedure have been described above (see *supra* paras 1 to 129). The main steps can be summarized as follows:

- On 12 January 2018, the Tribunal issued ***PO No. 1***, including the *Procedural Calendar* (see *supra* para. 39).

- On 10 July 2018, the Tribunal issued ***PO No. 2***, denying ***Respondent's*** Application for Bifurcation (see *supra* para. 45) because the objections to jurisdiction were intertwined with the merits of the case, and even if it were otherwise, it would not be more efficient in terms of time and cost to deal with those objections separately.

- On 13 September 2018, the Tribunal issued ***PO No. 3*** on the Parties' requests for production of documents (see *supra* para. 51).

- On 29 October 2018, the Tribunal issued ***PO No. 4*** on matters relating to document production, including the execution of a Confidentiality Agreement (see *supra* para. 59).

- On 20 November 2011, the Tribunal issued ***PO No. 5*** on further matters relating to the production of documents (see *supra* para. 66).

- On 29 November 2018, the Tribunal issued ***PO No. 6*** on the confidentiality conditions that should apply to the production of documents (see *supra* para. 68).

- On 28 May 2019, the Tribunal issued ***PO No. 7*** on the issue of Respondent's legal representation in this case (see *supra* para. 89).

  In reaching that decision, the Tribunal had to determine "*whether it may continue the present proceedings with Respondent's interests being represented by Respondent's Counsel on record, who at least until 4 February 2019, were indisputably the valid representatives of Venezuela*". It held that the dispute between the Parties over the representation of Respondent concerned a political

[42] See PO1, para. 2.4.

and constitutional issue that was beyond the authority and jurisdiction of the Tribunal. Nonetheless, the Tribunal had the authority to decide whether or not it could proceed in the case with Respondent's representative on record. The Tribunal found that it could do so in order to preserve the integrity of the arbitration and the interests of all Parties.

– On 24 February 2020, the Tribunal issued ***PO No. 8*** on the organization of the Hearing and Dr Flores' absence from that Hearing (see *supra* para. 105).

  In particular, the Tribunal ruled that Dr Flores' expert report would remain admissible, but that in deciding the evidentiary weight to be accorded to it, it would take into account the fact that Dr Flores would not corroborate its content or be subject to cross-examination by Claimant. The Tribunal specifically noted that Respondent could have avoided the present procedural incident by choosing an expert who was not affected by the U.S. sanctions.

  Further, the Tribunal ruled that the equal allocation of time originally agreed upon by the Parties would be upheld and applied in good faith and with flexibility.

  In addition, it ruled that Claimant's quantum expert be sequestered to avoid an imbalance between the Parties in their presentations and examinations.

– Between 10 and 12 March 2020, a ***hearing*** was held at the World Bank's premises in Paris (see *supra* para. 111).

– On 3 April 2020, the Tribunal issued ***PO No. 9*** regarding the Post-Hearing Briefs, including questions posed by the Tribunal to the Parties (see *supra* para. 114).

– On 7 July 2020, the Tribunal issued ***PO No. 10*** on certain issues relating to the Parties' Post-Hearing Briefs (see *supra* para. 125).

136. The Parties expressly acknowledged that they had no objection to the manner in which the proceedings were conducted.[43]

4. The Parties' prayers for relief

4.1 Claimant

137. In its final submission, ***Claimant*** requests the Tribunal to grant the following relief:[44]

[Claim. 1] *a declaration that the dispute is within the jurisdiction of the tribunal;*

[43] Tr. 12.03.20, 72:13-20.
[44] Reply C-PHB, para. 112. See also, Memorial, para. 202, Reply Memorial, para. 300 and C-PHB, para. 234.

[Claim. 2] *a declaration that Venezuela has breached its obligations under the BIT and international law with respect to Air Canada's investments;*

[Claim. 3] *an order that Venezuela pay compensation to Air Canada for all damages suffered, plus pre-award compound interest up to February 29, 2020, in the amount of US$ 213,140,023 or, alternatively, in the amount of US$ 72,118,369;*

[Claim. 4] *an order that Venezuela additionally pay Air Canada pre-award compound interest calculated from March 1, 2020 until the date of the Tribunal's award using Venezuela's cost of borrowing or, alternatively, Air Canada's cost of debt;*

[Claim. 5] *an order that Venezuela additionally pay all of Air Canada's costs of this proceeding, including (but not limited to) Air Canada's attorney's fees, experts, and all costs associated with the tribunal and the conduct of the proceeding;*

[Claim. 6] *an order that Venezuela additionally pay Air Canada post-award compound interest calculated using Venezuela's cost of borrowing or, alternatively, Air Canada's cost of debt until the date of Venezuela's final satisfaction of the award; and*

[Claim. 7] *any other relief the Tribunal deems fit and proper.*

4.2 Respondent

138. Respondent's prayers for relief in its Counter-Memorial are more detailed than those in its Rejoinder, Post-Hearing Brief and Reply Post-Hearing Brief. Therefore, the Tribunal will refer to the relevant versions in its analysis if it deems it necessary.

139. In its final submission, ***Respondent*** requests that the Tribunal:[45]

[Resp. 1] *Declare that the dispute is not within the jurisdiction of the Arbitral Tribunal and is, in any event, not admissible;*[46]

[45] Reply R-PHB, para. 49. See also Counter-Memorial, para. 533, Rejoinder, para. 462 and R-PHB, para. 169.

[46] In its Counter-Memorial, Respondent requests the Tribunal to:

> a. *Declare that the dispute is not within the jurisdiction of the Arbitral Tribunal because the dispute is governed by and must be resolved as per the terms of the ATA;*
> *b. Declare that the dispute is not within the jurisdiction of the Arbitral Tribunal or is inadmissible because:*
> *i. Claimant has not complied with the waiver requirement of Article XII(3)(b) of the BIT, and/or*

[Resp. 2] *Dismiss Air Canada's claims of liability under Articles II, VII and VIII of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments;*[47]

[Resp. 3] *Dismiss Air Canada's claim for compensation, as well as its claim for interest, or alternatively, reduce any amounts ordered as compensation on account of Air Canada's contributory fault, its unwise conduct or its improper actions;*[48]

[Resp. 4] *Order Air Canada to pay all costs incurred by the Republic in connection with this arbitration, including all of the Arbitral Tribunal's and ICSID's fees and expenses, and all legal fees and expenses incurred by the Republic (including but not limited to lawyer's fees and expenses);*

[Resp. 5] *Order Air Canada to pay interest as the Arbitral Tribunal may consider appropriate on the amounts owed to the Republic as from the date of the award on costs and complete payment; and*

[Resp. 6] *Order any additional measure it may deem appropriate.*

5. Roadmap

140. The Tribunal will proceed as follows:

- *First*, it will set out the law applicable to the present dispute (Section II).

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ii. Claimant has referred the dispute to arbitration after the expiry of the three year statutory period of Article XII(3)(d) of the BIT.
c. Declare that the dispute is not within the jurisdiction of the Arbitral Tribunal because Claimant does not meet the ratione materiae and/or ratione personae requirements of Article I of the BIT.

[47] In its Counter-Memorial, Respondent requests the Tribunal to:

d. Declare that the Bolivarian Republic of Venezuela has not violated either Article II, Article VII or Article VIII of the BIT.

[48] In its Counter-Memorial, Respondent requests the Tribunal to:

e. Declare:
i. That Claimant is not entitled to any compensation; or in the alternative
ii. That Claimant has failed to quantify its damages; or in a further alternative
iii. That Claimant's entitlement to any compensation shall be reduced by 75% due to Claimant's contributory fault; or by 50% due to Claimant's unwise conduct; or, at the very least by 25% due to its improper actions.
f. Declare, if any damages are awarded to Air Canada, that Claimant is not entitled to any interest neither simple nor compound;
g. Dismiss all of Claimant's claims;

- *Second*, it will rule on Respondent's jurisdictional and admissibility objections (Section III).

- *Third*, to the extent that it finds it has jurisdiction over the present dispute, it will rule on Claimant's claims on the merits, i.e., the alleged violations of the BIT (Section IV).

- *Fourth*, and to the extent it finds that Respondent breached the BIT, it will decide on issues relating to quantum (Section V).

- *Firth*, and in any event, the Tribunal will decide on the issue of costs of the arbitration (Section VI).

141. Having carefully considered all the arguments and evidence presented by the Parties in the course of these proceedings, the Tribunal does not consider it necessary to repeat all of them in the Award. The Tribunal will address in its reasoning only the decisive factors necessary to rule on the Parties' prayers for relief. When summarizing the Parties' positions, the Tribunal reproduces the positions as they were presented in the first two rounds of submissions on jurisdiction and the merits; reference is made to all other submissions (including Post-Hearing Briefs) to the extent necessary for the Tribunal's analysis.

II. Applicable law

142. The Parties made certain arguments in the first round of their written submissions regarding the applicable law.[49] Although the issue appears to become relevant if and after the Tribunal determines that it has jurisdiction, the Tribunal considers that it is appropriate to address it beforehand because the applicable law may also become relevant to the Tribunal's assessment of its jurisdiction (see *infra* para. 146).

143. The relevant provisions in relation to the applicable law in the present case are *Article 54(1) of the AF Arbitration Rules* and *Article XII(7) of the BIT*.

144. Article 54(1) of the AF Arbitration Rules provides as follows:

> *The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.*

[49] Memorial, paras 103-105; Counter-Memorial, paras 256-265.

145. Further, Article XII(7) of the BIT provides as follows:[50]

> *A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.* ***An interpretation of this Agreement to which both Contracting Parties have agreed shall be binding upon the tribunal****.* (emphasis as in original)[51]

146. The Parties agree, and the Tribunal confirms, that in accordance with the foregoing provisions, the BIT itself and international law govern this dispute.[52] However, the Parties appear to differ as to the application of Venezuelan law by this Tribunal. Specifically:

- ***Claimant*** points to the fact that the Vienna Convention on the Law of Treaties ("VCLT") provides that "*treaties are governed by international law*" and must be interpreted in light of "*any relevant rules of international law*". This makes international law supreme over domestic law in the area of state responsibility. This is also confirmed by the *International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts* ("ILC Articles"). These rules, together with the BIT's governing law provision, which does not mention domestic law, confirm that Venezuelan law may not be used by the Tribunal to determine the outcome of this dispute.[53]

- ***Respondent*** submits that that the Tribunal must indeed consider Venezuelan law when assessing Claimant's claims, Respondent's defenses and the conduct of both Parties, particularly with respect to civil aviation, labor law, exchange control, and administrative procedures, all matters governed by rules of Venezuelan law.[54] In the present case, the "territorial nexus" is undeniable, as the BIT requires that the investment be made "*in the territory of Venezuela*".[55] Moreover, Claimant was operating in an environment regulated by Venezuelan law, namely civil aviation. In conducting its business in the Republic, Claimant was also subject to Venezuelan labor regulations.[56] The same is true of Claimant's AAD requests, in the sense that they are also subject to Venezuelan law. Only by considering these provisions of Venezuelan law will the Tribunal be able to determine the proper scope and content of Claimant's alleged "right to U.S. dollars". This is consistent with the position taken by numerous arbitral tribunals.[57]

[50] Exh. C-1 (BIT).
[51] The interpretation is found in an Annex to the BIT, Exh. C-1.
[52] Memorial, paras 103-105; Counter-Memorial, paras 256-258.
[53] Memorial, para. 105.
[54] Counter-Memorial, para. 259.
[55] Counter-Memorial, para. 262.
[56] Counter-Memorial, para. 264.
[57] Counter-Memorial, para. 265.

147. ***The Tribunal*** agrees with Respondent. Domestic law, in this case Venezuelan law, "*is likely* [to be] *relevant*" to the determination of the claims and defenses at hand.[58] This being said, the role of domestic law is not to be confused with that of the BIT and/or international law. In particular, it is not part of the regime governing the present dispute (see *supra* para. 146). Instead, it must be considered from a factual perspective in order to determine, where appropriate, the scope and extent of the rights and obligations of the Parties alleged to give rise to the existence of an "investment" for jurisdictional purposes, as well those alleged to give rise to the claims on the merits.[59]

III. Jurisdiction and Admissibility

1. The issue

148. The issue is whether this Tribunal has ***jurisdiction*** over the present dispute and whether the claims are admissible.

149. ***Respondent*** requests that the Tribunal "[d]*eclare that the dispute is not within the jurisdiction of the Arbitral Tribunal and is, in any event, not admissible*" [Resp. 1] (see *supra* paras 138 and 139).[60] Specifically, that:

- "*the dispute is not within the jurisdiction of the Arbitral Tribunal because the dispute is governed by and must be resolved as per the terms of the ATA*";

[58] See Counter-Memorial, para. 260 quoting Exh. RL-65, C. Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, McGill Journal of Dispute Resolution / Revue de règlement des différends de McGill, Vo. 1: 1, 2014, pp. 17-18.

[59] See Exh. RL-68, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, dated 8 November 2010, para. 347 ("*When necessary to resolve factual questions, including the scope of Claimant's rights and interests in the JAAs, the Tribunal shall apply the domestic law of Ukraine*".); Exh. RL-69, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on liability, dated 27 December 2010, para. 39 ("*The first question concerns the role of Argentina's domestic law in determining the content and the extent of Total's economic rights as they exist in Argentina's legal system. In this regard, the Tribunal believes that Argentine law has a broader role than that of just determining factual matters. The content and scope of the Total's economic rights* […] *must be determined by the Tribunal in light of Argentina's legal principles and provisions* […] *Thus, the Tribunal shall determine the precise content and extent of Total's economic rights under Argentina's legal system in respect of Total's claims under the BIT, wherever necessary in order to ascertain whether a breach of the BIT has occurred*".); Exh. RL-23, *Emmis International Holding B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Award dated 16 April 2014, paras 149 and 162 ("*the existence and nature of any such rights must be determined in the first instance by reference to Hungarian law, before the Tribunal proceeds to decide whether any such rights can constitute investments capable of giving rise to a claim for expropriation for the purpose of its jurisdiction under the Treaties and ICSID Convention*" and "[i]*n order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law*".).

[60] Reply R-PHB, para. 49. See also Counter-Memorial, para. 533, Rejoinder, para. 462 and R-PHB, para. 169.

- "*the dispute is not within the jurisdiction of the Arbitral Tribunal or is inadmissible because: i. Claimant has not complied with the waiver requirement of Article XII(3)(b) of the BIT, and/or ii. Claimant has referred the dispute to arbitration after the expiry of the three year statutory period of Article XII(3)(d) of the BIT*";

- "*the dispute is not within the jurisdiction of the Arbitral Tribunal because Claimant does not meet the ratione materiae and/or ratione personae requirements of Article I of the BIT*".[61]

150. ***Claimant*** requests that the Tribunal find that "*the dispute is within the jurisdiction of the tribunal*" [Claim. 1] (see *supra* para. 137).[62]

151. ***The Tribunal*** recalls that it is constituted in accordance with the BIT and the AF Rules. Its jurisdiction should therefore in principle be determined only by reference to the criteria set out in the BIT and the AF Rules.[63] In the present case, however, Respondent contests the appropriateness of the BIT *forum* for the present dispute and, more specifically, whether it is affected by the ATA *forum*. In these circumstances, the Tribunal must first assess whether the present dispute is appropriately brought before it before considering if necessary, whether the jurisdictional requirements are met.[64]

152. The Tribunal is therefore concerned with the following questions:

- *First*, whether the ATA exclusively governs the present dispute (see *infra* Section 2).

- *Second*, and if necessary, whether an arbitration agreement has been reached under the BIT (see *infra* Sections 3 and 4); and/or

- *Third*, and if necessary, whether Air Canada qualifies as a protected investor that has made a protected investment within the meaning of the BIT (see *infra* Section 5).

2. Objection to jurisdiction based on the ATA

2.1 The Parties' positions

(i) Respondent

153. Respondent submits that the ATA is the *lex specialis* applicable to this dispute to the exclusion of the BIT.[65]

[61] Counter-Memorial, para. 533.
[62] Reply C-PHB, para. 112. See also, Memorial, para. 202, Reply Memorial, para. 300 and C-PHB, para. 234.
[63] See Reply, para. 75.
[64] See Rejoinder, para. 21.
[65] Application for Bifurcation, Section I; Counter-Memorial, Section III.A; Rejoinder, Section I.A.

154. According to Respondent, Claimant invokes the BIT when it needs to resort to arbitration, and the ATA when it needs to substantiate its claims.[66] As such, Claimant's case is nothing more than an ATA claim disguised as a BIT claim.[67] In fact, Claimant's alleged protected investment under the BIT has only one source: the ATA.[68] Further, each of Claimant's alleged claims point to the ATA.[69]

155. Claimant is mistaken that (i) the BIT is the *lex specialis* applicable to the dispute and governs, as such, jurisdictional issues, and (ii) the rules contained in the ATA are "*applicable rules of international law*" in the meaning of Article XII(7) of the BIT and as such may supplement the BIT.[70]

156. The *lex specialis* maxim seeks to resolve a situation where there is a conflict of norms, by ruling that the special norms should apply instead of the general ones.[71] In absence of any express exclusion of "*aviation industry investors*" from the scope of the BIT, the ATA and the BIT *prima facie* both provide protection to Claimant. However, they also provide for conflicting dispute settlement mechanisms.[72] While the ATA provides that disputes must exclusively be resolved through State-to-State negotiations, the BIT only offers an option for the investor to refer the dispute to arbitration.[73]

157. Further, the ATA already regulated the operation of airlines such as Air Canada for six years prior to the signature of the BIT. Moreover, as evidenced by official statements of the Legal Bureau of Department of legal Affairs of Canada of 1990, both Canada and Venezuela were aware that more specific treaties prevail over the general ones such as the BIT.[74]

158. Therefore, the Tribunal must apply the *lex specialis* maxim in order to first determine whether the ATA prevails over the BIT.[75] This determination requires the analysis of (i) the subject-matter of the studied norms and (ii) the number of actors whose behavior is regulated.[76] Respondent makes seven comparisons between the two instruments in this connection that confirm that the ATA has a more specific subject-matter than the BIT and that it specifically protects designated airlines, such as Claimant (i.e., in relation to the objective, scope, regulation of behavior of actors, subject-matter, reference to domestic

[66] Application for Bifurcation, para. 14.
[67] Application for Bifurcation, para. 11; Rejoinder, paras 14-15.
[68] Rejoinder, para. 16.
[69] Rejoinder, para. 17.
[70] Application for Bifurcation, paras 15-16.
[71] Application for Bifurcation, para. 19.
[72] Application for Bifurcation, para. 12; Rejoinder, paras 27, 30.
[73] Rejoinder, paras 49-50 quoting Exh. CL-107, V. Lowe, *Overlapping Jurisdiction in International Tribunals*, Australian Yearbook of International Law, 1999, vol. 20 ("Lowe").
[74] Rejoinder, para. 28 quoting Exh. RL-124, B. Mawhinney, *Canadian Practice in International Law at the Department of External Affairs in 1990/91*, 29 Can. Y.B. Int'l L., 1991, pp. 454-475 ("Mawhinney").
[75] Counter-Memorial, para. 111; Rejoinder, paras 20-25.
[76] Application for Bifurcation, para. 20; Counter-Memorial, paras 110-111.

law, MFN clause and national treatment clause).[77] In this connection, Respondent replies to Claimant's defense as follows:

- It is evident that the ATA and the BIT are international bilateral treaties entered into between the same parties, i.e., Venezuela and Canada.[78] Respondent does not agree with Claimant that in order for the *lex specialis* principle to apply, parties to the conflicting norms must be the same.[79]

- The subject matter of a treaty is defined by its general scope. It does not depend on the typology of the specific substantive provisions but on the situations regulated by such provisions. The ATA, which regulates the activity of and offers protection to "aviation industry investors", overlaps with the BIT that, in essence regulates and offers protection to investors in general, including, *prima facie*, those of the aviation industry.[80] In any event, the *lex specialis* applies even in the absence of a conflict between the subject matter of the ATA and the BIT.[81]

159. Even if the Tribunal were to accept that for the principle to apply there must be some inconsistency between the ATA and the BIT, the MFN, national treatment, free transfer of funds, as well as the dispute resolution clauses of the ATA and the BIT are inconsistent with each other.[82]

160. The relevant question is not whether specific provisions are similar but whether the ATA and the BIT are in conflict.[83] Article XVIII of the ATA covers all disputes arising out of the interpretation and application of that treaty, including any grievance that one of the beneficiaries of the ATA may have against either Venezuela or Canada. Air transportation carriers have always resorted to their home sovereigns to resolve disputes arising out of air transportation agreements.[84] Thus, the ATA cannot be deemed to be silent on the question of the resolution of disputes arising between the airlines designated thereunder and one of its member States. Instead, such disputes are to be resolved at the inter-State level through State-to-State negotiation.[85]

[77] Application for Bifurcation, paras 21-33; Counter-Memorial, paras 112-133.
[78] Rejoinder, para. 32.
[79] Rejoinder, paras 33-34.
[80] Application for Bifurcation, paras 19, 33; Rejoinder, paras 35-37.
[81] Rejoinder, para. 40 quoting Exh. RL-125, S. Zorzetto, *The Lex Specialis Principle and its Uses in Legal Argumentation. An Analytical Inquire*, Eunomía, Revista en Cultura de la Legalidad, No. 3, September 2012-February 2013, pp. 61-87.
[82] Application for Bifurcation, paras 31-32; Rejoinder, paras 41-42.
[83] Rejoinder, paras 43-44.
[84] Rejoinder, paras 45-46 quoting Exh. CL-98, A. B. Steinberg & Charles T. Kotuby Jr., *Bilateral Investment Treaties and International Air Transportation: A New Tool for Global Airlines to Redress Market Barriers*, 76 J. Air L. & Com. 457 (2011) ("Steinberg") and Exh. RL-126, T. C. Atherton & T.A. Atherton, *The Resolution of International Civil Aviation Disputes*, Journal of International Arbitration, Kluwer Law International, Vol. 9 Issue 2, 1992, pp. 105-122.
[85] Rejoinder, paras 47-48.

161. In the present case, neither the BIT nor the ATA contain a rule resolving the conflict between the two treaties. This is where the *lex specialis* doctrine plays its role. Accepting Claimant's argument that just because nothing in the ATA prevents it from bringing claims before this Tribunal in relation to the rights and protection it has under the ATA would amount to (i) simply negating the *lex specialis* principle used by Claimant itself and (ii) permitting shopping by any interested party amongst conflicting treaties.[86]

162. The Tribunal should therefore decline its jurisdiction in light of the more "special" procedure to which Venezuela and Canada agreed in the ATA.[87]

(ii) Claimant

163. Claimant submits that the ATA cannot and does not deprive the Tribunal of its jurisdiction under Article XII of the BIT.[88]

164. *First*, the BIT is the *lex specialis* applicable to the dispute and governs therefore jurisdictional issues.[89] The Tribunal's jurisdiction is to be determined solely by reference to the criteria set forth in the BIT, which Claimant has satisfied.[90] Claimant has not asserted any claim under the ATA. Instead, it relies on the ATA primarily to provide factual context and background for its claims under the BIT. Article XII(7) of the BIT positively requires this Tribunal to "*decide issues in dispute in accordance with* [the BIT] *and applicable rules of international law*". These international rules necessarily include the ATA.[91]

165. *Second*, if Canada and Venezuela had wanted to exclude investments by designated airlines under the previously signed ATA or aviation generally from the scope of the BIT's protections, including its investor-state dispute resolution provisions, then they could have done so, just as they expressly excluded investments in "cultural industries" from protection. Indeed, Canada and Venezuela were clearly mindful of the aviation sector when they entered into the BIT, because they specifically excluded third-party bilateral agreements relating to aviation from the scope of certain protections contained in Article II(3) and Article III(1) and (2) of the BIT.[92]

166. *Third*, it is well-established that the principle *lex specialis* applies only where the parties and the subject-matter of conflicting norms are identical. Here neither the parties nor the subject-matter of treaties is identical. Claimant alleges breaches by Respondent of the investment protections contained in the BIT, including its provisions governing FET and expropriation. The ATA does not contain such investment protection provisions.[93] In addition, Article XII of the BIT covers disputes between different parties and concerning different subject-matters than Article XVII of the ATA. This is not an inter-State dispute

[86] Counter-Memorial, para. 132.
[87] Rejoinder, paras 51-52 quoting Exh. CL-107 (Lowe).
[88] Response to Application for Bifurcation, paras 14-19; Reply, para. 73.
[89] RfA, para. 35; Memorial, Section III. C and para. 104.
[90] Reply, para. 75.
[91] Response to Application for Bifurcation, para. 16.
[92] Rejoinder, para. 76.
[93] Rejoinder, para. 77.

between Venezuela and Canada relating to the interpretation or application of the ATA. Even though the ATA contains free transfer rights and obligations that are similar to those in the BIT, a dispute arising under the latter is different from a dispute concerning the interpretation and application of the former, most notably because the parties are different.[94] Moreover, there is no indication that Venezuela or Canada intended the ATA to limit or otherwise curtail a designated airline's legal rights to those found in the ATA, to the exclusion of any other rights it might have under domestic or international law.[95]

167. *Fourth*, pursuant to the ILC Articles, for the *lex specialis* principle to apply there must be some actual inconsistency between the two provisions. Dispute settlement mechanisms are considered inherently cumulative in nature in the absence of a clear indication that they were intended to be exclusive. Thus, even if Claimant were a party to the ATA, it would not be precluded from bringing arbitration under the BIT, absent express language in either treaty to the contrary.[96]

2.2 The Tribunal's analysis

(i) The issue

168. The *issue* is whether the present dispute is governed exclusively by the ATA so that it must be resolved in accordance with the dispute settlement provision contained therein (see *supra* paras 153, 162, 163, 164).

169. *First,* the Tribunal notes that in its Post-Hearing and Reply Post-Hearing Briefs, Claimant developed in detail its defense to Respondent's jurisdictional objection under the ATA and in particular the *lex specialis* argument. Specifically, Claimant further developed its arguments[97] and sought to present new legal authorities on the issue,[98] which the Tribunal admitted into the record (see *supra* para. 117). Respondent indicated that it disagreed, arguing that Claimant had "*used its Post-Hearing Brief to present a fully new case* […] *and adduced new authorities of its choice*", that "*these limitations undoubtedly generate a procedural unfairness to the detriment of the Republic, in breach of the principle of equal treatment*" and that "[t]*he fact that the Republic was provided with an opportunity to respond to Air Canada's new case is not sufficient to cure this procedural unfairness*".[99]

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[94] Reply, para. 78.
[95] Response to Application for Bifurcation, para. 17.
[96] Reply, para. 79 quoting Exh, RL-116, *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the International Law Commission, United Nations, 53rd Session (2001) ("ILC Draft Articles Commentary"), Exh. CL-106, Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties (2003)* and Exh. CL-107 (Lowe).
[97] For example, invoking the *lex posterior derogate priori*, the intention of the Contracting States under the BIT, the relevant question of whether the treaties are part of the same "treaty regime", "*the presumption against normative conflict*". See C-PHB, paras 100-150; Reply C-PHB, paras 16-34.
[98] Exhibits CL-157 to CL-159.
[99] Reply R-PHB, paras 4-6. Respondent also objects to the relevance of Claimant's new legal authorities and argues that they should be dismissed by the Tribunal in its assessment. See Reply R-PHB, paras 45-48.

170. The Tribunal considers that Claimant could indeed have developed such arguments at a much earlier stage in these proceedings. At the same time, it cannot overlook the fact that, following the Hearing, the Tribunal asked specific questions about jurisdiction and, in particular, about Respondent's objection under the ATA which may have guided Claimant's recent and more elaborate position.

171. *Second,* the Tribunal considers that it has given both Parties an equal and sufficient opportunity on this point. In particular, it has also granted Respondent the right to address new and more detailed arguments and even to submit legal authorities with its Reply Post-Hearing Brief. Nonetheless, the Tribunal will address Respondent's jurisdictional objection under the ATA by reference to the Parties submissions up to the Hearing (including oral testimony). This does not mean that the Tribunal will not consider the Parties' Post-Hearing Briefs in this regard. Instead, to the extent that new avenues are developed or explored with respect to this objection, the Tribunal will consider them only if they are sufficiently presented by ***both Parties*** and to the extent necessary for the Tribunal to resolve this issue under the law applicable in this case.

172. In any event, the main question to be answered by the Tribunal is Respondent's question whether the Tribunal lacks jurisdiction because the allegedly applicable *lex specialis* governing the dispute, the ATA, does not contain an arbitration agreement.[100] Therefore, the Tribunal will address this issue as follows:

- *First*, it will set out the principle of *lex specialis* (Section (ii)).
- *Second*, it will analyze whether the principle of *lex specialis* applies by examining the "competing" treaties, i.e., the ATA and the BIT (Section (iii)).
- *Third*, it will examine whether the ATA supersedes the BIT in the present case, in the event that the *lex specialis* principle is applicable, or otherwise (Section (iv)).
- *Finally*, it will conclude (Section (v)).

(ii) *The lex specialis* principle

173. The Parties dispute the relevance, applicability, and scope of the *lex specialis* maxim to the present dispute.[101]

174. The Tribunal notes that, contrary to Respondent's submission, the Parties do not agree on the appropriateness of the *lex specialis* principle for determining the Tribunal's jurisdiction. Indeed, Claimant stated during the Hearing that the principle does not apply. The Parties also disagree on the requirements of the principle itself. Therefore, in order to determine whether the principle is relevant in this case, it is important for the Tribunal to understand the function and scope of the principle.

[100] Reply R-PHB, paras 9-10.
[101] Respondent (Counter-Memorial, para. 107; Rejoinder, paras 13-52; R-PHB, para. 10); Claimant (Memorial, para. 104; Reply, paras 73-80; C-PHB, paras 100-150).

175. According to the Report of the Study Group of the ILC on the "*Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*" – an authority relied upon by Respondent[102] – the *lex specialis* maxim in international law functions as follows:

- As Respondent submits, the maxim, that "*suggests that if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former*", is both a "*maxim of legal interpretation of a conflict and a technique for the resolution of normative conflicts*".[103]

- As such, the Report clarifies that "[t]*he relationship between the general standard and the specific rule may, however be conceived in two ways*": (i) *where the specific rule should read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter*";[104] (ii) "*where two legal provisions that are both valid and applicable, are in no express hierarchical relationship, and provide incompatible direction on how to deal with the same set of facts. In such a case, lex specialis appears as conflict-solution technique.*" In both cases, primacy falls on the "special" provision.[105]

- The Report adds, however, that "***the maxim does not admit of automatic application***". In this context, there are the following two sets of difficulties: "***First, it is often hard to distinguish what is "general" and what is "particular"*** *and paying attention to the substantive coverage of a provision or to the number of legal subjects to whom it is directed one may arrive at different conclusions. An example would be provided by a relationship between a territorially limited general regime and a universal treaty on some specific subject.* ***Second, the principle also has an unclear relationship to other maxims of interpretation or conflict-solution techniques*** *such as, for instance, the principle lex posterior derogate legi priori (later law overrides prior law) and may be offset by normative hierarchies or informal views about "relevance" or importance.*"[106] (emphasis added)

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[102] In its Post-Hearing Brief, Claimant relies on a passage of the ILC Study Group's report, which the Tribunal does not quote above, and states that "*the ILC's Study Group concluded that principles like lex specialis only make sense to apply when, within the same treaty regime, two treaties might potentially conflict or overlap*" and develops the argument that "[t]*he BIT's regime is thus entirely different from that of the ATA*". See C-PHB, paras 117-121 quoting Exh. RL-1, M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, United Nations General Assembly, International Law Commission, Fifty Eighth Session, Geneva, para. 255 ("Koskenniemi"). Respondent objects to this reasoning. See Reply R-PHB, para. 25. The Tribunal refers to its considerations above on the approach it will take in relation to Claimant's allegedly new and elaborated arguments (see *supra* paras 166-168). In any event, the Tribunal approaches the relationship between the two "regimes", i.e., the ATA and the BIT, in a slightly different way below, when it generally analyzes the *lex specialis* and assesses the general subject-matter of each Treaty in that context (see *infra* paras 183-186).

[103] Exh. RL-1 (Koskenniemi), para. 56; Counter-Memorial, para. 108; Tr. Day 1, 126:16-18.

[104] Exh. RL-1 (Koskenniemi), para. 56.

[105] Exh. RL-1 (Koskenniemi), para. 57.

[106] Exh. RL-1 (Koskenniemi), para. 58.

- Indeed, "*lex specialis is usually discussed as one factor among others in treaty interpretation (articles 31-33 VCLT) or in dealing with the question of successive treaties (article 30 VCLT, especially in relation to the principle of lex posteriori)*".[107] It may operate "*(a) within a single instrument; (b) between two different instruments; (c) between a treaty and a non-treaty standard and (d) between two non-treaty standards*".[108] "*Inasmuch as "general law" does not have the status of jus cogens, treaties generally enjoy priority over custom and particular treaties over general treaties*".[109]

- Further, "[a] *rule is never "general" or "special" in the abstract but in relation to some other rule*" and "[a] ***rule may be general or special in regard to its subject-matter (fact description) or in regard to the number of actors whose behavior is regulated by it***."[110] (emphasis added)

- With respect to specificity in relation to the "subject-matter", "*lex specialis can only apply where both the specific and general provisions concerned deal with the same substantive matter*". This is in line with Article 55 of the ILC Articles.[111] However, "*the criterion of the "same subject-matter" as a condition for applying a conflict rule is too unspecific to be useful*" and "[d]*ifferent situations may be characterized differently depending on what regulatory purpose one has in mind*".[112]

- In this regard, the Report refers to the ILC's explanation in its commentary on the drafting of Article 55 which states that "[f]*or the lex specialis principle to apply* ***it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other***".[113] (emphasis added)

176. The Tribunal can, therefore, infer the following from the foregoing in the context of the present case.

[107] Exh. RL-1 (Koskenniemi), para. 65.
[108] Exh. RL-1 (Koskenniemi), para. 68.
[109] Exh, RL-1 (Koskenniemi), para. 85.
[110] Exh, RL-1 (Koskenniemi), para. 112.
[111] Exh. RL-1 (Koskenniemi), para. 116. Article 55 ("*Lex specialis*") of the ILC Articles: "*These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.*"
[112] Exh. RL-1 (Koskenniemi), para. 117.
[113] Exh. RL-1 (Koskenniemi), paras 88-89.

177. *First*, the present case concerns two different and successive instruments, namely (i) the ATA, concluded between Canada and Venezuela in 1990,[114] and (ii) the BIT, signed between Canada and Venezuela in 1996 and in force since 1998.[115]

178. *Second*, the *lex specialis* functions both as a rule of interpretation and as a conflict of laws rule. In the present case, Respondent refers to the primacy of the ATA and the *incompatibility* of the dispute settlement clauses of the ATA and the BIT: the clauses allegedly provide incompatible direction on how to deal with Claimant's claims. As such, if applicable, the *lex specialis* can only become relevant here as a conflict rule.

179. *Third*, and in any event, the *lex specialis* principle is not automatically applicable. The Tribunal must first "*distinguish what is 'general' and what is 'particular'*". This distinction cannot be made in the abstract; rather, the Tribunal must look at the relevant subject matter and the actors whose conduct is to be regulated. This is consistent with Respondent's position that the subject matter and the number of actors whose behavior is regulated are the relevant criteria.[116]

180. *Fourth*, and with respect to subject matter, the Tribunal considers that in order to properly assess the relevant subject matter in the present case, it must consider both the overall subject matter of the instruments and that of the allegedly conflicting norms. In the present case, this means the subject matter of the ATA and the BIT as well that of their dispute settlement provisions.

181. *Fifth*, and in relation to the relevant actors, again the Tribunal finds it pertinent to see the relevant actors in each respect, that is, with respect to the Treaties themselves and with respect to their respective dispute resolution provisions.

182. *Finally*, and in any event, it is of paramount importance for the application of the principle that there is an actual contradiction or intention that one instrument or provision excludes the other. In this regard, the Tribunal must evaluate other considerations in its analysis, such as, for example, the wording of the instruments and the intent of the Contracting Parties, if any can be inferred.

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[114] *Agreement between the Government of Canada and the Government of the Republic of Venezuela* (the ATA) was entered into on *26 June 1990.* See Exh. C-5 (ATA).

[115] *Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments* (the BIT) was signed in Caracas on 1 July 1996 and entered into force on 28 January 1998. See Exh. C-1 (BIT).

[116] Counter-Memorial, para. 111 referring to Exh. RL-7, M. Koskenniemi, *Fragmentation of International Law: Topic (a): The function and scope of the lex specialis rule and the question of 'self-contained regimes': An outline, International Law Commission – Study Group on Fragmentation* (undated).

(iii) The ATA and the BIT

a. In general

183. Having set out the relevant principles in the context of the *lex specialis* maxim and in the context of the present case, the Tribunal will examine the "competing" instruments in light of these principles.

184. It is recalled that the present case concerns the ATA, concluded between Canada and Venezuela in 1990, and the BIT, signed between Canada and Venezuela in 1996 and in force since 1998 (see *supra* para. 177). While the instruments are consecutive, and Claimant only argues in its Post-Hearing Brief that *lex specialis* must be considered even in the midst of related principles such as *lex posterior derogate priori* found in Article 30(3) VCLT, Respondent objects, *inter alia*, that this argument is new.[117] Indeed, no such principle was raised by Claimant in its earlier submissions.[118] However, the Tribunal notes that the *lex posterior* principle is part of the international law applicable in this case through Article XXI(1) of the BIT. It may therefore take it into account only to the extent necessary and only if Respondent has adequately responded to Claimant's submissions in this regard in its Reply Post-Hearing Brief (see also the Tribunal's reasoning *supra* at paras 169-171).

185. Similarly, in its Post-Hearing Brief, Claimant develops the argument that it is clear from the text of the BIT itself that Canada and Venezuela had a common intention to apply the BIT and in particular Article XII of the BIT, to investors in the aviation sector.[119] Respondent challenges the correctness of this argument.[120] The Tribunal reiterates its above considerations on its approach (see paras 169-171 and 184) and emphasizes that an interpretation of the instrument on which it is based, including the intention of the relevant signatory parties, when its jurisdiction is challenged is an exercise it must undertake in any case, including on its own motion, in order to comply with its mandate.

b. The ATA

186. With regard to the ATA, the Tribunal observes the following:

- Its ***purpose*** is set forth in its preamble, which states that the Contracting Parties "[d]*esir*[ed] *to conclude an agreement supplementary to the* [Convention on International Civil Aviation, i.e., the Chicago Convention] *for the purpose of establishing commercial air services*".[121] Further, Article II on the "Applicability of the Chicago Convention" states that the ATA "*shall be subject to the provisions*

[117] C-PHB, para. 100. See also C-PHB, paras 122-128, 148-149, Reply C-PHB, paras 32-33 and Reply R-PHB, paras 38-44.
[118] See also Rejoinder, para. 33.
[119] C-PHB, paras 102-114, 138; Reply C-PHB, paras 16-21, 31.
[120] Reply R-PHB, paras 14-22.
[121] Exh. C-5 (ATA).

of the Chicago Convention to the extent that these provisions are applicable to international air services".[122] At this point, it is important to note that the Chicago Convention is a multilateral treaty concluded for the purpose of agreeing "*on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically*".[123] In the context of its purpose, the ATA grants each Contracting Party "*the right to designate an airline or airlines to operate the agreed services on the specified routes*".[124]

- In the context of the ***substantive rights*** of designated airlines, Article XXI provides that "[e]*ach designated airline shall have the right to engage in the sale of air transportation in the territory of the other Contracting Party*" and "*the right to convert and remit to its country on demand earnings obtained in the normal course of its operations* […] *at the foreign exchange market rates for current rates prevailing at the time of the transfer* […] *in accordance with national legislation* […] *under legislative and regulatory conditions no less favourable than those applied to any other foreign airline operating international air services to and from the territory of the other Contracting party*".[125]

- In the context of ***procedural rights*** in general, Article XVIII, set out above (see para. 133), provides for settlement by negotiation in the event of disputes "*between the Contracting Parties relating to the interpretation or application*" of the ATA.[126] If no satisfactory settlement is reached within 180 days, and unless the Contracting Parties agree otherwise, Article VII applies.[127] Article VII, also set out above (see para. 134), provides for the possibility for the aeronautical authorities of the Contracting Parties to refuse operating licenses in respect of certain airlines if those airlines fail to comply with certain laws or regulations or "*operate in accordance with the conditions prescribed under the*" ATA.[128] In addition, according to Article XXIII, any Contracting Party may "*give notice in writing through diplomatic channels to the other Contracting Party of its decision to terminate*" the ATA.[129]

187. Thus, in the context of the ATA, the following can be deduced:

- Its purpose is to develop and establish commercial air services in a bilateral context, subject to and in addition to the Chicago Convention. Air Canada, as the

[122] Exh. C-5 (ATA).
[123] Exh, CL-1, Convention on International Civil Aviation, signed on 7 December 1944 ("Chicago Convention), Preamble. Article 84 provides for settlement of dispute "*between two or more contracting States relating to the interpretation or application*" of the Chicago Convention.
[124] Article V(1) of the ATA, Exh. C-5.
[125] Article XXI on the ATA on "Sales and Transfer of Earnings", Exh. C-5.
[126] Exh. C-5 (ATA).
[127] Exh. C-5 (ATA).
[128] Exh. C-5 (ATA).
[129] Exh. C-5 (ATA).

designated airline for Canada, plays an indispensable role in the establishment of such services. As such, the ATA, like the Chicago Convention, provides certain rights and obligations for the designated airlines. Thus, the ATA governs the conduct of three actors, namely the Contracting States and the respective designated airline through the assurance of the Contracting States.

- In the event of a dispute between Canada and Venezuela over the interpretation and application of the ATA, such dispute can be referred to negotiations. In the event that no satisfactory agreement is reached between Canada and Venezuela, the appropriate aeronautical authority may revoke the designated airline's authorization if it fails to comply with the relevant laws or the ATA. Negotiation is thus only provided as a State-centric remedy[130] and apparently only when the designated airline is in the wrong. The designated airline certainly has no right to bring a claim, or no right to do so without the proxy of its State. Even if such a claim were made and successful, the ATA does not provide for any monetary compensation to the designated airline itself.

c. The BIT

188. In relation to the BIT, the Tribunal finds the following:

- Its ***purpose*** is set out in its first and second preambles. According to its first preamble, the BIT "*establishes the framework for cooperation in the cultural, economic and technological fields between them*".[131] According to its second preamble, the BIT "*recognizes that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conductive to the stimulation of business initiative and to the development of economic cooperation between them*".[132]

- The BIT provides, *inter alia*, the following relevant ***substantive protections***: Article II(2) provides for "*fair and equitable treatment*" of investments or returns of investors.[133] Article III prohibits the expropriation of investors' investments or returns unless certain conditions are met.[134] Article VIII protects the investor's "*unrestricted transfer of investments and returns*", "*without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned*" and "[u]*nless otherwise agreed by the investor*", "*at the rate of exchange applicable on the date of the transfer*". This protection is subject, *inter alia*, to "*the equitable, non-discriminatory and good faith application*" of certain laws of the Contracting Party.[135]

[130] Exh. CL-98 (Steinberg).
[131] Exh. C-1 (BIT).
[132] Exh. C-1 (BIT).
[133] Article II(1) of the BIT on "Establishment, Acquisition and Protection of Investment", Exh. C-1.
[134] Article III of the BIT on "Expropriation" Exh. C-1.
[135] Article VIII of the BIT on "Transfer of Funds", Exh. C-1.

- The BIT also provides for the following ***procedural safeguards***: In the context of a dispute between an investor and a Host Contracting Party "*relating to a claim by the investor that a measure taken or not taken by the* […] *Contracting Party is in breach of* [the BIT]", Article XII already outlined above (see para. 132) provides for the possibility of investor-state arbitration. In deciding the dispute, the investor-state tribunal "*shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*" and is bound by an interpretation of the BIT contained in an annex.[136] In the context of a dispute between the Contracting Parties over the "*interpretation or application*" of the BIT, Article XIV provides for amicable settlement through consultations followed by arbitration.[137]

- The interpretation of the BIT, agreed to by the Parties in an Annex that forms "*an integral part*" of the BIT,[138] provides the following with respect to certain exceptions to the protection of the BIT: Pursuant to Article II(4) of the Annex, Article II(3) and Article III(1) and (2) of the BIT, "*do not apply to treatment by a Contracting Party pursuant to any existing or future bilateral or multilateral agreement:* […] (b) *relating to* ***aviation****; telecommunications transport networks and telecommunications transport services; fisheries, maritime matters, including salvage; or financial services*" (emphasis added). Pursuant to Article III(8) of the Annex, Articles II, III, IV and V of the BIT and the related provisions of the Annex "*do not apply to (a) procurement by a government or state enterprise* […]*; (b) subsidies or grants* […]*; (c) any measure denying investors* […] *and their investments any rights* […] *provided to the aboriginal peoples of either country; or (d) any current or future foreign aid program* […]". According to Article III(9) of the Annex, "[i]*nvestments in cultural industries are exempt from the provisions*" of the BIT.

189. In the context of the BIT, therefore, the following can be deduced:

- Its purpose is to develop economic cooperation in general at the respective bilateral level. An important way to achieve this is through the promotion and protection of investment. In terms of content, the BIT is therefore entirely focused on the rights and obligations of the Contracting State *vis-à-vis* the investor of the other Contracting State. As such it primarily regulates the conduct of these two actors.

- Procedurally, the Tribunal envisages two options: first, the possibility of arbitration where there is a dispute between the investor and the host State over the investment as defined by the BIT itself; second, any dispute over the interpretation and application of the BIT, to be resolved by negotiation and then by arbitration at the inter-State level.

[136] Article XII of the BIT, Exh. C-1.
[137] Article XIV of the BIT on "Disputes between the Contracting Parties", Exh. C-1.
[138] Article XVI(2) of the BIT on "Application and Annex", Exh, C-1.

– Disputes relating to the cultural industries appear to be excluded from the BIT's protections. Disputes over treatment under a bilateral agreement relating to the aviation sector are excluded only to the extent set out in Article II(4) of the Annex to the BIT.

d. The application of the *lex specialis*

190. It follows from the above conclusions on the ATA (see *supra* para. 187) and on the BIT (see *supra* para. 189) that, contrary to Respondent's view,[139] there is not or cannot be any overlap between the ATA and the BIT.

191. *First*, the subject-matters of the ATA and of the BIT are generally different. The ATA deals with the establishment of relationships between commercial airlines in accordance with the principles and agreements of the Chicago Convention (see *supra* para. 186). The BIT, on the other hand, deals with the protection of investors who have made an investment for the purpose of developing economic cooperation in general (see *supra* para. 188). It does not deal with the legal regulation of cross-border air operations when such operations are directly related to an air carrier's investment in the destination State. However, the BIT requires that such operations, to the extent that they qualify as an investment, be treated in a specific manner.

192. Moreover, the subject-matter of the dispute settlement provision of the ATA does not overlap with that of the BIT. While the latter aims to provide the investor with an opportunity for financial redress in the form of a private lawsuit, the former does not provide for such an opportunity. Instead, the ATA provides for negotiations between states. If no settlement or agreement is reached after such negotiations, the only consequence appears to be the revocation of the airline's operating authorization or the termination of the ATA, both at the option of the state designating the airline. If anything, the dispute settlement clause of the BIT may overlap with that of the ATA if disputes arise over the interpretation or application of the ATA (see *infra* para. 195). There is therefore nothing to compensate the airline as a private actor or investor in the event of a complaint. For this reason, the Tribunal does not consider relevant any argument that:

– Aviation disputes are resolved through state-to-state negotiation and there are no arbitrations involving air transportation.[140]

– The BIT provides an optional dispute settlement clause, while the ATA provides a mandatory clause.[141]

– The ATA provides substantive protections for the designated airlines that are inconsistent with the protections for investors set forth in the BIT.[142]

[139] Rejoinder, para. 31.
[140] Rejoinder, paras 46, 53-56.
[141] Rejoinder, para. 50; R-PHB, paras 13-16 quoting Exh. CL-107 (Lowe), pp. 194-195.
[142] Application for Bifurcation, paras 11-38; Counter-Memorial, paras 102-133; Rejoinder paras 13-56; R-Opening, Slides 3-19; R-PHB, paras 21-26.

193. Similarly, it does not consider it necessary to address Claimant's new argument on the principle of harmonization in this context,[143] or Claimant's *lex posterior* argument under Article 30 VCLT, or any investment arbitration jurisprudence interpreting and applying this provision (see *supra* para. 184).[144]

194. Regardless, it is emphasized that the fact that two treaties – in this case the ATA and the BIT – may apply to the same facts, does not imply their subject matter is the same.

195. *Second*, the ATA regulates the conduct of states, which in turn control the conduct of their national carriers through the agreement in the ATA. This means that it is the states themselves that bear the consequences when these carriers misbehave. Rather, the BIT regulates the conduct of the states towards the investor of the other state. Thus, it is either the host state or the investor that bears the consequences of applying the BIT. The home State is not regulated and bears consequences for the conduct of its national investor in the host state. Again, and at best, the BIT also raises the possibility of interstate negotiation on the interpretation and application of the BIT for the sole purpose of defining standards of investment protection that are to the benefit of both states.

196. *Third*, the Tribunal sees no discernible intention from the Contracting Parties to the BIT to exclude investments in the aviation industry from the scope of the BIT and thus to make the ATA the proper and sole *forum* in relation thereto. It is true that the Contracting States Parties to the BIT excluded the application of Articles II(3) and III(1) and (2) to treatment under an existing bilateral agreement relating to aviation. The relevance of this exclusion to the present case has no bearing on the jurisdiction of the Tribunal. If anything, it is a question of admissibility and is relevant only if there are claims under those provisions, which there are not in this case. That is not the case with respect to investments in cultural industry, where the parties have expressly stipulated an exception in that regard. As to its authority in relation to the ATA,[145] the Tribunal refers to its reasoning in paragraph 202 below.

197. Accordingly, the Tribunal is not of the opinion that this is a situation where there is a general and a specific treaty or general or specific provisions therein providing for different directions. As such, there can be no inconsistency and the principle of *lex specialis* principle cannot be applied.

198. For the same reasons developed above, Respondent's argument that *lex specialis* applies even in the absence of a conflict[146] has no merit.

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[143] See C-PHB, paras 129-135 quoting, in particular, the Exh. RL-1 (Koskenniemi), para. 229. See also Respondent objecting to the correctness of this argument in Reply R-PHB, paras 23-37.
[144] See C-PHB, paras 100, 122-128, referring also to new legal authority submitted by Claimant with its Post-Hearing Brief, Exh. CL-157, *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020. See specifically C-PHB, para. 122.
[145] R-PHB, para. 28.
[146] Rejoinder, paras 40-42. See also R-PHB, para. 27 quoting Article I(4)(b) of the BIT, Exh. C-1.

(iv) Does the ATA supersede the BIT in the present case?

199. Having found that the *lex specialis* does not apply to the present case, the Tribunal will examine whether the ATA still supersedes the BIT.

200. *First*, the Tribunal has already examined the BIT and the ATA. It did so in the context of the examination of the *lex specialis* principle and having regard to the wording of the instruments, as well as any related agreements. The Tribunal found no overlap between the subject matters of the two instruments or between their respective dispute settlement provisions. It also found no conflict or discernible intent to exclude the aviation industry from the scope of the BIT.

201. *Second*, the Tribunal does not find that its conclusions in the context of the *lex specialis* examination are influenced by the facts presented by Respondent regarding the Parties' position and practice with respect to the ATA. Specifically:

- The fact that Air Canada participated in the negotiations[147] is not relevant to its possible status as an investor bringing a private claim for pecuniary loss under a different instrument.

- The fact that the ATA had already governed the operations of airlines such as Air Canada six years prior to the signing of the BIT[148] has no bearing on Canada's and Venezuela's express intention to have investment-related disputes, including those involving their commercial airlines, settled by arbitration under the BIT.

- The official statements of the Legal Bureau of Legal Affairs of Canada in 1990[149] show no intention to make the ATA relevant to an investment dispute in the manner advocated by Respondent.

- Air Canada's 10 December 2013 email referencing the Embassy of Canada in Venezuela addressing the issue of repatriation of funds under the ATA[150] does not negate the fact that Air Canada had or has the ability to pursue investor-state claims through the BIT. Nor does the view expressed by INAC and ALAV view in a letter to Air Canada dated 19 March 2014 on the application of the ATA.[151]

202. Equally, there is no merit in Respondent's argument that a refusal by this Tribunal to give effect to the ATA will nullify the ATA and deprive it of any purpose.[152] Neither does the contention that there are no prior Tribunals that have entertained claims by airlines, given

[147] Application for Bifurcation, para. 14; Counter-Memorial, paras 7, 105.
[148] Application for Bifurcation, paras 2, 14; Counter-Memorial, paras 21-22, 37.
[149] Rejoinder, para. 28 quoting Exh. RL-124 (Mawhinney), p. 465.
[150] Exh. R-51, Air Canada's internal communication, email thread from 6 December 2013 to 11 December 2013, *subject: Re: Venezuela – repatriation of funds – Call for Dec 11 at 11:30 CT* ("AC internal communication December 2013"); Rejoinder, paras 47-48; R-PHB, paras 10, 17, 18, 20, 50. See also Exh. R-72, Internal presentation, Venezuela, Excom – 12 March 2014, p. 4.
[151] Exh C-45, INAC letter to Air Canada, dated 19 March 2014, p. 2; R-PHB, para. 10.
[152] Memorial, paras 116-117.

that such claims require the authority of the airlines' states.[153] The Tribunal has already found on the basis of the wording of the relevant Treaties, that this is not the case in the present dispute (see *supra* paras 183-189). Instead, it is clear to the Tribunal it that the ATA becomes relevant and vital to the present dispute by Article XII(7) of the BIT, which requires this Tribunal to "*decide issues in dispute in accordance with* [the BIT] *and applicable rules of international law*". There is no question that the Chicago Convention provides for the establishment of bilateral relations on the regulation of the aviation sector and establishment of commercial airline activities. There is also no question that the ATA itself explicitly affirms that it stands to complement the Chicago Convention itself. There is therefore no doubt that the ATA falls within the international law reference of Article XII(8) of the BIT. Therefore, consideration of the substantive provisions of the ATA would not be impermissible in this case.

203. The Tribunal therefore reiterates that neither the wording nor the purpose of the two Treaties, nor any purported intention of the States concerned or of the Parties, lead to the conclusion that there is a conflict between them such that the ATA would override the BIT in a case such as the present.

(v) Conclusion

204. Based on the foregoing, the Tribunal concludes ***that Respondent's objection to jurisdiction based on the ATA is dismissed***.

3. Objection to jurisdiction based on the waiver provision of the BIT

3.1 The Parties' positions

(i) Respondent

205. Respondent submits that paragraph 43 of the Request for Arbitration does not meet the waiver requirement of Article XII(3)(b) of the BIT and, in the alternative, that Claimant has failed to comply with its own waiver.[154]

206. *First*, a good faith interpretation in accordance with the ordinary meaning of the language "*dispute settlement procedure*" of Article XII(3)(b) of the BIT in the context of dispute resolution encompasses non-adversarial mechanisms such as negotiation.[155] Respondent points to the negotiation references in Article XII(1) of the BIT and Article XVIII of the ATA in support of its position that negotiation is a dispute settlement procedure and was considered as such by Venezuela and Canada at the time the BIT was entered into.[156]

207. There can be no controversy as to the good faith and ordinary meaning of "*dispute settlement procedure of any kind*" which may only be constructed as inclusive of all kinds

[153] Rejoinder, para. 55.
[154] Application for Bifurcation, Section II.A; Counter-Memorial, Section III.B.1; Rejoinder, paras 58, 69, 74.
[155] Rejoinder, para. 59.
[156] Rejoinder, paras 60-61.

of dispute settlement procedures.[157] Nothing indicates that Venezuela and Canada intended to ascribe any other meaning to those terms than their ordinary one. An interpretation that encompasses negotiation is in line with the letter and spirit of Article XII of the BIT. Allegedly protected investors must waive their rights to negotiate a dispute in order to be allowed to refer the same dispute to arbitration in circumstances where arbitration is only meant to be initiated in case negotiation fails.[158] Further, the only thing that such a waiver prevents is cumulating arbitration with any other kind of dispute settlement mechanism.[159]

208. Claimant's most recent submission is a clear, unequivocal and express recognition that it never intended to waive such a right because it does not and did not consider at the time it issued its waiver that "negotiation" was a dispute resolution procedure encompassed by Article XII(3)(b). Therefore, Claimant cannot be deemed to have waived such a right through paragraph 43 of its Request for Arbitration.[160]

209. *Second*, and in the alternative, if the Tribunal were to find that Claimant formally waived its rights to any kind of dispute settlement procedure and not just to "*legal actions*" at paragraph 43 of its Request for Arbitration, Respondent maintains that Claimant has failed to comply with the waiver requirement in breach of the BIT.[161]

210. Claimant does not deny having been involved in negotiations relating to the measures alleged to be in breach of the BIT; such negotiations were engaged or continued by the ALAV, the Venezuelan Airlines Association, with officials of the Republic and with other international airlines directly and/or through IATA, both after the Request for Arbitration was filed.[162]

211. Claimant must therefore be deemed to have directly or indirectly continued, after the submission of the Request for Arbitration, to take part into negotiations in relation to the measures allegedly contravening the BIT, therefore multiplying parallel dispute resolution procedures, which is precisely what the waiver requirement of the BIT precludes.[163]

(ii) Claimant

212. Claimant submits that it waived its right to initiate or continue any other proceedings under Article XII(3)(b) of the BIT in paragraph 43 of its Request for Arbitration.[164]

213. The first prong of Article XII(3)(b) focuses on formal proceedings before Venezuela's domestic courts, while the second prong focuses on other dispute proceedings.[165] In this

[157] Rejoinder, para. 62.
[158] Rejoinder, paras 63-66.
[159] Rejoinder, para. 67.
[160] Rejoinder, paras 68-69.
[161] Application for Bifurcation, paras 50-61; Counter-Memorial, paras 181-186; Rejoinder, para. 70.
[162] Rejoinder, para. 71.
[163] Rejoinder, para. 73.
[164] Response to Application for Bifurcation, paras 20-31; Reply, paras 55-56.
[165] Response to Application for Bifurcation, para. 27; Reply, para. 58.

way, Article XII(3)(b) guarantees against the possibility of duplicative proceedings and inconsistent judgments in multiple fora. In this connection, Claimant points to the explanation of the tribunal in *Supervision v. Costa Rica* that the point of these type of waiver provisions is to "*avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions*".[166]

214. Paragraph 43 of the Request for Arbitration unequivocally confirmed that Claimant had not commenced either of the types of proceeding described in Article XII(3)(b) and that it waived to do so in the future. Further, Claimant confirmed the broad scope of that waiver again in its Response to the Application for Bifurcation.[167]

215. Respondent's position is also inconsistent with its prior arguments regarding the interpretation of Article XII(3)(b) in other disputes brought under the BIT.[168]

216. There is no basis therefore for the argument that the second prong of Article XII(3)(b) encompasses non-adversarial proceedings. Such interpretation would bar any attempts at amicable dispute resolution, an illogical result because a party cannot be compelled to settle and there is no risk that amicable settlement talks will lead to a contrary binding decision or to double recovery, the concerns that underlie the requirement for waivers in bilateral investment treaties. Such interpretation would also be impossible to define as it would preclude assertions of rights, requests to comply, exchanges between parties or discussion, thereby effectively preventing recourse to the BIT's dispute resolution provisions.[169]

217. Concerning the negotiations through the IATA and ALAV on which Respondent relies, Claimant submits that Respondent has inaccurately described the nature of these events as neither of these negotiations constitute proceedings for the purposes of Article XII(3)(b). Negotiations which are no more than discussions are not legal proceedings.[170]

218. Consequently, Respondent's waiver objection must be dismissed.[171]

3.2 The Tribunal's analysis

(i) The issue

219. The *issue* is whether Claimant has complied with the waiver requirement of Article XII(3)(b) of the BIT so that this Tribunal has jurisdiction to decide the dispute before it or that the claims are admissible (see *supra* paras 205 and 212).

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[166] Reply, para. 58 quoting Exh. CL-101, *Supervision y Control S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/12/4, Award, dated 18 January 2018 ("Supervision").
[167] Reply, para. 59.
[168] Reply, para. 61 quoting Exh. CL-88, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/04/6, Decision on Jurisdiction, 22 August 2008.
[169] Reply, para. 62.
[170] Response to Application for Bifurcation, paras 29-30; Reply, para. 63.
[171] Reply, para. 63.

The Tribunal will address this issue as follows:

- *First*, it will set out Article XII(3)(b) of the BIT and determine its scope (Section (ii)).

- *Second*, it will assess whether Claimant has complied with said provision (Section (iii)).

- *Finally*, it will conclude (Section (iv)).

(ii) Article XII(3)(b) of the BIT

220. The Parties disagree on whether Article XII(3)(b) of the BIT includes non-adversarial measures such as negotiations.[172] To decide this question, the Tribunal will set out Article XII in full and then determine the scope of the provision.

221. *First*, Article XII of the BIT, which deals with the "*Settlement of Dispute between and Investor and the Host Contracting Party*" (already set out *supra* para. 131), provides in the relevant part the following:

> *1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach, shall to the extent possible, be settled amicably between them.*
>
> *2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.*
>
> *3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4)* ***only if****:*
>
> […]
>
> *(b) the investor* ***has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before***

[172] Respondent (Application for Bifurcation, paras 40-63; Counter-Memorial, paras 136-188; Rejoinder, paras 62-67; R-PHB, para. 30); Claimant (Response to Application for Bifurcation, paras 26-27; Reply, para. 62; Reply C-PHB, para. 46).

the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind*;*

[…] (emphasis added)

222. The Tribunal must interpret this provision in accordance with the rules of treaty interpretation set forth in Article 31 of the VCLT[173] and, "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[174] For the purposes of interpretation, the "context" includes the text, the preamble of the Treaty and its Annexes, and matters referred to in Article 31(1)(a) and (b) of the VCLT. In addition, the Tribunal "*must take into account together with context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*".[175] In addition, the Tribunal may have recourse to "*supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable*".

223. The BIT imposes certain conditions on Respondent's consent to arbitrate claims under the BIT. This follows from the wording of Article XII(3)(b) that the investor, in this case allegedly Air Canada, may submit its claims to arbitration "***only if***" it "***has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind***" (emphasis added).

224. Accordingly, the so-called "waiver" provision, is a condition of Respondent's consent to arbitration. It is therefore a precondition to the jurisdiction of the Tribunal.

225. *Second*, as Respondent correctly submits, the waiver requirement has a formal and a material aspect.[176]

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[173] Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") provides as follows: "*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The content of the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.*" Respondent notes that Claimant is not a party to the VCLT but that "*the rule of treaty interpretation embedded in the VCLT are often referred to as being customary rule of international law*" which is not the case with other provisions. See Reply R-PHB, para. 40.

[174] VCLT, Article 31(1).

[175] VCLT, Article 31(3).

[176] Application for Bifurcation, para. 41.

226. The formal aspect requires that, in the same way that a claimant must satisfy the procedural and jurisdictional requirements in its Request for Arbitration, it must do so with respect to the waiver requirement, i.e., the existence of a conforming written waiver.[177] Accordingly, Claimant in the present case, must provide a written waiver of "*its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind*".

227. The material aspect requires that a claimant has not actually initiated or continued such proceedings, i.e., the investor's compliance with the waiver. Unlike the formal aspect of the requirement, compliance with this requirement requires proof of the negative or proof of absence. The Tribunal therefore considers that compliance with the formal requirement also requires an intent on the part of a claimant to have complied with the material requirement. It is at this moment, that the respondent party must prove the non-fulfilment of the material aspect, in which case the burden shifts.

228. *Third*, as to the scope of the waiver requirement, the Tribunal considers the following:

- The phrase "***any other proceedings in relation to the measure that is alleged to be in breach of this Agreement"*** includes proceedings commenced or continuing at the time of the filing of the Request for Arbitration and during the pendency of the arbitration. The temporal scope of the requirement therefore includes the period during which the alleged breach is filed and pursued.

- The purpose of the waiver provision is to protect a respondent State from having to defend itself in multiple *fora* with respect to the same measure and to minimize the risk of inconsistent decisions and double recovery with respect to such measure.[178]

- While the Parties agree on the meaning of "*the courts or tribunals of the Contracting Party concerned*", i.e., the first part of the provision per Claimant, they disagree on the meaning of "*in a dispute settlement procedure of any kind*", i.e., the second part of the provision.[179] It is true that "negotiations" between the

[177] Exh, RL-8, *The Renco Group Inc v. Republic of Peru*, UNCITRAL No. UNCT/13/1, Partial Award on Jurisdiction, dated 15 July 2016, para. 60 ("*the provisions of Article 10.18(2)(b) dealing with waiver encompass two distinct requirements: a formal requirement (the submission of a written waiver which complies with the terms of Article 10.18(2)(b)) and a material requirement (the investor abstaining from initiating or continuing local proceedings in violation of its written waiver*"); Exh. RL-10, *Waste Management, Inc. v. United Mexican States*, ICSID Casen No. ARB(AF)/98/2, Arbitral Award, dated 2 June 2000, para. 20 ("*Any waiver* […] *implies a formal and material act on the person tendering same. To this end,* [the] *Tribunal will therefore have to ascertain whether* [the claimant] *did indeed submit the waiver in accordance with the formalities envisaged under* [the treaty] *and whether it has respected the terms of the same through the material act of dropping or desisting from initiating parallel proceedings*."; Exh. RL-12, *Commerce Group Corp et al. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, dated 14 March 2011, para. 84 ("*requires Claimants to file a formal 'written waiver', and then materially ensure that no other legal proceedings are 'initiated' or continued*"").

[178] Response to Application for Bifurcation, paras 27-28; Reply, para. 58; Exh. CL-101 (Supervision), para. 294 ("*avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions*").

[179] Reply, para. 58.

> Parties in an attempt to reach settlement of a dispute with respect to a measure alleged to be in violation of the BIT can in principle be categorized as "*dispute settlement procedures*".[180] If anything, the subsequent term "*any kind*" expands the category of dispute settlement procedures. However, this category cannot include a procedure that has no third-party adjudicator or neutral, such as the "negotiation process" alleged in the present case.[181] Further, it cannot include a procedure the result of which can be complied with by a party at its choice.[182] To hold otherwise would be contrary to the purpose of the waiver provision. Further, it would mean that every time the parties to an arbitration agreement enter into good faith negotiations to resolve their dispute, the tribunal must automatically find that it lacks jurisdiction or that it loses its jurisdiction. In such a case, the parties themselves – and in particular the claimant – would do their utmost not to engage in any settlement options.

229. It would therefore appear that the second part of Article XII(3)(b) does not cover negotiations, but a procedure in which Respondent defends itself against a binding result in a dispute with Claimant concerning the measures alleged to have violated the BIT.

(iii) Has Claimant complied with Article XII(3)(b)?

230. The Tribunal refers to paragraph 43 of Claimant's Request for Arbitration, which states as follows:

> *In accordance with Article XII(3)(a) of the BIT, Air Canada consented to arbitration in its notice letter of June 15, 2016, and it does so here again.* ***In regard to Article XII(3)(b), Air Canada has not commenced any other proceedings in relation to the measures of Venezuela that are at issue in this dispute, and it expressly waivers its right to initiate any such proceedings****.* (emphasis added)

231. The Tribunal finds that Claimant has satisfied the formal requirement of the waiver provision of Article XII(3)(b) by making the foregoing statement. The statement is clear and unambiguous. The fact that Claimant did not reproduce the entire text of the provision to include its two parts and the possible procedures waived is not relevant. Claimant's express reference to Article XII(3)(b) and its intent to waive "proceedings" is sufficient.

232. With respect to Respondent's assertion that documentary evidence produced by Claimant confirm that it participated in at least two third-party dispute settlement procedures after the alleged waiver was made,[183] the Tribunal notes the following.

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[180] Exh, R-52, Canada Department of Justice, *Dispute Resolution Reference Guide*, Negotiation, dated 31 July 2017 ("Dispute Resolution Reference Guide"); Article XII(1) of the BIT, Exh. C-1 and XVIII of the ATA, Exh. C-5.
[181] Exh. R-52 (Dispute Resolution Reference Guide).
[182] Exh. R-52 (Dispute Resolution Reference Guide).
[183] Application for Bifurcation, paras 40-63; Counter-Memorial, paras 136-188; Rejoinder, paras 58-74; R-PHB, para. 30.

- *Concerning the "Application of IATA for Approval and Antitrust Immunity of Certain Discussions" of 28 April 2016*,[184] this procedure does not fall within the scope of Article XII(3)(b). This is because the application was made by a party other than Claimant and has the negotiation features that the provision excludes. In this regard, the Tribunal agrees with Claimant that the Application does not involve Claimant's assertion of any action or claims against Venezuela before any court, tribunal, or similar forum, but instead is a request by a third party trade association to the U.S. authorities to "*meet and discuss joint courses of action*" rather than an impermissible dispute settlement proceeding.[185]

- *Concerning the December 2017 meeting between representatives of ALAV – of which Claimant is a member – with the Ministry of Popular Power for Foreign Trade and International Investment of Venezuela and the General Director of INAC to discuss the "repatriation of the outstanding amounts of the airlines"*,[186] this "procedure" does not fall within the scope of Article XII(3)(b). For the same reasons as with the IATA Application, and as Claimant correctly submits, this meeting of a third-party industry group does not constitute the assertion by Claimant of separate formal actions or claims against Venezuela before a court, tribunal or similar forum.[187]

233. As a result, Claimant has also not violated the material requirement of Article XII(3)(b).

234. Accordingly, Claimant has not breached the waiver provision of the BIT.

(iv) Conclusion

235. Based on the foregoing, the Tribunal concludes ***that Respondent's objection to jurisdiction based on the waiver is dismissed***.

4. Objection to jurisdiction based on the time-bar provision of the BIT

4.1 The Parties' positions

(i) Respondent

236. Respondent submits that the Tribunal lacks jurisdiction because Claimant initiated the arbitration after the statutory period provided by Article XII(3)(d) of the BIT had expired.[188] As Claimant bears the onus to establish the jurisdiction of the Tribunal, it must show that it submitted the dispute to arbitration no more than three years from the date on which it first acquired knowledge or should have first acquired knowledge of the alleged BIT breaches. Given that the Request for Arbitration was submitted on 16 December

[184] See Exh. C-95, Application of IATA for Approval and Antitrust Immunity of Certain Discussions, dated 28 April 2016 ("IATA Application").
[185] Response to Application for Bifurcation, para. 29.
[186] See Exh. C-100, Letter from ALAVA to the Minister of Popular Power for Commerce, dated 18 December 2017.
[187] Response to Application for Bifurcation, para. 30.
[188] Rejoinder, para. 75.

2016, the cut-off date is 16 December 2013. Claimant nonetheless has not specified with precisions the date(s) on which it considers that Respondent allegedly breached its BIT obligations. This, in and of itself, suffices to dispose of Claimant's entire case. All the more as Respondent has pointed to a number of specific admissions by Claimant that show that it had acquired or should have acquired knowledge of the alleged BIT breaches well before 16 December 2013.[189] In fact, Claimant modified three times its position on the alleged timeliness of its Request for Arbitration.[190]

237. The record shows that Claimant first acquired knowledge of the alleged refusal to authorize the 15 AAD requests at the very least on 28 November 2013.[191] Claimant's account of its own knowledge as of 28 November 2013 is in line with the information to which Claimant had access through its active participation in IATA and is further confirmed by documents obtained during the document production phase.[192] Further, contemporaneous evidence also show that Claimant had already organized its departure from the country well before the cut-off date.[193] Moreover, by admission of one of Claimant's high representatives, Claimant was at the very least aware of the alleged breaches before the cut-off date of 16 December 2013.[194]

238. Claimant's Request for Arbitration was therefore filed in breach of the requirement of Article XII(3)(d) of the BIT. Consequently, the precondition to Respondent's consent embodied in the BIT is not met and the Tribunal must declare that it lacks jurisdiction to hear Claimant's claims.

(ii) Claimant

239. Claimant submits that it is well within the three-year period allowed under Article XII(3)(d) of the BIT as it filed its Request for Arbitration on 16 December 2016.[195]

240. Article XII(3)(d) also requires an investor's actual or constructive knowledge of the loss or damages it has suffered as a result of the measures not only knowledge of the measures.[196]

241. Prior to 16 December 2013, Claimant did not have actual or constructive knowledge that Respondent would ultimately not approve the outstanding AADs, or that Claimant would suffer loss due to Respondent's failure to do so. Claimant had knowledge of Respondent's acts and omissions leading up to 16 December 2013 – specifically its failure to approve, by that date, Claimant's outstanding AADs – but that omission did not give rise to actual or constructive knowledge that Respondent would not subsequently approve the AADs or that Claimant would suffer loss or damage as a result. Indeed, Respondent had always

[189] Rejoinder, paras 76-78.
[190] Rejoinder, paras 79-82.
[191] Rejoinder, para. 83.
[192] Rejoinder, para. 84.
[193] Rejoinder, para. 86.
[194] Rejoinder, para. 87.
[195] Reply, para. 64.
[196] Reply, paras 65-66 quoting Exh. CL-12, *Rusoro Mining limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/15, Award dated 22 August 2016 ("Rusoro").

complied with its AAD approval obligations, albeit often with delay, and Respondent was giving every indication that this would again be the case in the weeks leading up to and after 16 December 2013.[197]

242. Further, throughout the ten years during which Claimant ran the Toronto-Caracas-Toronto route, there had been instances where Claimant had been concerned about CADIVI's delay. Each time, CADIVI periodically assured the airlines that it would approve the airlines currency conversion requests promptly or would approve multiple AADs at the same time. Through this process, Claimant had been able to convert and transfer U.S.$ 91 million of returns to its bank account in New York and for use in its global operations. Therefore, the state of affairs in December 2013 was not entirely out of the ordinary.[198]

243. Moreover, Respondent approached Claimant and other airlines on 28 November with an offer to negotiate settlement.[199]

244. In addition, Respondent's own actions following 16 December 2014 contradict its arguments. As late as 28 January 2014, Claimant still had no basis to conclude that Venezuela would breach its obligations under the BIT or that Claimant would suffer harm. Respondent's agents themselves were reassuring Claimant that none of Respondent's delays were going to crystalize into permanent rejections, and that several potential payment methods were being assessed.[200]

245. Therefore, Respondent's argument that Claimant's claims are time-barred under the BIT is unfounded and should be rejected.[201]

4.2 The Tribunal's analysis

(i) The issue

246. The *issue* is whether Claimant's claims are time-barred under Article XII(3)(d) of the BIT so as to affect the Tribunal's jurisdiction or the admissibility of those claims (see *supra* paras 236 and 239). The Tribunal will address this issue as follows:

- *First*, it will set out the requirements of Article XII(3)(d) (Section (ii)).
- *Second*, it will consider whether Claimant has complied with that provision (Section (iii)).
- *Finally*, it will conclude (Section (iv)).

[197] Reply, para. 68.
[198] Reply, para. 69.
[199] Reply, para. 70.
[200] Reply, para. 71.
[201] Reply, para. 72.

(ii) The requirements of Article XII(3)(d)

247. The Parties disagree on the requirements of Article XII(3)(d) of the BIT.[202] However, both Parties agree that the concept of knowledge set forth therein is governed both by the text of the BIT itself and by international law.[203] Accordingly, in order to decide, the Tribunal will set out the provision encompassing Article XII(3)(d) and interpret that provision in accordance with the rules of treaty interpretation of Article 31 of the VCLT[204] (which form part of customary international law) and as set out above (see *supra* para. 222).

248. Article XII(3)(d) of the BIT, which is found in the provision on "*Settlement of Dispute between and Investor and the Host Contracting Party*" (already set out above in para. 132), reads in relevant part as follows:

> *1. **Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement**,* […].
>
> *2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.*
>
> *3. **An investor may submit a dispute as referred to in paragraph (1) to arbitration** in accordance with paragraph (4) **only if**:*
>
> […]
>
> *(d) **not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage**.*
>
> […] (emphasis added)

249. *First*, as with the waiver provision, it is clear from the wording of Article XII(3)(d) that the investor may submit its claims to arbitration "***only if*** […] ***not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has***

[202] Respondent (Application for Bifurcation, para. 66; Counter-Memorial, paras 209-210; Rejoinder, paras 75-88); Claimant (Reply, paras 64-72; C-PHB, paras 154-161).
[203] C-PHB, para. 151; R-PHB, para. 55.
[204] R-PHB, para. 43.

incurred loss or damage" (see *supra* para. 248). Therefore, the time-bar is also a condition of Respondent's consent to arbitration in the present case.[205]

250. *Second*, it is undisputed that the relevant time-frame set by the time-bar rule is three years. For purposes of counting that time-frame, it is apparent form the first sentence of paragraph (3) – "[a]*n investor may submit a dispute as referred to in paragraph (1)* ***to arbitration***" (emphasis added) – that it is the date of submission of the Request for Arbitration that is relevant, not the date of the Notice of Dispute.[206] In this regard, the Tribunal notes that the fact that Claimant submitted in its Memorial that the relevant date is that of the notice of dispute,[207] Claimant referred to the date of the Request for Arbitration in its responses to Respondent's time-bar objection,[208] is not an indication of bad faith or a situation that would require the Tribunal to draw adverse inferences, as Respondent requests; the Tribunal simply disagrees with Claimant's interpretation and agrees with Respondent's interpretation regarding the setting of the *dies ad quem*.[209]

251. *Third*, with respect to the "knowledge" requirement, the provision provides for two possibilities: (a) the date on which knowledge was first acquired; or (b) the date on which knowledge should have been first acquired. The latter, i.e., the date on which a reasonable person in circumstances would have first acquired knowledge, is usually more relevant, as the date of actual knowledge is often difficult to determine.[210]

252. *Finally*, the wording of Article XII(3)(d) is clear in that it requires both "*knowledge of the alleged breach* ***and*** *knowledge that the investor has incurred loss or damage*", not one or

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[205] Application for Bifurcation, para. 64; Counter-Memorial, para. 189.
[206] This is contrary to Claimant's argument in its Memorial, para. 100. This is in line with Respondent's argument in its Application for Bifurcation, para. 78.
[207] Memorial, para. 100.
[208] Response to Application for Bifurcation, paras 21-23; Reply, para. 64.
[209] Counter-Memorial paras 207-208.
[210] Exh. RL-13, *Spence International Investments, LLC, Berkowitz, et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award dated 30 May 2017 ("Spence"), para. 209 ("*the requirement of knowledge on the part of a claimant is a requirement of actual knowledge or of constructive knowledge.* ***As the actual knowledge of a claimant will often be difficult to determine, tribunals are frequently called upon to consider what a claimant must be deemed to have known****. The "should have first acquired knowledge" test in Article 10.18.1 is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known. In this regard, the Tribunal agrees with the analysis by the tribunal in Grand River on this issue, viz: "'Constructive knowledge' of a fact is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact. Closely associated is the concept of 'constructive notice.' This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further enquiry, or from wilfully abstaining from inquiry in order to avoid actual knowledge*") (emphasis added); Exh. RL-14, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, dated 31 May 2016 ("Corona"), para. 217 ("*DR-CAFTA Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage: actual knowledge – what the Claimant did in fact know at a given time – and constructive knowledge – what the Claimant should have known at a given time. For the running of the three-year period to be triggered, it is sufficient that the Claimant acquired either actual or constructive knowledge. The Tribunal shall first consider any evidence of the Claimant's actual knowledge of the Respondent's decision not to grant the environmental license for the Claimant's project; only when such an inquiry would lead to the conclusion that actual knowledge was not acquired by the Claimant before the critical date, would the Tribunal then need to engage in an objective determination of whether in light of all the circumstances it can be held that the Claimant should have first acquired knowledge of the breach and loss or damage at a particular point in time.*"). See also, R-PHB 44-45 and 46 noting that first knowledge test is a subjective standard.

the other (emphasis added). Thus, the Tribunal agrees with Claimant that the relevant date must involve knowledge of both the BIT breach and the resulting consequences, i.e., that a loss would or did occur. This does not require quantification of the loss itself.[211]

253. More specifically, it must be sufficiently clear that Claimant had clear knowledge of a clear breach of the BIT with the resulting consequences in terms of loss – but not quantification thereof – so that Claimant is in a position to arbitration immediately.

254. The Tribunal should now assess whether Claimant has complied with the requirements of Article XII(3)(d) of the BIT.

(iii) Has Claimant complied with Article XII(3)(d) of the BIT?

255. In the present case, Claimant filed its Request for Arbitration on 16 December 2016. Accordingly, Claimant must prove that it had or should have had first knowledge of the BIT violations and resulting damages or losses as of 16 December 2013, and not before, for this Tribunal to have jurisdiction. This is in dispute between the Parties.[212]

256. The Tribunal recalls that the present dispute concerns Respondent's alleged breaches of the BIT arising from Respondent's failure to approve the 15 AAD requests filed by Claimant. Relevant for the purposes of the time-bar rule, therefore, is the date on which Claimant first knew or ought to have known that Respondent's failure to approve *the 15 AAD requests or its "omission" to do so, breached its treaty obligations and caused Claimant damage or loss*. In this regard, the following facts are relevant.

257. *First*, Claimant filed the 15 AAD requests between 20 September 2013 and 22 January 2014. These AAD requests covered the period between October 2012 and July 2013 (see *supra* para. 21). According to Mr. Blanco's testimony, a normal process required CADIVI to approve, reject, or suspend an AAD request within a few days of each request. At the same time, it appears that Respondent had a practice of processing AAD requests somewhat late and collectively.[213] And, pursuant to Article 60 in conjunction with Article 4 of the *Administrative Procedure Law (or Ley Orgánica de Procedimientos*

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[211] Reply, paras 65-67; C-PHB, paras 152-153; Exh. CL-12 (Rusoro), paras 214, 217 ("*However, Art. XII.3 (d) requires, for the time bar to apply, not only that the investor knows about the alleged breach, but also that the investor is aware that such breach would cause loss or damage to its investment.*"; "*In accordance with established NAFTA case law, what is required is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear*"). See also Exh. RL-13 (Spence), para. 209; Exh. RL-14 (*Corona*), para. 234 ("*The answer to this question cannot be other than positive, as the Claimant, during the same period, proved not only to be conscious of the reality of damage caused by the DR refusal to grant the environmental license but was even able to evaluate it.*"). See also R-PHB, para. 47 quoting Exh. RL-13 (Spence), para. 213 ("*does not require full or precise knowledge of the loss or damage*").

[212] Respondent (Application for Bifurcation, paras 67-68, 77, 80, 82; Counter-Memorial, paras 192, 195, 200, 203, 205, 214-215; Rejoinder, paras 81, 93, 86-88; R-PHB, paras 31-38); Claimant (Response to Application for Bifurcation, paras 32, 35-38; Reply, paras 68-71; C-PHB, paras 154-161).

[213] Tr. Day 2, 100:14-101:8 ("*It was a surprise to Air Canada at the time because we had been able to repatriate our funds from the beginning, from 2004, up until the 2012 timeframe, which the applications were approved by CADIVI and the repatriations occurred; sometimes with delays, but they did happen.*"); C-PHB, para. 156. Indeed this was the case with the 91 AADs. See also Pittman WS, para. 23, FTI Report, Figure 4 and Schedule 6 and C-PHB, para. 157.

Administrativos[214]*)* administrative files need to be processed and resolved within four months; absent an express decision, the interested party can assume that the request has been denied and seek judicial recourse – Air Canada, as the interested party, could in no way have presumed that a breach had occurred before the lapse of these four months. Therefore, it appears that any failure by Respondent in this regard resulting in a breach of international obligations could not have commenced prior to 2014.[215] As such, Respondent's reliance on statements by IATA in November 2013 – of which Claimant's CEO was a member – regarding the delay in repatriating U.S.$ 1.5 billion to all corners of the world, including Respondent, cannot be considered evidence that attributes knowledge of Respondent's BIT breaches on Claimant.[216]

258. *Second*, it is true, and Claimant does not dispute this, that as of November 2013, CADIVI had not yet approved the AAD requests submitted by Claimant (out of the 15 AAD requests).[217] On 28 November 2013, the President of INAC, Mr. Pedro González Díaz, allegedly approached Claimant and other airlines to discuss a number of pending applications for AAD requests and proposed to pay outstanding AADs with jet fuel or through government bonds.[218] While the content of this meeting itself indicates knowledge of Respondent's failure to approve AADs for several airlines, there is nothing to indicate any knowledge of Respondent's breach of the BIT and resulting loss or damage with respect to its 15 AADs, the first of which was filed two months before the meeting. If anything, the meeting itself evidences an effort on Respondent's part to find a solution to the situation that existed at that time well into 2014.[219] Accordingly, the Tribunal rejects Respondent's argument that Claimant's perception of this meeting as an offer to negotiate a settlement is sufficient to be considered knowledge or notice of the BIT breach

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[214] Exh. RL-54.

[215] Air Canada had submitted the last three out of the 15 AAD requests in January. See C-PHB, para. 158.

[216] Exh. R-54, IATA Annual Review, pp. 5, 50; Rejoinder para. 83.

[217] By that time Air Canada had submitted 12 out of the 15 AAD requests (12 on 20 September 2013 and two on 11 October 2013 and 29 October 2013 respectively). See Memorial, paras 25, 58; C-PHB, para. 158; Reply C-PHB, para. 59.

[218] Babun WS, paras 14-17; Application for Bifurcation, para. 76; Counter-Memorial, para. 202; Rejoinder, para. 83; Exh. C-37, ALAV's summary of INAC's proposal dated 4 December 2013; Exh. C-38, El Universal News Article dated 30 November 2013.

[219] See Exh. C-95 (IATA Application), p. 11 comprising Letter from IATA to President of Venezuela, dated 17 February 2014: "*Last year the President of INAC speaking on behalf of the government and the Minister of Air Transportation, said that Venezuela would honor the debt (US$ 3 billion at the time) and would discuss with the airlines possible alternative means of payment* […]. *On January 23, 2014, the Minister of Air Transportation the President of INAC, together with the Minister of Finance and the President of the Centre of Foreign Commerce said that an approach to addressing the payments would be announced by February 4th. As of today, nothing has materialized*"). See also Babun WS, para. 15 ("*On January 28, 2014, I attended a meeting with INAC"s president, Mr. Pedro González Díaz, and our GSA. The meeting was specifically to negotiate how to resolve the Government's failure to grant Air Canada's Authorization for Currency Acquisition requests. During the meeting, I explained to Mr. González Díaz that it was vital for Air Canada to receive the required authorizations to be able to transfer its own revenue out of the country and to normally operate the route. Mr. González Díaz seemed to understand and be pro-business. Mr. González Díaz also explained that he had prepared several payment options for the Government to review and was confident that CADIVI would make an announcement along those lines towards the end of that week. As he explained it, the goal was to have the Government pay a percentage in cash, reach a deal as to the remainder, and start fresh in 2014, i.e. paying on time.*").

and resulting loss.[220] Similarly, it rejects Respondent's argument that the fact that Claimant had already arranged its departure from the country in 2021 is in any way relevant to early knowledge.[221]

259. Equally irrelevant is the letter sent by the Ministry of the Presidency to ALAV on 8 November 2013, which asked ALAV to provide information on ticket sales by the 26 member airlines of ALAV, including Claimant, in 2012 and between January and October 2013. The fact that Claimant cites this letter in support of its argument in its Memorial that Respondent prevented Claimant from repatriating its revenues does not demonstrate that Claimant had first knowledge of Respondent's BIT violations with respect to the 15 AAD requests and the resulting losses or damages.[222] To the extent necessary, and if the Tribunal finds that it has jurisdiction, it will evaluate Claimant's reliance on this document if and when it addresses the Merits.

260. *Third*, Respondent relies on Claimant's December 2013 internal communications to argue that Claimant had constructive knowledge of and was preparing to resolve the breach of the BIT and the resulting harm: (i) on 5 December 2013, by which BASSA informed Claimant that "*the government has halted payments since what they own to the airline industry is $3B (significant amount for a struggling economy) and thus want us to consider accepting USD denominated government bonds instead of case*";[223] (ii) on 6 December 2013, with Claimant's Senior Sale Assistant stating: "*there is a strong possibility that we will never see our money – so I suggest we expedite the negotiations to understand if there is good faith and really an option to receive fuel in exchange and how quickly we can offset our credit*"[224]; (iii) dated 9 December 2013, with Claimant's Senior Sale Assistant proposing to "*take this to a higher level*";[225] (iv) in which the same refers to "*rescue*[ing] *at least some of* [Air Canada's] *money*"; and (v) dated 10 December 2013, in which Claimant's Vice President-Alliances & Regulatory Affairs insists that Claimant's liaison officer with the Canadian officer participate on the conference call scheduled on 11 December 2013, along with various top Claimant executives, to discuss the repatriation of the funds,[226] stating that Claimant was "*now waking up internally*".[227] This internal correspondence may *prima facie* indicate recognition of the impending impairment. However, it suggests that Claimant is willing to engage in discussions and

[220] Reply, para. 70; Rejoinder, para. 83. See also R-PHB, paras 35-36. Nor does the Tribunal consider Claimant's statement during the Hearing on this issue to be a new argument.
[221] Exh. R-56, IATA Annual Review 2012; Exh. R-2 (Passenger General Sales Agency Agreement); Rejoinder, para. 86.
[222] Exh. C-36, Letter from CADIVI to ALAV dated 8 November 2013; Application for Bifurcation, para. 74; Counter-Memorial, paras 199-200. See also Memorial, Section III(c).
[223] Exh. R-51 (AC internal communication December 2013); Rejoinder, para. 83. In relation to this the Tribunal does not find that an alleged "*discomfort of Mr Babun when he was questioned on this topic*", who was copied on the email of 6 December 2013 and who first denied having received the email or Respondent's allegation in this connection, to confirm that Air Canada had acquired knowledge of the alleged breach and damages as a result prior to 16 December 2013. See R-PHB, para. 34.
[224] Exh. R-55, Air Canada's international communication, email thread from 5 December to 9 December 2013, *Subject: Re: CADIVI Update* ("AC internal communication December 2013 II"); Rejoinder, para. 83; Tr. 10.03.2020, 129:7-16, 143:18-146:21.
[225] Exh. R-55 (AC internal communication December 2013 II); Rejoinder, para. 83.
[226] Exh. R-51 (AC internal communication December 2013); Rejoinder, para. 83.
[227] Exh. R-51(AC internal communication December 2013); Rejoinder, para. 83; R-PHB, para. 49.

explore *bona fide* alternatives, implying that there can be no form of knowledge of a breach of the BIT, much less of the resulting loss or damage with respect to its 15 AADs, the first of which was filed two or three months before and the last of which was filed two months after.[228] Had the negotiations resulted, for example, in an agreement to settle the amount (allegedly) due with fuel payments, no loss or damage would have resulted. Certainty as to the loss or damage associated with the breach of the BIT breach could only be obtained at a much later stage, when the negotiations proved unsuccessful.

261. *Fourth*, Respondent also relies on Claimant's references in its submissions to argue that Claimant knew or should have known of the situation it describes as causing its alleged harm prior to the 16 December 2013 cut-off date:[229]

- Claimant's Notice of Dispute states that "[**b**]***eginning in October 2012, however, Venezuela ignored Air Canada's properly submitted AADs, simply refusing to act on the company's requests to exchange Bolivars for Dollars, thereby preventing from Air Canada repatriating its funds****. Specifically, Venezuela has refused to adjudicate Air Canada's fifteen AADs filed from October 2012 to December 2013. Venezuela, thus, prevented Air Canada from exchanging 330 million Bolivars earned through local ticket sales into Dollars and repatriating them*".[230] (emphasis added by Respondent)

- Claimant's Request for Arbitration states that "[b]***eginning in 2013, however, Venezuela ignored Air Canada's properly submitted AADs, simply refusing to act on the company's requests to exchange Bolivars for US Dollars, thereby preventing Air Canada from converting and repatriate its earnings.*** *Specifically, up to the present date, Venezuela has refused to process fifteen AADs submitted by Air Canada in relation to domestic ticket sales between October 2012 and December 2013*".[231] (emphasis added by Respondent)

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[228] See specifically 5 December 2013 email in Exh. R-51 (AC internal communication December 2013), p. 5, containing a report from Air Canada's GSA: "*Applications are now again in "analysis" waiting for authorization. Our application for Feb 2013 went thru the same process on Nov 06, it is also in "analysis" again waiting for approval. However a new situation came recently when the government realized that with the latest's airlines applications, the debt will be close to 3BB American dollars, and President Maduro has designated Aeronautical authorities to give us a proposal to reach an agreement for backlogs debt via Venezuela Public Debt Bonds (I do not recommend this option) and/or Fuel in our country or allied countries (such as Argentina). During this meeting I took the liberty to ask if Cuba will be an option and they say yes. Also they explain to us that CADIVI will continue current process and eventually some of our applications will be approved meanwhile negotiations go on. This is an option for backlogs only and they promised that their goal is to pay within 90 days maximum, for 2014.*" Similarly, neither the emails of 6 December 2013 in which Air Canada's Senior Sales Assistant informed his colleagues that there was a strong possibility that Air Canada "*will never see* [its] *money*", Exh. R-55 (AC internal December communication 2013 II) and on 10 December 2013, Air Canada was wondering how to "*rescue at least some of* [its] *money*" in Exh. R-51 (AC internal communication December 2013) meant that Air Canada had the believe that the alleged breach would cause it an alleged loss or damage. What was necessary was the knowledge of a breach plus actual loss not possible loss. See R-PHB, paras 37 and 49.

[229] Counter-Memorial, paras 192, 195, 214.

[230] Exh. C-14 (Notice Letter); Application for Bifurcation, para. 67; Counter-Memorial, para. 192.

[231] RfA, para. 25; Application for Bifurcation, para. 68; Counter-Memorial, para. 193; Reply, paras 81. 84, 157, 170, 184, 211; Rejoinder, para. 83.

- Claimant's Memorial states that "[s]***tarting in late 2012 and throughout 2013, Venezuela took a series of measures that made it much harder for airlines, including Air Canada, to file their AADs.*** *CADIVI and other Government agencies significantly increased the level of paperwork, information, and bureaucratic interaction necessary to process each AAD*"[232] (emphasis added by Respondent)

- Mr. Babún's witness statement states that "[t]***hroughout*** *2013* […] *Air Canada, and airlines in general, became increasingly concerned about the Government's failure to grant exchange requests*".[233] (emphasis added by Respondent)

- Mr. Pittman's witness statement states that "[b]***y the end of 2012 and during 2013****, CADIVI increased the level of paperwork and information necessary to process each Authorization for Currency Acquisition*".[234] (emphasis added by Respondent)

262. The Tribunal does not find that any of these statements show that Claimant first became aware of a material breach of the BIT prior to 16 December 2013. Consistent with the documents discussed above, these statements relate to what was undisputed at that time (Venezuela's delay in adjudicating requested AADs), but not knowledge of actual breach of the BIT for failure to adjudicate all 15 AADs and resulting in losses and damages, since it was still feasible that Venezuela – albeit with some delay – would process the AADs.

263. As a result, the Tribunal does not find that it is sufficiently clear that Claimant had first knowledge of Respondent's alleged breaches of the treaty and resulting consequences prior to 16 December 2013. Instead, the Tribunal considers that, in the circumstances of the case, such knowledge should not reasonably have been first acquired sometime between Claimant's decision to suspend its flights to and from Venezuela in 2014 and Claimant's notice of dispute in relation to Respondent's alleged breaches of the in 2016: that is, at time when Claimant could realize that the 15 AADS would not be processed and assess whether it might commence the present proceedings.

264. Accordingly, the Tribunal finds that Claimant has complied with the time-bar provision of the BIT.

(iv) Conclusion

265. Based on the foregoing, the Tribunal concludes that Respondent's objection to jurisdiction based on the time-bar provision of Article XII(3)(d) of the BIT is dismissed.

[232] Memorial, para. 49; Counter-Memorial, para. 194.
[233] Babun WS, para. 13; Application for Bifurcation, para. 71; Counter-Memorial, para. 196.
[234] Pittman WS, para. 24; Application for Bifurcation, para. 72; Counter-Memorial, para. 197.

5. Objections to jurisdiction *ratione materiae* and *ratione personae*

5.1 The Parties' positions

(i) Respondent

266. Respondent submits that Claimant has failed to demonstrate that it meets (i) the *ratione materiae* requirement of the BIT and (ii) the *ratione personae* requirement of the BIT.[235]

a. *Ratione materiae*

267. Claimant needs to establish that its alleged investment meets four requirements to qualify as a protected investment under the BIT, specifically that: (i) there must be an asset within the meaning of the BIT; (ii) Claimant must control that asset, directly or indirectly; (iii) the asset must be located in the territory of the Republic; and (iv) the control over the asset must comply with the laws of the Republic.[236]

268. *First*, Claimant has not been able to establish the existence of an "asset" in the terms of the BIT.[237] Specifically:

- Claimant never had any "*claim to money*" in the terms of Article I(f)(iii) of the BIT, which is a reference to enforceable rights, i.e., a right to a payment, rather than a mere demand for money.[238] This is in line with the three authenticated versions of the BIT.[239] It is in any event common ground that the alleged "*claims to U.S. dollars*" were not previously declared or recognized by any court or competent authority in the Republic or elsewhere. Those claims are mere requests from Claimant and cannot serve to establish the jurisdiction of the Tribunal. Especially since neither Article XXI of the ATA nor Article 2 of Providencia No. 23 granted Claimant with a right or an absolute and enforceable claim to US dollars.[240]

- Article XXI of the ATA and *Providencia No. 23* do not amount to a "*right conferred by law or under contract, to undertake any economic and commercial activity*". Neither the ATA nor Providencia Nor. 23 granted Air Canada any absolute right to acquire foreign currency, but the right to apply for the acquisition of foreign currency through CADIVI and this subject to the conditions set forth in said Providencia.[241] Transferring funds through CADIVI does not per se constitute a commercial activity.[242]

[235] Counter-Memorial, paras 221-251; Rejoinder, para. 90.
[236] Rejoinder, para. 93.
[237] Counter-Memorial, para. 112; Rejoinder, para. 94.
[238] Rejoinder, para. 103.
[239] Rejoinder, para. 104.
[240] Rejoinder, para. 106.
[241] Rejoinder, para. 107.
[242] Rejoinder, para. 108.

- Under the BIT, "returns" "*means all amounts yielded by an investment*". A return cannot therefore itself, *in abstracto*, constitute an investment. Claimant must first establish that it made an investment in order to claim to have a "return" and cannot claim to have a return in hope to establish that it made an "investment" in the territory of the Republic.[243]

- The Tribunal should in addition to the BIT requirements use the objective parameters of the *Salini* test as guidance and, therefore, verify that the alleged investment has been made with (i) a certain duration, (ii) an element of risk, (iii) a substantial contribution, and (iv) a significant contribution to the host State's development.[244] In fact, the Additional Facility Rules contain a provision almost identical to Article 25(1) of the ICSID Convention justifying the relevance of the *Salini* test, i.e., Article 2(a) of the Additional Facility Rules.[245] In this connection, the examination of the criteria of the *Salini* test must not be disconnected from Claimant's allegation of what its alleged investment is under the BIT. When it comes to this test, Claimant does not refer once to its alleged "*claims to money*" its "*right to acquire foreign currency*" or its "returns" but rather lists some "resources" that it claims to have invested in the Republic which it does not even claim to be part of its protected investment in the instant case.[246]

269. Claimant fails to identify (i) its alleged "investment" under the terms of the BIT and (ii) that the dispute directly arises out of an investment, in the terms of Article 2(a) of the Additional Facility Rules.[247]

270. *Second*, Claimant failed to own or control its alleged investment in compliance with the laws of the Republic.[248] Specifically:

- Claimant failed to establish that it operated its alleged investment in compliance with the laws of the Republic pursuant to Article I(f) of the BIT.[249] The legality requirement under the BIT relates to the ownership and control of an alleged investment throughout its life and not only at the time of its acquisition or inception.[250] Claimant cannot prove that it met with such requirement as it notably sold tickets in the territory of the Republic through unlawful contracts which aimed to circumvent the Forex regime in place in the Republic since 2003.[251]

- Between 2004 and 2014, under various GSAAs, BASSA offered, and Claimant accepted, services to be rendered in the territory of the Republic for which Claimant agreed to pay compensation in U.S. dollars. Moreover, Claimant

[243] Rejoinder, para. 109.
[244] Rejoinder, para. 110.
[245] Rejoinder, para. 112.
[246] Rejoinder, para. 113.
[247] Rejoinder, paras 114-115.
[248] Counter-Memorial, paras 239-244; Rejoinder, para. 115.
[249] Rejoinder, para. 118.
[250] Rejoinder, paras 119-124.
[251] Rejoinder, para. 125.

actually paid BASSA in U.S. dollars outside of the Republic for other services included in the GSAAs that were provided within the Republic and should thus have been paid in Bolivars as per the applicable laws and the contracts in place between BASSA and Claimant.[252] This payment scheme contravened the laws of the Republic. Specifically: (i) it entailed a breach of the prohibition in place since 2005 for Venezuelan companies to offer to be paid in foreign currency for services within the Republic, which vitiated the GSAAs; (ii) it artificially reduced the in-country costs that Claimant had to pay to BASSA and that were to be deducted from Claimant's AAD requests, in breach of both Providencia No. 23 and Providencia No. 124.[253]

- Further, unlawful contracts are null and void pursuant to the Venezuelan Civil Code. In the present case, the contracts executed by Claimant with third parties, i.e., the provision of services in the Republic against payment in foreign currencies, was illicit because it contravened the Laws Against Foreign Exchange Crimes in place in the Republic between 2005 and 2014.[254] Claimant could not have operated as an airline in the Republic without those agreements and therefore cannot be deemed to have operated, i.e., owned and controlled any of its alleged investments.[255]

- Claimant misrepresented key aspects of its operations to Venezuelan authorities. Claimant has admitted that its legal representatives misrepresented to INAC the company's employment practices in 2005 in order to obtain access and security clearance with highly secured premises belonging to the Republic, namely the limited access areas of the Maiquetía airport. By doing so, Claimant has not operated, i.e., owned and controlled its alleged investments in accordance with the laws of the Republic.[256] Claimant further misrepresented to INAC during work inspections in February 2010, November 2010, 2011, 2012 and 2013 having employees in charge of security matters.[257] In addition, Claimant's position that it had no employee between 2005 and 2013 and hired Mr. Roberto Serafini in June 2013 remains doubtful. Claimant's sale ledgers for the months of October through December 2012 show that Claimant was already making direct payment to Mr. Serafini. Respondent maintains its doubts as to Claimant's compliance with Venezuelan labor laws.[258]

- Pursuant to the Venezuelan Law of Civil Aviation, international air transportation of passengers is considered a "public service". Thus, Claimant could not suspend the operation of the Toronto-Caracas-Toronto Route neither by interrupting the

[252] Rejoinder, para. 127.
[253] Rejoinder, paras 128-135.
[254] Rejoinder, para. 136.
[255] Rejoinder, paras 137-138.
[256] Rejoinder, paras 141-146.
[257] Rejoinder, para. 147.
[258] Rejoinder, para. 149.

sale of its tickets in Bolivars nor by cancelling the route without prior notice. Claimant was fully aware of the unlawfulness of its two consecutive decisions.[259]

b. *Ratione personae*

271. In any event, Respondent contends that Claimant is not entitled to protection under the BIT as it failed to establish that it qualifies as a protected "investor."[260]

272. Article I(g) of the BIT defines a Canadian investor through five criteria, namely (i) lawful incorporation in the territory of Canada, (ii) lack of Venezuelan citizenship, (iii) existence of an investment, (iv) localization of the investment in the territory of the Republic and (v) making of the investment by the alleged investor.[261] The last two requirements remain unproven. Claimant cannot prove that it made "*a claim to money*" in the territory of the Republic, where according to Claimant such claim derives from an international treaty between the Republic of Canada, namely the ATA and/or Providencia no. 23, neither of which was made by Claimant. Similarly, Claimant cannot be deemed as having itself made its alleged "*right to acquire foreign currency*" or Providencia No. 60 in the territory of the Republic where it claims the former derives from the ATA between the Republic and Canada and where the latter was granted by INAC and obviously not Claimant.[262]

(ii) Claimant

a. In general

273. Claimant submits that it is a protected "investor" with protected "investments" and protected "returns" as those terms are defined under the BIT.[263] Claimant satisfies the requirements of Article I(g) of the BIT because it is an enterprise incorporated in accordance with Canadian law, that made an investment in Venezuela and that does not possess Venezuelan citizenship.[264]

b. Investment under Article I(f) of the BIT

274. Claimant argues that Article I(f) of the BIT is a broad, non-exclusive, asset-based definition, typical of the definitions contained in many bilateral and multilateral treaties. Claimant's assets, money, claims to money and right conferred by law squarely fall within Article I(f)'s definition of investment.[265] The BIT also extends its substantive protections to both "investments" and "returns". Claimant's income and profit earned on ticket sales in Venezuela are covered by this definition of "returns" as well as by the broader terms used to define "investment".[266]

[259] Rejoinder, paras 152-154.
[260] Rejoinder, para. 155.
[261] Rejoinder, para. 156.
[262] Rejoinder, paras 157-158.
[263] Reply, para. 11.
[264] Reply, para. 12.
[265] Reply, para. 14.
[266] Reply, para. 15.

275. *First*, Claimant has "claims to money" for the purposes of Article I(f)(iii) of the BIT, specifically claims to the U.S. dollars that Claimant was entitled to receive in exchange for the Bolivar-denominated returns that Claimant held in its Venezuelan bank account. Claimant's claim to those U.S. dollars arose pursuant to Article XXI of the ATA and Article 2 of Providencia No. 23, i.e., claims to the U.S. dollars that it was entitled to receive and should have received in late 2013 and early 2014 in exchange for the Bolivar-denominated returns that Claimant held in its Venezuelan bank account.[267] Specifically:

- Article XXI(2) of the ATA granted Claimant the right to convert its Venezuelan Bolivar earnings into the currency of its choice, in this case U.S. dollars.[268]

- Article 2 of Providencia No. 23 empowered foreign airlines to apply for foreign currency on a monthly basis upon submission of certain information. Once CADIVI approved the AAD, the requesting airline was able to expatriate its revenue in a hard, convertible currency, such as the U.S. dollars.[269]

276. *Second*, Claimant's rights to convert its local returns into U.S. dollars for onward repatriation necessarily constitute "*rights, conferred by law … to undertake any economic and commercial activity*" for the purposes of Article I(f)(vi). Article XXI(2) of the ATA and Article 2 of Providencia No. 23 granted Claimant rights to acquire foreign currency needed for the repatriation of returns at the official exchange rate in fore at the time. In addition, Article VIII of the BIT, Article XXI(2) od the ATA and Article 2 of Providencia No. 23 granted Claimant rights to repatriate those returns. The conversion and repatriation of locally generated returns are an intrinsic part of a foreign investor's economic and commercial activity in a host state.[270]

277. Claimant's broader rights to operate in Venezuela under the ATA and Providencia No. 60 also constitute "*rights, conferred by law … to undertake any economic and commercial activity*". Claimant's conversion and free transfer rights are part and parcel of its rights to operate in Venezuela.[271]

278. *Third*, the returns that Claimant sought to convert and repatriate undoubtedly constitute "assets" and "money" as well as "returns" as defined by the BIT. Claimant deposited its Bolivar-denominated returns in its Venezuelan bank accounts. Cash deposited in a company's bank account is treated as an asset on a company's balance sheet. Accordingly, Claimant's cash deposits in its Venezuelan bank account constitute an "*asset owned or controlled by an investor of one Contracting Party* [Air Canada] … *in the territory of the other Party* [Venezuela]".[272]

[267] Reply, paras 17, 20.
[268] Reply, para. 18.
[269] Rejoinder, para. 19.
[270] Reply, para. 21.
[271] Reply, para. 22.
[272] Reply, para. 23.

c. The *Salini* test

279. Claimant argues that the *Salini* test does not apply to the present dispute. Even if it were to apply, Claimant's investments would satisfy the test.[273]

280. *First*, the plain language of the BIT does not condition protection of an "investment" or a "return" on any criteria beyond those contained in Article I.[274] Article 3 of the AF Rules are likewise clear. Therefore, Article 25(1) of the ICSID Convention is irrelevant in the present case and neither the *Salini* factors nor any other objective test is applicable to determine the existence of an investment under the BIT.[275]

281. *Second*, and in any event, Claimant invested significant resources to establish and conduct its operations in Venezuela and to generate the returns at issue in this case.[276] During its operations, Claimant spent over U.S.$ 118 million operating the Toronto-Caracas-Toronto route, not including taxes paid to the Venezuelan and Canadian governments. That figure does not include the significant costs that Claimant incurred outside of Venezuela to support its investment in Venezuela, including salaries and social charges of personnel assigned to the Toronto-Caracas-Toronto route, or general overhead linked and attributable to Claimant's investment in Venezuela, or the aircraft purchase and leasing costs for the aircraft that were dedicated to that route.[277] In addition, Claimant made significant intangible contributions to Venezuela's economy and people.[278] Venezuela itself acknowledge the contribution that civil aviation and Air Canada specifically made to Venezuela.[279] In addition, Claimant also bore the risk that its investment would prove unprofitable. Claimant had no guarantee of profit when it invested in the Toronto-Caracas-Toronto Route.[280]

d. Compliance with Venezuelan law

282. Claimant submits that it respected Venezuelan law at all times in relation to its investments and during the course of its operations in Venezuela.[281]

283. *First*, Respondent is incorrect that Claimant's operations did not comply with the legal framework in place in Venezuela in relation to the sale of SOTI tickets.[282]

284. *Second*, Respondent's criticisms that Claimant's investment did not comply with Venezuelan law because Claimant hired an employee, Mr. Serafini in 2013 "for the sole purpose of benefiting from the possibility to seek an authorization from CADIVI" is

[273] Reply, paras 26, 45.
[274] Reply, para. 27,
[275] Reply, para. 28.
[276] Reply, paras 32-36.
[277] Reply, para. 37.
[278] Reply, para. 39.
[279] Reply, para. 40.
[280] Reply, para. 44.
[281] Reply, para. 46.
[282] Reply, para. 47.

misplaced.[283] Claimant had consistently informed CADIVI that it did not maintain any direct employees in Venezuela before 2013. Moreover, Claimant always disclosed to CADIVI its status as a non-contributing company to the IVSS.[284] It was CADIVI itself that suggested that Claimant hire an employee in 2013 so that Claimant could obtain the good standing certificate that the IVSS was refusing to issue unless Claimant became a contributing company.[285] Claimant's general sales agent prepare and submitted the six employment contracts relied on by Respondent to INAC in 2005 in order to obtain security clearance for individuals who were providing fate and security services on behalf of Claimant. None of these individuals were Claimant's direct employees at any point in time between 2005 and 2013.[286]

285. *Third*, none of these allegations, even if accurate, would have any bearing on the Tribunal's jurisdiction.[287] The relevant point in time for determining whether an investment was made "*in accordance with law*" for the purposes of establishing a tribunal's jurisdiction is at the investment's inception.[288] There is no basis to conclude that Claimant's investment was not in accordance with law at any time, much less at its inception. The fact that Respondent formally approved Claimant's operations in Venezuela and certified Claimant's status as a foreign company in Venezuela in 2004, confirms the legality of that investment at its inceptions. Any subsequent violations of Venezuelan law of the sort alleged by Respondent could only give rise to liability under Venezuelan domestic law and would not affect the conformity of Claimant's investment in the eyes of international law or deprive the Tribunal of jurisdiction over this dispute.[289]

286. Claimant submits that Article I(f)'s reference to "any kind of asset" followed by an illustrative list of qualifying assets, is typical of the definition contained in many bilateral and multilateral treaties. As the tribunal in *Mytilineos* noted "[s]*uch a definition, usually referred to as a "broad asset-based definition of investment" follows a well-established pattern pursued by many BITs. It combines a broad definition ("every kind of asset") with an illustrative list of assets categories that fall within the definition of investment*."[290] Indeed "[a]*ccording to a recent UNCTAD study … a BIT stating that ""investment includes "every kind of asset suggest[s] that the term embraces everything of economic value, virtually without limitation""*".[291]

287. In the present case, Air Canada's activities, operations, assets, and funds fall squarely within Article I(f)'s definition of an investment.[292]

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[283] Reply, para. 48.
[284] Reply, para. 49.
[285] Reply, para. 50.
[286] Reply, para. 51.
[287] Reply, para. 52.
[288] Reply, para. 53.
[289] Reply, para. 54.
[290] Exh, CL-91, *Mytilineos Holdings SA v. State Union of Serbia and Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006 ("Mytilineos").
[291] Exh. CL-91 (Mytilineos), para. 106; Response to Application for Bifurcation, para. 43.
[292] Response to Application for Bifurcation, paras 44-45; Memorial, paras 24-28, 30-32.

5.2 The Tribunal's analysis

(i) In general

288. The Tribunal will determine whether it has jurisdiction *ratione materiae* and *ratione personae*. In this regard, the Parties disagree as to whether Claimant qualifies as a protected investor who has made a protected investment within the meaning of the BIT (see *supra* paras 267, 269, 271 and 273).

(ii) Ratione materiae

a. The issue

289. The Parties disagree on the definition of "investment" and whether Claimant's alleged investment falls within that definition.[293] The Tribunal will therefore consider whether or not the dispute submitted before it arises out of an "investment". In doing so, it will proceed as follows:

- *First*, it will set out the definition of "investment" that is relevant to the dispute before it (Section (b)).
- *Second*, it will consider whether the facts established by Claimant meet the relevant definition of "investment" (Section (c)).
- *Finally*, it will conclude on the question of jurisdiction *ratione materiae* (Section (d)).

b. The definition

290. To determine whether an investment exists, the Tribunal will look to the relevant definition in Article I(f) of the BIT. In interpreting the definition, the Tribunal will again be guided by the rules of treaty interpretation of the VCLT and in particular Article 31. It will be recalled that Article 31 provides that "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose*" (see *supra* paras 222, 247). The starting point is thus the "ordinary meaning" of the term "investment".

291. Article I(f) of the BIT defines the term "investment" as follows:

> *ARTICLE I*
>
> *Definitions*
>
> *For the purpose of this Agreement: […]*

[293] Respondent (Counter-Memorial, paras 221-223, 245-247, 249; R-PHB, paras 55-61); Claimant (Reply, paras 14-54).

(f) "investment" means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State, in the territory of the other Contracting Party in accordance with the latter's laws. In particular, though not exclusively, "investment" includes:

(i) movable and immovable property and any related property rights, such as mortgages, liens or pledges;

(ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;

(iii) money, claims to money, and claims to performance under contract having a financial value;

(iv) goodwill;

(v) intellectual property rights;

(vi) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.

but does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.

Any change in the form of an investment does not affect the character as an investment.

292. Article I(f) of the BIT provides that an "investment" is "*any kind of asset*", which for purposes of this case includes "*though not exclusively*" "*money, claims to money*" and "*rights, conferred by law or under contract, to undertake any economic and economic activity*". The BIT therefore encompasses a broad concept of investment found in several BITs.[294] This means that to the extent that Claimant's alleged investment includes assets such as those enumerated in Article I(f), those assets may be considered an "investment" for purposes of the BIT.

293. However, in considering whether or not there is an investment for purposes of Article I(f), the test should not be limited to the identification of a defined "asset".[295] This is

[294] Reply, para. 14 citing Exh. CL-91 (Mytilneos), paras 102-103 ("*The BIT contains a broad definition of investment, Article 1 of the BIT defines "investment" as "every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party." In its non-exhaustive list of examples, it includes "claims to money or any other claim under contract having an economic value". Such definition, usually referred to as a "broad asset-based definition of investment," follows a well-established pattern pursued by many other BITs. It combines a broad definition ("every kind of asset") with an illustrative list of assets categories that fall within the definition of investment.*").

[295] Exh. RL-15, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/1, Excerpts of the Award, dated 30 April 2014 ("Nova Scotia"), para. 77

because the Tribunal considers that, while the defined asset in the BIT *prima facie* evidences the intention of the Parties as to which disputes should be subject to BIT arbitration, that asset is part of the broader concept of the investment whose protection is the subject-matter of the BIT (see *supra* paras 188-189). As such, it is recognized that the term "investment", as part of its ordinary meaning, carries inherent characteristics that must be taken into account in establishing jurisdiction under the BIT.[296] In this context, the fact that the present arbitration is not governed by the ICSID Convention, but initiated under the ICSID AF Rules, is not a reason to dispense with an examination of the existence of the inherent elements of an investment. This is for the following reasons (which have also been properly explained by the *Nova Scotia* tribunal[297]):

- *First*, a mechanical application of the categories listed in Article I(f) of the BIT would lead to an undesirable result contrary to the object and purpose of the BIT, which in this case is to recognize the need to promote and protect foreign investment with the aim of promoting the economic prosperity for both Venezuela and Canada, and the desire to intensify economic cooperation for the mutual benefit of both States (see *supra* paras 188-189). It is clear that a mechanical application would blur any conceptual distinction that exists between ordinary commercial transactions on the one hand, and investments on the other.[298]

- *Second*, and in the same spirit, it cannot be the case that the scope of the investment in a BIT or the substantive protection afforded by the BIT changes depending on the arbitral forum chosen by the investor. Indeed, it would be unreasonable to conclude that the Convention's Contracting Parties contemplated a definition of the term "investments" that effectively precludes recourse to the ICSID Convention and therefore renders meaningless the provision giving the investor a choice between ICSID and UNCITRAL arbitration. Therefore, (i) the fact that this is not an arbitration for which Article 25 of the ICSID Convention

[296] Nova Scotia, para. 81.

[297] Nova Scotia, paras 75-81. Claimant argues that the *Nova Scotia* tribunal is the only tribunal constituted under the Canada-Venezuela BIT that has chosen to include additional requirements in the definition of "investment", but that in this case the claimed investment consisted of rights to coal from a particular mine under a coal supply agreement that the tribunal dismissed as "[a] *commitment to simply pay money in the future after delivery of goods*". Reply, para. 29. The Tribunal does not dispute that there are different facts between the present case and Nova Scotia. However, it considers the analysis of the Nova Scotia tribunal on the principle of investment appropriate.

[298] Exh. RL-34, *Joy Mining Machinery Limited v. Arab Republic of* Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, dated 6 August 2004, para. 58 ("*if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?*").

must be considered[299] and (ii) whether the AF Rules provide for a similar notion of investment in Article 2(a) of the AF Rules[300] are irrelevant.

- *Third*, the fact that the inherent notion of investment should not differ depending on the forum, does not mean that the so-called "*Salini* test" used to determine the notion of investment under Article 25 of the ICSID Convention automatically becomes applicable in the present case. The *Salini* criteria are not rules of law or jurisdictional requirements that the Tribunal must follow.[301] Moreover, their global application, however "objective" they may appear, is not always appropriate, as each case is different and should be assessed in its own separate and appropriate context. This is because what may be considered a significant contribution for one tribunal or arbitrator may not necessarily be considered as such by another tribunal or arbitrator. In such a case, it depends on a discretionary consideration of the facts. Instead, in the view of the Tribunal, it is relevant and appropriate to consider an investment in the legal sense: that is, whether there is an ongoing cross-border business activity that can be evidenced in the form of equity or contributions, or in the form of committed capital that generates rights of value.

- *Finally*, and in light of the foregoing, finding an inherent concept does not mean that the Tribunal will condition the protection of an investment on any criteria beyond those contained in Article I(f).[302]

294. Thus, the Tribunal cannot simply confirm whether or not Claimant's assets fall within one or more of the categories listed in Article I(f) of the BIT but must instead additionally look for the existence of an "investment" in the legal sense.

295. *Concerning Claimant's argument that the BIT extends its substantive protections to both "investments" and "returns"*,[303] the Tribunal agrees with Respondent that a return cannot constitute an investment in the abstract sense.[304] Under Article I(i) of the BIT, returns are

[299] Reply, para. 28.
[300] Rejoinder, para. 112.
[301] Reply, para. 38; Exh. CL-94, *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, dated 30 November 2011, para. 7.4.8 ("*As regards the so-called Salini Test for what constitutes an investment, this test was developed in order to determine whether an 'investment' had been made for the purposes of the ICSID Convention. The cases cited by India in support of these requirements were also ICSID Decisions. The present case, however, is not subject to the ICSID Convention. Consequently, the so-called Salini Test, and Douglas's interpretation of it, are simply not applicable here*"); Air Canada notes that the Salini factors do not constitute jurisdictional requirements, even in cases under the ICSID Convention. See Reply, fn 32. See also Exh. RL-21, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, dated 2 July 2013, para. 206 ("*the four constitutive elements of the Salini list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction. They are typical features of investments under the ICSID Convention, not a set of "mandatory legal requirements." As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treat, as in the present case.*").
[302] *Cf.* Reply, para. 27.
[303] Reply, para. 15.
[304] Rejoinder, para. 109.

"[a]*ll amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, dividends, royalties, feels other current income or capital gains*". As such, "returns" are protected only to the extent that they (i) comprise a defined category that is additionally considered an investment in the legal sense, or (ii) are derived from a proven investment as defined in the BIT.

296. *Concerning the requirement of compliance with Venezuelan law*, the Parties disagree as to whether an investment must comply with Venezuelan law at the time the investment is made or instead during its operation.[305]

297. The Tribunal recalls – once again – that Article I(f) of the BIT provides:

> *(f) "investment" means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State, in the territory of the other Contracting Party* ***in accordance with the latter's laws****. In particular, though not exclusively, "investment" includes:* […] (emphasis added)

298. The definition of "investment" in Article I(f) expressly requires "*any kind of asset owned or controlled* [...] *in accordance with*" the laws of the territory of the other Contracting Party. The definition makes no explicit reference to whether compliance with the law refers to the creation of the investment or to its operation. Indeed, ownership and control of an asset could be relevant both at the time of acquisition of an asset and during its operation.

299. Respondent acknowledges that there is a distinction between legality at the inception of the investment and legality during the operation of the investment. It refers to specific provisions in the BITs relied upon by some tribunals to support the choice of one or the other temporal scope of legality.[306] The Tribunal does not dispute that such a distinction exists, sometimes more clearly than others, depending on the language of the specific treaty. Nonetheless, the Tribunal believes that regardless of the language, and particularly in cases such as the present where there is no express intent, only the first legality requirement becomes unquestionably relevant to its jurisdiction.[307] The Tribunal considers that legality in relation to the inception of the investment is relevant to the

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[305] Respondent (Counter-Memorial, paras 239-244; Rejoinder, paras 116, 118-124; R-PHB, para. 58); Claimant (Reply, para. 53; Reply PHB, paras 38-42).
[306] Rejoinder, para, 120.
[307] Exh. RL-17, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, dated 18 June 2010, para. 127 ("*The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue. In the Tribunal's view, the broader principle of international law identified in paragraphs 123-124 above does not change this analysis of Article 10, and in particular its distinction between legality at different stages of the investment.*").

existence of the investment itself and therefore to the Tribunal's jurisdiction.[308] If the law of the host State was complied with at the time of the commencement of the investment, allegations of host State law during the operation of the investment could serve as a defense to alleged substantive violations of the BIT (and only if raised in that context), but would not deprive a tribunal of jurisdiction under the BIT.[309] For jurisdictional purposes, therefore, the Tribunal must consider the lawfulness of the commencement of the investment.

300. Therefore, relying on the ordinary meaning of the terms of the BIT in their context and in light of its object and purpose, the Tribunal finds that investment includes the assets categorized in Article I(f) of the BIT and investment in the legal sense that is "made" in in accordance with Venezuelan law.

c. The facts

301. The Tribunal will now turn to the facts of this case and consider whether Claimant has made a protected investment.

302. At the outset, the Tribunal considers that Claimant must positively establish the facts which are intended to prove that an investment has been made in Respondent's territory, while facts which are part of the merits may be provisionally "*accepted at face value*" for the purposes of jurisdiction.[310] In this context, the Tribunal recalls that Claimant must prove that it has assets falling within the broad definition of Article I(f) of the BIT and of the term "investment" in the legal sense (see *supra* paras 292-300). The Tribunal considers the following for purposes of jurisdiction:

- *First*, Claimant asserts claims for money in U.S. dollars allegedly entitled to receive in exchange for the bolivar-denominated returns held in its Venezuelan Bank account. For such claims, Claimant relies on Article XXI(2) of the ATA, which provides that "[e]*ach designated airline shall have the right to convert and remit to its country on demand earnings obtained in the normal course of its operations*".[311]. It also relies on Article 2 of Providencia No. 23, which provides that "[f]*oreign international air transportation providers duly authorized by* [INAC] *may, acting through authorized currency exchange operators, acquire the foreign currency necessary for them to remit to their home offices, in their home country, the net balance of their revenue from ticket sales, cargo and mail freight at each sales point minus all costs, expenses and taxes payable by them in Venezuela for their adequate and safe operation*".[312] The Tribunal is of the opinion that both instruments indisputably contemplate a right for payment in

[308] Reply, para. 53; Exh. CL-97, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, para. 167 ("*the jurisdictional significance of the 'legality requirement' in the definition of an investment in Article I(f) is exhausted once the investment has been made.*").
[309] Accordingly, Respondent's arguments regarding Claimant's alleged violation of Venezuela's laws by employing staff without declaring them and misrepresenting aspects of its operations to INAC, as well as regarding allegedly false employment contracts, are not relevant at this stage. See Tr. Day 2, 4, 29, 79, 81-82; R-PHB, paras 59-62.
[310] Application for Bifurcation, para. 87 quoting Exh. RL-15 (Nova Scotia), para. 50.
[311] Exh. C-5 (ATA); Reply, paras 17-20.
[312] Exh. C-9 / R-11 (Providencia No. 23); Reply, paras 17-20.

favor of Claimant and thus a valid claim for such payment.[313] While it takes no position on whether such a right is absolute, the Tribunal considers it falls within the broad category of "claims to money" within the meaning of Article I(f)(iii) of the BIT for jurisdictional purposes.

– *Second*, Claimant alleges that it is entitled to the conversion and repatriation of locally generated returns that are an integral part of its economic and commercial activities in Venezuela. In this regard, Claimant again relies on Article XXI(2) of the ATA and Article 2 of Providencia No. 23. Claimant also relies on Article VIII of the BIT, which provides for the free transfer of funds, and argues that its right to convert its local returns falls within this provision.[314] In addition, Claimant relies on the rights granted to Air Canada by the ATA to operate certain international air services in Venezuela, including landing in Venezuela for the purpose of picking up and dropping off international passengers, cargo and mail while operating certain routes,[315] and Providencia No. 60, which authorizes Air Canada to operate as a commercial airline in Venezuela.[316] As set forth above, the Tribunal considers that the foregoing instruments confer *prima facie* rights on Claimant in connection with its activities in Venezuela, although it does not rule on their scope. Therefore, for jurisdictional purposes, the Tribunal considers that Claimant has "*rights, conferred by law* [..]*, to undertake any economic and commercial activity*" within the meaning of Article I(f)(vi) of the BIT.

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[313] See Respondent's argument in Rejoinder, paras 103-106 ("*103. First, Air Canada never had any "claim to money" in the terms of Article I(f)(iii) of the BIT. The term "claim to money" of Article I(f)(iii) of the BIT is a reference to enforceable rights, i.e., to rights that have already been declared or recognized by a competent court or authority or originate from a binding agreement providing for the payment of monies, thereby giving rise to a payment, rather than a mere demand for money. 104. This is in line with the three authenticated versions of the BIT […]. 105. Accepting that a "claim to money" under the BIT equates to a mere pretention to payment would mean that in order to establish the existence of an investment under the BIT, it suffices to articulate a claim for payment against the host State. This is absurd and leads, de factor, to wiping out the existing ratione materiae requirement from the BIT by rendering it meaningless.* […] *Therefore, as things stand, those claims are mere requests from Air Canada and cannot serve to establish the jurisdiction of the Arbitral Tribunal. Especially since, as the Republic maintains, neither Article XXI of the ATA nor Article 2 of Providencia No. 23 granted Air Canada with a right or an absolute and enforceable claim to U.S. dollars. Rather, as Air Canada itself describes, Providencia No. 23 "empowered airlines to apply for foreign currency on a monthly basis" and as we have seen this is not an automatic right to conversion*.")

[314] Article VIII of the BIT provides in relevant part: "*1. Each Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns.* […] *2. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer.* […] *4. Notwithstanding paragraphs 1, 2 and 3, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws* […]." See Exh. CL-1 (BIT).

[315] Exh. C-5 (ATA); Exh. C-30, Printout from the Canadian Transportation Agency's website, Summary of Agreement with Venezuela, last modified 23 November 1998; Exh. C-6, Canadian Transportation Agency's website; Exh. C-67, Printout from INAC's website, Air Transport Agreements signed by the Bolivarian Republic of Venezuela; Reply, para. 22.

[316] Exh. C-8 (Providencia No. 60); Exh. C-125, Venezuela's Civil Aviation Law, Articles 9, 119; Reply, para. 22; Reply C-PHB, para. 36.

– *Third*, the Tribunal agrees with Claimant that the cash deposited in its bank account is treated as an asset on a cooperation's balance sheet[317] and is therefore an "asset" in and of itself within the meaning of the BIT. These funds are undoubtedly related to Claimant's air transportation activities in Venezuela.[318] As Claimant's claims for "returns", the Tribunal does not consider that its claims for conversion and repatriation and its assets per se fall within the definition of "returns", for the reasons explained above (see *supra* para. 268).[319]

303. In the broader context, therefore, Claimant has demonstrated that it has assets that fall within the definition of Article I(f) of the BIT.

304. With respect to the broader context of the definition of investment in the legal sense, the Tribunal notes that Air Canada established a local branch in Venezuela on 24 October 1989 by contributing U.S.$ 50,000 in equity and registering it in the Venezuelan Commercial Registry.[320] On 1 July 2004, it began three weekly round-trip flights between Toronto and Caracas using a 120-seat Airbus 319. For the next ten years, it was the only airline offering scheduled flights between Canada and Venezuela.[321] On 5 October 2004, the Venezuelan SIEX issued a *Constancia de Calificación de Empresa to Air Canada*.[322] The registry classifies the local branch of Air Canada as a "*foreign enterprise*" and expressly recognizes the status of Air Canada as a "*foreign shareholder*" whose "*principal economic activity*" is the "*air transportation of cargo and passengers*".[323] The Tribunal therefore considers that Claimant was engaged in an ongoing cross-border business activity, namely air transport, which evidenced at least by its capital contribution in the establishment of its local branch in Venezuela since 1989 and the contribution of equity in the amount of U.S.$ 50,000. With this contribution, Claimant generated rights of value related to the Toronto-Caracas-Toronto route and, in particular, ticket sales therefrom. Claimant has therefore demonstrated that it also has an investment in the legal sense.

305. Finally, the Tribunal notes that Venezuela issued Providencia No. 60 on 25 June 2004, allowing Air Canada to operate as a commercial airline in Venezuela,[324] and a *Constancia de Calificación de Empresa* on 5 October 2004, when Air Canada began to use the Toronto-Caracas-Toronto route.[325] The fact that Venezuela formally authorized the operation of Air Canada in Venezuela and certified Air Canada's status as a foreign company in Venezuela in 2004 confirms the legality of this investment at its inception. Subsequent violations of Venezuelan law, as alleged by Venezuela could only give rise

[317] Exh. C-93, Letter from Air Canada to CADIVI dated 19 February 2013; Reply, para. 23; Reply C-PHB, para. 36.
[318] Counter-Memorial, para. 233; Reply, para. 24; Reply C-PHB, para. 36.
[319] Reply, para. 23.
[320] Exh. C-7, Certificate issued by the Registry of Commerce domiciling Air Canada's Venezuelan branch, dated 25 June 2005; Pittman WS, para. 6.
[321] Pittman WS, para. 11; Reply, para. 30.
[322] Exh. C-103, *Constancia de Calificación de Empresa*, Application No. 4732 dated 5 October 2004 ("Application No. 4732").
[323] Exh C-106, Fax from INAC authorizing Air Canada Operations, dated 30 June 2004; Exh. C-132, Fax from INAC authorizing Air Canada's Operations, dated 26 February 2014; Reply, para. 31.
[324] Exh. C-8, INAC *Providencia Administrativa No. 60*, dated 2 May 2003.
[325] Exh. C-103 (Application No. 4732).

to liability under Venezuelan domestic law and would not deprive the Tribunal of jurisdiction over this dispute.[326]

306. The Tribunal therefore finds that Claimant has made an investment that is protected under the BIT, and hence, that it has jurisdiction *ratione materiae.*

d. Conclusion

307. For all of the foregoing reasons, the Tribunal has decided to dismiss ***Respondent's ratione materiae objection to jurisdiction***.

(iii) Ratione personae

a. The issue

308. The Parties dispute whether Claimant is a protected investor under the BIT.[327] To decide this issue, the Tribunal will proceed as follows:

- *First*, it will set forth the definition of "investor" that is relevant to this dispute (Section (b)).
- *Second*, it will consider whether the facts established by Claimant meet the definition of "investor" (Section (c)).
- *Finally*, it will conclude whether it has jurisdiction *ratione personae* (Section (d)).

b. The definition

309. "Investor" is defined in Article I(g) of the BIT as follows:

> *(g) "investor" means*
>
> *In the case of Canada:*
>
> *(i) any natural person possessing the citizenship of Canada in accordance with its laws; or*
>
> *(ii) any enterprise incorporated or duly constituted in accordance with the applicable laws of Canada,*
>
> *Who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela; and*
>
> […]

[326] Reply, para. 54.
[327] Respondent (Counter-Memorial, paras 250-252); Claimant (Reply, para. 12).

310. According to its ordinary meaning found in Article I(f)((ii) (see *supra* para. 309), investor in the present case means, for non-natural persons, "*any enterprise incorporated or duly constituted in accordance with the applicable laws of Canada who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela*". Therefore, Claimant must prove that: (i) it is an entity incorporated or duly constituted under the applicable laws of Canada; (ii) it does not have Venezuelan citizenship; and (iii) it made a protected investment in the territory of Venezuela.

c. The facts

311. The Parties' disagreement on whether Claimant is a protected investor lies in whether Claimant has made an investment that is part of the definition of investor in the BIT.[328] The Tribunal notes that the requirement of having made a protected investment in the territory of Venezuela has already been established by the Tribunal above (see *supra* paras 306-307). It is also undisputed that Claimant is a company incorporated under the laws of Canada, which does not have Venezuelan citizenship.

312. The Tribunal therefore finds that Claimant is a Canadian company within the meaning of investor under the BIT.

d. Conclusion

313. Claimant is therefore a protected investor under the BIT and the Tribunal has jurisdiction *ratione personae*

(iv) Conclusion

314. The Tribunal finds that it has jurisdiction *ratione materiae* and jurisdiction *ratione personae* in this case.

6. Conclusion

315. Based on the foregoing, the Tribunal concludes that ***the present dispute is within its jurisdiction and is admissible.***

IV. Merits

1. The issue

316. Having determined that the present dispute falls within its jurisdiction and is admissible, the Tribunal will proceed to decide the merits of the case, in particular whether Respondent has breached its obligations under the BIT and international law in relation to Claimant's investments.

[328] Counter-Memorial, paras 239, 248-249, 254.

317. ***Claimant*** requests the Tribunal to find that:

> "*Venezuela has breached its obligations under the BIT and international law with respect to Claimant's investments*" [Claim. 2].

318. ***Respondent*** requests the Tribunal to find that:

> "*the Bolivarian Republic of Venezuela has not violated either Article II, Article VII or Article VIII of the BIT*" [Resp. 4].

319. ***The Tribunal*** will address the merits of this case as follows:

- *First*, it will address the alleged violation of the Free Transfer of Funds ("FTF") provision found in Article VIII of the BIT (see *infra* Section 2).
- *Second*, it will address the alleged breach of the provision on Fair and Equitable Treatment ("FET") found in Article II of the BIT (see *infra* Section 3).
- *Third*, it will address the alleged violation of the expropriation provision found in Article VII of the BIT (see *infra* Section 4).
- *Fourth*, it will conclude (see *infra* Section 5).

2. Article VIII of the BIT: Free Transfer of Funds

2.1 The Parties' positions

(i) Claimant

320. Claimant submits that Respondent breached the FTF provision in the BIT when it refused to approve Claimant's AAD requests to convert its Bolivar-denominated returns into U.S. dollars for repatriation.[329]

321. *First*, the right to freely transfer funds is central to the international regime for promotion and protection of investments.[330] The FTF obligation is absolute. Article VIII of the BIT establishes the principle that protected Canadian investors can make unrestricted transfers of their investments and returns in Venezuela, and that such transfers be "*effected without delay*".[331]

322. *Second*, the protections provided for in the BIT itself protect Claimant from Respondent's refusal to allow the free repatriation of Claimant's revenues in a convertible currency such as the U.S. dollars.[332] Article VII of the BIT specifically protects "returns" as well as "investments". The Bolivar-denominated funds that Claimant sought to convert and

[329] Reply, para. 84.
[330] Memorial, paras 109-111.
[331] Memorial, para. 113.
[332] Memorial, para. 118.

repatriate were returns "*yielded by an investment*".[333] Further, Claimant has presented ample evidence that it made a substantial part of its investments in relation to its Venezuelan operations in U.S. dollars.[334]

323. Respondent should not be allowed to escape its free transfer obligations even if the Tribunal were to conclude that Claimant did not make substantial U.S. dollar expenditures in relation to its Venezuelan operations. Specifically:

- The Parties' entire course of dealing reflects that they agreed Claimant could convert its returns into U.S. dollars, regardless of whether its investments had originally been made in U.S. dollars.[335]

- In practice, Respondent used the U.S. dollars as its hard, convertible currency almost exclusively until the latter part of 2017, including when Claimant submitted its AADs in late 2013 and early 2014.[336]

324. *Third*, Claimant never contended that Respondent's foreign exchange control regime constitutes a *per se* breach of BIT Article VIII. Instead, Respondent's refusal to process the AADs in a manner consistent with past practice and in accordance with its foreign exchange control regime constitutes breach of BIT Article VIII.[337] Concerning Respondent's arguments:

- No alterative mechanisms for obtaining foreign currency in Venezuela were available to Claimant in 2013 and 2014.[338]

- The fact that Claimant retained control over the bank accounts in Venezuela where its local currency was held throughout the period during which CADIVI was considering its requests and thereafter is irrelevant. The right enshrined in BIT Article VIII pertains to the free transfer of returns abroad not to the control of domestic bank accounts in which local currencies are held.[339]

- Respondent's measures cannot be justified by Venezuela's "*sovereign prerogatives under international law over its monetary policy to safeguard its national economy*".[340]

325. Respondent's failure to take action on Claimant's 15 AADs is plainly inconsistent with the mandate of the BIT that all transfers of an investor's investments and returns "*shall be effected without delay*".[341]

[333] Reply, paras 86-88.
[334] Reply, paras 90-94.
[335] Reply, para. 96.
[336] Reply, paras 97-102.
[337] Reply, para. 105.
[338] Reply, paras 109-113.
[339] Reply, paras 114-115.
[340] Reply, paras 116-117.
[341] Reply, paras 119-120.

326. *Fourth*, and in any event, Claimant's protection is not limited to Article VIII of the BIT. Pursuant to the provisions of Article III of the BIT which accord investments or returns "*most-favored-nation treatment*", Claimant is entitled to rely upon more favorable FTF provisions of other treaties, domestic law, and international law.[342] Specifically, through the MFN clause, Claimant may rely on any FTF provision in any BIT entered into by Respondent and another State, for example, the Spain-Venezuela and Costa-Rica BITs, that provide that the transfer should occur within three months from the date of the transfer request. Consequently, Claimant was entitled to receive its transfers of funds, in U.S. dollars, either "without delay" or within three months from submitting each AAD request, whichever was shorter.[343]

327. *Fifth*, Respondent's failure to permit Claimant to freely repatriate its revenues in a convertible currency violates the express terms of the ATA, which provides applicable rules of international law that the Tribunal may consider in determining Respondent's liability. Under Article XXI of the ATA, Claimant, as a "designated airline" has the right to convert and repatriate any revenues it generated in Venezuela.[344]

328. *Finally*, in light of MFN language in the ATA, Claimant invokes (i) Article 15(1) of the Brazil-Venezuela Air Services Agreement, which provides that "*conversion and remittance shall be allowed promptly at the exchange rate applicable on the date of the request*"; and (ii) Article 8(4) of the Caribbean Countries-Venezuela Air Services Agreement which provides that "*conversion and remittance shall be allowed promptly and without taxes or restrictions, at the exchange rate applicable to the transactions on the date the airline made the initiate remittance request, pursuant to the legislation in force in each country*".[345]

329. Accordingly, the Tribunal should conclude that Respondent breached the FTF provision in Article VIII of the BIT and related rules of international law.[346]

(ii) Respondent

330. Respondent submits that there have been no illegal restrictions to the transfer of funds[347] and that Claimant has failed to establish that there has been a breach of Article VIII of the BIT.[348]

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[342] Memorial, paras 114-116.
[343] Memorial, paras 117-118; Reply, paras 122-125 referring to Exh. C-64, *Agreement between the Kingdom of Spain and the Bolivarian Republic of Venezuela for the Reciprocal Promotion and Protection of Investments*, signed on 2 November 1995, Article VII(4) and Exh. C-65, *Agreement between the Republic of Costa Rica and the Bolivarian Republic of Venezuela for the Reciprocal Promotion and Protection of Investments*, signed on 7 March 1997, Article 8(2).
[344] Memorial, para. 119 referring to Exh. C-5 (ATA), Article XXI(2).
[345] Memorial, paras 120-121 referring to and/or quoting Exh. C-5 (ATA), Article XXI(2), Exh. C-24, *Agreement Between Brazil and the Bolivarian Republic of Venezuela for Air Services*, Article 15(1) and Exh, C-32, *Agreement Between Caribbean Countries and the Bolivarian Republic of Venezuela for Air Services*, Article 8(1).
[346] Memorial, para. 131.
[347] Rejoinder, para. 175.
[348] Counter-Memorial, para. 272.

331. *First*, the appropriate standard to assess Respondent's conduct regarding FTF arises exclusively under the BIT. The Tribunal does not have jurisdiction to find any "breaches" of the ATA. It may rely on the ATA as an international law instrument in force between Respondent and Claimant's home State in its assessment of the conduct of Claimant and Respondent. It may do so in order to interpret and apply the BIT.[349]

332. *Second*, Claimant's "transfers" are not protected by Article VIII of the BIT. Article VIII(2) of the Venezuela-Canada BIT establishes a clear link in Article VIII between the existence of an investment and the FTF standard. By including this language, Venezuela and Canada sought to limit the type of transfers that would be protected.[350] In the present case, there is no question that the "investment" must have been made in U.S. dollars, that the "returns" mentioned in the same provision must be linked to the "investment" previously made in U.S. dollars, and that the "investment" must have been made in the territory of the Republic.[351]

333. Claimant has not proven that it ever made an investment in U.S. dollars.[352] If the Tribunal were to find that it has jurisdiction *ratione materiae* and *ratione personae*, a detailed analysis of Claimant's alleged investment would still be necessary. Respondent's foreign exchange control regime rests on the assumption that economic actors will transact in the national currency, i.e., Bolivars. This means that if income was generated in local currency, so were the expenses incurred. Therefore, in the absence of any investment made in U.S. dollars, the currency it now seeks, Claimant is barred from relying on Article VIII of the BIT.[353]

334. Furthermore, Claimant's claim that its AAD requests were historically approved for acquiring U.S. dollars is legally unsound. Continuous practice is not a valid criterion under international law to counter the clear language which requires an investment made in U.S. dollars for a claim for U.S. dollars.[354]

335. *Third*, Respondent has not illegally restricted Claimant's transfers of funds and has at all times acted in accordance with the provisions of Article VIII of the BIT. Claimant's case rests on an improper interpretation of the articulation between the provisions of Article VIII and Respondent's Forex regime. The mere existence of a foreign exchange control regime does not constitute a violation of the international obligation under Article VIII.[355] The main relevant feature of this regime is the possibility airlines had to request an authorization to have their in-country earned Bolivars converted into foreign currency, notably U.S. dollars, if they wanted to acquire such currency through CADIVI at the particularly attractive and subsidized proposition exchange rate: 6.3 Bolivars per U.S.

[349] Counter-Memorial, paras 273-280.
[350] Counter-Memorial, paras 281-286.
[351] Rejoinder, para. 186.
[352] Rejoinder, para. 189.
[353] Counter-Memorial, paras 287-291.
[354] Rejoinder, para. 188.
[355] Rejoinder, para. 193.

dollar.[356] Claimant is seeking to misuse the protection of the BIT as a safeguard against devaluation risk.[357]

336. In this connection, the Tribunal must necessarily address the following two questions: (i) whether *Providencia No. 23* provides for a possibility to request the conversion of local currency into foreign currency; whose flipside is Respondent's possibility to approve said request or not; and (ii) if answered in the affirmative, whether Respondent could validly adopt a foreign currency exchange regime with such a feature under the BIT? The answer to both questions is in the affirmative.[358] In any event, the possibility of requesting foreign currency by submitting requests to CADIVI, as provided for in Providencia No. 23, was subject to the availability of currency, as determined by the Central Bank of Venezuela and the directives issued by the National Executive.[359] Further, Respondent could in exercise of its sovereign powers establish a foreign exchange control regime like the one it did.[360]

337. In the instant case, currency controls are not in breach of Article VIII of the BIT because:

- Respondent put in place a foreign exchange control regime, which existed well before Claimant started operating the Toronto-Caracas-Toronto route. This foreign exchange regime was subject to a fixed exchange rate that evolved over time, as well as to the availability of foreign currency. The main features of this regime were known to Claimant when it decided to start operations.[361]

- Claimant has failed to comply with the procedures established by Respondent to authorize the acquisition of foreign currency.[362]

- The currency controls have not "imprisoned" Claimant's money because it had at all relevant times alternatives to the CADIVI regime to acquire foreign currency. The CADIVI regime was the most attractive one, as it was heavily subsidized by the State. Claimant chose not to use the alternatives, preferring instead to wait for years and then commence the instant arbitration proceedings.[363] Specifically, it could have relied on the Transaction System for Foreign Currency Denominated Securities system ("SITME"), the System for Initial Placement of Bonds denominated in Foreign Currency ("SICOTME"), SICAD II, the Marginal Currency System ("SIMADI") or could have explored non-regulated options available outside the territory of the Republic for the conversion of its Bolivars.[364]

[356] Counter-Memorial, para. 271; Rejoinder, para. 176.
[357] Rejoinder, para. 197.
[358] Rejoinder, paras 177-178.
[359] Rejoinder, paras 181-184.
[360] Rejoinder, paras 181-184.
[361] Counter-Memorial, paras 292-296; Rejoinder, paras 194, 199.
[362] Counter-Memorial, paras 75-84, 373-389; Rejoinder, para. 201.
[363] Counter-Memorial, paras 292, 297-300; Rejoinder, para. 202.
[364] Rejoinder, paras 203-207.

– There was likewise no "imprisonment" since Claimant had always been free to dispose of such moneys as indeed it did.[365]

338. Claimant did not and could not point to any measures taken by Respondent that positively restrict transfers of funds. As such, Article VIII is not applicable.[366]

339. *Fourth*, and in any event, Respondent enjoys sovereign prerogatives under international law over its monetary policy to safeguard the national economy.[367] These prerogatives have been codified into the BIT. Article VIII of the BIT carves out the possibility for the enactment and application of "*equitable, non-discriminatory and good faith*" regulation. Such regulation does not contravene the standard of treatment provided for in Article VIII of the BIT. In the case at hand, Respondent was confronted with a situation of ebbing availability of currency, which created a difficult economic environment. In regulating the administration of foreign currency, Respondent issued the *Ley del Régimen Cambiario y sus Ilícitos* ("Law of the Foreign Exchange Regime and its Crimes") of 19 February 2014, which spelled out the priorities for the allocation of the limited resources available in terms of foreign currency. Thus, the treatment given to the pending AAD requests of international airlines was justified as an "*equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of*" the national economy.[368]

340. *Fifth*, the appropriate standard to assess Respondent's conduct regarding FTF may not be expanded by invoking the BIT's MFN clause.[369] Under a proper interpretation of the treaty, in accordance with the general rule of interpretation included in Article 31 of the VCLT, the Tribunal cannot ignore the Contracting Parties' inclusion of the expression "*in like circumstances*" into the MFN clause. In the instant case, the Tribunal is not in a position to compare any treatment that may have been accorded to Spanish and Costa Rican airlines with that received by Claimant, as it did not provide any factual elements in this respect.[370]

341. In any event, Respondent has always processed AAD requests in accordance with its foreign exchange control regimes, i.e., in strict application of the governing legal provisions, namely *Providencia No. 23* and *Providencia No. 124*. Under both legal instruments, air transportation of passengers is considered a public service, and the

[365] Counter-Memorial, paras 292, 301-302.
[366] Counter-Memorial, para. 303.
[367] Counter-Memorial, paras 292, 304-307; Rejoinder, para. 208.
[368] Counter-Memorial, paras 308-311 referring to Exh. RL-76, *Decree with Rank, Value and Force of Law of the Exchange Regime and its Crimes No. 798, published in Extraordinary Official Gazette No. 6.126*, dated 19 February 2014, Article 6 and Exh. RL-77, *Decree with Rank, Value and Force of Law of the Exchange Regime and its Crimes No. 1.403 (as amended in November 2014)*, published in Extraordinary Official Gazette No. 6.150, dated 18 November 2014, Article 6, and Exh. RL-78, *Decree with Rank, Value and Force of Law of the Exchange Regime and its Crimes No. 2.167 (as amended in December 2015)*, published in Extraordinary Official Gazette No. 6.210, dated 30 December 2015, Article 8; quoting also Exh. C-1 (BIT), Article VIII; Rejoinder, para. 209.
[369] Rejoinder, para. 211.
[370] Counter-Memorial, paras 315-316 quoting Exh. C-1 (BIT), Article III; Rejoinder, para. 212 referring to Exh, RL-80, *İçkale İnşaat Limited Şirketi. v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, dated 8 March 2016, paras 328-329.

administration of foreign currency by CADIVI was always subject to currency availability. Spanish and Costa Rican airlines continued to fly to and from Caracas long after Claimant decided to abandon the Toronto-Caracas-Toronto route. As such they are not suitable comparators for the "*in like circumstances*" element of the MFN clause. In any event, Claimant has not made any particularized allegation that such airlines were paid within the three-month window it suggests is the standard.[371]

342. In addition, *Providencia No. 23* and *Providencia No. 124* are clear in setting forth the criteria for the processing of AAD requests from airlines operating in the country. Neither Providencia provides for any time-limit for the processing of AAD requests. No such time-limit can be found elsewhere in the Venezuelan legal framework.[372]

343. In its Reply, Claimant had abandoned its reliance on the MFN imported timeframes and is instead focused on the "*without delay*" element of the standard. The question of delay is a false question. As has been established, the 15 AAD requests were rejected by operation of the administration's negative silence. Such rejection operated four months after the submission of the requests and therefore renders the question of delays moot.[373]

344. Therefore, Claimant failed to meet its burden of proving that, under the applicable standard of the BIT, Respondent had incurred in any liability with regard to the FTF guarantee.[374]

2.2 The Tribunal's analysis

(i) The issue

345. The *issue* is whether Respondent breached its FTF obligations under the BIT by failing to approve Claimant's AAD requests to convert its bolivar-denominated proceeds into U.S. dollars for repatriation (see *supra* paras 320 and 330).

346. To address this issue, the Tribunal will proceed as follows:

- *First*, it will set out the FTF requirements of Article VIII of the BIT and determine whether Claimant's FTF claim falls within the scope of that provision (Section (ii)).

- *Second*, it will address whether Respondent has violated Article VIII of the BIT (Section (iii)).

[371] Counter-Memorial, para. 317.
[372] Counter-Memorial, paras 318-320 referring to Exh. C-9 / R-11 (Providencia No. 23) and Exh. C-12, CADIVI Providencia No. 124, published in Extraordinary Official Gazette No. 6.122, dated 23 January 2014 ("Providencia No. 124").
[373] Rejoinder, para. 213 referring to Exh. RL-54, Organic Law of Administrative Procedures, published in Extraordinary Official Gazette No. 2.818, dated 1 July 1981 ("LOPA"), Articles 4, 60.
[374] Counter-Memorial, para. 321; Rejoinder, para. 214.

– *Third*, it will consider, to the extent necessary, other arguments of the Parties relating to the alleged violation of Claimant's right to exchange and repatriate its bolivar-denominated proceeds (Section (iv)).

– *Fourth*, it will conclude (Section (v)).

(ii) Article VIII of the BIT

347. At the outset, the Tribunal notes that Respondent objects to the Tribunal's jurisdiction over the ATA.[375] Indeed, the ATA has a provision on free transfer of funds similar to that of Article VIII of the BIT.[376]

348. The Tribunal has already decided that its jurisdiction is based on the BIT itself (see *supra* para. 204). It has also determined that the ATA does not displace the BIT; quite the contrary, the ATA is made relevant and decisive for the present dispute by Article XII(7) of the BIT, which requires this Tribunal to "*decide issues in dispute in accordance with* [the BIT] *and applicable rules of international law*" (see *supra* para. 202). As Respondent submits, such an agreement can therefore be relied upon to adjudicate the Parties' conduct.[377] This being said, the Tribunal is called upon to find or reject international liability under the BIT alone.

349. The Parties disagree on the proper interpretation of Article VIII of the BIT and, in particular, whether it covers Claimant's AAD requests.[378] In order to decide this question, the Tribunal will first set out Article VIII and determine its scope and conditions in accordance with the rules of treaty interpretation of Article 31 of the VCLT (see *supra* para. 222).

350. Article VIII of the BIT, which deals with the "*Transfer of Funds*", provides as follows:

> *1. Each Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns. Without limiting the generality of the foregoing, each Contracting Party shall also guarantee to the investor the unrestricted transfer of:*
>
> *(a) funds in repayment of loans related to an investment;*

[375] Counter-Memorial, paras 273-280.

[376] Article XXI on "Sales and Transfer of Earnings" provides the following: "*1. Each designated airline shall have the right to engage in the sale of air transportation in the territory of the other Contracting Party directly and, at its discretion, through its agents, subject to the national monetary laws of that Contracting Party. 2. Each designated airline shall have the right to convert and remit to its country on demand earnings obtained in the normal course of its operations. Conversion and remittance shall be permitted at the foreign exchange market rates for current rates prevailing at the time of transfer and shall not be subject to any charges except normal service charges collected by banks for such transactions. Such transfers of earnings shall be carried out on the basis of reciprocity in accordance with the national legislation in effect at the time of the transfer in each country, under legislative and regulatory conditions no less favourable than those applied to any other foreign airline operating international air services to and from the territory of the other Contracting Party*." See Exh. C-5 (ATA).

[377] Counter-Memorial, para. 277.

[378] Claimant (Reply, paras 85-104); Respondent (Rejoinder, para. 186).

(b) the proceeds of the total or partial liquidation of any investment;

(c) wages and other remuneration accruing to a citizen of the other Contracting Party who was permitted to work in a capacity that is managerial, executive or involves specialized knowledge in connection with an investment in the territory of the other Contracting Party;

(d) any compensation owed to an investor by virtue of Articles VI or VII of the Agreement.

2. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer.

3. Neither Contracting Party may require its investor to transfer, or penalize its investors that fail to transfer, the returns attributable to investments in the territory of the other Contracting Party.

4. Notwithstanding paragraphs 1, 2 and 3, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal or penal offenses;

(d) reports of transfers of currency or other monetary instruments; or

(e) ensuring the satisfaction of judgments in adjudicatory proceedings.

5. Paragraph 3 shall not be construed to prevent a Contracting Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph 4. Notwithstanding paragraphs 1, 2 and 3 and without limiting the applicability of paragraph 4, to a Contracting Party may prevent or limit transfers by a financial institution to, or for the benefit of, an affiliate of or person related to such institution, through the equitable, non-discriminatory and good faith application of measures relating to the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions.

351. *First*, Article VIII is a typical transfer clause found in BITs, providing for the possibility of a free transfer of funds, and granting investors important freedoms related to their investments and the resulting benefits. Thus, it is an imperative right for the investor itself.[379]

352. However, contrary to Claimant's view, this right is not absolute.[380] While the text of Article VIII speaks of a right that is mandatory, i.e., "[e]*ach Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns*"[381], the same text provides for the possibility of preventing a transfer by the host State Contracting Party, i.e., "*a Contracting Party may prevent a transfer through* […]"[382], "*a Contracting Party may prevent or limit transfers by* […]"[383]. Indeed, there is a competing interest contemplated by Article VIII and that is the right of host States to control such transfers, arguably in an attempt to prevent immediate capital flight that may have a negative impact on States, particularly in relation to their foreign currency reserves. This competing right was recognized by the tribunal in *Rusoro Mining v. Venezuela*, which dealt with the same provision and found that:

> *576. Art. VIII.1 and 2 of the BIT guarantee investors that they will be able to transfer funds related to their investments and returns without delay, in a convertible currency and at the exchange rate prevailing at the date of transfer.*
>
> *577. Provided that this triple guarantee is complied with, the BIT does not impose restrictions on the manner in which Contracting States decide to regulate their exchange control regime. States have the choice of abolishing all exchange control restrictions, of establishing certain limits or of submitting all foreign currency transactions to administrative control.*
>
> *578. After 2010 the Bolivarian Republic has chosen to impose a stringent exchange control mechanism, in which residents in Venezuela must acquire foreign currency via an administrative authorization, must sell a high percentage of foreign currency earned to the BVC, and in which the Official Exchange rate is established by fiat of the BVC. Each of these choices is a policy decision, which the Bolivarian Republic is empowered to adopt exercising its monetary*

[379] Exh, CL-8, *Continental Casualty Co. v. Argentine Republic,* ICSID Case No. ARB/03/9, Award, 5 September 2008 ("Continental Casualty"), para. 239 ("*This type of provision is a standard feature of BITs: the guarantee that a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain, in case of sale or liquidation, is fundamental to the freedom to make a foreign investment and an essential element of the promotional role of BITs. On the other hand, the Treaty terms show that such freedom is not without limit.*")

[380] Claimant refers to Exh. CL-10, Transfer of Funds, UNCTAD, UNCTAD Series on Issues in International Investment Agreements 6 (2000) ("UNCTAD Series"), noting that the free transfer is "*normally of an absolute rather than relative nature*". See Memorial, para. 112. The Tribunal does not disagree with this statement, but this does not override the clear wording of Article VIII of the BIT.

[381] Article VIII(1) of the BIT, Exh. C-1.

[382] Article VIII(4) of the BIT, Exh. C-1.

[383] Article VIII(6) of the BIT, Exh. C-1.

> *sovereignty, and which is compatible with the guarantees offered to protected investors in the BIT. Art. VIII simply requires that if a protected investor requests foreign currency in relation to its investment or returns, the application must be approved without delay, the funds delivered in convertible currency and at the Official Exchange Rate prevailing at the date of transfer.*[384]

353. The Contracting Parties to the BIT thus intended to allow the host State to restrict an investor's right to freely transfer funds in certain situations. In the present case, this means that, while Claimant has the right to freely transfer or repatriate its funds – indeed, such right was an incentive for its initial investment in Venezuela – this right is not absolute, but subject to the restrictions imposed by Respondent. This does not imply that authorization of free transfers is at the discretion of the host State or that the exercise of the host State's regulatory power should be in any way capricious or discriminatory. The BIT is clear that any restrictions be made in accordance with the provisions of Article VIII itself, and in particular paragraphs (4) to (6) of that provision, which refer to "*equitable, non-discriminatory and good faith application of its laws*" (see above para. 350).

354. The freedom of Contracting States (here, Venezuela) to regulate their foreign exchange control regime is recognized also in Article XII(1) of the ATA which provides that "*the right to engage in the sale of air transportation in the territory of the other Contracting Party*" is "*subject to the national monetary laws of that Contracting Party*" and in Article XII(2) of the ATA which provides that "[s]*uch transfers of earnings shall be carried out* […] *in accordance with the national legislation in effect at the time of the transfer in each country*" (see *supra* fn 376).

355. *Second*, the wording of Article VIII(1) of the BIT is clear in that it covers both "*transfer of investments and returns*".[385] Article I(i) of the BIT defines "returns" as "*all amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, dividends, royalties, fees, other current income or capital gains*". This means that the type of transfers covered by the BIT must necessarily be related to the investment, i.e., transfer of the investment itself or of income "*yielded by an investment*".[386]

356. The Tribunal found that Claimant had made an investment protected by the BIT (see *supra* para. 306). This investment comprises assets categorized in Article I(f) of the BIT and constitutes an investment in the legal sense, made in accordance with Venezuela law (see *supra* para. 300). It includes the following: Claimant's claims to receive money in U.S. dollars allegedly in exchange for the bolivar-denominated proceeds it held in its Venezuelan Bank, proceeds that are an integral part of its economic and commercial activity in Venezuela, cash deposited in its Venezuelan bank account (see *supra* para. 302), and in a broader legal sense, the establishment of its local branch, the deposit of U.S.$ 50,000 as equity, its airline operations and its economic activity, including the generation of rights of value, in particular the ticket sales (see *supra* para. 304). As such,

[384] Exh. CL-12 (Rusoro), paras 576-578.
[385] See also Reply, para. 86.
[386] See also Counter-Memorial, paras 284-286; Rejoinder, para. 186.

the Tribunal considers that "*transfer of investments and returns*" under Article VIII of the BIT covers Claimant's claims relating to the currency exchange and repatriation of funds derived from ticket sales in Venezuela and, in particular, the claims brought before this Tribunal, i.e., in relation to the 15 AAD requests.

357. *Third*, as to whether Claimant's claim for U.S. dollars falls under the BIT, the Tribunal refers to the following:

- The wording of Article VIII(2), which considers the type of currencies available for transfer, namely, "[*t*]*ransfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned*" and "[u]*nless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer*".[387]

- The Parties' past practice in relation to the exchange of bolivar-denominated proceeds from ticket sales into U.S. dollars in accordance with the foreign exchange system in force in Venezuela (i.e., the CADIVI system, which in fact defined only two currencies – the bolivar and the U.S. dollar – and whose application process required Air Canada to apply for foreign currency exchange in U.S. dollar).[388]

358. Accordingly, the Tribunal finds that Claimant's claim for U.S. dollars in the present case involves "*convertible currency*" within the meaning of Article VIII of the BIT.

359. *Fourth*, with respect to the exchange rate, the Tribunal notes that the wording of Article VIII(2) is clear in that it is intended to be the applicable rate "*on the date of transfer*".[389] It is understood that this means the rate fixed by the applicable legislation of the host State on the relevant date.[390] Since it is undisputed that no such transfer took place (see *supra* para. 21), the Tribunal will address the relevant rate – which is in dispute between the Parties – when addressing the specific facts relating Claimant's FTF claim below (see *infra* paras 367 *et seq.*).

360. *Fifth*, an important element of the FTF claim under Article VIII is, of course, the temporal element. Article VIII provides that "[t]*ransfers shall be effected without delay*". It is clear from the wording of the provision that the Contracting States have not set a precise time

[387] Exh. C-1 (BIT).
[388] Reply, paras 97-104; C-PHB, para. 34; Tr. Day 1, 12:16-19, 58:23-59:7; Blanco WS, para. 33 ("*After the granting of an ALD, the exchange operator would block the necessary amount in bolivars in the applicant's funds to acquire the foreign currency approved. After converting them into US dollars, it transferred them to the account indicated by the requesting airline*."). See also, C-31 / RL- 52 (Exchange Agreement No. 1), Article 6; Exh. C-144 CENCOEX's website; Exh. C-11, CADIVI Request for Registration and Authorization for Currency Acquisition Allocated to International Air Carriers Form). At this point, the Tribunal clarifies that the Parties' practice in relation to the 91 AADs is not referred to as support for an investment made in U.S. dollars, but as support for the U.S. dollar being a convertible currency under the BIT. *Cf.* Rejoinder, paras 188-191.
[389] See also Article XXI(2) of the ATA which provides that "[c]*onversion and remittance shall be permitted at the foreign exchange market rates for current rates prevailing at the time of transfer*", Exh. C-5.
[390] Exh. CL-10 (UNCTAD Series), p. 34.

limit within which a transfer must be effected, nor have they defined the phrase "*without delay*" in the BIT. It is explicit, however, that the time limit begins to run on the day on which the request for transfer was made.

361. The following facts seem to be relevant in the context of the time taken to process AAD requests:

- There have been recurring delays in the processing of Claimant's AAD requests, but as Claimant submits, the system has worked.[391] In the context of the 91 AAD requests approved by CADIVI and on file,[392] the time frame for completing the necessary formalities appears to have ranged between one to seven months.[393]

- During the Hearing, Respondent's witness, Mr. Blanco, an employee of CADIVI during the time relevant to the dispute, testified that CADIVI would at best scenario make its decisions within three weeks once it had all the relevant documents.[394]

- The law governing CADIVI's practice does not set a time limit for issuing a formal decision on the requests for AADs. The *Organic Law of Administrative Procedures* ("LOPA") – on which Respondent relies[395] and which applies to all administrative procedures – states that in principle, all petitions must be resolved in four months and if no decision is rendered within that time period the *silencio administrativo negativo* applies.[396] Accordingly, under the LOPA, the interested party may assume that the application has been denied and can start appeal proceedings (following the four-month lapse), arguably in an effort to prevent the State from delaying a decision forever without providing any justification.[397] It does not *per se* set a firm deadline for decisions and thus cannot be relied on to determine the temporal element of Article VIII of the BIT.

362. It is clear from the above that no consideration was given to defining the timeframe for the implementation of a transfer in the BIT as it is specific to the foreign exchange system in place in the Contracting State. This means that the time frame should reflect the period

[391] Reply, para. 106; see also Pittman WS, para. 23.
[392] Claimant confirms that only six out of 91 AADs are in the record and on which its expert, Mr. Rosen, relies for the purposes of its damages' assessment.
[393] See Exhs FTI-7 to FTI-12, Currency Acquisition Requests dated April to September 2012; FTI Report, para. 3.9 and Figure 4.
[394] Tr. Day 2, 155:1-8.
[395] Rejoinder, para. 379.
[396] Exh. RL-54 (LOPA), Article 4 provides as follows: "*In the cases in which a public administration body does not resolve a matter or recourse within the corresponding periods, it shall be considered that it has resolved it negatively and the interested party may attempt the next immediate recourse, unless expressly provided otherwise. This provision does not relieve the administrative bodies, or their representatives, of the responsibilities that are attributable to the omission or delay*". Further, Article 60 states as follows: "*Processing and concluding files shall not exceed four (4) months, except if there are exceptional circumstances, whose existence shall be recorded, with an indication of the extension granted*".
[397] Exh. RL-54 (LOPA), Article 9 states as follows: "*The administrative acts of individual nature need to be reasoned, save for those of mere procedure or express provision in the Law. To that effect, they shall refer to the facts and the legal basis of the act*." See also Article 94 on "Reconsideration Recourse".

of time normally required to complete the necessary formalities related to the requested transfer. In the present case, this period appears to be between:

- a few weeks from when CADIVI had all the relevant documents according to the uncontradicted testimony of Mr. Blanco,[398] and

- one to seven months, which corresponds to the actual time required to repatriate the six AAD requests on file from the 91 approved ones submitted in 2012.[399]

363. From the foregoing, it can be inferred that the review of an AAD request should normally be short but may take up to seven months (as was the case with some of the 91 approved AAD requests). The use of the maximum time does not necessarily mean that there has been a violation that rises to the level of a violation of international treaty law. However, repeated delays without explanations could indicate such violation. This is true regardless of whether a delay can be attributed to a State's right to take policy decisions in this context. Accordingly, the temporal element of Article VIII of the BIT must be assessed in light of the specific facts of each case.

364. In this context, the Tribunal does not consider it appropriate to decide Claimant's MFN argument to adopt a specific timeframe of two to four months from third country BITs.[400]

365. *Finally*, and in light of the foregoing, the Tribunal finds that Claimant's FTF claim falls within the scope of Article VIII of the BIT and the claim must be decided in accordance with the Tribunal's interpretation of that provision.

(iii) Did Respondent violate Article VIII of the BIT?

366. The Parties dispute whether Respondent prevented Claimant from repatriating its funds in connection with the 15 AAD requests, in violation of Article VIII of the BIT.[401] To decide this question, the Tribunal will first set out the relevant and undisputed facts and then assess whether Respondent is liable based on its interpretation of Article VIII (see *supra* paras 347-365).

a. The facts

367. The Tribunal recalls the following pertinent facts:

- On 5 February 2003, the then President Hugo Chávez, created, by separate decree, the *CADIVI* or *CADIVI Commission*, a collegial body composed of five members also appointed by the President of Venezuela. The CADIVI administers the legal exchange of currency in Venezuela under the terms established in Exchange Rate Agreements between the Venezuelan Central Bank and the Ministry of Finance.[402]

[398] Tr. Day 2, 155:1-8.
[399] See FTI Report, para. 3.9 and Figure 4, as well as Exhs FTI 7 to FTI 12 comprising the six approved AAD requests that are in the record of these proceedings.
[400] See Reply, paras 122-125.
[401] Claimant (Reply, paras 105-121); Respondent (Rejoinder, paras 194-209).
[402] Exh. C-10, (Decree No. 2,302), Article 2. See also C-PHB, para. 12; R-PHB, para. 92.

At that point in time, The CADIVI Exchange rate, representing the official fixed exchange rate that changed from time to time, was fixed at Bs. 1,600 per U.S. dollar.[403]

On the same day, the Central Bank and the Ministry of Finance signed *Exchange Agreement No. 1*, pursuant to which (i) the purchase and sale of foreign currency in Venezuela was centralized in the Central Bank;[404] (ii) the Central Bank and the Ministry of Finance would set the official exchange rate for certain sectors and activities;[405] and (iii) the Central Bank would be authorized to sell foreign currency at the official exchange rate and at the request of the CADIVI.[406]

- On 7 April 2003, CADIVI issued *Providencia No. 23* for the purpose of "*Regulating Authorization for Currency Acquisition by International Air Transportation Providers in Venezuela*". Providencia No. 23 established the procedure that foreign airlines had to follow in order to acquire foreign currency at the exchange rate established by the Central Bank and the Ministry of Finance in order to repatriate their proceeds to their home countries.[407]

- In June 2013, CADIVI and the Executive Branch created the "Alternative System for the Acquisition of Currency" ("SICAD 1") which established a periodic system of auctions in order to acquire foreign currency for different sectors of the economy. The rate of SICAD 1 was originally set at 11,36 per U.S. dollar.[408]

[403] Econ One Report, paras 27-28; Counter-Memorial, para. 343. On 9 February 2004 it was fixed at Bs. 1,920 per U.S. dollar and on 3 March 2005 at Bs. 2,150 per U.S. dollar. On 9 February 2013, the CADIVI rate was fixed at Bs. 6.3 per U.S. dollar. See Exh. RL-56, Exchange Agreement No. 14, published in Official Gazette No. 40.108, dated 8 February 2013.

[404] Exh. C-31 / RL- 52 (Exchange Agreement No. 1), Article 1 ("*The Central Bank of Venezuela shall centralize the purchase and sale of foreign currency in the country*") and Article 2 ("CADIVI "*shall be in charge of coordinating, administering, controlling and setting any requirements, procedure and restrictions required for the performance of this Foreign Exchange Agreement*"). See also C-PHB, para. 13.

[405] Exh. C-31 / RL- 52 (Exchange Agreement No. 1), Chapters II and III. In accordance with Article 26, "[t]*he acquisition of foreign currency by natural and legal persons for transfer, remittances, and payment of imports of goods and services, as well as the capital and interest of duly registered external private debt, will be limited and subject to the requirements and conditions established for that purpose by* […] *(CADIVI)*." See also C-PHB, para. 13.

[406] Exh. C-31 / RL- 52 (Exchange Agreement No. 1), Chapter IV. See also C-PHB, para. 13.

[407] Exh. C-9 / R-11 (Providencia No. 23), Article 1 provides as follows: *This order shall regulate the handling and processing of requests for an Authorization for Currency Acquisition (AAD) by foreign providers of international air passenger, cargo, and mail transportation service under authorization by the National Executive.*" Article 2 states as follows: "*foreign international air transportation companies, duly authorized by the National Civil Aviation Institute, may acquire the foreign currency necessary for them to remit to their home offices, in their home country, the net balance of their revenue from ticket sales, cargo and mail freight at each sales point minus all costs, expenses and taxes payable by them in Venezuela for their adequate and safe operation*". See also C-PHB, paras 14-15; R-PHB, para. 92.

[408] Exh. RL-57, Exchange Agreement No. 21, published in Official Gazette No. 40.134, dated 22 March 2013; Econ One Report, para. 44.

- Between July 2004 and November 2012, Air Canada submitted 91 AAD requests for the exchange and repatriation of bolivar-denominated funds into U.S. dollars. CADIVI had approved all 91 AADs.[409]

- Between September 2013 and January 2014, Air Canada submitted 15 AADs for the repatriation of U.S.$ 50.6 million in proceeds that it had generated from ticket sales in Venezuela between October 2012 and December 2013.[410]

- Between 21 October 2013 and 6 November 2013, CADIVI sent Air Canada requests for additional information on five (of the 15) AADs that covered the period between October 2012 and February 2013. Specifically, CADIVI requested Air Canada to provide the following: (i) a detailed report explaining the reasons for remittance increases between the requesting month and the same month in the previous year; (ii) the tariff structure for the requesting month and the same month in the previous year; and (iii) a summary table showing the quantities of tickets sold in the requesting month and the same month in the previous year, indicating the rate applied in each case. CADIVI suspended the processing of these five AADs pending Air Canada's response to its requests for information. Air Canada responded by providing CADIVI with the requested information between 5 and 22 November 2013. After receiving the responses from Air Canada, CADIVI did not request any additional information from Air Canada regarding the five AADs, nor did it provide any indication that the information provided by Air Canada was complete. Instead, it changed the status of these five AADs in its system back to "*under analysis*".[411] It is undisputed that all 15 AAD requests remained "*under analysis*" in CADIVI's system at least until 2018[412] and that CADIVI never issued a decision to accept or reject these AADs.[413]

- In November 2013, through Decree No. 601, the Executive Branch created the Centro Nacional de Comercio Exterior ("CENCOEX"), which succeeded CADIVI in its prerogatives.[414]

- On 8 November 2013, INAC issued a request for information to ALAV, the Venezuelan Airlines Association.[415]

- On 24 January 2014, *Providencia No. 124* ("Order Establishing the Requirements and Processing for the Authorization for Currency Acquisition (AAD) by International Air Transportation Providers") entered into force, replacing Providencia No. 23. According to its Article 12, "[t]*he exchange rate applicable*

[409] Memorial, para. 47; Pittman WS, paras 23-24; C-PHB, para. 26.
[410] Memorial, para. 58; C-PHB, para. 18.
[411] Babun WS II, para. 8; C-PHB, paras 176-177.
[412] Exh. C-70, Printout from CENCOEX's website showing Air Canada's AAD requests as pending, 2 March 2018; C-PHB, para. 178.
[413] Counter-Memorial, para. 84; Rejoinder, paras 213, 245; Tr. Day 1, 165:12-16.
[414] Exh. RL-58, Decree with Rank, Value and Force of Law No. 601, published in Extraordinary Official Gazette No. 6.116, dated 29 November 2013. See also Counter-Memorial, para. 60.
[415] Exh. C-36, Letter from CADIVI to ALAV, dated 8 November 2013.

to the operations specified in this Order at the time of the Authorization of currency conducted through the Ancillary Foreign Currency Administration System (SICAD)." [416] Other than the implementation of another rate, Providencia No. 124 did not substantially alter the requirements or process in connection with the acquisition of foreign currency.[417]

- In January 2014, representatives of Air Canada met with the President of INAC. Mr. Babún testified that the purpose of the meeting was "*to negotiate how to resolve the Government' failure to grant Air Canada's Authorization for Currency Acquisition requests*".[418]

- On 23 January 2014, Air Canada informed the public that its "*flights continue operating as normal*" but that "*the issuance of tickets* [has been] *temporarily suspended*".[419]

- On 27 January 2014, INAC submitted a request for information to Air Canada.[420]

- On 14 March 2014, according to press reports, President Nicolás Maduro stated in connection with the repatriation of funds that "[w]*e will be making payment as we should*".[421]

- On 17 March 2014, Air Canada informed INAC of its decision to suspend its flights to Caracas from the same date until further notice, due to the unrest and challenges in conducting business in Venezuela, including the possibility of repatriating its funds from Venezuela. It indicated that its office in Caracas would remain open to assist passengers with tickets out of Venezuela. It further stated that it would monitor the situation and reassess the reprogramming of its flights with a view to resuming operations on this route once the situation in Venezuela had stabilized.[422]

- On 19 March 2014, INAC acknowledged receipt of the notification from Air Canada that it intended to suspend its flights to Caracas. INAC stated that relations between Air Canada and Venezuela were subject to the ATA and that the ATA provided for a specific termination regime. INAC also stated that Air Canada's motivations for terminating the flights could be resolved through the dispute settlement mechanism of Article XVIII of the ATA. Finally, INAC reminded Air Canada that air transport is a public service and it is up to the State to decide when a private entity ceases to provide such a service. In particular, it stressed that

[416] Exh. C-12 (CADIVI Providencia No. 124). See also Exh. RL-59, Exchange Agreement No. 25, published in Extraordinary Official Gazette No. 6.122, Article 1.e.
[417] Counter-Memorial, para. 61.
[418] Babun WS, para. 15; C-PHB, para. 181.
[419] Exh. R-45, Printout if Air Canada Venezuela's Twitter webpage, dated 23 January 2014.
[420] Exh. C-60, Letter from INAC to Air Canada, dated 27 January 2014.
[421] Exh. C-20, La Razón press article dated 14 March 2014.
[422] Exh. C-49, Letter from Air Canada to the President of INAC, dated 17 March 2014; RfA, para. 29; Memorial, para. 67.

foreign companies that comply with the Venezuelan legal framework will be protected and their investments encouraged, but those that choose to break the law will not benefit from exemptions or privileged treatment.[423]

- Air Canada clarified to INAC on 26 March 2014 that it had notified the suspension of the service, but that Air Canada could not terminate the ATA because it was an intergovernmental treaty.[424]

- In late March 2014, Venezuela announced that it would allow airlines to repatriate their revenues.[425]

- On 28 April 2014, Air Canada wrote to the President of INAC requesting a meeting to clarify any misunderstandings regarding Air Canada's suspension notice of 17 March 2014 and the repatriation of its funds.[426]

- On 28 May 2014, Air Canada wrote to the Venezuelan Vice President to discuss the suspension of its operations in Venezuela and to clarify any misunderstandings in relation to the suspension notice of 17 March 2014. Air Canada clarified that it had never been involved in the domestic or foreign affairs and therefore had not publicly commented the restriction to transfer its funds necessary to maintain operations. Air Canada stated that despite the suspension, it remained committed to its operations and investments in Venezuela and intended to return once the situation was regularized. To this end, it indicated the hope to find a workable solution to restore operations. Finally, Air Canada indicated its intention to meet with government officials to resolve the issue and negotiate a plan for moving forward.[427]

- On 13 June 2014, IATA's Director General and CEO sent a letter to the President of Venezuela "*on behalf of the airline members of the* [IATA] *that operate flights to Venezuela*", concerning the members' "*blocked monies from airline ticket sales in Venezuela*" and "*a number of serious concerns*" expressed from them in this respect.

- Air Canada wrote to the Minister for Popular Power, Air and Water Transport, on 10 July 2014, in relation to the suspensions of Air Canada operations in Venezuela. Air Canada noted that it had contacted the Vice President directly but had not received a response. Air Canada referred to agreements reached on 3 July 2014 between the Government and 14 airlines regarding their requests for currency exchange in connection with their operations in Venezuela. It described this event as encouraging and indicated its intention to move Air Canada's operations forward in Venezuela. Air Canada reiterated the fact that it was unable to maintain its operations due to the prevention of repatriation of its funds and

[423] Exh. C-45, Letter from INAC to Air Canada, dated 19 March 2014; Memorial, para. 75.
[424] Exh. C-46, Letter from Air Canada to INAC, dated 26 March 2014; Memorial, para. 75.
[425] Memorial, para. 78.
[426] Exh. C-91, Letter from Air Canada to the President of INAC, dated 28 April 2014; Memorial, para. 83.
[427] Exh. C-56, Letter from Air Canada to the Vice-President of Venezuela, dated 28 May 2014; Memorial, para. 84.

indicated its hope to find a viable solution in this regard. Finally, Air Canada stated its willingness to meet and negotiate a mutually acceptable agreement.[428]

- Air Canada wrote to the Minster for Popular Power of Economic, Finance and Public Banks on 3 October 2014, reiterating what it had already written to the Minister for Popular Power, Air and Water Transport and noting its willingness to meet and resolve the issue of repatriating Air Canada's funds. Air Canada also noted that while its proposal was the preferred option, it would continue to consider and assess its options in this regard, including legal options.[429]

- Meanwhile, between May and October 2014, Venezuela entered into agreements with other international airlines and negotiated settlements regarding their outstanding AADs. Under these agreements, Venezuela had approved their AAD requests for U.S. dollars corresponding to ticket sales in the country in 2012 and 2013, using the exchange rate of 6.3 bolivars.[430]

- On 15 June 2016, Air Canada provided Venezuela with a written notice of dispute pursuant to Article X(II) of the Canada-Venezuela BIT.[431]

368. Further, the Tribunal refers to the following procedure, set forth by both Parties, which applies with respect to AAD requests under the CADIVI system in effect at the relevant time. The procedure is largely undisputed save for the relevance of the LOPA and the condition for currency availability to which Respondent invariably refers.

- *First, registration with RUSAD:* Before an international airline could apply for an AAD, it first had to register with the Currency Administration System Users Registry ("RUSAD").[432] To maintain an active status in the RUSAD, the user was required to submit (i) its Tax Information Registration (RIF) and the three most recent income tax, Tax on Corporate Assets, and Value-Added Tax returns; (ii) certificates of good standing from IVSS and the National Institute of Education

[428] Exh. C-57, Letter from Air Canada to the Minister of Popular Power, Air and Water Transport, dated 10 July 2014; Memorial, para. 85.
[429] Exh. C-58, Letter from Air Canada to the Minister of Popular Power of Economy, Finance and Public Banks, dated 3 October 2014; Memorial, para. 86.
[430] Exh. C-52, Gobierno venezolano cancela deuda a seis aerolíneas, ULTIMA HORA, 26 May 2014; Exh. C-53, El Gobierno de Venezuela salda deudas con seis aerolíneas internacionales, ABC INTERNACIONAL, 27 May 2014; Exh. C-54, Venezuela Reaches Deals With Six Airlines to Pay Dollar Debt, BLOOMBERG, 26 May 2014; Exh. C-149, Letter from United Airlines to the Minister of Aquatic and Aerial Transportation, 29 July 2014; Exh. C-150, Letter from TAP Portugal to the Minister of Aquatic and Aerial Transportation; Exh. C-151, Letter from Cubana de Aviacion S.A. to CENCOEX, 10 October 2014; Exh. C-152, Letter from the Minister of Aquatic and Aerial Transportation to Lufthansa, 29 May 2014; Exh. C-153, Tiara Air's Clear and Irrevocable Declaration of Will, 4 June 2014; Exh. C-154, TAM Lineas Aereas' Clear and Irrevocable Declaration of Will, 22 July 2014; Exh. C-155, Aeromexico's Clear and Irrevocable Declaration of Will, 26 May 2014; Exh, C-156, Arubaanse, Clear and Irrevocable Declaration of Will, 26 May 2014; Exh. C-157, Insel Air International's Clear and Irrevocable Declaration of Will, 26 May 2014; Exh. C-158, Aerolineas Argentinas' Clear and Irrevocable Declaration of Will, 16 May 2014. See also C-PHB, para. 83.
[431] Exh. C-14 (Notice Letter). See also Exh. C-1 (BIT).
[432] Exh. C-10 (Decree No. 2,302), Article 7. See also, Exh. C-9 / R-11 (Providencia No. 23), Article 3; Counter-Memorial, paras 44-46; C-PHB, para. 166; R-PHB, para. 93.

and Cooperation; and, if applicable, (iii) the most recent tax return.[433] The certificate of good standing from IVSS was only valid for one month. Therefore, each time the airline filed an AAD application, it had to obtain a new certificate from IVSS to reactivate its registration with RUSAD unless the airline filed multiple AAD applications within the same month.[434]

- *Second, submission of AAD request:* Once registered, the airline received an AAD form from RUSAD, which it was required to "*file with the authorized currency exchange operator* […] *along with a sworn statement listing the* [airline's] *income, costs, expenses, taxes and the monthly net balance to be remitted to their parent company*."[435] The airline was required to submit three copies of each AAD request (one for the exchange operator, one for CADIVI, and one for the user), with each page numbered and organized with dividers.[436] The detailed and complete list of the documents required by CADIVI was freely accessible from CADIVI, together with the guidelines regarding the CADIVI procedure and the manner in which the documentation had to be compiled and submitted. CADIVI issued two sets of such guidelines as per Article 3(5) of Decree No. 2,302 ("CADIVI Guidelines").[437]

- *Third, the transmission of the AAD file by the exchange operator to CADIVI:* The Central Bank of Venezuela authorized banks and certain other entities to act as exchange operators in charge of receiving AAD requests and carrying out purchase and transfer of foreign currency, once approved by CADIVI.[438] The exchange operator, in this case Banco Mercantil, would receive the AAD requests, certify that the airline had submitted original copies of documents or originals when required, and maintain records of all AAD requests received and completed.[439] The exchange operator would then forward the AAD file to CADIVI.[440]

- *Fourth, assigning an AAD request for review by a CADIVI analyst:* CADIVI would assign the ADD request to an operational analyst for review.[441] According to Respondent, the procedure commenced upon receipt of the request by CADIVI,

[433] Exh. C-10 (Decree No. 2,302), Article 7; Exh. C-9 (Providencia No. 23), Article 3.
[434] C-PHB, paras 166-167.
[435] Exh. C-9 / R-11 (Providencia No. 23), Article 6; C-PHB, para. 167; R-PHB, para. 96.
[436] Exh. R-12, Guidelines of the Norms and Procedures for the Submission of Documents Before the Currency Administration Commission (CADIVI) Through the Authorized Exchange Operator dated January 2009 ("January 2009 CADIVI Guidelines"), Section III(2).
[437] Exh. R-12 (January 2009 CADIVI Guidelines); Exh. R-13, Guidelines of the Norms and Procedures for the Submission of Documents Before the Currency Administration Commission (CADIVI) Through the Authorized Exchange Operator dated April 2011 ("April 2011 CADIVI Guidelines"); R-PHB, para. 97.
[438] Exh. C-10 (Decree No. 2,302), Articles 5, 28; C-PHB, para. 168.
[439] Exh. R-12 (January 2009 CADIVI Guidelines), Section III(2); Exh. C-10 (Decree No. 2,302), Article 5; C-PHB, para. 168.
[440] Exh. C-9 / R-11 (Providencia No, 23), Articles 2 and 6; Blanco WS, para. 13; C-PHB, para. 168; R-PHB, paras 94-95.
[441] C-PHB, para. 169; R-PHB, paras 94-95.

pursuant to Article 48 of the LOPA.[442] CADIVI had to open a specific record accessible to the applicant for each single request received, pursuant to Article 51 of the LOPA.[443]

The CADIVI analyst would first conduct a formal verification, i.e., confirm that all required information and documentation was submitted with the AAD request.[444]

If information was missing, the CADIVI analyst would request the information directly from the airline via email, pursuant to Article 10 of Decree No. 2,302.[445] Mr. Blanco testified that this email would include reference to the legal framework and applicable time-limits.[446] As he also explained, "*if the CADIVI analyst did not issue a request, then no further documents or information were required.*"[447] According to Respondent, the applicant had 15 days to file the relevant documents or requested information pursuant to Article 50 of the LOPA.[448]

CADIVI retained electronic and hard copy records of all documentation related to an AAD request, including any communication between CADIVI and the airline.[449] Thus, all requests for information from CADIVI to the airline would be included in CADIVI's master file for each AAD request.[450] If the airline does not provide the requested information, CADIVI would declare the AAD request to suspended.[451] According to Respondent, a suspension of two months resulted in the termination of the file and rejection of the request in accordance with Article 64 of the LOPA.[452]

– *Fifth, the performance of a financial analysis or verification by a CADIVI analyst:* When or if the requested information was complete, the CADIVI analyst would perform a financial analysis or verification.[453] According to Mr. Blanco, the financial analysis included "*a review of the amounts requested and the documents provided by the international airline*," as well as a review "*that what was included by the international airline in its request was in accordance with the remittable items allowed by* [Providencia] *No. 23*".[454] After conducting the financial review, the CADIVI analyst could request additional documents or information pursuant

[442] Exh. RL-54 (LOPA); R-PHB, para. 93.
[443] Exh. RL-54 (LOPA), Articles 51 and 59; R-PHB, para. 93.
[444] Blanco WS, paras 13, 23-25; Tr. Day 2, 122:9-12; C-PHB, para. 169; R-PHB, para. 96.
[445] Exh. C-10 (Decree No. 2, 302); Blanco WS, para. 28; C-PHB, para. 169; R-PHB, para. 98.
[446] Tr. Day 2, 149:10-25; R-PHB, para. 99. According to Respondent this is confirmed by the requests for additional information sent by CADIVI in relation to five of the 15 AAD requests by Air Canada. See Counter-Memorial, paras 75-84; Exhs R-18 to R-22 (Currency Acquisition Requests dated October 2012 to February 2013); R-PHB, para. 99.
[447] Tr. Day 2, 123:1-4; C-PHB, para. 169.
[448] Exh. RL-54 (LOPA); R-PHB, para. 98.
[449] Tr. Day 2, 121:17-20, 122:3-6; C-PHB, para. 169.
[450] C-PHB, para. 169.
[451] Blanco WS, para. 28; C-PHB, para. 169; R-PHB, para. 98.
[452] Exh. RL-54 (LOPA); R-PHB, para. 98.
[453] Blanco WS, para. 26; Tr. Day 2, 123:10-13; C-PHB, para. 170; R-PHB, para. 100.
[454] Blanco WS, paras 26-27; C-PHB, para. 170; R-PHB, para. 100.

to Article 10 of Decree No. 2.302.[455] In case the financial analysis revealed that a request included amounts that should not have been included, the CADIVI analyst would recalculate the eligible amount, without reverting to the applicant.[456]

According to Respondent, the applicant had 15 days to file the relevant documents or submit the information requested, pursuant to Article 50 of the LOPA. Failure to comply with this deadline meant that the procedure was suspended and a suspension of two months resulted in the termination of the file and rejection of the request in accordance with Article 64 of the LOPA.[457]

The time allocated to or dedicated by CADIVI analysts to review an AAD request was not framed by any specific legal provision. In practice, this phase apparently would take a few days.[458]

The CADIVI analyst would then formulate a recommendation to the CADIVI Commission to approve, partially approve or refuse the AAD request based on his or her formal and financial analysis.[459] Once a recommendation was made, the task of the CADIVI analyst was complete and he or she was neither directly involved with the decision-making by the Commission nor specifically informed of the outcome of such process.[460]

– *Sixth, the CADIVI Commission's decision to grant, deny or suspend the AAD request:* Mr. Blanco stated that the CADIVI Commission would issue a written decision granting, denying, or suspending an AAD request.[461] In practice, the CADIVI Commission would at best case rule within three weeks after receipt of the CADIVI analyst's recommendation.[462] The decision would also be recorded in CADIVI's internal electronic system.[463] Mr. Blanco confirmed that the CADIVI Commission's decision would be "*motivated, or explained and supported, so that an applicant could challenge that decision or, in the case of a suspension, provide additional information.*"[464] If the Commission denied an AAD request, then it would notify the airline by email,[465] unless, according to Respondent, the AAD request was refused by operation of Article 4 of the LOPA.[466] The Commission would also notify the airline if it suspended the

[455] Exh. C-10 (Decree No. 2,302); R-PHB, para. 100.
[456] Tr. Day 2, 151:19-152-18; R-PHB, para. 102.
[457] Exh. RL-54 (LOPA); R-PHB, para. 100.
[458] Blanco WS, para. 34; Tr. Day 2, 150:1-13; R-PHB, para. 103.
[459] Blanco WS, para. 29; R-PHB, paras 104-105.
[460] R-PHB, para. 105.
[461] Blanco WS, para. 30; Tr. Day 2, 126:2-10; C-PHB, para. 171; R-PHB, para. 106.
[462] Tr. Day 2, 155:1-8; R-PHB, para. 108.
[463] Tr. Day 2, 125:19-21; C-PHB, para. 171.
[464] Tr. Day 2, 127:22-128:1; C-PHB, para. 171.
[465] Blanco WS, para. 31; C-PHB, para. 171; R-PHB, para. 109.
[466] R-PHB, para. 109.

request so that the airline could submit additional information to support its AAD request.[467]

According to Respondent, the CADIVI Commission had up to four months to rule upon an AAD request as from the date of receipt of the request by the same, pursuant to Article 60 of the LOPA. In case no decision was notified to the applicant within that timeframe the AAD request was considered as rejected pursuant to Article 4 of the LOPA. The LOPA does not contain any requirement of form of the decisions to be rendered by CADIVI nor any communication requirements in this connection.[468] In case of refusal, including by operation of Article 4 of the LOPA, the applicant could contest the decision of the CADIVI Commission pursuant to Articles 94 or 97 of the LOPA within 15 days from the decision. The CADIVI Commission had 15 days to rile on a reconsideration recourse. In case it maintained its initial decision, the applicant could file recourse to the Minister of Finance, pursuant to Article 95 and 96 of the LOPA.[469]

Also, according to Respondent, pursuant to Article 3 of Decree No. 2,302, as amended by Decree No. 2,330, Article 8 of Exchange Agreement No. 1, and Article 8 of Providencia No. 124, the CADIVI Commission could only approve an AAD request subject to currency availability established by the Central Bank of Venezuela and the directives issued by the National Executive.[470]

– *Seventh, upon approval, CADIVI's authorization to purchase U.S. dollars:* If the Commission granted an AAD request, it would issue an authorization to purchase a specified amount of U.S. dollars.[471]

Once approved, the "AAD request" became an "AAD" and in turn, an "ALD", i.e., authorization to liquidate foreign currency. No applicant could acquire any foreign currency without having obtained an AAD that was converted into an ALD.[472]

The CADIVI Commission would notify the exchange operator, in Air Canada's case Banco Mercantil, of the approval.[473] The applicant would order its exchange operator to proceed with the acquisition of the foreign currency from the Central Bank of Venezuela and authorize the operator to debit the bolivars equivalent to the foreign currency to be acquired from a specified bank account held in

[467] Blanco WS, para. 31; C-PHB, para. 171.
[468] Exh. RL-54 (LOPA); Rejoinder, para. 237; R-PHB, para. 108.
[469] Exh. RL-54 (LOPA); R-PHB, para. 110. See also Exh. RL-54 (LOPA), Articles 98 and 99 and R-PHB, para. 111.
[470] Exh. C-10 (Decree No. 2,302); Exh. RL-53, Decree No. 2.330, published in Official Gazette No. 37.644, dated 6 March 2003, Article 3; Exh. C-31 / RL-52 (Exchange Agreement No. 1); Exh. C-9 / R-11 (Providencia No. 23); Exh. C-12 (Providencia No. 124); R-PHB, para. 107.
[471] C-PHB, para. 172.
[472] Blanco WS, para. 32; R-PHB, paras 113-114.
[473] C-PHB, para. 172.

Venezuela by the applicant.[474] As Mr. Blanco explained, the exchange operator "*would block the necessary amount in bolivars in the applicant's funds to acquire the foreign currency approved. After converting them into US dollars, it transferred them to the account indicated by the requesting airline*. Mr. Blanco also explained that "[f]*rom this transfer, a 'swift' receipt would be kept, which had to be submitted in the subsequent AAD requests. The submission of this 'swift' allowed the administration to verify that the applicant had made a lawful use of the currencies*"[475] i.e., that the applicant had actually repatriated the U.S. dollars abroad. This requirement ensured that the U.S. dollars had not remained in Venezuela.[476]

369. Mr. Blanco considered that the entire CADIVI review process explained above should take only a few weeks, during which time the applicant could track the status of its AAD request.[477] In the case of the 15 AADs at issue, the electronic system indicated that the AADs remained "*under review*" in 2018.[478]

370. The CADIVI process was allegedly followed in Air Canada's 91 AAD requests for the period from 2004 to 2012.[479] According to Respondent, the same process was followed in Air Canada's 15 AAD requests, but in this case the difference in outcome is explained by the fact that AAD requests were always subject to the availability of foreign currency.[480]

b. <u>The assessment</u>

371. Based on the foregoing facts, the following can be inferred.

<u>*Possibility for a BIT violation*</u>

372. *First*, there is no doubt that Respondent rightly had a system in place regarding the exchange and repatriation of locally generated funds and specifically for airlines. This process was governed by Exchange Agreement No. 1, Providencia No. 23 (until it was

[474] R-PHB, paras 115-117. Air Canada acquired U.S. dollars from the Central Bank of Venezuela after having been authorized by CADIVI to do so, via Banco Mercantil. See for example, Exhs FTI-7 to FTI-12, Currency Acquisition Requests dated April to September 2012. According to Respondent, the form corresponded to a request from Air Canada to Banco Mercantil to "*proceed with the obtaining, before the* [CADIVI] *and Banco Central de Venezuela, of currency*" corresponding to the amount authorized by CADIVI. In the form, Air Canada had to specify the type of currency which CADIVI had authorized it to acquire. As to the acquisition itself, Air Canada had to request its exchange operator to acquire the foreign currency from the Central bank of Venezuela. Because the exchange operator was not "*bound to finance such transaction*", Air Canada had to expressly authorize its exchange operator to debit from its dedicated bank account in Venezuela the Bolivars equivalent of the foreign currency to be acquired. The transfer of the foreign currency to Air Canada's account outside Venezuela would occur in a further step, once the exchange operator has received the funds in U.S. dollars from the Central Bank of Venezuela.
[475] Blanco WS, para. 33; C-PHB, para. 172. See also R-PHB, paras 117, 131.
[476] C-PHB, para. 172.
[477] Tr. Day 2, 155:1-8.
[478] Exh. C-70, Printout from CENCOEX's website showing Air Canada's AAD requests as pending, 2 March 2018.
[479] R-PHB, para. 119.
[480] R-PHB, para. 120.

replaced by Providencia No. 124), and the CADIVI Guidelines.[481] With respect to the LOPA, on which Respondent relies,[482] there is no doubt that it applies to the administrative process and, therefore, also governs the entire AAD process together with the aforementioned instruments. Apart from that, and as considered above, the Tribunal does not consider that the LOPA defined the timeframe within which an AAD request had to be processed (see *supra* para. 361). Given this regulatory framework and at all relevant times, Claimant was legally obliged to follow the procedure provided in relation to the exchange of its bolivar returns into U.S. dollars for repatriation. This was the system used by Claimant in relation to previous AAD requests in Venezuela, and the system it sought to use in relation to the 15 contested AAD requests.

373. *Second*, the CADIVI process was apparently a transparent and straightforward process, albeit with delays, but one that worked well, as Claimant acknowledges.[483] It respected an airline investor's right to a free transfer of funds (as provided in the BIT and the ATA) and the State could not interfere with that right at will (see *supra* para. 353). However, the system itself was not absolute in the sense that it did not guarantee approval of AAD requests. Instead, as seen above (see *supra* para. 368), the CADIVI procedure had to be followed, and the CADIVI Commission could take three possible decisions: an approval, a suspension or a denial of an AAD request. Thus, the suspension or denial of an AAD request, cannot, in and of itself, be considered as a violation of the FTF provision in the BIT. Instead, one can consider a possibility for a violation only if:

- no free transfer of funds was possible in Venezuela (despite the existence of the BIT and ATA), or

- Respondent acted in such a way to effectively prevent an investor in the airline sector – in this case Air Canada – from exercising its right to freely transfer its funds, contrary to the existing system.

Respondent's actions in the present case

374. In the present case, it is clear and undisputed that the right to a free transfer of funds was available to an investor investing in Venezuela (see *supra* paras 353-369 and 373). In fact, Claimant makes clear that it has never alleged that Respondent's foreign exchange control regime constitutes a violation the BIT, but rather the breach comes from Respondent's refusal to process Claimant's AAD requests in a manner consistent with their past practice and in accordance with that regime.[484] What therefore needs to be clarified is whether Respondent, through CADIVI, deprived Claimant of the right to freely transfer its funds in accordance with the existing system.

[481] Exh. C-31 / RL- 52 (Exchange Agreement No. 1); Exh. C-9 / R-11 (Providencia No. 23); Exh. R-12 (January 2009 CADIVI Guidelines).
[482] R-PHB, para. 404.
[483] Reply, para. 167.
[484] Reply, para. 105.

375. *First*, since the inception of Claimant's investment in Venezuela, the Parties had apparently followed the applicable procedure in connection with the repatriation of Claimant's local sales proceeds (see *supra* para. 368).[485] As noted above, Claimant's 91 AAD requests in this context were granted over a period of eight years (see *supra* para. 367).[486] CADIVI has granted each of these requests and authorized Venezuela's Central Bank to convert Claimant's bolivars into U.S. dollars and transfer them to Claimant's bank account in New York.[487] With respect to some of these requests, there is no doubt that there were delays,[488] regardless of the standard by which they are measured: i.e., a few weeks, as mentioned by Mr. Blanco, or otherwise (see *supra* paras 361-362). In any event, there was never a problem in this regard, and requests that exceeded the timeframe of a few weeks – and certainly timeframe of four months allegedly set by the LOPA (see *supra* paras 361 and 372) – were ultimately approved and processed.

376. *Second*, Claimant's 15 AAD requests were prepared in the same manner as the 91 prior AAD requests CADIVI had previously approved and were submitted between September 2013 and January 2014.[489] With respect to five of those requests, CADIVI requested additional information that Claimant provided, in October and November 2013. Thus, apart from this exchange and the fact that all had remained "*under analysis*" until 2018, there is no document or testimony regarding the conduct of the CADIVI process referred to above with respect to these requests.[490] What is clear is that Claimant pursued the status and settlement of the amounts in respect of these claims with Respondent and that Respondent acknowledged that there was a debt owed to Claimant in this regard, which it held out the prospect of settling. Claimant had suspended its route and again approached Venezuelan authorities in an attempt to obtain payment of the outstanding amounts and to reactivate the route (see *supra* para. 367).

377. It is undisputed that CADIVI never made a decision to accept, suspend or reject these AADs.[491] Although Respondent submits that "[i]*n practice, unless an AAD request was refused by operation of Article 4 of the LOPA, the Commission generally notified the applicant of its negative decision by e-mail*"[492] meaning that the 15 AAD requests were allegedly automatically rejected, Mr. Blanco stated that the years-long consideration of AADs was a departure from normal procedure and that he had never seen a file that, after three years, is still under review or under analysis.[493] Indeed, under the procedure described by Mr. Blanco or under the LOPA, one had to have a reasoned decision to challenge a denial. Moreover, CADIVI had always made a decision– whether to deny a

[485] R-PHB, paras 119-120.
[486] Memorial, para. 47; Pittman WS, paras 23-24; C-PHB, para. 26.
[487] Exhs FTI-7 to FTI-12, Currency Acquisition Requests dated April to September 2012; C-PHB, para. 174; R-PHB, paras 115-117.
[488] Pittman WS, para. 23; Tr. Day 2, 100:24-101:8 (Pittman: "[i]*t was a surprise to Air Canada at the time because we had been able to repatriate our funds from the beginning, from 2004, up until the 2012 timeframe, which the applications were approved by CADIVI and the repatriations occurred; sometimes with delays, but they did happen*."); C-PHB, para. 175.
[489] C-PHB, para. 26; R-PHB, para. 120.
[490] Tr. Day 2, 119:19-121:3.
[491] Counter-Memorial, para. 84; Rejoinder, paras 213, 245.
[492] R-PHB, para. 109; see also Blanco WS, para. 31.
[493] Tr. Day 2, 154:16-20.

request or request additional information – and had not remained silent in order to make the LOPA work (see *supra* paras 361, 372 and 375).[494]

378. *Third* and in light of the foregoing, the relevant timeframe for assessing Respondent's action (or inaction) with respect to Claimant's 15 AAD requests is that which begins with Claimant's filing of its 15 AAD requests, extends to the suspension of the route and ends with Claimant's notice of dispute. In this connection, the Tribunal considers the following:

- In view of the practice with respect to the 91 AADs (which took up to seven months to approve), the Tribunal cannot reasonably conclude that Respondent acted in a manner that had the effect of preventing Claimant from recovering its proceeds in U.S. dollars, when no decision had been made by CADIVI in relation to the 15 AAD requests by March 2013. This is because the maximum period between the first of these requests and Claimant's reaction to CADIVI's failure to respond is seven months, between September 2013 and March 2014. This does not mean that Claimant had to wait or that Respondent took all steps in accordance with the applicable procedure to consider Claimant's AAD requests. Nor does it mean that this fact alone can lead the Tribunal to find a breach of Respondent's international obligation under the BIT.

- However, at the time Claimant suspended the route, it was clear that early examination of the 15 AAD requests was not imminent. This is because Respondent acknowledged that there was a debt in respect of the airlines' funds to be repatriated. At the same time, Claimant's efforts to clarify or settle the situation with the Government were unsuccessful. Indeed, the status of the 15 AAD requests remained "under analysis" in the CADIVI system and Respondent did not respond to several of Claimant's inquiries on the matter (see *supra* para. 367). As a result, Claimant found itself in a position where it could no longer exercise its right to freely transfer its investments or earnings, as the system it knew to be applicable and functioning, was virtually non-existent. And this did not change for some years. Moreover, it is significant that there is nothing in the record of this case to indicate any activity in connection with these requests. The fact that Claimant's domestic bank accounts were not "imprisoned",[495] as Respondent contends, is not relevant to this assessment.

379. Accordingly, the Tribunal considers that Respondent's inaction in relation to Claimant's 15 AAD requests over the entire period set out above has had the effect of depriving Claimant of the right to freely transfer its funds in accordance with the applicable regime. This being said, the Tribunal will consider whether there were any possible reasons for Respondent's failure to act.

[494] Tr. Day 2, 126:22-128:1; Blanco WS, para. 31.
[495] Counter-Memorial, para. 302.

The possible reasons for Respondent's inaction

380. Respondent points to the following reasons in connection with its failure to consider and/or approve Claimant's 15 AAD requests: (i) the lack of sufficient U.S. dollar reserves to process Claimant's requests;[496] (ii) Claimant's failure to meet the requirements of Providencia No. 23 and CADIVI's requests;[497] (iii) its sovereign prerogative to reject such requests;[498] and (iv) the fact that Claimant could have sought alternative means to have its funds converted into U.S. dollars for repatriation.[499] The Tribunal will consider these reasons in turn.

381. *First, with respect to the sufficiency of U.S. dollar reserves in Venezuela*: Respondent points to the applicable regime and specifically the directives of the National Executive as established in Article 7 of Providencia No. 23 and Exchange Agreement No. 1, which allegedly foresaw that AAD requests would only be approved subject to currency availability.[500] According to Respondent this explains the different conclusion in relation to the 15 AADs.[501] Moreover, Respondent specifically points to a letter dated 11 October 2018 from the Central Bank of Venezuela that purports to provide a historical overview of the availability of foreign currency in Venezuela between 2008 and 2014 and supports its argument that, at that time, U.S. dollar reserves were insufficient to process Claimant's 15 AAD requests.[502] Claimant submits that this letter was prepared solely for the purposes of this arbitration and should be treated with caution. At the same time, it argues that the letter also proves that Respondent actually had more than enough U.S. dollar reserves at the end of 2013 and the beginning of 2014 to process Air Canada's AAD requests, i.e., almost U.S.$ 34 billion in foreign currency in 2013 and U.S.$ 27 billion in 2014, in order to "*meet the applicable needs of the private sector and the public sector*".[503]

382. The Tribunal does not question Respondent's presentation of the applicable exchange regime, specifically as it relates to the condition on currency availability which falls within its existing right to regulate its monetary policy. Moreover, it does not question the fact that this regime set forth the possibility to reject AAD requests on this basis.[504] Having said that, it questions whether in this particular case, Respondent's alleged lack of U.S. dollar currency justified its inaction in relation to Claimant's 15 AAD requests. Specifically:

- The Tribunal gives no weight to a document produced in 2018 – either in favor or against Respondent. While the Tribunal has no reason to doubt Respondent's

[496] Rejoinder, paras 172, 314.
[497] Counter-Memorial, paras 62-84.
[498] Counter-Memorial, paras 305-311; Rejoinder, para, 208.
[499] Rejoinder, para. 202.
[500] R-PHB, paras 66-67; Exh. C-9 / R-11 (Providencia No. 23); Exh. C-31 / RL-52 (Exchange Agreement No. 1).
[501] R-PHB, para. 120.
[502] Exh. C-112, Letter from the Central Bank of Venezuela, dated 11 October 2018.
[503] C-PHB, para. 37.
[504] See Respondent's reliance on Articles 2 and 7 of Providencia No. 23, Exh. C-9 / R-11, Providencia No. 124, Exh. C-12 and Exchange Agreement No. 1, Exh. C-31 / RL-52. Having determined that the right to free transfer of funds is not absolute, but in fact subject to the regime in force in Venezuela, the Tribunal does not consider it pertinent to decide the Parties' dispute on the wording of Article 2 of Providencia No. 23.

submission that there was a decline in available foreign currency and that it had to prioritize in this regard, it cannot conclude that Respondent met its burden of proving with contemporaneous documents that there was a shortage of U.S. dollar reserves at the relevant time such that Claimant's requests could not be processed.

- This being said, the Tribunal cannot ignore the fact that at the same time U.S. dollar amounts equivalent to other airlines' AADs were paid to those airlines between May and October 2014.

383. The Tribunal therefore does not consider Venezuela's reliance on the lack of sufficient U.S. dollar reserves as a sufficient reason not to process Claimant's 15 AAD requests.

384. *Second, with respect to the alleged failure of Claimant to meet the requirements of Providencia No. 23 and CADIVI's requests*: Respondent argues that CADIVI did not make a decision on the 15 Air Canada AADs because Claimant had failed to respond to CADIVI's requests for further information and had been unable to secure the IVSS certificates required for the RUSAD, resulting in a delay in the submission of the AADs.[505] The Tribunal finds nothing in the record to support this contention. As seen above, under the applicable procedure, a CADIVI analyst would seek further information if there was a need (see *supra* para. 368). Indeed, this apparently occurred with respect to five of Claimant's 15 AADs (see *supra* para. 367). However, there is nothing in the record to support any such request or follow-up in connection with the information Claimant submitted with respect to the five AADs after CADIVI requested it.[506] Instead, the status of the review of all requests remained "*under review*" until well after the commencement of the present arbitration.[507]

385. With respect to Respondent's reliance on the information requests INAC made to ALAV, the Venezuelan Airlines Association in November 2013 and Air Canada in January 2014,[508] the Tribunal agrees with Claimant that none of these requests has any bearing on CADIVI's review of the 15 AADs of Claimant.[509] Specifically:

- INAC's November 2014 request for information to ALAV was not related Claimant's 15 AAD requests. Instead, the letter requested information on the 26 international airlines operating in Venezuela at that time. Specifically, information was requested to "*help fully identify any Venezuelan or foreign citizens who, via lawful commercial transactions, acquired international air tickets within the territory of the Bolivarian Republic of Venezuela in 2012 and January-October 2013 in accordance with the tax regulations currently in force*".[510]

[505] Counter-Memorial, para. 67.
[506] See Babun WS II, para. 8.
[507] Exh. C-70, Printout from CENCOEX's website showing Air Canada's AAD requests as pending, 2 March 2018.
[508] Tr. Day 1, 161:7-20.
[509] Reply, paras 182-185; C-PHB, para. 42. See also Counter-Memorial, paras 380-383.
[510] Exh. C-36, Letter from CADIVI to ALAV, dated 8 November 2013.

– INAC's request for information to Air Canada, dated 28 January 2014 is not relevant, as it referred to information that CADIVI already had.[511] Moreover, Anira Dinorus Padron Barito, Venezuela's witness and the general manager of aviation at INAC confirmed at the Hearing that INAC has no role in the approval of AAD requests.[512]

386. With respect to Respondent's argument that Claimant was unable to obtain the IVSS certificates required for the RUSAD in connection with its AAD requests, resulting in a delay in the submission of the AADs,[513] the Tribunal notes that there appears to have been a change in the practice of the Venezuelan authorities in relation to the certificate of good standing that Claimant was required to submit with its AAD requests. Specifically, as of the end of 2012, the IVSS refused to issue a certificate of good standing to Claimant, claiming that it no longer issues such certificates to non-contributing companies, i.e., companies without direct employees that do not actively contribute to the IVSS.[514] It is undisputed that Claimant has had no direct employees in Venezuela since 2004[515] and that it has been able to obtain such a certificate on several occasions. However, with the change in practice, Claimant hired a direct employee.[516]

387. During the Hearing, Venezuela attempted to demonstrate that Air Canada had employees in Venezuela prior to 2013. However, Mr. Pittman unequivocally stated that Claimant had no employees before prior to mid-2013, when it hired Mr. Serafini, and that the individuals named by Respondent were employees of BASSA, Claimant's GSA.[517] Thus, there does not appear to have been any abuse with respect to Claimant's compliance with this practice regarding employees and in connection with the 15 AAD requests, or that any alleged delay in this regarding is imputed to Claimant.

388. Therefore, the Tribunal finds no basis for the argument that Claimant's 15 AADs were deficient.

389. *Third, with respect to Respondent's invocation of its sovereign prerogative under Article VIII(6)*: Respondent submits that it enjoys sovereign prerogatives under international law in order to safeguard its national economy and is therefore entitled to regulate its own currency. This sovereign prerogative is codified in the BIT and Respondent's treatment of the AAD requests was justified therefore "*equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity*

[511] Exh. C-60, Letter from INAC to Air Canada, dated 27 January 2014; Babun WS, para. 18. See also Exhs R-18 to R-22 (Currency Acquisition Requests dated October 2012 to February 2013).
[512] Tr. Day 2, 162:6-8 ("*INAC doesn't have any role in the approval of CADIVI's AAD requests*").
[513] Counter-Memorial, paras 376-379.
[514] Exh. C-93, Letter from Air Canada to CADIVI, dated 19 February 2013; Pittman WS, paras 25-27.
[515] Pittman WS, para. 26; Babun WS, paras 9-10.
[516] Babun WS, para. 10; Exh. C-99, Certificate of Document Submission to CADIVI, attaching certificate from the IVSS, dated 31 July 2013.
[517] Tr. Day 2, 98:12-99:9.

or financial responsibility of" the national economy.[518] The Tribunal refers to Article VIII(6) which provides as follows:[519]

> *Notwithstanding paragraphs 1, 2 and 3 and without limiting the applicability of paragraph 4, a Contracting Party may prevent or limit transfers by a financial institution to, or for the benefit of, an affiliate of or a person related to such institution, through the equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions.*

390. The Tribunal first recalls its findings above on the requirements of Article VIII and the fact that it also takes due account of a State's right to regulate its monetary policy and that limitations on an investor's FTF can be found in the provision itself, such as in Article VIII(6) (see *supra* para. 353). As such, it considers that a sovereign prerogative exists in this context if it is actually applied *via* the relevant regime and without discrimination.

391. In particular, with regard to Article VIII(6) in particular, the Tribunal notes that Claimant is neither a financial institution, nor an affiliate of such institution, nor an associated person of such institution.[520] The involvement of Banco Mercantil in the processing of the AAD requests does not make this provision relevant. In any event, any restrictions imposed by a possible application of Article VIII(6), would have to be for the purpose of maintaining the "*safety, soundness, integrity or financial responsibility of financial institutions*" which was not the case with respect to the measures taken by Respondent to safeguard its national economy.

392. Even if the Tribunal had found otherwise, Article VIII(6) would still not operate as a defense in the present case, since the provision itself requires that any measures taken be "*equitable, non-discriminatory and* [in] *good faith*". In the instant case, Respondent settled other carriers' AAD requests immediately after Claimant announced its decision to suspend its operations and during the time Claimant was still contacting Respondent to reevaluate the situation.

393. The Tribunal therefore does not consider that Article VIII(6) applies as a defense to Respondent's failure to consider Claimant's 15 AAD requests.

394. *Fourth, with respect to the claim that there were alternatives to the exchange of bolivars into U.S. dollars*: Respondent insists that Claimant had at all relevant times alternatives to CADIVI to concert its bolivars into foreign currency, not at the attractive preferential subsidized rate offered by the CADIVI regulated market. According to Respondent, Claimant's failure to explore any of these alternatives can only be attributed to its own conduct.[521] The Tribunal need only point to the relevant applicable foreign exchange regime established by Respondent at the time, and that is the relevant one in accordance

[518] Counter-Memorial, paras 308-311 quoting also Exh. C-1 (BIT), Article VIII; Rejoinder, para. 209.
[519] Exh. C-1 (BIT).
[520] See Tr. Day 1, 172:14-173:4.
[521] Rejoinder, paras 202-207.

with the BIT and the ATA as comprehensively described by both Parties, i.e., the regime provided by Exchange Agreement No. 1, Providencia No. 23, the CADIVI Guidelines and the LOPA (see *supra* para. 368). It is undisputed that this foreign exchange regime allowed Claimant to access U.S. dollars at a preferential rate, the Tribunal and thus finds, that none of the other mechanisms for exchanging foreign currency constitutes an alternative providing equally beneficial exchange conditions.[522] Claimant was legally entitled to use the CADIVI system provided under Providencia No. 23 to exchange its bolivars for U.S. dollars.

395. Furthermore, the Tribunal agrees with Claimant's observation that the government would not acknowledge that there was a debt with respect to the airlines' repatriation of funds if such alternatives provided an equivalent source for U.S. dollars.[523] Even if it were otherwise, the Tribunal wonders how the argument that Claimant failed to seek alternatives in Venezuela fits well with the assertion that Respondent could not have fulfilled its obligations with respect to Claimant's 15 AADs in any event, due to the "ebbing" availability of foreign currency at the time.

396. The Tribunal therefore finds that none of the above considerations justify Respondent's failure to act with respect to Claimant's 15 AAD requests. Venezuela therefore failed to ensure the unimpeded transfer of the proceeds of Air Canada when it failed to process these AADs.

(iv) Other considerations

397. Having found that Respondent violated Article VIII of the BIT, the Tribunal need not decide whether the provisions of Article III of the BIT entitle Claimant to rely on more favorable FTF provisions in other treaties (as already decided above; see *supra* para. 364), in domestic law and in international law.[524]

(v) Conclusion

398. In light of the foregoing, ***the Tribunal finds that Respondent violated Article VIII of the BIT***.

399. Having found that Respondent has violated Article VIII of the BIT, the Tribunal should end its analysis here. Indeed, Claimant itself notes that the Tribunal need go no further. However, for the sake of completeness and in light of the importance of the case and, in particular, the impact on Claimant's claim and/or the assessment of damages, the Tribunal considers it important to briefly assess Claimant's claims for FET and expropriation as well, in light of its considerations above.

[522] See Tr. Day 1, 67:1-68:25; see also C-PHB, paras 53.
[523] C-PHB, para. 56.
[524] Memorial, para. 114.

3. Article II of the BIT: Fair and Equitable Treatment

3.1 The Parties' positions

(i) Claimant

400. Claimant submits that Respondent violated the FET standard in Article II of the BIT, because its treatment of Claimant's investments was (i) inconsistent with Claimant's legitimate expectations that Respondent would respect its obligations under the law, (ii) arbitrary and (iii) lacked transparency.[525]

401. *First*, Article II of the BIT specifically extends FET to "returns of investors" rather than merely "investments". Respondent's unfair treatment of Claimant's "returns" is the issue in this case.[526]

402. *Second*, the BIT's FET standard is not synonymous with the international minimum standard. Even if it were, Respondent's contention that the threshold for finding a breach of the FET is "particularly high" is incorrect. Outside the NAFTA context, the international minimum standard has evolved so that it comports generally with the treatment due to investors under the autonomous FET standard.[527]

403. Tribunals often focus on specific elements of a State's conduct that may relate to a breach of FET. The core elements are generally uniform. Legitimate expectations, arbitrariness, and lack of transparency are particularly relevant in this case.[528] Further, contrary to Respondent's restrictive position, recent awards make it clear that a "*state's conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard*".[529] What is more, Claimant had never argued that it is entitled to a stabilization or a "freezing" of the legal regime under which it invested. Rather, its position is that it was entitled to a predictable, non-arbitrary, non-discriminatory, and transparent application of relevant legal rules and regulations.[530]

<u>*Concerning legitimate expectations:*</u>

404. Numerous authorities and tribunals have confirmed that the guarantee of FET for foreign investments encompasses the protection of investors' legitimate expectations regarding their investment.[531] The Parties' dispute regarding legitimate expectations primarily

[525] Memorial, para. 133; Reply, para. 126.
[526] Memorial, para. 134.
[527] Reply, paras 130-142.
[528] Memorial, para. 136; Reply, paras 144-145.
[529] Reply, para. 146 quoting Exh. CL-18, *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 ("Crystallex"), para. 543.
[530] Reply, para. 147.
[531] Memorial, paras 137-138; Reply, paras 148-150.

centers on the application of the rules to the facts of this case rather than the scope of the rules.[532]

405. In deciding to invest in Venezuela, Claimant legitimately expected that Respondent would review and grant its AADs without delay, based on the framework that Respondent had agreed and put in place for the repatriation of investments and returns, and the sale and transfer of foreign currencies: the BIT, the ATA, and *Providencia No. 23* issued by CADIVI. Respondent breached Claimant's legitimate expectations when it failed to abide by the legal rules as written.[533] By executing the ATA and the BIT, as well as by enabling the conversion and repatriation of Claimant's revenues for a decade, Respondent created legitimate expectations it subsequently violated.[534] Claimant would never have invested in Venezuela had it known that it would be prevented from repatriating the returns from its ticket sales in Venezuela.[535]

406. Further, nothing in Venezuela's domestic legislation existing at the time Claimant invested or subsequently could invalidate or permit Respondent to breach its free transfer of funds obligations to Claimant in the BIT or the legitimate expectations created by those obligations in the BIT and the ATA. Nor could it invalidate Claimant's legitimate expectations based on the BIT. Article 2 of Providencia No. 23 expressly provides that airlines are entitled to acquire foreign currency to transfer their returns out of Venezuela. Neither *Providencia No. 23* nor Exchange Agreement No. 1 restrict Air Canada's free transfer rights.[536]

407. Moreover, to date, Respondent has not produced any contemporaneous documents evidencing a shortage of hard currency to satisfy Claimant's requests. The evidence instead shows that it did have sufficient hard currency available.[537]

408. Thus, Respondent had no justification for violating Claimant's legitimate expectations that the former would comply with its international and domestic legal obligations and approve Claimant's AADs.[538]

Concerning arbitrariness:

409. Respondent also breached the Treaty's FET provision by treating Air Canada's returns in an arbitrary and inconsistent manner.[539]

[532] Reply, para. 151.
[533] Reply, paras 152-157 referring to Exh. C-5 (ATA), Exh. C-1 (BIT) and Exh. C-9 / R-11 (Providencia No. 23).
[534] Memorial, paras 139-140.
[535] Reply, paras 157-158.
[536] Reply, paras 159-163 referring to and quoting Exh. C-9 / R-11 (Providencia No. 23) Article 2 and Exh. C-31 / RL-52 (Exchange Agreement No. 1), Article 10.
[537] Reply, paras 164-165.
[538] Reply, para. 166.
[539] Reply, para. 167.

410. Arbitrariness can present itself in many forms, including when a State acts with bias, preferential treatment, or concealment. In order for a State's acts to be considered legitimate and reasonable, they need not only be related to a rational policy but must actually be appropriately tailored to that end.[540]

411. Respondent's conduct in this case was arbitrary, in violation of the BIT's FET standard. Respondent chose not to process Claimant's properly submitted AADs, thereby preventing the conversion of Claimant's revenues into U.S. dollars and their repatriation. Its refusal to act was attributed to the need for senseless "authorizations" that had never been demanded before. Thereafter, Respondent "went silent" on the subject and ignored Claimant's requests for action or dialogue. Its decision to neglect Claimant's AADs, far from being supported by clear and articulable legal or policy principles or reached in accordance with due process principles, was undertaken in a black box. Furthermore, its failure to approve such AADs was inconsistent with the actions and statements from high-ranking Venezuelan officials who were assuring Claimant and airlines in general that payment would be forthcoming. Moreover, it was manifestly inconsistent, because it had approved 91 AADs submitted by Claimant over the previous eight years.[541] To this day, Respondent has failed to furnish Claimant with an answer as to why its 15 AADs have been neglected for five years, let alone a well-reasoned, meritorious explanation for why Respondent has decided to not abide by its obligations. CADIVI has simply never acted upon Claimant's requests and to this date, the 15 AADs remain "under analysis". This itself suffices to demonstrate arbitrariness.[542]

412. In relation to Respondent's arguments, Claimant notes the following:

- Respondent did not content that it failed to approve Air Canada's AADs because of Claimant's alleged delays and there is no contemporaneous evidence to support such a contention. Claimant's delay in presenting ten of its 15 AAD requests resulted from the bureaucracy of the CADIVI system and of the IVSS.[543]

- Claimant promptly submitted its AADs and responded CADIVI's requests for information. If it had not done so, CADIVI would have denied the requests or at minimum there would be contemporaneous evidence of information shortfalls.[544]

- Claimant was not required to exhaust local remedies and in any event it would have been futile.[545]

[540] Memorial, paras 141-142.
[541] Reply, para. 168.
[542] Memorial, paras 143-144; Reply, para. 168.
[543] Reply, paras 172-177.
[544] Reply, paras 178-186.
[545] Reply, paras 187-194.

413. Thus, CADIVI's refusal to take a decision on Air Canada's AAD requests was arbitrary as well as inconsistent with CADIVI's past practice of approving Air Canada's AAD requests.[546]

Concerning lack of transparency:

414. It is also well-established that the FET standard requires a host state to act transparently toward investors and their investments. In this connection, a State's legal and regulatory framework must be "*readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework*".[547] The facts giving rise to a lack of transparency need not be complicated; mere absence of notice or communication is sufficient.[548] Further, transparency is not limited to the publishing of laws and decrees. It also comprises executive and administrative transparency in the application of its own laws and decrees.[549]

415. Respondent's lack of transparency toward Claimant in relation to the processing of the 15 AADs is evident. Respondent never took any decisions in relation to the AADs or at least none were communicated to Claimant. Respondent had never explained its actions, provided a rationale, or engaged in any process to address the consequences of its actions. Moreover, it chose to approve AADs submitted by other airlines and entered into payment agreements with several others, while completely excluding Claimant from negotiations and failing to explain the basis for this policy of picking and choosing which airline would get paid.[550] Respondent concedes that it singled out Claimant for discriminatory treatment because it suspended its service in March 2014. But Respondent had ceased approving Claimant's AADs long before it suspended its Toronto-Caracas-Toronto route.[551]

416. Therefore, Respondent's violation of Claimant's legitimate expectations, its arbitrariness, and its lack of transparency in relation to the processing of Claimant's AADs are each independent grounds for the Tribunal to conclude that Respondent breached the BIT's FET standard. Taken together, there can be no doubt Respondent is liable to Air Canada for violating the FET requirement.[552]

(ii) Respondent

417. Respondent submits that it has treated Claimant at all times in a fair and equitable manner.[553]

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[546] Reply, para. 195.
[547] Memorial, para. 145; Reply, paras 197-198 quoting Exh. CL-30, *Frontier Petroleum Services Ltd. v. Czech Republic*, Final Award, 12 November 2010 ("Frontier"), para. 285.
[548] Memorial, para. 149.
[549] Reply, para. 203.
[550] Memorial, para. 150; Reply, paras 196, 203, 207.
[551] Reply, paras 204-205 referring to Counter-Memorial, para. 394.
[552] Memorial, para. 151.
[553] Counter-Memorial, paras 322-324; Rejoinder, para. 215.

418. *First*, Claimant misrepresented the appropriate standard for the assessment of FET. Under Article II(2) of the BIT, the threshold for finding that there had been a breach of the FET standard is high. Even when applying an objective standard, the Tribunal must take into account Respondent's public policy reasons and assess the reasonability and proportionality of its conduct, to determine whether, in the particular circumstances of the case, it had afforded FET to Claimant's alleged investment.[554]

419. Article II(2) includes an express reference to "*the principles of international*" law. As such, Claimant's submission that the FET should be looked at through a "modern eye", meaning without regard to customary international law, must be rejected. This is all the more so because the applicable law, according to Article XII(7) of the BIT, expressly provides for this Tribunal to decide the dispute in accordance with the "*applicable rules of international law*".[555]

420. NAFTA arbitral tribunals have also adopted the more restrictive approach required by international law, in particular since the issuance of the NAFTA interpretation in July 2011. The understanding of the minimum standard of treatment under the NAFTA is central to the interpretation of the FET under the BIT. The BIT in this particular case is closely linked to the NAFTA. In fact, the conclusion of the NAFTA had a direct impact on the final version of the BIT.[556] In this context, a proper interpretation of the "*plain meaning of the terms*" of the BIT, in accordance with the VCLT, must necessarily take into account that the Parties established limitations to Article II(2) of the BIT on the basis of the NAFTA.[557]

421. Arbitral tribunals outside the NAFTA universe have followed a similar approach when interpreting the FET standard. They have consistently interpreted similar language to that of Article II(2) of the BIT to mean that the FET standard is inexorably linked to the minimum standard under customary international law. As such, violations to the FET standard need to rise to the level of acts of "*willful neglect of duty, and insufficiency of action falling far below international standards, or even subjective bad faith*".[558]

422. Thus, the threshold for a finding of a breach of the FET standard under the BIT is particularly high.[559]

423. In addition, Article II(2) does not guarantee Claimant a stable legal framework. The BIT, in the current case, plainly lacks such language and there are no other elements that would point to any intention of Parties in this respect. States have a sovereign prerogative to amend their legal framework as they see fit.[560]

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[554] Counter-Memorial, para. 324; Rejoinder, paras 216-220.
[555] Counter-Memorial, paras 325-326 quoting Exh. C-1 (BIT), Article XII(7).
[556] Counter-Memorial, paras 329-332 referring to Exh. RL-81, Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission), dated 31 July 2011; Rejoinder, paras 216-218.
[557] Rejoinder, para. 219.
[558] Counter-Memorial, paras 327-336 quoting Exh. RL-84, *Alex Genin et al. v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, dated 25 June 2001 ("Alex Genin"), para. 367.
[559] Counter-Memorial, para. 337; Rejoinder, para. 216.
[560] Counter-Memorial, paras 338-342; Rejoinder, paras 221-222.

424. In the instant case, Respondent put into place a foreign exchange control regime with an official fixed exchange rate that changed from time to time.[561] At the same time, private individuals and companies operating in Venezuela had the possibility to acquire foreign currency through the CADIVI regulated market at the CADIVI official rate. Both features of this regime, the fixed official exchange rate that evolves over time and the acquisition of foreign currency subject to availability, have been in place and remained unchanged since the inception of the regime in 2003, long before Claimant started operating its route. While these features have remained unchanged, they hinge on two variables which themselves have evolved over time: the official exchange rate and the availability of currency. Such evolution is in no way proscribed by the BIT.[562]

425. *Second*, and in any event, Respondent did not frustrate any legitimate expectations of Claimant.[563]

426. While certain tribunals have recognized a trend towards protecting investors' legitimate expectations, that trend finds no basis in the text of the BIT. In this context, Claimant's reliance on "legitimate expectations" as the "key element" in defining the FET standard of treatment should be viewed with caution. The only legitimate expectations that may be considered by the Tribunal are those that are reasonable and arise at the time of making the investment; or in the instant case, at the time Claimant started operating the Toronto-Caracas-Toronto route, in the absence of an investment. Furthermore, they must be assessed *in concreto*, with regard to all circumstances, including whether the State made any specific promises to Claimant, which in this case it did not.[564]

427. Further, Claimant could not have had any legitimate expectations to an unlimited availability of currency nor to a stable exchange rate. Close examination of the laws and regulations in place when it started the Toronto-Caracas-Toronto route belies Claimant's position. In addition, there is no legal basis provided for Claimant's conclusion that a repeated practice – approval of AAD requests – generated a right, or the expectation of a right, on its part. Requesting an authorization to acquire foreign currency remained a possibility, under the terms of Article 2 of Providencia No. 23 subject to the availability of such foreign currency, in accordance with the provisions of Article 7 of Providencia No. 23 and those of the Exchange Agreement No. 1. In the instant case, Respondent chose to exercise such sovereignty by putting into place the foreign exchange control regime, one of its main features of which is that availability is determinative for the processing of AAD requests, from international airlines and others. Respondent never represented that there were any guarantees of unlimited availability. In fact, the Preamble to the Exchange Agreement No. 1 already hints at a decrease in foreign currency, which explains the adoption of the foreign exchange control regime in 2003.[565] Further, there cannot be any

[561] Counter-Memorial, para. 343 quoting Flores Report, paras 27-28.
[562] Counter-Memorial, paras 344-346.
[563] Rejoinder, para. 223.
[564] Counter-Memorial, paras 347-356; Rejoinder, para. 224.
[565] Counter-Memorial, paras 257-367 referring to Exh. C-9 / R-11 (Providencia No. 23) and Exh. C-31 / RL-52 (Exchange Agreement No. 1).

"reinforced" expectations on account of the fact that Claimant may have also looked at the ATA or at the BIT.[566]

428. Respondent did not rely on Article 27 VCLT and did not contend that Providencia No. 23, Exchange Agreement No. 1 and the entire Forex regime prevail over its international obligations or that they justified any failure to perform such obligations. Rather, it had submitted that its Forex regime was adopted in exercise of its sovereign powers and in full conformity with its international obligations, including those arising out of the BIT. And, in 2004 or at any other time, Claimant could not have legitimately expected that its AAD requests would automatically or necessarily be approved. It is impossible that Claimant did not conduct a due diligence of the Forex regulations that were in place at the time it decided to start operating the route in 2004.[567]

429. Therefore, having due regard to the legal framework in place when Claimant started operating the Toronto-Caracas-Toronto route, Claimant could not have legitimately nor reasonably expected an unlimited availability of currency nor an unchanged exchange rate for the duration of their stay in Venezuela.[568]

430. *Third*, there was no arbitrariness in the treatment of Claimant. The standard proposed by Claimant is overbroad. Arbitrariness is often defined by reference to the ruling of the International Court of Justice ("ICJ") in *ELSI v. Italy*, which found that "[a]*rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law*" and that an arbitrary act is "*a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety*." In the context of bilateral investment treaties, "arbitrary" is used interchangeably with "unjustified" and "unreasonable". As confirmed by the *AES* tribunal, a state measure will be sustained as reasonable if it flows from a rational policy and is reasonably related to that policy. In this sense, *ELSI* sets a standard that is narrow and entails a high threshold, while *AES* expressly provides that the existence of public policy explanations for the State's actions is incompatible with a finding that they have been arbitrary.[569]

431. Further, Claimant did not provide any legal authority for its claim that the FET standard includes a separate obligation of consistency and the contexts and limitations of such an obligation, were it to exist.[570]

432. In the instant case, Respondent's application of its foreign exchange regulations had not been arbitrary. The two "measures" of which Claimant complains – their difficulties in obtaining the IVSS certificates and their failure to respond to legitimate information requests from the Venezuelan authorities – cannot be characterized as arbitrary, even by

[566] Rejoinder, paras 226-227.
[567] Rejoinder, paras 228-231.
[568] Counter-Memorial, paras 368-369.
[569] Counter-Memorial, para. 370 quoting Exh. RL-97, *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Rep., dated 20 July 1989 ("ELSI"), para. 128 and citing Exh. CL-40, *AES Summit Generation Limited, et al. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, dated 23 September 2010, para. 460; Rejoinder, para. 235.
[570] Rejoinder, para. 235.

Claimant's overbroad standard. Both were expressly foreseen in Venezuelan legislation, in force before it started its operations, and any complications that may have arisen were in part of Claimant's own doing.[571] In fact, they constituted the normal exercise of Respondent's regulatory powers as provided for in the applicable legal regime.

433. In addition, there is no legal basis to claim that "past practice" could somehow be taken into account when processing a given AAD request. Past approval of AAD requests, even repeated approval, does not create any rights as to future approval for the requesting entity. The main criteria for approval were compliance with the requirements, the availability of currency and the directives of the National Executive, each of which were examined *de novo* for each request.[572]

434. By the time Claimant presented its last 15 AAD requests, the availability of currency in the Republic had significantly ebbed. At the same time, Respondent was struggling with the potential abuses committed possibly both by private individuals and commercial airlines to take advantage of the CADIVI currency acquisition system. CADIVI's mission had always been to administer the available currency per the guidelines of the Executive Branch and the availability determined by the Venezuelan Central Bank. As a regulatory body, its actions and conduct were subject to the LOPA. Article 4 of the LOPA provides a solution when requests go unanswered, so as to not leave the requesting party vulnerable in the exercise of its rights. At the very least, Claimant had the possibility of filing a reconsideration recourse, provided for in Article 94 of the LOPA. Jurisdictional remedies were also available, such as the *contencioso-administrativo* action and those of a constitutional character. None of these available remedies were undertaken by Claimant. Claimant chose to disengage with Respondent when it decided to abandon the Toronto-Caracas-Toronto route.[573] The Tribunal should therefore dismiss Claimant's allegations on arbitrariness.[574]

435. *Fourth*, there was no lack of transparency in the treatment of Claimant. The standard proposed by Claimant is overbroad. The principles of international law, which are to be considered as part of the FET assessment, require neither transparency nor the involvement of the investor in the decision-making process. In any event, the definition and scope of any duty of transparency must be placed in its proper context. Having said that, it is good administrative practice to render the legal framework for the investor's operations readily apparent and give the investor the opportunity to trace decisions affecting its investments to that legal framework. Respondent did not deny this as it acted in conformity with this good administrative practice. All the main relevant foreign exchange control regulations were adopted in norms ranked as *Providencia* or higher, and duly published in the official journal *Gaceta Oficial*.[575]

436. In the present case, although Claimant alleges to have been excluded from negotiations, it has not presented any evidence, other than the testimony of its official, on any such

[571] Counter-Memorial, paras, 371-375.
[572] Rejoinder, para. 236.
[573] Counter-Memorial, paras 376-387; Rejoinder, paras 237-240 referring to Exh. RL-54 (LOPA).
[574] Counter-Memorial, paras 388-389.
[575] Counter-Memorial, para. 392; Rejoinder, para. 242.

exclusions. In fact, the basis for its policy is clearly stated in the law. In circumstances in which it was becoming increasingly difficult for CADIVI to administer the ebbing available currency, the government established clear priorities. The "public service" nature of the air transportation of passengers explains that payments of pending AAD requests were made to other airlines that were still operating in the country. Its "public service" is undeniable as a matter of Venezuelan law and justified any payments that may have been made to other airlines in order to ensure the continuity of the service.[576]

437. Further, Respondent, through CADIVI, put into place an electronic platform for the processing of the AAD requests submitted by users, including Claimant. CADIVI did not issue any document informing users of AAD requests or their status because such information was handled electronically. In addition, Claimant's AAD requests were rejected by operation of the administration's negative silence, under the LOPA. By definition, the administration's negative silence is not notified and it is instead incumbent upon the interested party to know the applicable legal framework in force in the Republic and which regulates the relevant requests and their processing.[577]

438. Claimant's ignorance can only be described as willful or gross negligence. Indeed, the fact that the AAD requests submitted under *Providencia No. 23*, and later *Providencia No. 124*, would be processed according to the availability of foreign currency as determined by the Central Bank of Venezuela and the National Executive is an essential feature of the CADIVI mechanism and was in place well before Claimant submitted its first AAD request, and even before Air Canada started operating its route.[578]

439. Therefore, Claimant's FET case fails both as a matter of law and as a matter of fact.[579]

3.2 The Tribunal's analysis

(i) The issue

440. The *issue* is whether Respondent acted in a manner contrary to its FET obligations under the BIT in connection with Claimant's investments or its returns (see *supra* paras 400 and 417).

441. To determine this issue, the Tribunal will proceed as follows:

- *First*, it will set out the requirements of Article II(2) of BIT (Section (ii)).
- *Second*, it will address the question of whether Respondent violated Article II(2) of the BIT (Section (iii)).
- *Third*, it will conclude (Section (iv)).

[576] Counter-Memorial, paras 393-394; Rejoinder, paras 247-248.
[577] Rejoinder, paras 244-245 referring to Exh. RL-54 (LOPA).
[578] Rejoinder, para. 246 referring to Exh. C-9 / R-11 (Providencia No. 23) and to Exh. C-12 (Providencia No. 124).
[579] Rejoinder, para. 249.

(ii) Article II(2) of the BIT

442. Article II(2) provides as follows:

> *Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.*[580]

443. Article II(2) corresponds to the so-called "Fair and Equitable Treatment" or FET clause, an important protection that requires states to treat investors and their investments fairly and equitably.

444. *First*, in the context of its scope, Article II(2) refers, like Article VIII, to "*investments or returns of investors*". In this regard, the Tribunal refers to its reasoning regarding the phrase "*transfer of investments and returns*" found in the FTF cause (see *supra* paras 355-356) and notes that Article II(2) also covers Claimant's claims relating to currency exchange and repatriation of funds from ticket sales in Venezuela.

445. *Second*, the Parties disagree as to the standard to be applied in the context of this clause. The disagreement arises from the use of the phrase "*in accordance with the principles of international law*" in the clause. Respondent contends that the reference to "principles of international law" in Article II(2) clearly indicates that the FET, to which Canadian investors are entitled under the BIT, is "*inexorably linked to the minimum standard under customary international law*". On this basis, "*violations to the fair and equitable treatment standard need to rise to the level of acts of 'willful neglect of duty, and insufficiency of action failing far below international standards, or even subjective bad faith'*".[581] Moreover, according to Respondent, the BIT in this case is closely linked to the NAFTA and a proper interpretation must necessarily take into account that the Parties established limitations to Article II(2) on the basis of the NAFTA.[582] However, Claimant submits that Respondent seeks to apply an overly restrictive interpretation of international law.[583] According to Claimant, this is wrong because the FET standard of the BIT is not synonymous with the century-old international minimum standard, and even if Respondent were right, the argument that the threshold for finding of a breach of the FET standard under the BIT is particularly high would be incorrect. This is because, outside of the NAFTA content, the international minimum standard has evolved so that it comports generally with the treatment due to investors under the autonomous FET standard.[584]

[580] Exh. C-1 (BIT).
[581] Counter-Memorial, paras 334-335.
[582] Rejoinder, paras 216-220.
[583] Reply, paras 128-147; C-PHB, para. 58.
[584] Reply, paras 130-131.

446. The Tribunal does not ignore the fact that such standards have been interpreted both ways, i.e.,:

- one that follows the NAFTA direction of the customary international law minimum standard, which requires a high threshold to find a violation,[585] and

- one that follows a more liberal, low-threshold direction that embraces various elements of what is fair and equitable as developed not only in investment law but, international law generally.[586]

447. The Tribunal's starting point in determining the relevant threshold for FET in the present case is the BIT itself (not any other instrument) and international law as set out in the applicable provision namely Article XII(7) of the BIT (see *supra* paras 145-146).

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[585] See, for example, Exh. RL-84 (Alex Genin), para. 367 ("*Article II(3)(a) of the BIT requires the signatory governments to treat foreign investment in a 'fair and equitable' way. Under international law, this requirement is generally understood to 'provide a basic and general standard which is detached from the host State's domestic law.' While the exact content of this standard is not clear, the Tribunal understands it to require an 'international minimum standard' that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith. Under the present circumstances—where ample grounds existed for the action taken by the Bank of Estonia—Respondent cannot be held to have violated Article II(3)(a) of the BIT.*"); Exh. RL-87, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, paras 188-190 ("*188. There is sti1l one aspect that the Tribunal needs to address in respect of this Article and the arguments of the parties related thereto. The Article provides that in no case shall the investment be accorded treatment less favorable than that required by international law. This means that at a minimum fair and equitable treatment must be equated with the treatment required under international law. 189. The issue that arises is whether the fair and equitable treatment mandated by the Treaty is a more demanding standard than that prescribed by customary international law. 190. The Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment. To this extent the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above. It is also quite evident that the Respondent's treatment of the investment falls below such standards.*").

[586] See, for example: Exh. CL-18 (Crystallex), para. 530 ("*The Tribunal starts its analysis of FET by elucidating the content of the standard. In this respect, the Tribunal begins with the examination of the formulation 'in accordance with the principles of international law', which is found in Article II(2) o the Treaty, quoted above. The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the 'international minimum standard of treatment' under customary international law, but rather constitutes an autonomous treaty standard. Unlike treaties such as NAFTA, which expressly incorporate the minimum standard of treatment, the Canada-Venezuela BIT nowhere refers to such minimum standard.*"); Exh. CL-4, *Compañia de Aguas de Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 ("Vivendi"), para. 7.4.7 ("*The Tribunal sees no basis for equating principles of international minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago.*"; Exh. CL-15, *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017 ("Valores"), para. 530.

In this regard, the Tribunal takes the following view:

- The Tribunal reads this provision as a stand-alone norm. It is clearly not synonymous with the standard of protection in the NAFTA context. The fact that Article II(2) refers to "principles of international law" does not imply that these "principles" are synonymous with customary international law or to the "international minimum standard".

- Rather, international law requires this Tribunal to interpret the concept of fair and equitable treatment in a manner consistent with the context of investor-State arbitration and the purpose of the BIT itself, namely investment protection. In this regard, the more liberal approach, which focuses on the broadly consistent elements of "fair and equitable", is appropriate.

- These elements are the respect for an investor's "legitimate expectations", the obligation not to act in an arbitrary, inconsistent or discriminatory manner, and the existence of transparency.[587]

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[587] Exh, CL-72, *S Rumeli Telekom A.S. and Telsim Mobil v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 609 ("*The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following concrete principles: - the State must act in a transparent manner; - the State is obliged to act in good faith; - the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; - the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations.*"; Exh. CL-117, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 ("Lemire"), paras 284-285 ("*The FET standard defined in the BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis. It requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm. The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including among others the following: - whether the State has failed to offer a stable and predictable legal framework; - whether the State made specific representations to the investor; - whether due process has been denied to the investor; - whether there is an absence of transparency in the legal procedure or in the actions of the State; - whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State; - whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent. 285. The evaluation of the State's action cannot be performed in the abstract and only with a view of protecting the investor's rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred: - the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors; - the legitimate expectations of the investor, at the time he made his investment; - the investor's duty to perform an investigation before effecting the investment; - the investor's conduct in the host country.*"); Exh. CL-12 (Rusoro), paras 523-525 ("*Art.II.2 of the BIT simply states that each Contracting Party shall accord protected investments or returns 'fair and equitable treatment'. 523. Although the Treaty does not provide further guidance, it is generally accepted that this undefined legal concept requires States to adopt a minimum standard of conduct vis-à-vis aliens. A State breaches such minimum standard if actions (or in certain circumstances omissions) occur, for which the State must assume responsibility, and which violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor. The obligation to provide FET binds all branches of government, and can be disavowed - by administrative acts, adopted by the government or its agencies, targeting the investor or its investment directly, - by judicial decisions, approved by the State's judicial system, which are directed directly against the investor or the investment personally and which amount to a denial of justice, - or finally by legislation, approved by the legislative power, or regulation,*

448. Invoking such elements by adopting a liberal FET approach does not lower the threshold for finding a violation. Indeed, as established by arbitral tribunals, "*the decision of what is fair and equitable shall depend on the facts of each specific case*". Moreover, these elements are also to be measured against a State's interest, such as regulating to protect its public interest.[588] Accordingly, the Tribunal considers that an investor must positively prove an act of the State which:

- Contradicts reasonable *legitimate expectations* of the investor regarding the protection of its interests and its rights at the time of the investment.[589] This does not require the expectation of stabilization of the legal environment if such stabilization is not expressly provided for in the BIT.[590] Expectations must be assessed in light of all the circumstances of the case.[591]

- Fails to provide a *transparent environment* in which to make and operate one's investment, in the sense that the procedures that must be followed are clear and

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adopted by government (or by another authority with regulatory powers), affecting citizens in general, and the protected investor and investment in particular. 524. The required threshold of propriety must be defined by the tribunal after a careful analysis of facts and circumstances, and taking into consideration a number of factors, including among others the following: - whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State; - whether the State had made specific representations to the investor, prior to the investment; - whether the State's actions or omissions can be labelled as arbitrary, discriminatory or inconsistent; - whether the State has respected the principles of due process and transparency when adopting the offending measures; - whether the State has failed to offer a stable and predictable legal framework, breaching the investor's legitimate expectations. 525. In evaluating the State's conduct, the Tribunal must balance the investor's right to be protected against improper State conduct, with other legally relevant interests and countervailing factors. First among these factors is the principle that legislation and regulation are dynamic, and that States enjoy a sovereign right to amend legislation and to adopt new regulation in the furtherance of public interest. The right to regulate, however, does not authorize States to act in an arbitrary or discriminatory manner, or to disguise measures targeted against a protected investor under the cloak of general legislation. Other countervailing factors affect the investor: it is the investor's duty to perform an appropriate pre-investment due diligence review and to show a proper conduct both before and during the investment."); Exh, CL-18 (Crystallex), paras 539- 542 ("*Arbitral tribunals have on numerous occasions attempted to capture the somewhat elusive essence of FET and, with a view to ascertaining the ordinary meaning of the phrase 'fair and equitable treatment', have extracted a number of elements which they considered inherent components of the standard. The Tribunal considers the findings of these tribunals in this respect to be instructive as they evidence what is nowadays considered to be the core of the 'fair and equitable treatment' standard*. […]."); Exh. CL-15, (Valores), para. 539 ("*From the construction and application that different arbitral tribunals have given to the obligation to grant fiar and equitable treatment, some elements commonly accepted as part of the standard arise. These components include, inter alia, the obligation not to act in an arbitrary or discriminatory manner, abide by due process and to act in a consistent and transparent manner. It has also been understood that 'the guarantee of fair and equitable treatment […] is an expression and constitutive part of the principle of good faith recognized by international law' and must therefore be construed in light of such principle. In any case as established by the tribunal of Modev. v. USA, the decision of what is fair and equitable shall depend on the facts of each specific case.*"); Exh. CL-25, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 ("Gold Reserve"), paras 569-574; See also Reply, paras 143-147.

[588] Exh. CL-117 (Lemire), para. 285; Exh. CL-12 (Rusoro), para. 525.

[589] Counter-Memorial, para. 356; Reply, para. 151; Exh. RL-93, *El Paso Energy International Company v. The Argentine republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 348.

[590] Rejoinder, para. 221.

[591] Counter-Memorial, para. 356; Reply, para. 151; Rejoinder, para. 224.

obvious and are in fact followed.[592] This does not mean that the investor has to be involved in the decision-making process, but only that the legal framework for the investor's operation is readily apparent and allows the investor to trace decisions affecting its investments back to that legal framework.[593]

– Treats an investor's investment in a manner that is not arbitrary, inconsistent or discriminatory as compared to the investments of other investors.[594] Indeed, this must be measured against a State's right to regulate in the public interest.[595]

449. Accordingly, the Tribunal will assess whether Respondent's treatment of Claimant's investments complies with the BIT's FET standard by considering the following elements: (i) legitimate expectations, (ii) transparency and (iii) arbitrariness, inconsistency or discrimination.

(iii) Did Respondent violate Article II(2) of the BIT?

450. The Parties disagree as to whether Respondent treated Claimant's investments and returns in violation of Claimant's legitimate expectations and in an arbitrary and non-transparent manner.[596]

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[592] Reply, paras 197-200; Exh. CL-30, (Frontier), para. 285 ("*The protection of the investor's legitimate expectations is closely related to the concepts of transparency and stability. Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework. Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment. While the host state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making.*"); Exh. CL-12 (Rusoro), para. 525. While Respondent is sceptic that an obligation of transparency, including an investment or the investor in the decision-making process, should be read into Article II(2), it submits that its application could not go to the lengths presented by Claimant, According to it, although transparency is not required as a condition it is good administrative practice to render the legal framework for the investor's operation readily apparent and give the investor to trace decision affecting its investments to that legal framework. See Counter-Memorial, paras 390-392; Rejoinder, para. 242. Respondent's reliance on Exh. RL-99, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 294 is inapt, as that case excludes transparency as an element for the customary international minimum standard: "*The Tribunal holds that Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per Article 1105's requirement to afford fair and equitable treatment. The principal authority relied on by the Claimant-Tecmed- involved the interpretation of a treaty-based autonomous standard for fair and equitable treatment and treated transparency as an element of the 'basic expectations' of an investor rather than as an independent duty under customary international law.*"). Here, the Tribunal is instead confronted with an autonomous standard.

[593] Counter-Memorial, paras 390-392; Rejoinder, para. 242.

[594] Reply, paras 148-150; Exh. CL-18 (Crystallex), para. 578 ("*a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.*")

[595] Counter-Memorial para. 370; Rejoinder, para. 323; Exh. RL-97 (ELSI), para. 128 ("*Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.* [...] *It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.*").

[596] Claimant (Reply, para. 126); Respondent (Rejoinder, para. 215).

To decide, *the Tribunal* will first point to the relevant facts and then assess whether Respondent is liable based on its considerations of the interpretation of Article II(I).

a. Facts

451. The Tribunal has already set out the relevant facts above in relation to Claimant's FTF claim (see *supra* para. 367). There is no need to repeat them here. However, the Tribunal will set out in more detail the facts which it considers to be more relevant to the present claim. Specifically, it will be recalled that:

- On 17 March 2014, Air Canada submitted the Suspension Notice to INAC.[597]

- In late March 2014, Venezuela announced that it would allow airlines to repatriate their revenues.[598]

- On 28 April 2014, Air Canada wrote to the President of INAC requesting a meeting to clarify the Suspension Notice and the repatriation of its funds.[599]

- On 28 May 2014, Air Canada wrote to the Venezuelan Vice President to discuss the suspension of its operations in Venezuela and to clarify any misunderstandings in relation to the Suspension Notice.[600]

- On 13 June 2014, IATA's Director General and CEO sent a letter to the President of Venezuela "*on behalf of the airline members of the* [IATA] *that operate flights to Venezuela*", concerning the members' "*blocked monies from airline ticket sales in Venezuela*" and "*a number of serious concerns*" expressed from them in this respect.

- On 10 July 2014, Air Canada wrote to the Minister for Popular Power, Air and Water Transport, in relation to its suspension of operations in Venezuela. Air Canada noted that it had contacted the Vice President directly but had not received a response.[601]

- On 3 October 2014, Air Canada wrote to the Minister for Popular Power of Economic, Finance and Public Banks, reiterating what it had already written to the Minister for Popular Power, Air and Water Transport and noting its willingness to meet and resolve the issue of repatriating Air Canada's funds.[602]

[597] Exh. C-49, Letter from Air Canada to the President of INAC, dated 17 March 2014; RfA, para. 29; Memorial, para. 67.
[598] Memorial, para. 78.
[599] Exh. C-91, Letter from Air Canada to the President of INAC, dated 28 April 2014; Memorial, para. 83.
[600] Exh. C-56, Letter from Air Canada to the Vice-President of Venezuela, dated 28 May 2014; Memorial, para. 84.
[601] Exh. C-57, Letter from Air Canada to the Minister of Popular Power, Air and Water Transport, dated 10 July 2014; Memorial, para. 85.
[602] Exh. C-58, Letter from Air Canada to the Minister of Popular Power of Economy, Finance and Public Banks, dated 3 October 2014; Memorial, para. 86.

– Between May and October 2014, Venezuela entered into agreements with other international airlines and negotiated settlements regarding their outstanding AADs. Under these agreements, Venezuela had approved their AAD requests for U.S. dollars corresponding to ticket sales in the country in 2012 and 2013, using the exchange rate of 6.3 bolivars. Specifically, Venezuela approved several requests submitted by Lufthansa, Aeromexico, Insel Air, Tame Ecuador, Aruba Airlines, Avianca, and LACSA-TACA in 2012 and 2013.[603]

  For example, on 30 May 2014, the Minister of People's Power for Air and Water Transportation wrote to Lufthansa informing it that CENCOEX (formerly CADIVI) "*authorized the Currency Acquisition Requests made by* [Lufthansa . . .] *which will be implemented as follows* [. . .] *The currency acquisition requests* [. . .] *scheduled for fiscal year 2013 will be considered under an Exchange Rate of six bolivars and thirty cents (VEF 6.30) per US dollar (US$ 1).*"[604]

– On 15 June 2016, Air Canada provided Venezuela with a written notice of dispute pursuant to Article X(II) of the Canada-Venezuela BIT.[605]

b. Assessment

Legitimate expectations

452. The Parties dispute whether Respondent breached Claimant's legitimate expectations when it allegedly prevented it from repatriating the proceeds of its ticket sales in Venezuela. In particular, Claimant argues that it never expected Respondent's foreign reserves to be unlimited or Respondent to freeze the Bolivar – U.S. dollar exchange rate or the relevant legal regulatory framework. It legitimately expected that Respondent would review and grant its AADs without delay, based on the framework that Respondent had agreed and established for repatriation of investments and returns and the same and transfer of foreign currency, namely the BIT, the ATA and Providencia No. 23.[606] Respondent argues that Claimant could never legitimately expect that all of its AAD requests would be approved, as it began operations in in 2004, after the Venezuelan foreign exchange regulations (and, in particular, Providencia No. 23 and Exchange

[603] Exh. C-52, Gobierno venezolano cancela deuda a seis aerolíneas, ULTIMA HORA, 26 May 2014; Exh. C-53, El Gobierno de Venezuela salda deudas con seis aerolíneas internacionales, ABC INTERNACIONAL, 27 May 2014; Exh. C-54, Venezuela Reaches Deals With Six Airlines to Pay Dollar Debt, BLOOMBERG, 26 May 2014; Exh. C-149, Letter from United Airlines to the Minister of Aquatic and Aerial Transportation, 29 July 2014; Exh. C-150, Letter from TAP Portugal to the Minister of Aquatic and Aerial Transportation; Exh. C-151, Letter from Cubana de Aviacion S.A. to CENCOEX, 10 October 2014; Exh. C-152, Letter from the Minister of Aquatic and Aerial Transportation to Lufthansa, 29 May 2014; Exh. C-153, Tiara Air's Clear and Irrevocable Declaration of Will, 4 June 2014; Exh. C-154, TAM Lineas Aereas' Clear and Irrevocable Declaration of Will, 22 July 2014; Exh. C-155, Aeromexico's Clear and Irrevocable Declaration of Will, 26 May 2014; Exh, C-156, Arubaanse, Clear and Irrevocable Declaration of Will, 26 May 2014; Exh. C-157, Insel Air International's Clear and Irrevocable Declaration of Will, 26 May 2014; Exh. C-158, Aerolineas Argentinas' Clear and Irrevocable Declaration of Will, 16 May 2014. See also C-PHB, para. 83.

[604] Exh. C-152, Letter from the Minister of Aquatic and Aerial Transportation to Lufthansa, 29 May 2014.

[605] Exh. C-14 (Notice Letter). See also Exh. C-1 (BIT).

[606] Reply, paras 152-165.

Agreement No. 1). These regulations make the processing of AAD requests subject to the availability of foreign currency and the directives of the National Executive, thus providing for the possibility that any given AAD request may be rejected.[607]

453. The Tribunal considers the following.

454. *First*, as noted above, the right to a free transfer of funds, as codified in Article VIII of the BIT, but also in the ATA, is an imperative right for an investor who decides to invest in a country (see *supra* para. 351). For an airline such as Air Canada, this right becomes particularly important the moment it decides to establish its local business there, which includes setting up the Toronto-Caracas-Toronto route and an office in Venezuela for the purpose of selling tickets locally. Therefore, the Tribunal considers that Claimant did in fact acquire, as it claimed, legitimate expectations that it would be granted the right to exchange and repatriate the proceeds of its ticket sales in the country when it decided to invest in and establish the route, in accordance with the relevant legal and regulatory framework. These expectations were based on the international treaties that Canada had signed with Venezuela, as well as the Venezuelan legal framework, i.e., *inter alia*, the BIT, the ATA and Providencia No. 23 (for the domestic legal framework see *supra* para. 368).[608] Indeed, the repatriation of funds sought not only by Claimant, but by many international airlines operating in Venezuela, was essential to ensure the viability of their business, for which they devoted aircraft, personnel and capital; in the case of Claimant, approximately 80% of route's revenue came from sales in Venezuela and was generated in Bolivars, so repatriation was indispensable to ensure the viability of its route.[609]

455. Thus, Claimant's expectation was not only fundamental and legitimate, but reasonable. Indeed, this is what happened during the time Claimant operated its route. Between July 2004 and November 2012, Claimant filed, and CADIVI approved, 91 AAD requests that allowed Air Canada to repatriate approximately U.S.$ 91 million worth of returns generated in Venezuela from ticket sales on the route. In reliance on this, and until the route was discontinued, Claimant had continued to invest in Venezuela.[610]

456. *Second*, the Tribunal must reiterate that Claimant's right to exchange and repatriate funds was mandatory under the BIT and the ATA and not a possibility, as Respondent contends.[611] At the same time, it was not absolute, but subject to the limitations imposed by the relevant foreign exchange regime, which had to be applied at all times in a non-capricious and non-discriminatory manner, regardless of whether the exchange of currency was conditional on the availability of currency (see *supra* paras 352-353). Thus, the Tribunal's conclusion in this regard is not based on an interpretation of Article 2

[607] Rejoinder, para. 225.
[608] Pittman WS II, para. 21.
[609] Pittman WS, para. 19; See also Exh. C-19, IATA Urges Governments to Address Airline Blocked Funds, IATA Press Release, 2 June 2016 (quoting Tony Tyler, IATA's Director General and CEO: "*The airline industry is a competitive business operating on thin margins. So the efficient repatriation of revenues is critical for airlines to be able to play their role as a catalyst for economic activity. It is not reasonable to expect airlines to invest and operate in nations where they cannot efficiently collect payment for their services*.")
[610] Pittman WS, para. 23.
[611] Rejoinder, para. 225.

Providencia No. 23 (on which the Parties disagree) or on the pertinence of Article 7 of Providencia No. 23 and Article 7 of Exchange Agreement No. 1,[612] but on its overall assessment of the relevant regimes (the BIT, the ATA and the regime relevant to the CADIVI in processing the AAD requests in the present case; see *supra* paras 352-353, 368).

457. In the present case, it is undisputed that there is no evidence that Respondent dealt with or processed Claimant's 15 AAD requests pursuant to the CADIVI process set out above (see *supra* para. 368), let alone that it informed Claimant of any CADIVI decision in this regard. Mr. Blanco testified that he did not know whether any operational analyst had ever reviewed the 15 AAD requests or whether any of the operational analysts had made any recommendations with respect to those requests. Mr. Blanco also testified that he had not seen any CADIVI Commission decision on those requests. There is in fact no document in the record reflecting any decision-making in this regard.[613]

458. With respect to the application of the LOPA and the argument that the absence of a response to an AAD request after four months is automatically considered a rejection,[614] the Tribunal reiterates its reasoning above regarding the impact on Claimant's AADs (see *supra* paras 361, 372, 375 and 377). It specifically refers to Mr. Blanco's testimony that having AADs "*under analysis*" for years is a departure from normal procedure and he has never seen a file that, after three years, is still under review or under analysis.[615] Under

[612] The Parties dispute the interpretation of the word "may" in the English version or "*podrán*" in the Spanish version of Article 2 of Providencia No. 23 and, in particular, whether that provision means that Claimant enjoyed a possibility that it would be permitted to repatriate its proceeds using Respondent's exchange mechanisms subject to the availability of foreign currency. Article 2 in its English version reads specifically as follows: "*Foreign international air transportation providers duly authorized by the National Institute for Civil Aviation (INAC) may, acting through authorized currency exchange operators, acquire the foreign currency necessary for them to remit to their home offices, in their home office, the net balance of their revenue from ticket sales, cargo and mail freight at each sales point minus all costs, expenses and taxes payable by them in Venezuela for the adequate and safe operation.*" See Exh. C-9 / R-11. Article 7 of Providencia No. 23 on the fact that AADs are subject to currency availability provides, in its English version, as follows: "*The authorizations by international air transportation companies to acquire foreign currency will be subject to currency availability as established by the Central Bank of Venezuela (BVC) and the directives issued by the National Executive in the corresponding norm*". See Exh. C-9 / R-11. Similarly, in its English version Article 7 of Exchange Agreement No. 1 provides as follows: "*The Central Bank of Venezuela, in application of its own mechanisms and using the information that the National Executive and Public Entities shall submit to it, will set the currency availability that will be administered in accordance with the provisions of this Agreement and will inform the National Executive and the Foreign Currency Administration Commission (CADIVI). This availability will be adjusted and/or revised by the Central Bank of Venezuela, every time the conditions of the reserves and cash flow in the foreign currency of said Issuing Entity so determines, of which it will inform to the Foreign Currency Administration Commission (CADIVI). For the purposes of determining currency availability, the Central Bank of Venezuela shall take into account the monetary, credit and exchange conditions related to monetary stability and to the orderly development of the economy, as well as the levels of international reserves*." In turn, Article 8 provides: "*The Central Bank of Venezuela will only see foreign currency in accordance with the currency availability determined by said Institution and in accordance with the provisions of Article 7 of this Exchange Agreement*." See Exh. C-31 / RL-52. See also the Tribunal's consideration *supra* fn 504. The Tribunal need not assess whether Respondent's international commitments take precedence over the terms of Exchange Agreement No. 1 in light of its findings above (see *supra* para. 456). For the Parties' positions in this context see Claimant (Reply, paras 156-163) and Respondent (Counter-Memorial, paras 357-358; Rejoinder, para. 225, 228).

[613] Tr. 11.03.2020, 114:2-3, 124:13-15, 128:14-17.

[614] Counter-Memorial, para. 385; Rejoinder, para. 245.

[615] Tr. 11.03.2020, 154:16-20.

the procedure described by Mr. Blanco or the application of the LOPA, one had to have a reasoned decision to challenge a rejection or provide more information in the case of a suspension. In fact, CADIVI has always made a decision – whether to deny an application or request additional information – and has not remained silent for the LOPA to work.[616]

459. It is significant that despite the fact that Respondent acknowledges that Claimant could only legitimately expect the CADIVI process to be respected, Respondent never responded to Claimant's efforts to reach out to officials to pursue the status and settle the outstanding amounts in respect of the 15 AAD requests (see *supra* paras 367 and 451). Regardless of the reason behind Respondent's inaction, Respondent should have at least responded to Claimant's inquiries and requests.

460. Therefore, the Tribunal finds that Respondent's failure to address or process Claimant's 15 AAD requests in accordance with the applicable rules violates Claimant's legitimate expectations.

Transparency

461. The Tribunal will also briefly assess whether CADIVI's failure to process the AADs as described above constitutes an independent breach of Respondent's obligation to act transparently in relation to Claimant's investments.[617]

462. As noted above, if CADIVI had processed Claimant's AADs, then all sorts of evidence reflecting such processing would be available (see *supra* para. 457). The operation of the LOPA and in particular the operation of an adverse silent decision of which Claimant should have allegedly been aware,[618] does not relieve Respondent of its transparency obligations under the BIT's FET provision. Nor does the fact that Venezuelan law informed Claimant that AADs would be processed subject to the availability of currency as were determined by the Venezuelan Central Bank and the National Executive.[619] This is because Claimant had the right to be informed of the status of its AAD requests, as well as the reasons why these were not approved by Respondent, particularly in light of its repeated appeals for information and settlement in this context. All the more so because Mr. Blanco testified that the CADIVI Commission's decision would be reasoned so that the applicant could appeal the decision to the appropriate body or, if a decision was made to suspend consideration of the AAD, submit additional information in support of the AAD request.[620] For this reason, Respondent's invocation of its right to regulate in the public interest and therefore to have priority in the handling of its currency (which the Tribunal does not dispute)[621] plays no role in its obligation to act transparently with respect to Claimant's 15 AADs and to afford Claimant a minimum level of due process

[616] Tr. 11.03.2020, 126:22-128:1.
[617] Claimant (Memorial, paras 145-151; Reply, paras 196-207); Respondent (Counter-Memorial, paras 385-394; Rejoinder, pars 242-248).
[618] Counter-Memorial, para. 385; Rejoinder, para. 245; Exh. RL-54 (LOPA), Articles 4 and 60.
[619] Rejoinder, para. 246; Exh. C-9 / R-11 (Providencia No 23), Article 7; Exh. C-12 (Providencia No. 124); Exh. C-31 / RL-52 (Exchange Agreement No. 1), Article 7.
[620] Tr. 11.03.2020, 126:23-128:1.
[621] Rejoinder, para. 248.

from the time they were filed. As such, the fact that Claimant has suspended its operations also plays no role.[622]

463. Thus, in the present case, the Tribunal finds no evidence of how such requests were handled, if at all. Therefore, Respondent's treatment of Claimant's investment in this regard was not transparent.

Arbitrariness, Inconsistency or Discrimination

464. The Tribunal will further briefly consider whether Respondent discriminated against Claimant and treated it inconsistently or arbitrarily compared to other international airlines with similar AADs.

465. As seen above, between May and October 2014, Venezuela entered into at least ten agreements with other international airlines. Pursuant to such agreements, it approved hundreds of millions of dollars' worth of AADs from those airlines (see *supra* paras 367 and 451). By contrast, it is undisputed that Venezuela failed to do so in connection with Air Canada's 15 AAD requests. This was despite Claimant's requests, which resulted in Claimant suspending its operations.

466. Respondent relies on its right to regulate in the public interest, and therefore to prioritize the allocation of its currency, as a justification behind its disparate treatment of Claimant's AAD requests (see also *supra* para. 264).[623] In this context, it argues as follows:

> *When Claimant decided to "jump ship" and abandon the route it had been operating without undue interference from the Republic for almost a decade, other companies understood the social and public interest dimension of the service they were providing and continued to operate. In circumstances in which it was becoming increasingly difficult for CADIVI to administer the ebbing available currency, the government established clear priorities. In this context it was only reasonable and proportionate for the Republic to give preference to those airlines who were still operating, thus ensuring the public service of air transportation of passengers*.[624]

467. The Tribunal does not follow Respondent's argument that it favored other airlines after Claimant discontinued its route. Indeed, both before and after Claimant suspended the Toronto-Caracas-Toronto route, it had made efforts to clarify and/or resolve the situation with respect to its 15 AADs. Respondent had not responded to those efforts, let alone in a manner that would reassure Air Canada by suggesting that a settlement might be forthcoming. Even more, while settlements with other carriers were taking place, Claimant was still evaluating its options in connection with its unanswered AADs. In fact, in its letter of 17 March, Claimant communicated its intention to reevaluate the resumption of the route. Thus, Respondent's failure to include Claimant in these discussions and to keep the status of Air Canada's requests "under review" long thereafter

[622] Counter-Memorial, para. 394.
[623] Rejoinder, para. 248.
[624] Counter-Memorial, para. 394.

demonstrates that Respondent did not intend to continue its dealings with Claimant as an investor in the aviation sector. If Respondent had not intended to discriminate against Claimant, it would have approached Claimant (or at least responded to its inquiries) in the same manner it did with other airlines.

468. Moreover, the Tribunal has already rejected all possible reasons for Respondent's failure to deal with Claimant's AADs (see *supra* paras 380-396 including, in particular, Respondent's allegation that Claimant delayed to submit its AADs while it sought to obtain the IVSS Certificates or that Claimant had failed to respond to CADIVI's requests for information, or that I had failed to pursue alternatives) that could have served as a defense to its treatment towards Claimant. With respect to the argument that the airlines abused the CADIVI system, the Tribunal refers to its findings above that Respondent had established the CADIVI system as the only available legal system by which the airlines could clearly exercise their right to repatriate their funds. As regards the argument that legal resources, administrative and judicial, were available to Claimant but that it did not avail itself of them,[625] the Tribunal refers to the procedure set out above in connection with AAD requests (see *supra* para. 368) and to the fact that, in view of Respondent's inaction in particular, Claimant did not have such means at its disposal.

469. Therefore, the Tribunal finds that Respondent discriminated against Claimant and treated it inconsistently, if not arbitrarily, compared to other international airlines with similar pending AAD requests during the same period.

470. In light of the foregoing, the Tribunal finds that the combined violation of Claimant's legitimate expectations, as well as Respondent's failure to treat Claimant in a transparent and non-discriminatory manner, results in a breach of Respondent's obligation to treat Claimant in a fair and equitable manner pursuant to Article II(2) of the BIT.

(iv) Conclusion

471. In view of the foregoing, the Tribunal finds that ***Respondent breached Article II(2) of the BIT***.

4. Article VII of the BIT: Expropriation

4.1 The Parties' positions

(i) Claimant

472. Claimant submits that Respondent unlawfully expropriated Claimant's investments and returns.

[625] Rejoinder, paras 238-240.

473. Article VII of the BIT provides Claimant with broad rights against expropriation.[626] It prohibits Respondent from expropriating protected investments or returns unless it meets stringent requirements. As in the case of the FTF and FET provisions, Article VII specifically refers to "returns of investors" as well as "investments".[627]

474. Although the BIT does not define "expropriation" or "nationalization," the concepts are well-defined under international law. The BIT's wording uses "nationalization" and "expropriation" interchangeably and also includes "*measures having an effect equivalent to nationalization or expropriation*", commonly referred to as "indirect expropriation".[628] Expropriation can take many names and forms. Here, regardless of semantics, Respondent's acts and omissions clearly violate Article VII of the BIT.[629] Specifically, while Claimant maintains that Respondent directly expropriated Claimant's investments and returns, the distinction between direct and indirect expropriation is ultimately academic in this case. There is no serious dispute that at minimum Respondent is liable to Claimant for "indirect" expropriation.[630] Such expropriations were also unlawful and not excusable as proper exercise of Respondent's sovereign powers.[631]

475. *First*, Respondent directly expropriated Claimant's investments and returns.

476. Direct expropriation "*involves the investor being deprived of property and a corresponding appropriation by the state, or state-mandated beneficiary, of specific property rights*".[632] The most common form of direct expropriation is state acquisition to pursue national economic policies.[633]

477. The BIT provides only limited situations in which a Contracting Party may prevent an investor from transferring its returns in a convertible currency and none of those situations apply in the present case. Neither *Providencia No. 23* nor Exchange Agreement No. 1 restrict Claimant's free transfer rights to a mere "possibility" or otherwise justify Respondent's actions.[634]

478. Here, Respondent dispossessed Claimant of its returns and its "investments" defined as money and/or claims to money. It "took" Claimant's right to U.S. dollars, representing Claimant's in-country revenues that could be repatriated. The taking effectively transferred those U.S. dollars to Respondent to use for other purposes for which it needed scarce hard currency. The taking directly resulted from CADIVI's refusal to act upon

[626] Reply, para. 209.
[627] Memorial, paras 152-153; Reply, para. 210.
[628] Memorial, para. 154.
[629] Memorial, para. 155.
[630] Reply, paras 211- 212.
[631] Reply, para. 213.
[632] Memorial, para. 156 quoting Exh. CL-34 A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International Jan 2009) ("Newcombe & Paradell"), p. 340; Reply, para. 214.
[633] Memorial, para. 156.
[634] Reply, para. 215 referring to Exh. C-9 / R-11 (Providencia No. 23) and Exh. C-31 / RL-52 (Exchange Agreement No. 1).

Claimant's 15 properly submitted AADs. Respondent's acts and omissions amounted to an outright taking of Claimant's money or, at a minimum, Claimant's claims to money.[635]

479. *Second*, and in any event, Respondent indirectly expropriated Claimant's investments and returns.[636]

480. In the event that the Tribunal finds that Respondent's acts and omissions do not constitute a direct expropriation, then doubtlessly they constitute an "indirect expropriation" or, in the words of the BIT, "*measures having an effect equivalent to nationalization or expropriation*". Investment tribunals recognize that a state's interference with an investor's rights may constitute an indirect expropriation. The *Tecmed* tribunal's analysis of indirect expropriation is particularly instructive.[637]

481. In the instant case, all of the elements the *Tecmed* tribunal considered relevant to a finding of indirect expropriation are present.

- Claimant has been deprived of the economical use and enjoyment of its returns and investments. Respondent's refusal to allow Claimant to convert and expatriate its revenues stripped away any "*real substance*" or value from those revenues. It forced Claimant to retain its revenues in Bolivars – a currency that was quickly plunging in value and useless outside of Venezuela – and forego any meaningful use of the relevant ticket sales proceeds, which should have been promptly expatriated as valuable U.S. dollars. Thus, Respondent stripped away the economic value of Claimant's returns.

- Respondent's conduct amounts to a *de facto* expropriation. It had the severe effect of depriving Claimant of its ability to freely use and enjoy its investments and returns. Respondent prevented Claimant from exercising its basic right to use the property (here, the revenues) it generated. Although Claimant was technically allowed to generate revenues, it was forced to maintain those revenues in country and in Bolivars, which were depreciating at a rapid pace. Therefore, it could not use its revenues or investments in Venezuela as it wished. Furthermore, Claimant's 15 AAD requests have been pending since 2013. Thus, the interference with its rights to its revenues has been permanent and constitutes an expropriation.

- Claimant should be compensated for Respondent's conduct. The BIT is clear in that Respondent is liable for measures having an effect equivalent to expropriation. Claimant provided a service to its customers, for which it was paid, and is entitled to the value of those payments absent Venezuelan interference.

[635] Memorial, para. 157; Reply, para. 216.
[636] Reply, para. 217.
[637] Memorial, paras 158-160 quoting Exh. C-1 (BIT), Article VII and referring to Exh. CL-7, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("Tecmed"), para. 116.

> Respondent's conduct not only deprived Claimant of the value of its revenues, but it also blocked the repatriation of its revenues completely.[638]

482. The only benefit to Claimant from operating in Venezuela was the U.S. dollar value of the income derived from ticket sales in-country, which accounted for approximately 80% of its sales for the Toronto-Caracas-Toronto route. Respondent's measures, effectively deprived Claimant of 80% of its total returns from the route, and 100% of its returns from ticket sales in Venezuela, thus rendering worthless the entirety of its investments and activities in Venezuela.[639]

483. The fact that Claimant has retained possession and been able to dispose of its Bolivars in Venezuela is irrelevant. Legally, what is at issue is Respondent's expropriation of Air Canada's "investments" and "returns," as defined by the BIT.[640]

484. The fact that Claimant ultimately spent the bulk of its Bolivars in Venezuela has no bearing on Respondent's liability for the earlier expropriation of Claimant's investments. But for Respondent's unlawful acts and omissions, Claimant would never have incurred the extraordinary in-country expenses that it ultimately had to pay with the Bolivars that were still on its account in Venezuela i.e., for ticket refunds and wind-down costs following Claimant's forced withdrawal from Venezuela. These amounts are additional costs to Claimant that do not excuse Respondent's unlawful acts.[641]

485. *Third*, Respondent's acts and omissions constitute an unlawful expropriation.

486. The BIT sets forth the requirements for a lawful expropriation: the actions or measures must be: (i) for a public purpose; (ii) under due process of law; (iii) in a nondiscriminatory manner; and (iv) against prompt, adequate, and effective compensation. Respondent must comply with these requirements cumulatively in order for an expropriation to be lawful.[642]

487. Here, Respondent did not comply with any of the requirements for a lawful expropriation. Its taking was of money, and it never provided any compensation in any form. There was no public purpose to Respondent's acts and omissions; no purpose was ever articulated. There was no due process, as all of Claimant's attempts to engage Venezuelan authorities fell upon deaf ears. Furthermore, there was obvious discrimination against Claimant in terms of the treatment some other similarly situated airlines received.[643]

488. Further, Respondent's expropriations are not excused as a proper exercise of its sovereign powers. This is not an actual defense to any of the claims in this case nor is it based on any language of the BIT. In any event, Respondent did not discharge its burden of proof in this respect. It has not established that hard currency shortages prevented it from

[638] Memorial, paras 161-165; Reply, paras 220-221.
[639] Reply, para. 222.
[640] Reply, para. 223.
[641] Reply, para. 224.
[642] Memorial, para. 166; Reply 225.
[643] Memorial, para. 167; Reply, paras 226-232.

approving Claimant's long-pending AADs. It has also failed to establish that Claimant's withdrawal from the Venezuelan market in March 2014, after months of it receiving no response to its AADs, somehow excuses Respondent's earlier inaction in approving those AADs and its breach of the free transfer obligations contained in the BIT and the ATA.[644]

489. For all of the foregoing reasons, Respondent unlawfully expropriated Claimant's investments and returns in violation of Article VII of the Treaty.[645]

(ii) Respondent

490. Respondent submits that there was no expropriation.[646]

491. At the outset, under public international law, the power to expropriate is a sovereign prerogative, which may be exercised under certain conditions, such as those found in Article VII of the BIT. There is no such thing as "*broad rights*" against expropriation.[647]

492. *First*, Claimant did not have a "right" to U.S. dollars susceptible of being expropriated. The starting point for any expropriation analysis is necessarily the identification of the "asset" that is susceptible of being expropriated. The first question to be addressed is that of the existence of an "interest" that is protected. Article VII of the BIT defines such interests as "*investments or returns of investors*".[648]

493. Claimant did not have an absolute right to U.S. dollars under Venezuelan law susceptible of being expropriated. Under *Providencia No. 23* and Exchange Agreement No. 1, Claimant, like the other international airlines operating in Venezuela, had the possibility of applying for the acquisition of foreign currency at the official, preferential rate, subject to the availability of foreign currency as determined by the Central Bank of Venezuela. This possibility was never an absolute right, and the passage of time and repeated approvals of Claimant's AAD requests over the years do not transform it into one. Adding to this, foreign currency acquisition through CADIVI was in fact not the only possibility for Claimant and the other airlines and economic actors in the country. Individuals, companies and others wishing to have access to foreign currency were able to do so through the alternatives that existed and evolved over time in the Republic. There was no "right" and thus no taking.[649]

494. *Second*, and in any event, Claimant had retained possession and control of its funds and had actually been able to freely dispose of them as it had seen fit.[650]

495. The difference between a direct expropriation and an indirect one turns on whether the legal title of the owner is affected by the disputed measure. In a direct expropriation the

[644] Reply, paras 233-238.
[645] Memorial, para. 167; Reply, para. 239.
[646] Counter-Memorial, para. 395.
[647] Rejoinder, para. 258 quoting Reply, para. 209.
[648] Counter-Memorial, paras 396-398 referring to Exh. C-1 (BIT), Article VII; Rejoinder, paras 253-257.
[649] Counter-Memorial, paras 399-401 referring to Exh. C-9 / R-11 (Providencia No. 23) and Exh. C-31 / RL-52 (Exchange Agreement No. 1); Rejoinder, paras 270-271, 275, 277.
[650] Counter-Memorial, para. 402.

title is taken. For its part, in an indirect expropriation, there is no interference with the title but there is a deprivation of the possibility to use and enjoy the "asset" or "interest" in a meaningful way.[651] Thus, the distinction is far from academic.[652]

496. There are two cumulative requirements for there to be a direct expropriation: "[d]*irect expropriation involves the investor being deprived of property and a corresponding appropriation by the state, or state-mandated beneficiary, of specific property rights.*"[653] Claimant did not prove there had been either (i) a deprivation of property or (ii) a corresponding appropriation by Respondent for each of its claim for expropriation of its alleged right to transfer money and its claim for expropriation of its alleged entitlement to U.S. dollars.[654] Claimant did not have an absolute right to U.S. dollars under Venezuelan law susceptible of being expropriated.[655] Further, there was no such thing as "*returns in U.S. dollars*", or at least none that were or could have been affected by Respondent's sovereign monetary policy, including its Forex regime.[656] In addition, Claimant did not show that the CADIVI's refusal of the AAD requests would have prevented it from acquiring U.S. dollars by other means.[657] What is more, Claimant itself conceded that it still holds the Bolivars resulting from the sale of its airline tickets. And the evidence shows that Claimant had actually been able to dispose of its funds as it has seen fit. For the purpose of assessing any impact on Claimant's title, it is clear that there had been none.[658] Thus, Claimant's case on direct expropriation fails.[659]

497. Claimant's case on indirect expropriation also fails.[660] Claimant has not seen the value of such funds impacted, let alone destroyed, by any government measure.[661] Impact on the economic value of an "interest" or "asset" is the relevant consideration for a finding of expropriation when there has been in fact no taking of the title, as in the instant case. In what is a mostly pacific interpretation, an indirect expropriation implies such an interference with property that it destroys its value.[662] Indeed, Claimant must demonstrate that its allegedly protected assets have suffered from an important degree of deprivation and that said degree of deprivation is caused by a measure with permanent effects taken by the State.[663]

498. In the instant case, there was no indirect expropriation because Claimant not only retained possession and control of its assets, but it was able to freely dispose of them as it has seen fit. A claimant, such as Air Canada, which not only retains full possession and control (or

[651] Counter-Memorial, para. 403.
[652] Rejoinder, para. 260.
[653] Rejoinder, paras 260-266 quoting Exh. CL-34 (Newcombe & Paradell), p. 339.
[654] Rejoinder, paras 260-269.
[655] Rejoinder, para. 275.
[656] Rejoinder, para. 277.
[657] Rejoinder, para. 278.
[658] Counter-Memorial, paras 404-405.
[659] Rejoinder, para. 279.
[660] Rejoinder, para. 279.
[661] Counter-Memorial, para. 406.
[662] Counter-Memorial, paras 407-410.
[663] Rejoinder, paras 282-291.

title) of its "interest" but is also able to freely dispose of it, cannot be said to have been substantially deprived of its interest.[664]

499. On the other hand, in order to prove that there has been a compensable expropriation due to a substantial deprivation, a causal link is required between the disputed measure and the substantial deprivation.[665]

500. In the present case, Claimant's business setbacks and its decision to abandon the Toronto-Caracas-Toronto route is not linked to the situation of its AAD requests nor can it be traced back to any alleged expropriatory conduct by Respondent. In any event, there is simply no evidence that Claimant was "*forced to suspend its Caracas flights*". The business decision to leave cannot in any way be attributed to Respondent or its conducts.[666] Further, Claimant failed to take into account that CADIVI was the most advantageous component of the Forex regime implemented by the Republic in 2003 because of its subsidized exchange rate but by no means the only one. It likewise failed to factor in the legal recourses available under Venezuelan law, which Air Canada chose not to exercise. Following the legal standard regarding indirect expropriation, Claimant had not demonstrated that CADIVI's negative silence regarding Claimant's AAD requests had been "*irreversible and permanent*" since it could have had to have recourse to legal action before Venezuelan courts and/or CADIVI to challenge the refusal of its AAD requests. Claimant also failed to demonstrate that its allegedly protected investments had "disappeared", or that their economic values have been "*neutralized or destroyed*" nor that this would have been due to the refusal by operation of the law of the 15 AAD requests.[667]

501. Even if the only benefit to Claimant from operating the Toronto-Caracas-Toronto route in Venezuela were the U.S. dollar value of the income derived from ticket sales in-country, Claimant was not deprived of the same because of CADIVI's silence regarding the 15 AAD Requests. Indeed, had Claimant wished to convert its money in U.S. dollars, it simply could have done so through any of the regulated and unregulated alternatives it had at its disposal at the time. The fact that Claimant decided not to do so cannot suffice to establish a causal link between their alleged damage and the refusal of the 15 AAD requests by operation of Articles 4 and 60 of the LOPA.[668]

502. In addition, Claimant had not established either that there was a loss of economic value or that if there was one, CADIVI's silence was its cause. In any case, the alleged loss in economic value would in any case be due to its negligence in seeking both (i) domestic remedy for CADIVI's silence regarding its AADs and (ii) its inertia in seeking for alternative ways of converting its Bolivar-earned profits into foreign currency.[669]

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[664] Counter-Memorial, para. 411.
[665] Counter-Memorial, paras 412-413.
[666] Counter-Memorial, para. 414 quoting Memorial, p. 30, Section "D".
[667] Rejoinder, paras 292-294 quoting Reply, para. 221.
[668] Rejoinder, para. 297 referring to Exh. RL-54 (LOPA).
[669] Rejoinder, para. 299.

503. As such, it is clear that there has been no "taking" nor the "*deprivation of any economic value*".[670]

504. *Third*, even on Claimant's own case, Respondent is not liable for the payment of any compensation to Claimant, as the situation in which Claimant finds itself is nothing more than a case of the exercise of sovereign regulatory powers.[671]

505. Tribunals have held that precisely the criteria to distinguish between a compensable expropriation and a non-compensable regulation is whether the measure is within the recognized police powers of the host State, as is indeed the case of public policy decisions with regard to currency and monetary policy.[672]

506. In the instant case, CADIVI rejected Claimant's 15 AAD requests in light of the ebbing availability of foreign currency at the time, as expressly provided for in both *Providencia No. 23* and Exchange Agreement No. 1. This is part and parcel of Respondent's prerogative regarding its monetary policies.[673] Pursuant to Article 4 of the LOPA, with the passage of time Claimant's pending AAD requests were considered to be resolved in the negative. This came at a time when the Republic was dealing with ebbing currency availability, which had an impact on CADIVI's currency administration functions. Claimant had furthermore abandoned the operation of the Toronto-Caracas-Toronto route, thereby interrupting the "public service" of air transportation of passengers.[674] Further, the hypothesis of "complete" restriction on the use of property must be set aside in the instant case, given that Claimant retained control over its funds.[675] Finally, Air Canada never even attempted to find a remedy to challenge CADIVI's negative silence despite the passage of time and the availability of domestic remedies under the LOPA nor did it seek other alternatives to convert its Bolivars into foreign currency.[676]

507. Therefore, Respondent's conduct, even if characterized as having had an effect on Claimant's funds or "interests", was nothing more than non-compensable regulation. The Republic is thus not liable for the payment of any compensation to Claimant.[677]

508. In light of the above, Respondent has not breached in any manner Article VII of the BIT.[678]

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[670] Counter-Memorial, para. 415.
[671] Counter-Memorial, para. 416; Rejoinder, para. 300.
[672] Counter-Memorial, paras 417-418; Rejoinder, paras 301-305.
[673] Rejoinder, para. 314 referring to Exh. C-9 / R-11 (Providencia No. 23) and Exh. C-31 / RL-52 (Exchange Agreement No. 1).
[674] Counter-Memorial, para. 419 referring to Exh. RL-54 (LOPA); Rejoinder, para. 314.
[675] Rejoinder, paras 304-306 referring to Exh. R-42, Claimant's Bank Statements (Banco Mercantil) for January 2014 and April 2018.
[676] Rejoinder, para. 314.
[677] Counter-Memorial, para. 420; Rejoinder, paras 307-313, 315.
[678] Rejoinder, para. 316.

4.2 The Tribunal's analysis

(i) The issue

509. The *issue* is whether Respondent expropriated or effectively expropriated Claimant's investments and returns by precluding Claimant from exercising its legal rights to exchange and repatriate its money and by expropriating or effectively expropriating Claimant's claims to U.S. dollars, therefore violating Article VII of the BIT (see *supra* paras 472 and 490).

510. In order to decide this question, the Tribunal will proceed as follows:

- *First*, it will set out the scope and requirements of Article VII of BIT on expropriation (Section (ii)).
- *Second*, it will address the question of whether Respondent breached Article VII of the BIT (Section (iii)).
- *Third*, it will conclude (Section (iv)).

(ii) Article VII of the BIT

511. Article VII on "Expropriation" provides the following:

> *1. Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier shall be payable from the date of expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation with interest at a normal commercial rate, shall be paid without delay and shall be effectively realizable and freely transferable.*
>
> *2. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment or returns in accordance with the principles set out in this Article.*

512. Article VII includes the protection against expropriation of investments or returns of investors which does not meet certain legal requirements.

513. *First*, in the context of its scope, Article VII, similar to Articles II(2) and VIII, refers to "*investments or returns of investors*". In this regard, the Tribunal refers to its considerations above (see *supra* paras 355-356 and 444) and notes that generally Article VII also covers Claimant's claims relating to currency exchange and repatriation of funds from ticket sales in Venezuela.

514. *Second*, Article VII itself describes (but does not define) expropriation (i.e., "*referred to 'expropriation'*") as the "*nationaliz*[ation]*, expropriat*[ion] *or subject*[ion] *to measures having effect equivalent to nationalization or expropriation*" of an investor's returns or investments in the territory of the other Contracting Party. It prohibits such expropriation unless certain elements are met. From this description, the Tribunal can infer the following:

- The terms "nationalization" and "expropriation" are used interchangeably, and although they are not explicitly defined, they are presumed to refer to direct expropriation.

- The reference to "*measures having effect equivalent to nationalization or expropriation*" implies that Article VII also covers indirect expropriation.

- Article VII prohibits direct or indirect expropriation "*except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation*". This means that such expropriations are *unlawful expropriations* unless these four elements are present and/or satisfied in a particular case.

515. The Parties disagree on the proper legal standard for both direct and indirect expropriation in this case. While Claimant contends that the distinction between the two is largely academic,[679] Respondent disagrees.[680] Notwithstanding the distinction, which the Tribunal does not ignore, the difference between the Parties appears to be limited to the existence of a requirement of transfer of specific property rights and the degree of deprivation of the protected property rights.[681]

516. The Tribunal notes that investment law jurisprudence is rich when it comes to definitions of direct and indirect expropriation. Indeed, there is a plethora of formulations from which tribunals can select and apply in a given case.

[679] Reply, para. 212

[680] Rejoinder, para. 260 referring to Exh. CL-34 (Newcombe & Paradell), p. 322 ("*The primary distinction in customary international law is between: (i) direct forms of expropriation in which the state openly and deliberately seizes property, and/or transfers title to private property to itself or a state-mandated third party; and (ii) indirect forms of expropriation in which a government measure, although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefits.*"; Exh. CL-37, R. Dolzer & C. Schreuer, Principles of International Investment Law (Oxford University Press) ("Dolzer & Schreuer"), p. 92.

[681] Claimant (Reply, paras 214, 217-219); Respondent (Rejoinder, paras 264-266, 281-290).

517. For example, *direct expropriation:*

- Is where "*the state openly and deliberately seizes property, and/or transfers title to private property to itself or a state-mandated third party*".[682]

- "[A]*rises where there is a forced transfer of property from the investor to the state, or a state-mandated beneficiary*"; "*involves the investor being deprived of property and a corresponding appropriation by the state, or state-mandated beneficiary, of specific property rights*"; and has as its "*most common form* […] [the] *state acquisition of property for public infrastructure or to pursue national economic policies*".[683]

- Is "*understood as the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action*"; "*In considering the severity of the economic impact, the analysis focuses on whether the economic impact unleashed by the measure adopted by the host State was sufficiently severe as to generate the need for compensation due to expropriation. In many arbitral decisions, the compensation has been denied when it has not affected all or almost all the investment's economic value. Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished. The impact must be substantial in order that compensation may be claimed for the expropriation.*"[684]

- "[M]*eans a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect*" but "*also covers a number of situations defined as de facto expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership of such assets, without allocating such assets to third parties or to the Government.*"[685]

- Requires "*at least some essential component of property rights has not been transferred to a different beneficiary, in particular the State.*"[686]

[682] Exh, CL-34 (Newcombe & Paradell), p. 322.
[683] Exh, CL-34 (Newcombe & Paradell), p. 340.
[684] Exh. CL-28, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 ("LG&E"), paras 187, 191. See also Exh. RL-142, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008 ("Metalpar"), paras 172-174.
[685] Exh. CL-7 (Tecmed), para. 113
[686] Exh. CL-35, *Enron Corporation, Ponderosa Assets, L.P., v. Argentine Republic*, ICSID Case No ARB/01.3, Award, 22 May 2007, para. 243.

518. In turn, *indirect expropriation*:

- Is where "*a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention, and* […] *even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.*"[687]

- "[I]*nvolves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure.*"[688]

- Exists where claimant "*was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto […] had ceased to exist*"; it is distinct from a "*a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights*"ˆ; it is "*a de facto expropriation that deprives those assets and rights of any real substance* […] *the effects of the actions or behavior under analysis are not irrelevant to determine whether the action or behavior is an expropriation*"; "*it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that '...any form of exploitation thereof...' has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects. To determine whether such an expropriation has taken place, the Arbitral Tribunal should not* [...] *restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.*"[689]

- Exists where "*a government measure, although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefits*".[690]

- Exists where "*measures taken by a state can interfere with property rights to such an extent that the rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated*

[687] Exh. CL-126, W. M. Reisman & R. D. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, 2004 Faculty Scholarship Series (2004), para. 120 (quoting G.C Christie in 1962).
[688] Exh. CL-125, UNCTAD Series on Issues in International Investment Agreements II (2012), p. 7.
[689] Exh. CL-7 (Tecmed), paras 115-116.
[690] Exh. CL-34 (Newcombe & Paradell), p. 323.

them and the legal title to the property formally remains with the original owner".[691]

- It must be considered that "[w]*hile the assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental ownership and it appears that this deprivation is not merely ephemeral.*"[692]

- "[R]*equires a certain level of sacrifice of private property in order to be found. Minor losses that are an incidental consequence to a general regulation of the economy adopted in the public interest are not considered to be expropriation giving rise to indemnification*."[693]

- *Indirect expropriation* is generally an unreasonable interference with the use, enjoyment or disposition of one's property.

519. The Tribunal does not find one formulation more fitting than the other. Rather, all are appropriate and founded on law. If the Tribunal were to distinguish some important elements, they would be:

- Appropriation or taking of property rights *for a direct expropriation*, and

- An interference with property to such an extent as to give rise to a right to compensation for *an indirect expropriation*. While this does not necessarily require the transfer of property rights, it does require some degree "*of sacrifice of private property*".[694]

520. In either case, an appropriate assessment in this context would look at the circumstances of the case, and in particular "*the severity of the economic impact*" focusing "*on whether the economic impact unleashed by the measure adopted by the host State was sufficiently severe as to generate the need of compensation due to expropriation*".[695]

521. Accordingly, the Tribunal will assess whether Respondent's treatment of Claimant's investments was in violation of the BIT's standard on expropriation.

(iii) Did Respondent violate Article VII of the BIT?

522. The Parties disagree as to whether Respondent treated Claimant's investments and returns in violation of the BIT's provision on protection against expropriation. To decide this

[691] Exh. CL-125, *Starrett Housing Corp. v. Islamic Republic of Iran*, 4 Iran-United States Claims Tribunal (1983) 122, 154.
[692] Exh. CL-36, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2, reprinted in 6 IRAN-U.S. C.T.R. 219, dated 29 June 1984, p. 5.
[693] Exh, CL-8 (Continental Casualty), para. 284.
[694] Exh, CL-8 (Continental Casualty), para. 284.
[695] Exh. CL-28 (LG&E) para. 191; Exh. RL-142, (Metalpar), paras 172-174.

question, the Tribunal will first refer to the relevant facts and then assesses whether Respondent is liable based on its reasoning on the interpretation of Article VII (see *supra* paras 514-520).

a. Facts

523. The Tribunal need not repeat the facts relevant to the treatment of Claimant's claim under Article VII of the BIT. Instead, it shall refer to the same facts set out in detail in the discussion of Claimant's FTF and FET claims (see *supra* paras 367 and 451).

b. Assessment

524. The Tribunal considers the following.

525. *First*, *with respect to direct expropriation*, it is recalled that Claimant's alleged expropriated rights concern its legal right to a free transfer of funds under the BIT, the ATA and Providencia No. 23, its money and/or claims to money and its returns in U.S. dollars in that connection.[696]

526. The Tribunal has already held that Claimant's right to a free transfer of funds, though not absolute, was imperative and mandatory. It was not a mere possibility, as interpreted by Respondent, but a right which had to be respected by Respondent in accordance with a non-discriminatory and transparent application of the relevant foreign exchange regime (see *supra* paras 352-353, 456). On this basis, and after an assessment of the relevant facts (most of which also come into play almost identically in the context of Claimant's expropriation claims), the Tribunal found Respondent liable for breach of this right under both the FTF and FET provisions (see *supra* paras 398 and 471). However, the Tribunal's conclusion in this regard (based on an independent application of the requirements of those provisions concerning) cannot convert a free transfer of funds right into a property right that it itself is subject to direct expropriation. While Claimant's claims relating to currency exchange and repatriation of funds from ticket sales in Venezuela fall within the scope of Article VII of the BIT, the same is not true as to the right to free transfer of funds itself under the BIT, the ATA and Providencia No. 23. To hold otherwise would require this Tribunal to significantly stretch any formulation of direct expropriation and to find breach based on elements of other BIT provisions.

527. Although the situation may initially appear somewhat different when it comes to Claimant's alleged expropriation of its money and/or claims to money and its returns in U.S. dollars in connection with Claimant's right to a free transfer of funds, the Tribunal is again of the view that it would be going too far to conclude that Respondent appropriated these U.S. dollars or claims to U.S. dollars in such a way that it would necessarily be obliged to pay compensation on the basis of a direct taking. This is all the more so because the 15 AAD requests had not been dealt with at all under the relevant procedure, let alone approved, so that ownership of the bolivar amount would pass on from Claimant to Respondent and ownership of the U.S. dollar amount would pass on from Respondent to Claimant. The fact that Claimant had a legitimate claim to have its bolívares converted

[696] Reply, para. 216.

into U.S. dollars and that Respondent was found liable for the breach of its international obligations in that respect, does not mean that an equal breach can be presumed in the context of direct expropriation.

528. *Second, with respect to indirect expropriation*, it is recalled that Claimant points to the fact that Respondent's failure to approve the 15 AADs effectively deprived Claimant of the use and economic benefit of its legal rights to U.S. dollars, its money and/or its claims to those U.S. dollars, and its returns. Specifically, Claimant contends that it was deprived of 80% of its total returns from the Toronto-Caracas-Toronto route (the only benefit to it from operating in Venezuela), and 100% of its ticket sales revenues in Venezuela, rendering the entirety of its investments and operations in Venezuela worthless. According to it, the fact that Claimant retained ownership of its bolivars in Venezuela and could dispose them, as it did, is irrelevant.[697]

529. As noted above, the Tribunal has concluded that Claimant's right to freely transfer funds, was imperative and mandatory (see *supra* paras 352-353, 456), and held Respondent liable for breach of the FTF and FET provisions of the BIT (see *supra* paras 398 and 471). In this regard, and although the Tribunal has not reached the point of deciding the claim for damages, it does not deny that this breach very likely had an impact on Claimant's investment in Venezuela, and that this impact is not insignificant. In particular, the Tribunal does not ignore the fact that Claimant had to suspend its operations as a result of Respondent's treatment of Claimant's 15 AAD requests.

530. What the Tribunal fails to see, however, is that Respondent's failure to treat the 15 AAD requests in accordance with the applicable regime and in the same manner as it did with other carriers caused a serious impact on Claimant's investment that warrants compensation on the basis of indirect expropriation. This is all the more true since Claimant itself reiterated its intention to return to Venezuela and to resume the Toronto-Caracas-Toronto route after reassessing the situation. Moreover, Claimant continued to carry out activities on the ground, even if these were limited to small activities such as refunding ticket and paying various expenses. In addition, Claimant did not lose its personal property in connection with its investment in Venezuela. Thus, although Respondent's acts or omissions had serious effects on Claimant's business, it did not occur to an extent that would justify a finding of indirect expropriation.

531. Therefore, the Tribunal does not find evidence of indirect expropriation of Claimant's investments or returns in this case.

532. *Third, with respect to the lawfulness of expropriation*, in light of the Tribunal's findings above on direct and indirect expropriation, the argument that any expropriation was unlawful because it did not meet the requirements of public purpose, due process, non-discrimination, and compensation is moot. Therefore, it is not necessary to address Respondent's argument that it is not liable for compensation because this was a case of non-compensable sovereign regulatory power or police power.[698]

[697] Reply, paras 221-224.
[698] Rejoinder, paras 300-315.

(iv) Conclusion

533. Therefore, the Tribunal finds that ***Respondent did not breach its obligations under Article VII of the BIT***.

5. Conclusion

534. In light of the foregoing, the Tribunal finds that Respondent breached its obligations under ***Articles VIII and II(1) of the BIT.***

V. Damages

1. The issue

535. Having found that Respondent has breached its obligations under Articles VIII and II(1) of the BIT, the Tribunal shall proceed to determine the damages, if any, arising from such breaches.

536. ***Claimant*** requests that the Tribunal award to it

> *an order that Venezuela pay compensation to Air Canada for all damages suffered, plus pre-award compound interest up to February 29, 2020, in the amount of US$ 213,140,023 or, alternatively, in the amount of US$ 72,118,369;* [Claim. 3];
>
> *an order that Venezuela additionally pay Air Canada pre-award compound interest calculated from March 1, 2020 until the date of the Tribunal's award using Venezuela's cost of borrowing or, alternatively, Air Canada's cost of debt;*" [Claim. 4]; and
>
> *an order that Venezuela additionally pay Air Canada post-award compound interest calculated using Venezuela's cost of borrowing or, alternatively, Air Canada's cost of debt until the date of Venezuela's final satisfaction of the award;* [Claim. 6].

537. ***Respondent*** requests that the Tribunal

> *Dismiss Air Canada's claim for compensation, as well as its claim for interest, or alternatively, reduce any amounts ordered as compensation on account of Air Canada's contributory fault, its unwise conduct or its improper actions;*[699] [Resp. 3]; and

[699] In its Counter-Memorial, Respondent requests the Tribunal to:

> *e. Declare:*

Order Air Canada to pay interest as the Arbitral Tribunal may consider appropriate on the amounts owed to the Republic as from the date of the award on costs and complete payment; [Resp. 5].

538. ***The Tribunal*** will address the damages of this case as follows:

- *First*, it will address the issues of entitlement to and quantification of damages (Section V.2).
- *Second*, it will address the issue of interest (Section V.3).
- *Third*, it will conclude (Section V.4).

2. Entitlement to and quantification of damages

2.1 The Parties' positions

(i) Claimant

Entitlement to damages

539. Claimant submits that Respondent's conduct violated the BIT and international law and caused significant damage to Claimant. Therefore, it is entitled to full compensation as a result.[700]

540. To determine compensation, the Tribunal should in the first instance look to any *lex specialis* in the BIT. The only *lex specialis* standard of compensation is found in Article VII of the BIT, which sets out the conditions that Respondent must satisfy for lawful expropriation.[701] The BIT does not expressly provide a standard of compensation for an unlawful expropriation or for other violations of the BIT, and thus the customary international law principle of full compensation fills the *lacuna* and provides the governing rules of compensation. Customary international law calls for the payment of full compensation. The principle of full reparation was first established by the Permanent Court of International Justice in the seminal 1928 case of *Chorzów Factory* between Germany and Poland[702] and has more recently been codified in the ILC Articles.[703]

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i. That Claimant is not entitled to any compensation; or in the alternative
ii. That Claimant has failed to quantify its damages; or in a further alternative
iii. That Claimant's entitlement to any compensation shall be reduced by 75% due to Claimant's contributory fault; or by 50% due to Claimant's unwise conduct; or, at the very least by 25% due to its improper actions.
f. Declare, if any damages are awarded to Air Canada, that Claimant is not entitled to any interest neither simple nor compound;
g. Dismiss all of Claimant's claims;

[700] Memorial, para. 168.
[701] Memorial, para. 169; Reply, para. 244
[702] Memorial, paras 170-176 referring to and quoting Exh. CL-59, *Case Concerning the Factory at Chorzów*, PCIJ Ser. A, No. 17, Judgment No. 13, Merits, 47, 13 September 1928 ("*Chorzów*"); Reply, paras 244-245.
[703] Reply, paras 246-247 referring to Article 31 of the ILC Articles, Exh. CL-6.

541. Claimant is entitled to full compensation for Respondent's violations of the BIT. Although Respondent breached each of those BIT standards, a violation of any one of them would entitle Claimant to full compensation.[704] In the instant case, each of Respondent's various breaches of the BIT led to exactly the same loss, namely the loss of the U.S.$ 50,618,073.89 that Claimant would have received in late 2013 and early 2014 if Respondent had allowed Claimant to exchange the 318,893,865.58 BSF worth of returns that Claimant held in its Venezuelan bank account for U.S. dollars at the then applicable rate, for onwards repatriation. Accordingly, the Tribunal need not distinguish between Venezuela's measures when determining the amount of compensation due to Claimant in these proceedings.[705]

542. There is an unbroken and obvious causal link between Respondent's actions and Claimant's damages: Respondent prevented Claimant from converting and repatriating its revenues in U.S. dollars.[706]

543. The revenues that Venezuela prevented Air Canada from repatriating should be undisputed. Air Canada submitted 15 ADDs to CADIVI through the official foreign exchange agent, Banco Mercantil. The foreign exchange agent received each of these ADDs and sent them to CADIVI. To date, the 15 ADDs appear within CADIVI's system, now CENCOEX, as pending "*under analysis*".[707]

544. Further, Claimant did not cause or fail to mitigate its losses.

- The fact that by February 2014, Respondent had refused to authorize more than $ 3.5 billion worth of AADs submitted by many different international airlines demonstrates the fallacy of the argument that Claimant was responsible for its losses. Venezuela's allegation regarding Claimant's supposed failure to explain the increase in its revenues does not absolve Respondent of responsibility. Respondent also cannot avoid liability by arguing that Claimant never sought administrative or judicial review of CADIVI's refusal to authorize the 15 AADs. Further, Respondent has not identified any alternatives to the CADIVI regulated market that were available to Claimant in 2013 and 2014. Respondent's allegation that Claimant contributed to its own losses by waiting to file this arbitration is spurious and without any legal basis. Finally, Respondent does not explain how Claimant's use of its Bolivars after March 2017 could possibly have contributed to the injury that it suffered in late 2013 and early 2014.[708] Concerning Respondent's reliance on Article 39 of the ILC Articles, such provision makes clear that not every action or omission by a claimant that contributes to the damage suffered is relevant to determining the amount of compensation. Here, Respondent has not proven that Claimant played any role whatsoever, much less that it acted "willfully" or "negligently" in connection with Respondent's arbitrary denial of

[704] Memorial, para. 177.
[705] Reply, para. 250.
[706] Memorial, para. 178; Reply, paras 253-255.
[707] Memorial, para. 179 referring to Exh. C-70, Printout from CENCOEX's website showing Air Canada's AAD requests as pending, dated 2 March 2018.
[708] Reply, paras 256-262.

Claimant's AADs.[709] The Tribunal should thus reject Respondent's attempts to invoke contributory negligence to reduce Claimant's compensation.[710]

- Concerning mitigation, for the same reasons that Respondent's arguments do not establish that Claimant caused its own damages, they do not establish that Claimant failed to mitigate its damages. The Tribunal should therefore reject this argument.[711]

Quantification of damages

545. Claimant's damages expert in this arbitration, Mr. Howard Rosen of FTI Consulting, reviewed and verified the 15 ADDs. As summarized by Mr. Rosen, Claimant should have been able to repatriate U.S.$ 50,618,073.90.[712]

546. Further, Respondent's criticisms of Mr. Rosen's reports are unfounded. Specifically:

- Claimant's claim is limited to the value of the unapproved AADs, calculated at the applicable exchange rate, plus interest. Mr. Rosen's determination of this amount does not require any "quantification model".[713]

- Respondent's criticisms of Mr. Rosen's independence are likewise without merit. Mr. Rosen is not a legal expert qualified to interpret Article VIII of the BIT and his acceptance of a legal assumption upon instruction was transparent and entirely appropriate.[714]

- Respondent wrongly argues that Mr. Rosen's opinion is based on unreliable information.[715]

- Further, Respondent's contention that Claimant "may have" inflated the price of its tickets in Bolivars in Venezuela, thereby overstating the amounts to be repatriated in its AADs is misplaced.[716]

547. Respondent's arguments and those of its expert are thus meritless.[717]

[709] Reply, paras 263-267 referring to Exh. RL-116, Article 39 of the ILC Articles.
[710] Reply, para. 268.
[711] Reply, paras 269-270.
[712] Memorial, paras 180-181; Reply, para. 242.
[713] Reply, para. 272.
[714] Reply, para. 273.
[715] Reply, para. 274.
[716] Reply, paras 275-276.
[717] Reply, para. 276.

(ii) Respondent

Entitlement to damages

548. Respondent submits that Claimant is not entitled to damages.[718]

549. *First*, Claimant failed to meet its burden to prove the existence of an actual and concrete loss caused by the Respondent. This is enough in and of itself to dismiss Claimant's case on damages.[719]

550. Claimant's case on damages consists on a multiplication of unsubstantiated claims rather than on an assessment of its alleged harm, its nature, its cause and extent, irrespective of whether its claims are brought for expropriatory or non-expropriatory damages.[720] In cases of claims for non-expropriatory damages, the doctrine and arbitral tribunals tend to treat differently cases depending on whether or not the alleged breach of a treaty involves a total or a partial loss of an asset.[721] The case is different in relation to the claims for alleged expropriatory damages.[722] Claimant recognizes the various breaches it invokes did not have the same impact nor caused the same harms, if any.[723]

551. In any event, Claimant failed to prove it was deprived of its alleged investment, whichever it may be, or of any returns. Either Claimant was deprived of its Bolívar-denominated funds and could not have spent them, or it had not been dispossessed of said funds and was able to freely spend them, which it did. These contradictory statements defy all logic and do not assist Claimant in meeting its burden of proving its case on damages.[724]

552. In these circumstances, any amount of money accorded to Claimant would amount to unjustified enrichment, not to compensation for damages.[725] Respondent therefore requests that the Tribunal reject Claimant's claims for compensation.[726]

553. *Second*, Claimant failed to prove that the alleged damages were caused by Respondent.[727]

554. Failure to establish a causal link between the alleged damages and the alleged actions of the Republic would also be sufficient, in and of itself, to entirely dismiss Claimant's claim for damages. This would be valid even in cases where States are found responsible of an international wrongful act.[728]

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[718] Counter-Memorial, paras 423-424; Rejoinder, paras 317-318, 321.
[719] Counter-Memorial, paras 425-426; Rejoinder, para. 324.
[720] Counter-Memorial, paras 427-429; Rejoinder, para. 323.
[721] Counter-Memorial, para. 430.
[722] Counter-Memorial, paras 432-433.
[723] Rejoinder, para. 325.
[724] Rejoinder, para. 326.
[725] Counter-Memorial, para. 434.
[726] Rejoinder, para. 327.
[727] Counter-Memorial, para. 439.
[728] Counter-Memorial, paras 440-442; Rejoinder, para. 329.

555. In the present circumstances, it is complicated – if not impossible – for Respondent to address the issue of causation.[729] Specifically, Claimant failed to point to any specific action attributable to Respondent that would have caused the damages for which it seeks compensation. Its entire case on causation relies on the unsubstantiated and cursory statement according to which "*Air Canada claims the U.S. dollar amounts that Venezuela prevented Air Canada from converting and repatriating*". This statement does not suffice to evidence any causation, in that there is neither any explanation nor any evidence as to how Respondent would have "prevented" Claimant from repatriating its funds.[730]

556. Claimant has the burden to particularize its case on causation. It is not Respondent to try to guess what Claimant's case on causation is. Claimant failed to put forward a case on causation or, in any event, to meet its burden of proof. It failed to explain why or how the alleged violations of the BIT by Respondent could have caused Claimant any loss. This is true for both the non-expropriatory and expropriatory claims.[731]

557. If, nevertheless, the Tribunal were to determine that the AAD requests were properly submitted and that CADIVI's refusal was wrongful in some meaningful way, Claimant would still be lacking a sufficient causal link between the alleged breach and the alleged loss. The proper submission of AAD requests is not a guarantee, in accordance with Article 7 of Providencia 23 and Article 9 of Providencia 124, the conversion into U.S. dollars is subject to the availability of U.S. dollars and the directives of the National Executive Branch.[732]

558. Respondent therefore requests that the Tribunal dismiss Claimant's claims for damages in the absence of any evidence that Respondent has caused any such damages.[733]

559. *Third*, and in any event, Claimant materially contributed to its own alleged injury. Indeed, Claimant refused to provide CADIVI with all the documents that had been requested in order to assess the accuracy of the 15 AAD Requests. Without this, CADIVI was not in a position to understand the abnormal increase of Air Canada's revenues and to assess whether the prices fixed by Air Canada, as required under the ATA, were reasonable. Furthermore, it failed to act as a "wise investor", because it did not attempt to acquire U.S. dollars through one of the alternatives to the CADIVI regulated market. Similarly, it contributed to its own injury by not even attempting to challenge CADIVI's negative silence before CADIVI itself or before the competent courts of Respondent and rather awaiting more than three years to lodge its claims.[734] It also disposed of its revenues in Bolivars and concealed this fact to the Tribunal. Therefore, the Tribunal could only

[729] Counter-Memorial, paras 443-445.
[730] Rejoinder, para. 328 quoting Reply, para. 251.
[731] Counter-Memorial, paras 446-447.
[732] Counter-Memorial, para. 448.
[733] Rejoinder, para. 330.
[734] Rejoinder, para. 331 quoting Exh. CL-43, *MRD Chile MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004, para. 242.

attribute such loss to Claimant's own conduct and declare that Respondent's wrongful conduct does not amount to a sufficient nor to a direct cause of Claimant's loss.[735]

560. At the very least, its suggestion that it was unaware of the existence of alternatives that would have allowed it to mitigate its alleged damages shows Claimant had been grossly negligent. Claimant's contributory fault should at least lead to a 75% reduction of any award on damages and that, in any event, such reduction should not be less than 25%.[736]

561. *Fourth*, and in the alternative, the Tribunal should nevertheless take into consideration the fact that Claimant failed to mitigate its alleged loss[737] and reduce any award on damages.[738] It is undisputed that the principle of mitigation of damages is applicable in the instant case as a general principle of international law recognized by numerous arbitral tribunals.[739]

562. Claimant could have challenged CADIVI's decision through various administrative and judicial recourses, the existence of which is undisputed. It did not, in breach of its obligation to mitigate its damages. Additionally, it failed to mitigate its alleged damages when choosing not to acquire U.S. dollars through the alternatives to the CADIVI regulated market. Claimant never had an unconditional right to obtain a favorable decision from CADIVI, nor did it ever have any right or any legitimate exceptions to have access to the CADIVI subsidized exchange rate of 6.3 Bolivars per U.S. dollar.[740] The Tribunal should therefore reject Claimant's claims for damages entirely and on this sole basis.[741]

563. Even if the Tribunal were to consider that Claimant was entitled to benefit from CADIVI's preferential rate at all times, Claimant should have mitigated its damages and acquired U.S. dollars through one of the alternatives to CADIVI.[742]

564. Finally, and in any event, Claimant has failed to mitigate its damages by initiating these proceedings in December 2016. By its negligence, it contributed to the aggravation of the damages it claims to have suffered due to the time value of money, which it estimates to be between U.S.$ 16,769,433 and U.S.$ 113,630,857 as of 30 November 2018. Thus, the Tribunal should also reject Claimant's claim for pre-award interests.[743]

565. Based on the foregoing, the Tribunal should deny Claimant's claims for damages or reject its claims for pre-award interest.[744]

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[735] Counter-Memorial, paras 449-450.
[736] Rejoinder, para. 332. See also Counter-Memorial, paras 449-457, for Respondent's proposed redactions on account of alleged contributory fault on the part of Claimant.
[737] Rejoinder, para. 333.
[738] Counter-Memorial, paras 435-438.
[739] Counter-Memorial, para. 437; Rejoinder, para. 334.
[740] Counter-Memorial, paras 435-438; Rejoinder, paras 335-337.
[741] Rejoinder, para. 338.
[742] Rejoinder, para. 339.
[743] Rejoinder, para. 340 referring to FTI Report II, para. 3.72, Figure 19.
[744] Rejoinder, para. 342.

Quantification of damages

566. Respondent submits that Claimant's quantification of damages is fundamentally flawed. Mr. Rosen does not offer any relevant economic expert opinion but his report consists instead of factual and legal submissions.[745]

567. *First*, neither Claimant nor Mr. Rosen have attempted to perform any damages quantification exercise.[746] The two-step methodology adopted by Mr. Rosen, namely to first verify six approved AAD requests and then verify the 15 AAD Requests, is not a quantification of damages but a mere matching exercise. The results obtained therefrom are not sufficient for the Tribunal to assess Claimant's damages, if any.[747]

568. The claims as presented by Claimant have nothing to do with a claim for unpaid invoices, as Claimant would have the Tribunal believe. The 15 AAD Requests are not invoices and neither CADIVI nor Respondent have any debt towards Claimant. In any event, even a claim for an unpaid invoice would have required a more detailed analysis than the matching exercise performed by Mr. Rosen.[748]

569. Mr. Rosen's so-called verification of the six previously approved AADs lead him to understand (i) that Claimant had repatriated funds at the official Bs./US dollar exchange rate through CADIVI, which is uncontroverted and inapposite for the present case and (ii) "*how unprocessed AADs would have been accounted for*", which is even more inapposite to quantify damages.[749]

570. Therefore, Mr. Rosen has performed nothing more than a matching exercise. Thus, the Tribunal should disregard Mr. Rosen's methodology and discard his findings for the purpose of quantifying damages. If the Tribunal were to decide that Mr. Rosen might have applied the appropriate methodology to quantify damages, it should nevertheless find that the underlying documentation to Mr. Rosen's report is unreliable.[750]

571. The documents on which Mr. Rosen's matching exercise was performed do not take into consideration various inconsistencies found in other documents related to Claimant's operations.[751] Specifically:

- Claimant's final tax declaration for 2013 appears irreconcilable with the monthly tax declarations that Claimant submitted to CADIVI in support of its 12 AAD requests for that year. It would have been easy for Mr. Rosen to identify those discrepancies. Thus, the declarations contained in the monthly income statements "verified" by Mr. Rosen cannot be relied upon to assess damages.[752]

[745] Counter-Memorial, paras 458-460; Rejoinder, pars 343-344.
[746] Counter-Memorial, paras 461-464.
[747] Rejoinder, para. 345.
[748] Rejoinder, paras 348-349.
[749] Counter-Memorial, paras 468 and 472 quoting FTI Report paras 3.10-3.11.
[750] Counter-Memorial, para. 474; Rejoinder, paras 345, 357.
[751] Counter-Memorial, para. 476.
[752] Counter-Memorial, paras 477-479.

- The documents on which Mr. Rosen relied contain various indicators that Air Canada may have inflated the prices of its ticket sold in Bolivars in Venezuela. If confirmed, this would necessarily lead to the conclusion that the amounts Claimant sought to repatriate through the 15 AAD Requests, or any amounts repatriated in the past, are overstated. Mr. Rosen does not discuss those obvious indicators.[753]

572. Mr. Rosen has not verified that the amounts reported by Claimant in its AAD requests actually correspond to the difference between the revenue Claimant collected on ticket sales in the Republic and its in-country expenses, including taxes. The only verification performed was circular and based on documents that cannot lead to any conclusive evidence that the amounts reported are accurate. Mr. Rosen's assessment exclusively relies on Claimant's own representations rather than on his independent analysis of contemporaneous documents.[754] Only the relevant audited and complete financial books of Claimant, as well as samples of their underlying documentation could have permitted Mr. Rosen to assess, in an independent manner, Claimant's net proceeds of ticket sales in the Republic.[755]

573. The results of Mr. Rosen's "analysis" is that the amounts authorized for repatriation by CADIVI were invariably lower than those sought by Claimant. In practice, Mr. Rosen's conclusion should have been that Claimant did not historically repatriate the amounts and therefore cannot, in the present arbitration, seek to repatriate $ 50.6 million.[756]

574. Therefore, Mr. Rosen's verifications are incomplete both in terms of underlying documents and in terms of methodology. Mr. Rosen did not have sufficient documents to properly quantify Claimant's damages, which he did not. Mr. Rosen simply performed a matching and cross-referencing exercise based on Claimant's own circular declarations, with no consideration of any economic reality. As stated by Dr. Flores, such an exercise "*does not come anywhere close to quantifying the economic losses allegedly suffered by Claimant*".[757]

575. *Second*, and in the alternative, Claimant's claims for damages are overstated. Claimant fails to take into account six factors that severely affect its quantification of damages, in spite of the findings in this respect of its own expert, Dr. Flores and Respondent. A consideration of these factors reduces Claimant's alleged damages by more than 50%, to U.S.$ 21,334,156.51.[758] Specifically:

576. *In relation to the SOTI tickets:* It is undisputed that Claimant had to limit the sale and issuing of tickets sold outside the Republic for trips originating from the Republic (the "SOTI Tickets" or "Sold Outside Ticketed In") to a maximum of 10% of its general sales volume. Dr. Flores and Mr. Rosen concur that the 15 AAD Requests include requests for

[753] Counter-Memorial, paras 480-481.
[754] Rejoinder, paras 351-352.
[755] Rejoinder, paras 351-353, 356
[756] Counter-Memorial, para. 465.
[757] Counter-Memorial, para. 491quoting Econ One Report, para. 13.
[758] Rejoinder, paras 358-359.

VEF 7,787,081.79 in excess of that limit. This amount must be deducted from Claimant's quantification of its alleged damages.[759] This is because, even in the "but for" scenario, Claimant would not have been authorized to acquire foreign currency for the net proceeds of its SOTI sales that were in excess of the agreed 10% limit.[760]

577. Therefore, in order to avoid overcompensating Claimant, an amount of VEF 7,787,081.79 should be deducted from the amount Claimant claims it could have used in the "but for" scenario to acquire U.S. dollars. Dr. Flores has performed this calculation and Mr. Rosen agrees with the same. Once the correction is made, the amount in Bolivars that Air Canada would allegedly have been authorized to use to acquire U.S. dollars corresponds to VEF 310,563,655.03.[761]

578. *In relation to the interest revenue:* Dr. Flores and Mr. Rosen concur that the 15 AAD Requests include an amount of VEF 739,672 corresponding to accrued interest revenue on funds deposited in Claimant's bank accounts in the Republic. This amount should be deducted. Under *Providencia No. 23*, and *Providencia No. 124*, as from 20 January 2014, Claimant was only authorized to submit requests for the acquisition of foreign currency equivalent to the net proceeds of its ticket sales, i.e., the difference between Claimant's proceeds from ticket sales and the costs due by it in the Republic. Interest revenue do not qualify as proceeds from ticket sales.[762] In the "but for" scenario, Claimant would not have been authorized to transfer such interest revenue outside of the Republic through AAD requests. The six "Approved AADs" analyzed by Mr. Rosen prove so.[763]

579. Therefore, in order to reinstate Claimant in the situation in which it would have been but for the alleged breaches, it is necessary to further deduct an amount of VEF 739,672 from its quantification of the amount it would have allegedly been authorized to convert in foreign currency in the "but for" scenario. Dr. Flores has performed this calculation and Mr. Rosen agrees with the same. Once this adjustment is made, this amount corresponds to VEF 310,367,311.82.[764]

580. *In relation to the applicable exchange rate:* Claimant should have used the rate applicable at the dates on which it would have been able to acquire the U.S. dollars it claims in this arbitration. In the instant case, it is appropriate to refer to the BIT in order to determine how many U.S. dollars Claimant would have been authorized to acquire in the "but for" scenario, which provides that the appropriate rate is the one "*applicable on the date of transfer*". Those dates need to be retroactively determined because no transfer occurred.[765] If the Tribunal were to reach the quantum aspect of the case, the "*without*

[759] Rejoinder, paras 360-361. See also Counter-Memorial, paras 468-471.
[760] Rejoinder, para. 363.
[761] Rejoinder, para. 365 referring to Exh. EO-2, Table 4.
[762] Rejoinder, paras 366-368. See also Counter-Memorial, paras 466-467.
[763] Rejoinder, paras 371-372.
[764] Rejoinder, para. 373 referring to Exh. EO-2, Table 4.
[765] Rejoinder, paras 374-377 quoting Exh. C-1 (BIT), Article VIII(2).

delay" expression of the BIT should be construed in light of the LOPA, to which both the 15 AAD Requests and CADIVI were subject.[766]

581. Claimant would have allegedly been able to acquire in the "but for" scenario VEF 310,367,111.82 which corresponds to U.S.$ 27,321,048.51. Indeed, as Mr. Flores and Mr. Rosen agree, the applicable exchange rate went from 6.3 Bolivars per U.S. dollar to 11.36 Bolivars per U.S. dollar as from 24 January 2014.[767] Claimant was fully aware that the exchange rate of 6.3 Bolivars per U.S. dollar would never have been applied in the "but for' scenario to any of the 15 AAD Requests.[768] Claimant would, at best have been able to acquire U.S.$ 27,321,048.51 in the "but for" scenario with VEF 310,367,111.82.[769]

582. Claimant's assessment based on the dates of submission of the AAD requests to CADIVI is incorrect. The exchange rate of 11.36 Bolivars per U.S. dollar should be applied at the very least in relation to the AAD request, corresponding to the month of December 2013. In such circumstances, i.e., if an exchange rate of 6.3 Bolivars per U.S. dollar is applied to the first 14 Controverted AAD Requests and a rate of 11.36 Bolivars per U.S. dollar is applied for the 15th AAD request, Claimant would allegedly have been authorized to acquire U.S.$ 47,664,214.53 with VEF 310,367,111.82.[770]

583. *In relation to the free spending by Claimant of its Bolivars since 2014:* Claimant misrepresented that, as of 28 June 2018, it still held the Bolivars that it needed in order to acquire U.S. dollars through CADIVI in 2014 and has since then been forced to confess that it has freely spent those Bolivars. Beyond the fact that this affects its credibility, this has an impact on its case on damages.[771]

584. In the instant case, Claimant claims for the U.S. dollars it says it should have acquired through CADIVI with VEF 310,563,655.03 but for the alleged breaches. At best, this would have corresponded to U.S.$ 27,321,048.51. However, Claimant fails to consider the fact that in order to acquire those U.S. dollars, it would have had to provide the Bolivar equivalent of the U.S. dollars it wanted to acquire, which at the time amounted to VEF 310,367,111.82. Even upon approval, an AAD request does not qualify as a debt towards Claimant.[772] It is thus necessary to assess the value of the Bolivars that Claimant spent since 2014 and deduct it from the U.S. dollars it would allegedly have been able to acquire in the "but for" scenario, i.e., $ 27,321,048.51.[773]

585. Mr. Rosen concludes that between the end of March 2014 and the end of July 2018, Air Canada freely spent VEF 305,464,316. This corresponds to more than 98% of the funds Claimant should have had to provide in order to acquire the U.S. dollars it claims. According to Mr. Rosen, this corresponds, at the maximum, to U.S.$ 5,986,892. Since,

[766] Rejoinder, para. 379 quoting Exh. C-1 (BIT), Article VIII(2) and referring to Exh. RL-54 (LOPA).
[767] Rejoinder, para. 381.
[768] Rejoinder, para. 382 referring to Exh. R-76 (Air Canada's internal communication, e-mail from Daniela Mauro to Yves Dufrense et al. Subject: Conversation with Ben – VE, dated 4 March 2014).
[769] Rejoinder, para. 383.
[770] Rejoinder, paras 374, 384-387.
[771] Rejoinder, para. 389.
[772] Rejoinder, para. 390.
[773] Rejoinder, para. 393.

for reasons beyond its control Respondent avers not having been able to file a reply expert report, Respondent was left with no other choice than to rely, under strict reserves, on Mr. Rosen's quantification.[774] Thus, the amount of U.S.$ 5,986,892 must be deducted from Claimant's alleged damages, if any.[775] Thus, any compensation to Claimant, could not exceed U.S$ 21,334,156.5, corresponding to a cap rather than an accurate assessment because as of today, Respondent cannot confirm whether Claimant had spent the Bolivars that it still had on its Venezuelan bank accounts in July 2018. This deduction must be applied on any amount that the Tribunal will determine as corresponding to the U.S. dollars that Claimant would have been able to acquire through CADIVI in the "but for" scenario.[776]

586. Claimant's contention that this amount corresponds to "*additional, exceptional costs that Air Canada suffered as a result of Venezuela's measures*" is unsubstantiated and inapt.[777] In any event, a superficial review of the documents related Bolivars freely spent by Claimant between March 2014 and July 2018, reveals that the use of its funds is not remotely connected to the alleged breaches. The Tribunal should draw adverse inferences and conclude that none of the expenditures incurred by Claimant since March 2014 were caused by the alleged breaches.[778]

587. Further, Claimant does not make any specific claim in this proceeding for damages related to the alleged "additional costs" deriving from the alleged breaches on top of the value of the 15 AAD Requests. Claimant's disguised claim for damages for U.S.$ 5,986,892 for "additional costs" allegedly caused by the alleged breaches should therefore fail.[779]

588. *In relation to the fact that Claimant would have had to provide Bolivars to acquired* U.S. dollars*:* In order to make Claimant whole and not overcompensate it, the Tribunal will have to direct it to provide Respondent with the Bolivars equivalent of any damages awarded to it with respect to the 15 AAD Requests as per the exchange rate applicable in the Republic as at the date of the Award. As per Article VIII of the BIT, the relevant rate is the rate applicable at the date of transfer. In order to avoid overcompensation, the relevant rate to be considered cannot be the one that was applicable at the dates at which a transfer would have occurred for each AAD request in the "but for" scenario. In the instant case, Claimant has spent all of the Bolivars it held in the Republic. If it is ordered to provide Bolivars in exchange of the U.S. dollars that may be awarded to it, as would have been the case in the "but for" scenario, Claimant would have to acquire the Bolivars it no longer has. The equivalent U.S. dollars to the Bolivars would be U.S.$ 27,321,048.51. Any award should not compensate Claimant over U.S.$ 21,334,156.51 (i.e., the U.S dollar equivalent of the Bolivars of the 15 AAD

[774] Rejoinder, para. 394 referring to FTI Report II, Figure 12.
[775] Rejoinder, paras 395, 409.
[776] Rejoinder, paras 396, 409.
[777] Rejoinder, paras 397-398 quoting Reply, para. 262.
[778] Rejoinder, paras 400-407.
[779] Rejoinder, para. 408.

Requests minus the Bolivars spent thereafter).[780] In this connection, two scenarios may be compared:

- In the first scenario, the rate applicable to determine the amount in Bolivars that Claimant will have to provide in exchange of the U.S. dollars it may acquire through the award is the rate applicable at the date each of the transfer should have taken place.

- In the second scenario, the rate considered is the one applicable on the date of the Award.

589. The first scenario leads to an unwarranted substantial enrichment for Claimant whereas the second comes as closely as possible to making Air Canada whole.[781] Thus, in order to make it whole, if need be, the Tribunal should order it to provide Respondent with the Bolivars equivalent of any U.S. dollars it found that Air Canada could have acquired through the 15 AAD Requests but for the alleged breaches. This equivalent should be determined pursuant to the average Bolivar per U.S. dollar exchange rate, as published by the BCV as at the date of the Award.[782]

590. Based on the foregoing, the Tribunal should deny Claimant's claims for damages as being unsubstantiated.[783]

2.2 The Tribunal's analysis

(i) The issue

591. The issue is whether Claimant is entitled to damages as a result of Respondent's breaches of Articles VIII and Article II(2) of the BIT and if so, how those damages should be quantified (see *supra* paras 537, 543, 546 and 564).

592. To address this issue, the Tribunal will *first* consider the question of entitlement to damages (Section V.2), and *second*, if necessary, proceed to the question of quantification (Section V.2.2)(iii)).

(ii) <u>*Entitlement to damages*</u>

a. <u>The law</u>

593. The Tribunal has already found Venezuela in violation of Article VIII and Article II(2) of the BIT (see *supra* para. 534). The question is whether Claimant has suffered loss as a result of this violation that entitles it to damages.

[780] Rejoinder, para. 395.
[781] Rejoinder, para. 418.
[782] Rejoinder, para. 423.
[783] Counter-Memorial, para. 492.

594. *First*, the Tribunal should look to the BIT to determine the requirements for damages or, in other words, compensation for the breach of the BIT itself. The only reference to compensation in the BIT itself is in the context of protection against expropriation in Article VII, the violation of which the Tribunal did not find (see *supra* para. 533). There is no other reference or guidance to this effect, particularly in relation to the violation of non-expropriatory norms. Accordingly, the Tribunal resorts to the provision of applicable law, namely Article XII(7) of the BIT, which requires it to decide issues in dispute, including the question of damages, in accordance with the BIT and the "*applicable rules of international law*".

595. Although fundamentally a principle of customary international law, the Tribunal considers that the principle of "full reparation", developed in the PCIJ Judgment of *Chorzow Factory* and codified in the ILC Draft Articles, is a relevant international rule – particularly in investment arbitration – to be applied when considering questions of damages. In the *Chorzow Factory* judgment, the PCIJ held the following:

> *The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committee. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*[784]

596. In the present case, this would require the remedying of the consequences suffered by Claimant as a result of Respondent's violation of Article VIII and Article II(2) of the BIT.[785]

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[784] Exh. CL-59, *Case Concerning Factory at Chorzów (Germany v. Poland)*, Judgment 13, PCIJ, 13 September 1928 (1928 PCIJ, Series A. No. 17) ("Chorzów"), p. 47; Exh. CL-132, *Flughafen Zürich A.G. v. Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, para. 749; Exh. CL-25 (Gold Reserve), paras 675-679. See also, Exh. CL-6, International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, 53th Sess., November 2001 ("ILC Draft Articles"), Articles 31, 34 and 36. Article 31 on "Reparation" provides as follows: "*1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damages whether material or moral, caused by the internationally wrongful act of a State*". Article 34 on "Forms of reparation" provides as follows: "*Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.*" Article 36 on "Compensation" provides as follows: "*1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established*.". See also Reply, paras 244-248.

[785] Exh. Cl-4 (Vivendi), para. 8.2.7 ("*Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.*".

597. *Second*, the Tribunal considers that the burden of proving the damage is on Claimant. Indeed, as Respondent submits, Claimant must prove actual and concrete loss.[786] In this case, it means that Claimant must concretize and prove the losses it has suffered as a result of Respondent's violation of Article VIII and Article II(2) of the BIT.

598. *Third*, and importantly, the Tribunal also agrees with Respondent that it is crucial that there is a sufficient causal link between the breach and the damage caused.[787] Causation is not only a prerequisite for the claim for damages, but also has an impact on the amount or scope of the damages to be compensated. If only partial causation is proved, this may lead to a substantial reduction in damages.

599. In the present case, this requires Claimant to prove a sufficient causal link between Respondent's act, found to be in breach of Article VIII and Article II(2) of the BIT, and the damage that Claimant seeks, which must be substantiated and proven.

600. *Fourth*, there are certain cases in which the right to damages may be affected as follows:

- When there is a duty to mitigate damages on the part of the non-breaching party, and that party has failed to do so; and

- Where the non-breaching party is at fault in some way and that fault contributes to the loss suffered, known as "contributory fault".

601. These principles, although not set out in the BIT, are among the applicable rules of international law and, to the extent they are invoked in the present case, the Tribunal must take them into account.

602. In light of the above principles, the Tribunal will proceed to determine whether Claimant is entitled to its claimed losses arising from Respondent's breach of Article VIII and Article II(2) of the BIT.

b. <u>The assessment</u>

603. It is recalled that Claimant seeks, as damages for Respondent's breach of all and/or any of the provisions of the BIT, the amount in U.S. dollars which it was unable to repatriate in respect of the 15 AAD requests which it submitted to CADIVI and that were never

[786] Rejoinder, para. 322.

[787] Rejoinder, paras 321, 329; Exh. RL-112, *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 29 February 2008, para. 632 ("*Having said that, the Tribunal wishes to emphasize that compensation will only be awarded if there is sufficient causal link between the breach of the BIT and the loss sustained by the Claimant.* […]."; Exh. RL-114, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007, para. 282 ("*Any determination of damages under principles of international law require a sufficiently clear direct link. between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury. A breach may be found to exist, but determination of the existence of the injury is necessary and then a calculation of the injury measured as monetary damages. This Tribunal is required to ensure that the relief sought, i.e., damages claimed, is appropriate as a direct consequence of the wrongful act and to determine the scope of the damage, measured in an amount of money.*").

processed.[788] Respondent objects, arguing that Claimant has failed to prove its alleged damages, as it has not specified its damages for the non-expropriatory damages in a concrete and precise manner, and has not established the required causal link between the act/omission and the damages.[789] In this regard, the Tribunal considers the following.

604. *First*, the Tribunal found that:

- Although Claimant was not absolutely entitled to the approval of its AAD requests, Respondent violated Article VIII of the BIT by failing to treat these requests in accordance with the applicable foreign exchange regime, thereby depriving Claimant of the opportunity to have its right to repatriation properly considered under the law (see *supra* paras 371-398).

- In any event, Respondent has violated Article II(2) of the BIT by treating Claimant, and its AAD requests in particular, in an unfair and inequitable manner, contrary to the legitimate expectations of Claimant when it decided to invest in Venezuela, and in a non-transparent and discriminatory manner (see *supra* paras 452-471).

605. In connection with all of its BIT claims, Claimant seeks as damages the same U.S. dollar amount that it would have received had Respondent approved its 15 AAD requests. The Tribunal considers that, based on its findings above, there is no reason why Claimant's 15 AAD requests would not have been approved. Indeed, they were properly submitted in accordance with the applicable procedure and there were no deficiencies on Claimant's part (see in particular the Tribunal's consideration of the possible reasons for Respondent's inaction *supra* paras 380-396). Moreover, while it is true that, as Respondent argues, the AADs would still be subject to the available currency in U.S. dollars (see *supra* para. 382), the Tribunal does not consider that there was something that prevented Respondent from settling the amount with Claimant, as it has done with other carriers with similar AAD requests (see *supra* para. 467).

606. Were it not for Respondent's inaction (whether intentional or not), Claimant would have been able to exchange and repatriate U.S. dollars equivalent to approximately VEF 319 million (corresponding to the 15 AADs) as returns of late 2013 and early 2014 at the exchange rate set by the Government at that time or enter into a settlement in this regard. Moreover, and as a result, Claimant would most likely still operate and profit from its route in Venezuela. However, as a result of Respondent's breaches of the BIT, Claimant has lost the opportunity to earn its revenues in U.S. dollars, and furthermore, the opportunity to profit from that amount.[790] Thus, there is a sufficient nexus between Respondent's actions and the harm suffered by Claimant.

607. What must be therefore remedied, is the harm suffered by Claimant, whether assessed under the FTF violation or the FET violation.

[788] Reply, para. 250.
[789] Rejoinder, para. 321.
[790] Tr. 12.03.2020, 10:17-11:11; Rosen Presentation, p. 9; C-PHB, para. 67.

608. *Second, and with respect to mitigation*, the Tribunal does not find that Claimant failed to mitigate its claimed losses. Specifically:

- Claimant was under no obligation to challenge CADIVI's decision through administrative and judicial channels, because there was no decision in this connection, let alone a reasoned decision, to challenge. Indeed, the AAD requests remained under review on CADIVI's website well into 2018 (see *supra* paras 361, 372, 375 and 377 and 458).

- Claimant had no equal legal alternatives to acquire U.S. dollars in connection to its 15 AAD requests (see *supra* paras 394-395).

- Claimant attempted to mitigate the consequences by contacting Venezuelan officials at the time (see *supra* para. 367).

- Claimant brought its claims against Venezuela within the time limit provided for in Article XII(2) of the BIT (see *supra* para. 265).[791]

- Claimant's suspension of its operations in Venezuela in March 2014 was justified in light of the circumstances (see *supra* para. 378).

609. *Third, with respect to contributory fault*, the Tribunal reiterates its above reasoning on the challenge to CADIVI's decisions, the lack of equal alternatives, Claimant's suspension of the route, and the timely commencement of the arbitration, and holds that there is no contributory fault. With respect to Respondent's argument that Claimant failed to establish an alleged irregular increase in revenues or the fact that Claimant had disposed of its revenues in Bolivars, the Tribunal considers that this is an issue that must be taken into account in determining the amount of Claimant's compensation.

610. Having therefore found that there is a sufficient connection between Respondent's breach and Claimant's claimed loss, and that Claimant did not fail to mitigate and did not contribute to this loss, the Tribunal finds that Claimant is entitled to damages.

611. The Tribunal must now determine whether the damages claimed by Claimant are appropriate or whether it must adjust them to remedy the consequences caused by Respondent's breach of Article VIII and Article II(2) of the BIT.

(iii) *Quantification of damages*

612. It will be recalled that Claimant claims U.S.$ 50,618,073.90, an amount equal to the 15 AADs that it could have repatriated, as reviewed and verified by Claimant's expert,

[791] See also Exh. C-56, Letter from Air Canada to Vice-President of Venezuela, dated 28 March 2014; Exh. C-57, Letter from Air Canada to the Minister of Popular Power, Air and Water Transport, dated 10 July 2014; Exh. C-58, Letter from Air Canada to the Minister of Popular Power of Economy, Finance and Public Banks, dated 3 October 2014.

Mr. Rosen.[792] Respondent, on the other hand, disputes this amount, and argues that Claimant's quantification of damages is fundamentally flawed.[793]

613. The Tribunal must determine whether the amount claimed is proper compensation for the damage caused by Respondent's breaches of the FTF and FET clauses. Although there is no indication in the BIT of what is proper compensation for such breaches, the Tribunal notes that the purpose of the compensation must be to reinstate Claimant in the same financial position it would have been in had there been no BIT breach.

614. Further, Article 36 of the ILC Draft Articles states that "*compensation shall cover any financially assessable damage including loss of profits insofar as it is established*"[794]. The Tribunal will therefore proceed with these principles in mind when determining the amount of compensation, also taking into account that it has a wide margin of discretion in this respect.

615. In the present case, there is no question that absent Respondent's breaches of the BIT, Claimant would have received the U.S. dollar amount associated with the 15 AADs, either in the event that Respondent had properly applied its foreign exchange regulations or in the event that it had approached Claimant to consider the possibility of a settlement, as it has done with other airlines. Accordingly, it is necessary to determine whether, on the basis of the Parties' submissions and, in particular Respondent's defenses in this regard, Claimant's claimed U.S. dollar amount is appropriate and whether it is also affected by what, if anything, Claimant currently owns in this context.

616. *First*, the Parties disagree as to whether Claimant's expert, Mr. Rosen, properly assessed the damages in this case.[795]

617. It should be recalled at this point that Respondent's expert, Mr. Flores, was unable to provide a second expert rebuttal report to Mr. Rosen's second report (see *supra* paras 70-73) and to be present at the Hearing (see *supra* paras 100-105) because of the alleged impact of the U.S. sanctions. While Respondent consistently contended that this situation and the Tribunal's refusal to stay the proceedings on this basis hindered its right to defend itself, the Tribunal granted Respondent several opportunities in the form of extensions of time and an opportunity to find a replacement expert. Respondent did not do so, and in its PO No. 8, the Tribunal admitted Mr. Flores' report into the record, but decided that it would take into account that Mr. Flores would not corroborate its contents and would not be subject to cross-examination by Claimant (see *supra* para. 105).[796]

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[792] Memorial, paras 180-181; Reply, para. 242; Reply C-PHB, para. 100.
[793] Counter-Memorial, paras 458-460; Rejoinder, pars 343-344.
[794] Ex. CL-6 (ILC Draft Articles).
[795] Rejoinder, paras 345-357; Reply, para. 272.
[796] See also Tr. 10.03.2020, 87:35-88:18 (Claimant: "[I]*t's very important to recognize and consider how Dr Flores's opinion in this case should be treated. The Tribunal has elected to admit the report into evidence despite the fact he is not here to testify. But he has prepared only one report in support of Venezuela's first submission; he never responded to Mr Rosen's second report and the rebuttal of his first report. He is not present here to testify, ostensibly because of US regulations and restrictions, but none of which have ever been really confirmed. Most importantly,*

618. Thus, insofar as the assessment of the quantum and Respondent's criticism of Mr. Rosen's methodology and reports are concerned, the Tribunal will not ignore Mr. Flores' report – which remains in the record – but will take into account that its contents were not ratified or subject to cross-examination.

619. In this regard, the Tribunal considers Mr. Rosen's methodology, as detailed in his First Report and during his oral testimony, to be reasonable, independent and objective.

620. In particular, Mr. Rosen first reviewed the documents related to six previously approved AADs in relation to domestic ticket sales between April 2012 to September 2012, i.e., the approved AADs, to understand the documents that supported Claimant's AADs that were approved by Respondent and the documents related to the transfer of funds upon approval.[797] Mr. Rosen then reviewed the following documents in relation to the 15 AADs: (i) the 15 AADs for the period from October 2012 to December 2013; (ii) Claimant's Ticket Sales Sub-Ledger of ticket sales in the country in bolivars in relation to the 15 AADs; (iii) Claimant's monthly income statements evidencing the amounts of revenues and specific costs in Venezuela that Claimant submitted in the AADs; and (iv) Claimant's monthly VAT tax returns.[798]

621. On the basis of these documents, Mr. Rosen stated that he verified the amounts of the approved AADs by: (i) reviewing the application forms to check that the revenues, costs and VAT payments listed in each equaled to the net amount to be repatriated; (ii) verifying that the total ticket sales listed in the application forms matched with the Ticket Sales Sub-Ledger for each month; (iii) comparing the VAT credits and debits listed in each Application Form to the VAT Tax Returns; (iv) reviewing the monthly income statements to verify that the specific revenue line items and cost line items included in the application forms matched with those recorded in the monthly income statements; (v) verifying that the BS/U.S. dollar exchange rate used in the application forms matched with the official rated being used in Venezuela at the time; (vi) reviewing the wire transfer receipts showing the transfers of U.S. dollars form Banco Mercantil to Claimant's bank account out of country (Citibank, New York) and comparing the amounts transferred to the amounts recorded in the application forms; and (vii) reconciling any differences between the amounts stated in the application forms and the information stated in the VAT Tax Returns, Income Statement, Wire Transfer Receipts and Ticket Sales Sub-Ledger.[799] This review and verification along with the supporting documents established his

Venezuela has not replaced him. They had a year to replace him, they had a year to come before you with an expert who could testify, and could explain and defend his opinion, and they chose not to. Air Canada submits that in these circumstances, while the report has certainly been admitted by the Tribunal, it should be given no weight. And that's particularly the case given Mr Rosen's detailed and reasoned rebuttal of that report in his second report."); Tr. 10.03.2020, 87:35-88:18 (Respondent: "*And this is the main impacting factor and the main reason why we believe Air Canada has not engaged into a proper damages assessment, which we had to conduct ourselves, facing the impossibility to have a second report by Dr Flores or any other expert in this case due to the political situation that we are all aware of. That's the final parameter.*").

[797] FTI Report, paras 3.2-3.3.

[798] FTI Report, para. 3.4.

[799] FTI Report, para. 3.5.

understanding on how the unprocessed AADs would have been accounted for and supports his verification of the amounts that Claimant has not been able to repatriate.[800]

622. The Tribunal finds the foregoing analysis employed by Mr. Rosen to be appropriate to this case. In particular, it does not see, and neither Respondent nor Mr. Flores offer any explanation as to which or how any other economic analysis would be more appropriate in this case. More specifically, it does not find that Claimant has relied on any improper or non-contemporaneous documents, as Respondent contends. Nor does it see how any alleged inconsistencies with other documents would render Mr. Rosen's approach inappropriate.[801]

623. *Second*, and more specifically, the Tribunal considers the following in connection with Respondent's argument that Claimant's damages are overstated in any event and that certain factors should reduce those damages by more than 50% to U.S.$ 21,334,156.51.[802]

Concerning Claimant's higher revenues in 2013

624. Respondent argues that the documents on which Mr. Rosen relied contain various indicators that Claimant may have inflated the prices of its ticket sold in Bolivars in Venezuela. If confirmed, this would necessarily lead to the conclusion that the amounts Claimant sought to repatriate through the 15 AAD Requests, or any amounts repatriated in the past, are overstated. According to Respondent, Mr. Rosen does not discuss those obvious indicators.[803] Claimant disputes this by arguing that it generated higher revenue in 2013 compared to previous years due to (i) a large increase in the number of tickets sold and (ii) a relatively smaller increase in the U.S. dollar price of its tickets.[804] According to Claimant, the revenues reported by Air Canada in its AADs can be reconciled to the amounts reported in its 2013 tax return.[805]

625. The Tribunal agrees with Claimant. Indeed, as Mr. Rosen explained, the increased ticket sales are independently confirmed by IATA's records. The increased revenue reflects more ticket purchases at higher prices.[806] Moreover, comparing the last 15 months of operations to the previous eight years cannot be an appropriate comparison.[807]

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[800] FTI Report, paras 3.10-3.11.
[801] Counter-Memorial, paras 474-481; Rejoinder, paras 345-356.
[802] Rejoinder, para. 359.
[803] Counter-Memorial, paras 480-481.
[804] FTI Report II, paras 3.35-3.54; Tr. 12.03.2020, 19:8-22:24, 49:11-50:22; C-PHB, para. 88.
[805] Reply, para. 276; FTI Report II, paras 3.55-3.64; Tr. 12.03.2020, 22:25-23:23 C-PHB, para. 88.
[806] Tr. 12.03.2020, 19:8-22:24. See also C-PHB, paras 89-90.
[807] Tr. 11.03.2020, 54:2-55:8 ("*Originally when the route began, in 2004, the load factor on the flight was low because it was a brand new route. And after a two-year period of operating three frequencies per week on the Toronto-Caracas route, we changed the route to operate through Port of Spain Trinidad. So the flight operated Toronto-Port of Spain Caracas-Toronto. Effectively we split the capacity of the route in half with Trinidad, with half of the capacity of the aircraft being sold in Trinidad, and leaving the other half to be sold in Venezuela. So that resulted in obviously, a significant reduction in capacity Subsequent to that, we eliminated Trinidad and began operating the route directly to Caracas. And after that date, as the route performed better, we increased frequencies from the three per week up to four/five per week. And the market was growing, and so we were having higher load factors and at the same time*

626. Accordingly, Claimant's revenues between October 2012 and December 2013 were properly determined and included in Claimant's net returns for purposes of the 15 AADs.[808]

Concerning the inclusion of revenues from the SOTI ticket sales to calculate Claimant's damages

627. Respondent submits that Claimant had to limit the sale and issuing of tickets sold outside Venezuela for trips originating from Venezuela (i.e., SOTI ticket sales) to a maximum of 10% of its general sales volume. Mr. Flores and Mr. Rosen concur that the 15 AAD Requests include requests for VEF 7,787,081.79 in excess of that limit. According to Respondent, therefore, this amount must be deducted from Claimant's alleged damages.[809] Claimant on the other hand contends that its revenues earned from SOTI ticket sales form part of its "returns" in relation to its investments as defined in the BIT. The fact that Respondent has attempted to limit these amounts through domestic practices and regulations does not limit the rights of Claimant under the BIT.[810]

628. It is true that revenues from the sale of SOTI tickets could very well be part of the definition of "returns" of the BIT, and in particular the returns related to investments as defined in Articles VIII and II(2), which Respondent has violated (see *supra* 355, 356, 365, 444 and 471). This being said, the Tribunal recalls it specifically held Respondent liable for failing to deal with Claimant's 15 AADs in accordance with the relevant foreign exchange regime at the time (see *supra* paras 374-396). The Tribunal also considered that any claim to damages should reinstate Claimant in a financial situation it would have been in had there been no BIT breach (see *supra* para. 613). If, according to the relevant foreign exchange regime, revenues from the sale of SOTI tickets were subject to a limit, that limit would have applied regardless of the ultimate BIT breach. Accordingly, the Tribunal finds that these revenues were not properly included in the amounts that Claimant was entitled to exchange and repatriate and should therefore be deducted from Claimant's total claim.[811]

629. Consequently, of the VEF 318,893,865.58 totaling Claimant's AADs[812], VEF 7,787,081.79 were unduly included. The net amount is, thus, VEF 311,106,783.79.

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higher yielding fares. [F]*rom a period from roughly 2010, approximately, going forward, the load factors increased significantly on this route*."). See also C-PHB, para. 91.

[808] C-PHB, para. 92.

[809] Rejoinder, paras 360-361.

[810] Reply, paras 47, 273; C-PHB, para. 75.

[811] Mr. Rosen admits that the inclusion of this amount is a legal issue to be determined by the Tribunal and agrees with the calculated amount by Dr. Flores, should the Tribunal decide that this element should be excluded from Mr. Rosen's calculation: "*2.4 I disagree with Dr. Flores that my inclusion of SOTI ticket sales in the Claimant's net revenue is an overstatement of the funds to be repatriated since this represents a legal issue to be determined by the Tribunal. 2.5 If the proceeds from SOTI ticket sales in excess of CADIVI's limit were to be excluded from my calculation, it would reduce Air Canada's claim by bs. 7,787,082, or US $ 1,236,045 (using an exchange rate of Bs. 6.3 per US $.*" See FTI Report II, paras 2.4-2.5.

[812] Rosen Presentation, p. 8.

Concerning interest on Claimant's revenue to calculate Claimant's damages

630. Respondent argues that, in a "but for" scenario, Claimant would not have been authorized to transfer interest revenue (at an amount of VEF 739,672.00) outside of Venezuela through AAD requests submitted under Providencia No. 23 and Providencia No. 234, as proven also by the approved AADs analyzed by Mr. Rosen. This is because, under this regime, Claimant was only authorized to submit requests for the acquisition of foreign currency equivalent to the net proceeds of its ticket sales, i.e., the difference between Claimant's proceeds from ticket sales and the costs due by Claimant in Venezuela.[813] Claimant contends that interest on revenue that qualifies as "returns" related to investments falls squarely within Article I(i) of the BIT, which expressly defines "returns" as "interest". As such, the inclusion of such interest in Mr. Rosen's calculation was appropriate.[814]

631. Similar to the considerations above in relation to the sale of SOTI tickets (see *supra* para. 627), had there been no breach, Claimant would have received the relevant U.S. dollar amount in relation to its 15 AAD requests under the relevant foreign exchange regime. The fact that "returns" under Article I(i) includes interest does not alter this conclusion. Indeed, as Mr. Blanco testified, interest was not included in the remittable items allowed under Providencia No. 23 or Providencia No. 124.[815] Accordingly, the inclusion of interest revenue in the amount claimed should be deducted from Claimant's claim.

632. Interest revenue undisputedly amounts to VEF 739,672[816]. This figure needs to be deducted from the amount in bolivars that Claimant was entitled to exchange: VEF 311,106,783.79 – VEF 739,672 is VEF 310,367,111.79.

Concerning the application of the 6.3 bolivar per U.S. dollar exchange rate to calculate Claimant's damages

633. Respondent notes the BIT's reference to a rate "*applicable on the date of the transfer*" in order to determine how many U.S. dollars Claimant would have been authorized to

[813] Rejoinder, paras 369-371.
[814] C-PHB, para. 76.
[815] Blanco WS, para. 27; R-PHB, para. 101. Indeed Mr. Rosen states as follows: "3.7 […] [T]*he Income Statements show higher amounts than the Application Forms. However, it is my understanding that most of the differences arise form the fact that the Income Statements include the interest revenue before taxes, while the Application Forms reflect the after-tax amount. Other than this small difference, the amounts in the Approved AADs Supporting Documents matched with the amounts stated in the Application Forms. 3.8 It is my understanding that Air Canada included interest revenue in the Application Forms for the purpose of matching these amounts with the submitted supported documents. While I understand that Venezuela did not accept the repatriation of interest revenue at the time, I have been advised by Counsel that Air Canada's claim is based on Article VIII of the BIT which guarantees the unrestricted transfer of investments and returns. As such I have been requested by Counsel to assume that for the Unprocessed AADs, the amounts to be repatriated would include interest revenue.*". See FTI Report, paras 3.7-3.8. See also FTI Report II, paras 2.8-2.9 ("2.8 I disagree with Dr. Flores that my inclusion of after-tax interest revenue in the Claimant's net revenue is an overstatement of the funds to be repatriated since this represents a legal issue to be determined by the Tribunal. 2.9 If after-tax interest revenue were to be excluded from my calculation, it would reduce Air Canada's claim by Bs. 739,672, or US $117,408 (using an exchange rate of Bs. 6.3 per US $1)."
[816] Rejoinder, para. 366.

acquire in the "but for" scenario.[817] According to Respondent, pursuant to Article 60 of the LOPA, an AAD request was to be considered as having been rejected after four months. Considering these deadlines for Claimant's 15 AAD requests and factoring in the applicable rate of 11.36 Bolivars per U.S. dollar from 24 January 2014 (as agreed by Mr. Rosen and Mr. Flores), the amount in U.S. dollars that Claimant would have been able to acquire in the "but for" scenario with VEF 310,367,111.82 corresponds to U.S.$ 27,321,048.51.[818] Alternatively, Respondent argues that if the Tribunal were to adopt the rate applicable at the date of submission to CADIVI, Claimant is still not entitled to the amount it claims, as the AAD request for December 2013 was submitted by Claimant to its exchange agent on 30 January 2014, i.e., after the implementation of Providencia No. 124, subjecting it therefore to the rate of 11.36 bolivars per U.S. dollar. This would mean that Claimant would be entitled to acquired U.S.$ 47,664,214.53.[819]

634. Claimant disagrees with Respondent's position arguing first that there is no basis for applying the LOPA's 4-month administrative deadline to its AADs. In specific, Article VIII(1) and (2) of the BIT required Venezuela to guarantee the unrestricted transfer "without delay" and four months does not constitute "without delay". Moreover, CADIVI never actually approved Claimant's AADs or transferred the U.S. dollars making the use of the date of submission to CADIVI as a relevant date instead. Further, Respondent prevented Claimant from submitting its AAD requests for almost ten months due to the change in practice in relation to the IVSS certificates. In addition, the bolivar returns that Claimant sought to exchange and repatriate were generated using the 6.3 bolivar exchange rate. Lastly, Claimant submits that Respondent discriminated against Claimant when it entered into at least 10 agreements with other international airlines in May and October 2014 and approved their pre-2014 returns at the more favorable 6.3 bolivar rate. Accordingly, Claimant contends that Mr. Rosen's application of an exchange rate of 6.3 bolivars per U.S. dollar to calculate the U.S. dollar amount that Claimant should have received for the VEF 319 million it intended to exchange through its 15 AADs is appropriate.[820]

635. The Tribunal recalls the following:

- Claimant's AAD requests were subject to the system established by Respondent for the exchange and repatriation of locally generated funds and, in particular, to the CADIVI process (see *supra* paras 368 and 372). This meant that the relevant exchange rate was that established by that process and not any other purported alternative, let alone that of a "parallel" or "unregulated" market (see *supra* paras 368 and 394-396).[821]

[817] Counter-Memorial, paras 13, 18; Rejoinder, para. 376; R-PHB, para. 147.
[818] Rejoinder, para. 381; Econ One Report, para. 29.
[819] Rejoinder, paras 384-385.
[820] C-PHB, paras 77-84.
[821] See also Econ One Report, para. 26: "*Venezuela has a regulated currency exchange regime, meaning that currency cannot be freely exchanged. Rather, it must be exchanged according to the procedures set forth by Venezuela's currency authorities. The Venezuelan bolivar has been subject to a fixed exchange regime since 2003. CADIVI*

- LOPA did not define the time frame within which an AAD request had to be processed (see *supra* paras 361, 372, 375 and 377).

- CADIVI never made a decision to accept, suspend or reject Claimant's 15 AAD requests (see *supra* para. 377).

- Following Claimant's suspension of its route, Respondent settled other airlines AAD requests at the rate 6.3 bolivar per U.S. dollar (see *supra* paras 375, 451 and 465).

636. In view of the foregoing, the Tribunal considers that the application of a rate at the date of transfer, as required by the BIT itself, is inappropriate. There is no such date in the present case. To place Claimant in a financial position it would have been in the absence of Respondent's breach, it is more appropriate to use the exchange rate applied when Respondent settled other airlines' AADs for their 2012 and 2013 returns in bolivars, i.e., the 6.3 bolivars per U.S. dollar, which should also be the exchange rate applicable to the 15 AADs (covering the period between October 2012 and December 2013 and submitted to CADIVI between 20 September 2013 and 22 January 2014).[822] The fact that the last of Claimant's 15 AAD requests was filed with the exchange agent once Providencia No. 124 (and the higher exchange rate) was in force, is therefore not relevant to the Tribunal's consideration on this point: the relevant issue here is that other airlines saw their December 2013 returns converted at the lower rate and, thus, Claimant should be entitled to the same treatment.

637. In these circumstances, the Tribunal considers Mr. Rosen's use of the exchange rate of 6.3 bolivars per U.S. dollars to calculate Claimant's damages to be appropriate.

638. The VEF amount mentioned in the 15 AADs, net of SOTI tickets and interest revenue is VEF 310,367,111.79. Once the 6.3 bolivars per U.S. dollars is applied, it results in U.S.$ 49,264,621.

Concerning the equivalent bolivar amount kept by Claimant

639. Respondent argues that, in the "but for" scenario, Claimant would have had to provide Bolivars in exchange for the U.S. dollars. Therefore, to avoid overcompensating Claimant, the Tribunal should direct Claimant to provide Respondent with the bolivars equivalent of any damages awarded to it with respect to the 15 AAD Requests as per the exchange rate applicable in Venezuela as of the date of the Award, i.e., as per the date of the transfer in accordance with Article VIII of the BIT (not the dates at which a transfer would have occurred for each AAD request in the "but for" which would lead to overcompensation).[823]

administered foreign currency exchange in accordance with the fixed exchange regime determined by the Central Bank of Venezuela."

[822] Exhs C-75 to C-89 (corresponding to the 15 AAD requests).

[823] Rejoinder, paras 413-418; R-PHB, paras 148-150.

640. Claimant submits that Respondent's claim in this regard is "*illogical and specious*". If the Tribunal were to follow Respondent's logic and credit Respondent the equivalent in bolivars of any U.S. dollar awarded, then Claimant would be ordered to provide Respondent more than VEF 2.4 trillion, as calculated issuing the official exchange rate on 30 December 2019 (almost 7,700 times what Respondent would have received in early 2014) contrary to the purpose of the but-for scenario and the *Chorzow* principle. But for Respondent's unlawful acts in early 2014, Claimant would have received U.S.$ 50.6 million in exchange for VEF 319 million. Thus, according to Claimant, if the Tribunal awards Claimant U.S.$ 50.6 million, then it should offset the present-day U.S. dollar value of VEF 319 million against that amount, effectively providing Respondent with the VEF 319 million that it would have received in early 2014. This means that the Tribunal would reduce Claimant's compensation by a few thousand dollars, depending on the exchange rate the Tribunal applies.[824]

641. The Tribunal recalls that the purpose of compensation is to remedy the consequences suffered by Claimant as a result of Respondent's violation of Article VIII and Article II(2) of the BIT (see *supra* para. 594) and to place Claimant in the situation it would have been in the absence of such BIT breaches (see *supra* para. 611). In this regard, the Tribunal enjoys a wide margin of discretion (see *supra* para. 614).

642. Both Parties seem to accept that Claimant needs to provide Respondent with an amount in bolivars equivalent to the U.S. dollars Claimant was entitled to receive. However:

- Claimant recalls it was owed U.S.$ 50.6 million in exchange for VEF 319 million; thus, Claimant should now provide Respondent with VEF 319 million at current exchange rates, which would be equivalent to a few thousand U.S. dollars.

- Respondent, on the other hand, disregards that the historically owed U.S.$ 50.6 million were the equivalent of VEF 319 million and focuses on the amount in U.S. dollars it will be ordered to pay in this Award; it is this amount which needs to be converted into VEF as of the date of the Award.

643. The Tribunal finds that both Parties are partially correct and partially wrong: Claimant is correct in fixing at VEF 319 million the amount that needs to be deducted from the compensation owed to it; it would make no sense to award Respondent the current equivalent of U.S.$ 50.6 million because in the absence of a BIT breach, Claimant would have transferred U.S.$ 50.6 million in exchange for VEF 319 million in 2014. For the same reasons, Claimant cannot simply convert VEF 319 million at a current exchange rate, because that would unduly harm Respondent for the devaluation of the VEF, when in fact it had the right to obtain VEF 319 million at their value in March 2014.

644. In deciding the equivalent U.S. dollar amount of VEF 319 million in March 2014, the Tribunal decides to resort to Mr. Rosen's expert report. Mr. Rosen avers that in March 2014 two official supplementary foreign currency exchange rates existed:[825] SICAD 1

[824] Reply C-PHB, para. 107.
[825] FTI Report II, p. 20.

and SICAD 2. The first provided for an exchange rate of 10.9 and the second one of 51.[826] Respondent has not offered an alternative exchange rate, in fact, it agrees "*under strict reserves*" with converted amounts applying the SICAD 1 exchange rate.[827] The Tribunal will, thus, apply the 10.9 exchange rate as it appears to represent a common ground among the Parties.

645. The total of VEF shown in the AADs minus the amount for SOTI tickets and interest revenue, i.e., VEF 310,367,111.79 (see *supra* para. 632), converted into U.S. dollars at an exchange rate of 10.9, results in U.S.$ 28,474,047.

646. The above amount needs to be set-off against U.S.$ 49,264,620.92 that Claimant was entitled to freely transfer. The resulting net figure is, thus, U.S.**$ 20,790,574**.

Concerning the spending of the bolivars post suspension of Claimant's route

647. Respondent avers that Claimant actually kept VEF 319,535,316 in his Venezuelan bank accounts and freely spent thereof VEF 305,464,316. This amount equals, as per Mr. Rosen's quantifications, U.S.$ 5,986,892 – a figure which Respondent, albeit under strict reserves, accepts[828] (see *supra* para. 644). According to Respondent, this amount should be deducted from any quantification of Claimant's alleged damages.[829]

648. Claimant submits that none of the payments it made in respect to post-suspension expenses bore any relation to the amounts that it requested to exchange via its 15 AAD requests and that it claims as damages in this arbitration. Any and all expenses incurred in relation to those 15 AAD requests were incurred and paid during the month for which the relevant AAD request was issued, i.e., well before Claimant suspended operations. Any expenses incurred and paid using its bolivars following its suspension of operations are not properly deductible from Claimant's damages.[830]

649. Respondent counters that the bolivars spent by Claimant were used to pay taxes[831], the subscription to ALAV and other memberships[832], BASSA's services[833], accountant's services[834], the reimbursement of travel expenses of a certain Mr. Villegas[835], etc.; none of these expenditures would bear any link to the alleged breaches.[836]

650. The Tribunal has already determined that, absent the breach of the BIT, Claimant's damages are its entitlement of the U.S. dollar amount at the favorable exchange rate minus the amount that Respondent was entitled to receive in Bolivars in March 2014. Whether

[826] FTI Report II, p. 19.
[827] Rejoinder, para. 394.
[828] Rejoinder, para. 394.
[829] Rejoinder, paras 389-395.
[830] C-PHB, paras 207-212; Reply C-PHB, paras 104-105.
[831] Rejoinder, para. 402.
[832] Rejoinder, para. 403.
[833] Rejoinder, para. 404.
[834] Rejoinder, para. 405.
[835] Rejoinder, para. 406.
[836] Rejoinder, para. 406.

Claimant spent the latter amount and for which purpose is therefore no longer relevant to the calculation of Claimant's damages.[837]

2.3 Conclusion

651. In light of the foregoing, the net amount which results is U.S.$ 20,790,574. The Tribunal finds that Claimant shall be awarded U.S.**$ 20,790,574**.

3. Interest

3.1 The Parties' positions

(i) Claimant

652. Claimant requests that the Tribunal award pre- and post-award interest at the highest lawful rate until the date Respondent pays the Award in full. Interest is an integral component of full reparation under customary international law[838] as set forth in Article 38 of the ILC Draft Articles and it is not awarded in addition to reparation.[839] Here, full reparation will only be achieved if Claimant is awarded compound interest, running from three months after Claimant submitted its AADs, at either of the rates proposed by Claimant and its expert.[840]

653. *First, concerning the timing of pre-award interest:* Interest should be awarded and run from three months after Claimant submitted the AADs. Article VIII(2) of the BIT requires that transfers "*be effected without delay*". Three months is a reasonable time limit. Respondent does not dispute that a state's duty to pay interest arises immediately after its unlawful act or omission causes harm. Indeed, Respondent had an existing debt to Claimant under the applicable legal framework, not simply "*requests for acquisition of foreign currency*".[841]

654. Further, Respondent's argument for the date of the Request for Arbitration being an alternative start date for the accrual of pre-award interest has no merit.[842]

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[837] Indeed as Claimant submits: "*Putting aside the fact that the parties disagree on how that credit should be calculated* […]*, it cannot be the case that Venezuela is entitled to a credit and to an additional deduction of the U.S. dollar value of the expenditures (exceptional or otherwise) that Air Canada paid after suspending operations using the bolivars on its account. That would plainly amount to double-dipping, because it would effectively deduct the VEF 319 million from Air Canada's damages twice. This highlights once again why Air Canada's post-suspension use of the bolivars in its account is irrelevant, both for the purposes of determining Venezuela's liability and for determining the quantum of Air Canada's damages.*" See Reply C-PHB, para. 106.
[838] Memorial, paras 182-184.
[839] Reply, paras 277-278.
[840] Reply, para. 279 referring to Exh. RL-116 ("ILC Draft Articles Commentary") Article 38.
[841] Reply, paras 280-282 quoting Exh. C-1 (BIT), Article VIII(2) and Counter-Memorial, para. 502.
[842] Reply, paras 283-284 quoting Exh. RL-120, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 ("Vestey"), para. 438.

655. Moreover, Respondent's request for a 90-day grace period because Claimant has supposedly delayed in bringing its claims to arbitration should be denied.[843]

656. *Second, concerning the applicable interest rate:* The appropriate rate of interest is a matter within the discretion of the Tribunal, subject to the requirement that damages should provide full compensation to the injured claimant. To guide the Tribunal, Mr. Rosen identified two suitable interest rates that the Tribunal might apply.[844]

657. The first alternative is the rate of return that Claimant would have collected or the interest it would have avoided, if it would have used the funds it could not repatriate to pay down existing debt or borrow less debt. In 2013, Claimant completed private offerings of senior secured notes and a senior secured credit facility at a weighted average interest rate of 7.12%.[845]

658. The second alternative would be for the Tribunal to apply Respondent's cost of borrowing which is 11.75%. By failing to authorize Claimant's AADs, Venezuela was able to have free access to approximately U.S.$ 50 million and use those funds for other purposes. To calculate Respondent's cost of borrowing, Mr. Rosen reviewed sovereign debt issuances from Venezuela during the relevant period.[846]

659. Claimant effectively has been forced to lend money to Respondent for almost five years. The market views this as a higher risk "transaction" and applying Respondent's borrowing rate or Claimant's cost of debt to Claimant's damages would recognize the involuntary nature of the transaction in which Respondent forced Claimant and would make Claimant whole. It is indeed common for tribunals to apply interest rates that account for a risk premium.[847]

660. An interest rate based on U.S. Treasury bill rate does not qualify as a "*normal commercial rate*", provided for by the BIT, because commercial parties cannot borrow funds at the Treasury bill rate, which is only available to the U.S. government.[848]

661. Based on the foregoing and Mr. Rosen's analysis, the Tribunal should employ a pre-award interest rate of 7.12% or 11.75%. As a result, Claimant's damages to date would total U.S.$ 67,545,647 or U.S.$ 126,096,700.[849]

[843] Reply, para. 285.
[844] Memorial, para. 185.
[845] Memorial, para. 186.
[846] Memorial, paras 187-188.
[847] Reply, paras 286-287.
[848] Reply, para. 288 referring to FTI Report II, para. 3.68.
[849] Memorial, para. 189 referring to FTI Report, Figure 9.

662. Finally, for both pre-award and post-award interest, the opportunity cost for delay in payment is the same. Consequently, Claimant requests post-award interest at one of the above rates until the date of Respondent's full payment of the Tribunal's award.[850]

663. *Third, concerning compound interest:* Claimant further requests that any award of interest granted by this Tribunal be compounded. The recent practice of international investment tribunals confirms that awarding compound interest is the most widely accepted and appropriate method of making a claimant whole.[851]

664. Awarding Claimant compound interest is also appropriate because it prevents Respondent from unjustly enriching itself from its wrongdoing. Respondent's withholding of Claimant's revenues essentially constitutes a coerced loan from which Respondent has been unjustly enriched.[852]

665. The role of interest is to compensate a claimant fully for the delay between the date of harm suffered and the award of damages. In this regard, interest awarded on a compound basis more accurately reflects what the claimant would have been able to "*earn on the sums owed if they had been paid in a timely manner*".[853]

666. In addition, Claimant is not required to prove that it has incurred compound interest as damages. It is sufficient to assume that Claimant could have earned compound interest on the money that Respondent has refused to pay.[854]

667. Further, it is irrelevant whether compound interest is permitted under Venezuelan law. Claimant basis its claim for interest on the BIT and customary law. Indeed, tribunals in at least two cases issued awards in 2016 that rejected Respondent's argument that compound interest should not be awarded because it is prohibited under Venezuelan law.[855]

(ii) Respondent

668. Respondent submits that Claimant's claims for interest are ill-founded. Claimant fails to make reference to the commentary to the ILC Articles, which clarifies that interest is not an autonomous form of reparation but is rather subsidiary to the principal "sum" and only necessary when needed to make reparation "full". Claimant does not point out in any concrete or particularized way to the circumstances of the case that would support the

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[850] Memorial, para. 190; Reply, para. 299 quoting Exh. CL-133, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016 ("Saint-Gobain"), para. 886.
[851] Memorial, paras 191-196.
[852] Memorial, para. 197.
[853] Memorial, para. 198 quoting Exh. CL-55, J. Y. Gotanda, *A Study of Interest*, 83 VIillanova University School of Law Working Paper Series 4 (2007), p. 31. See also Memorial, paras 199-201.
[854] Reply, paras 296-298 quoting Exh. CL-68, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 12, Exh. CL-68 (Wena Hotels), para. 129, and Exh. RL-120 (Vestey), para. 447.
[855] Reply, paras 290-295 referring to and quoting Exh. CL-133 (Saint-Gobain), para. 890 and Exh. RL-120 (Vestey), para. 447.

interest start date and rate it claims, let alone whether such interest should be simple of compounded. There is likewise no discussion from Claimant on why procedurally it should be entitled to any post-award interest.[856]

669. *First*, Claimant applies an inappropriate start date for interest (*dies a quo*).

670. In the instant case, any obligation to make any payment to Claimant would only arise with a potential unfavorable award to Respondent. Indeed, today, there is no debt to Claimant, only requests for the acquisition of foreign currency, which were subject to the availability of such foreign currency. Were the Tribunal to determine that there is any compensation for damages due, it would need to engage in the exercise of determining the quantum of such compensation taking into account the particularities of AAD requests under Venezuelan law, deducing the amounts requested but not susceptible of being repatriated and especially it would have to direct Claimant to provide the necessary Bolivars to acquire the U.S. dollars it wants to buy (after establishing the appropriate exchange rate).[857]

671. Indeed, Claimant was never dispossessed of its funds. The *dies a quo* cannot correspond to the dates at which Claimant may have allegedly started to suffer a damage and cannot therefore serve as a basis for any interest calculation. In the absence of an alternative date proposed by Claimant, interest should not run earlier than the date of the Award.[858]

672. If the Tribunal were to follow Claimant's position, it should take into consideration the fact that Claimant retained control over its bolivars and freely spent them, and consider that the amount of U.S.$ 5,986,892 was available to it as from the first date on which the Republic allegedly defaulted and somehow balanced the consequences of the alleged breaches that Claimant claims to have suffered.[859]

673. In the alternative, the start date for the accrual of interest should be no earlier than the date of the Claimant's Request for Arbitration, i.e., 16 December 2016.[860]

674. In any event, Respondent should be provided with an opportunity to make any required payment and therefore that a 90-day grace period be applied, at the very least regarding the application of post-award interest.[861]

675. *Second*, Claimant suggests inappropriate interest rates.

676. Claimant's proposed interest rates, namely Claimant's cost of debt and Respondent's borrowing rate, lead to overcompensation.[862]

[856] Counter-Memorial, paras 493-499; Rejoinder, para. 425.
[857] Counter-Memorial, paras 500-502; Rejoinder, paras 426-428.
[858] Rejoinder, paras 429-430.
[859] Rejoinder, paras 431-432 referring to FTI Report II, para. 3.23 Figure 8.
[860] Counter-Memorial, para. 503; Rejoinder, para. 427.
[861] Counter-Memorial, para. 504.
[862] Counter-Memorial, para. 515.

677. Claimant's proposition of an interest rate with a premium risk is inapposite. Neither Claimant nor Mr. Rosen provided evidence that Claimant was forced to issue loans or senior notes.[863] The use of the borrowing rates of Claimant would only be appropriate if Claimant had been forced to take out a loan to bridge the period from the date of the breach until the date of award. A review by Dr. Flores of Claimant's 2013 Annual Report does not indicate that this was the case. Dr. Flores draws the same conclusion from the analysis of Claimant's 2014 through 2017 Annual Reports which show that the company's liquidity target was never breached. According to Dr. Flores, had Claimant repatriated the funds, they would not have been used to pay off an existing debt.[864]

678. Claimant's proposition for a rate of 11.75% based on sovereign debts issuance from Venezuela during the relevant period is likewise inapposite.[865] Claimant's "unjust enrichment" argument in support of choosing an interest rate that corresponds to Respondent's borrowing costs defies economic logic.[866] Indeed, full compensation aims to compensating aggrieved parties and any assessment of damages must therefore be performed form the perspective of those parties rather than form the perspective of the party having allegedly caused the damage. Thus, the Tribunal should not consider Respondent's cost of borrowing. Even more so as in the "but for" scenario, Claimant would have transferred the U.S. dollars equivalent of its Bolivars outside of the Republic and would not have reinvested them in the Republic.[867]

679. Respondent refers to Article XII(9) of the BIT and submits that only a short-term risk free interest rate should be considered as being the "applicable interest" rate in the instant case and in order to make Claimant whole and avoid overcompensation. This is in line with investment arbitration precedent.[868]

680. Thus, the Tribunal should apply the yield of six-month or one-year U.S. Treasury bills. Concerning Claimant's reliance on Article VII of the BIT's reference to "normal commercial rate" in relation to lawful expropriation, and its argument that the U.S. Treasury bill rate is not a commercial rate because it would only be available to the U.S. government, Respondent points to the fact that Claimant's case rests on an alleged unlawful expropriation and alleged breaches of the BIT's FET and FTF provisions. These claims fall outside the scope of Article VII. Thus, the standard under Article VII is irrelevant.[869]

681. In any event, the Treasury bill rate is undoubtedly a "commercial rate".[870]

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[863] Counter-Memorial, paras 506-508.
[864] Counter-Memorial, para. 511; Rejoinder, para. 443.
[865] Counter-Memorial, para. 512; Rejoinder, para. 444.
[866] Counter-Memorial, paras 513-514.
[867] Rejoinder, paras 445-448 referring to and quoting Exh. CL-134, *Tidewater Investment SRL, et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 205 and Exh. RL-120 (Vestey), para. 440.
[868] Counter-Memorial, paras 516-518; Rejoinder, paras 434-435 quoting Exh. RL-120 (Vestey), para. 440.
[869] Rejoinder, paras 436-438.
[870] Rejoinder, para. 439.

682. Thus, a short-term risk-free rate interest using the six-month or one-year U.S. Treasury Bill rates should be applied.[871]

683. If the Tribunal were to apply a rate with a premium, then it should apply a rate of 1.39% corresponding to interest related to cash, cash equivalent and short-term investment earned by Claimant as per its 2013 Annual Reports.[872]

684. In a further alternative, if the Tribunal were to consider that neither of the above rates is appropriate in the instance case, the Tribunal should use a rate corresponding to the average six-month U.S. dollar London Interbank Offered Rate (LIBOR) plus 1% or 2%. Even though either of these two rates will undoubtedly lead to overcompensation, arbitral tribunals frequently apply them as "*normal commercial rates*", "*reasonable rates*" or the "*widely recognized conservative measure*" in the absence of clear evidence of the claimant's cost of borrowing.[873]

685. *Third*, Claimant inappropriately claims compound interest.[874]

686. Specifically, the granting of compound interest is not appropriate since, under Venezuelan law, the granting of compound interest requires an express agreement between the parties, and there are no contentions that there has been one in the instant case. Indeed, Venezuelan law applies to the determination of the type of interest. Arbitral tribunals have found host State provisions relevant when international law is silent on the fixation of interest rate.[875]

687. Claimant's claim is anyhow incompatible with the BIT. Article XII(9) of the BIT refers to "applicable interest" and nothing indicates that the Venezuela and Canada have consented that "compound interest" could be applied and qualify as "applicable interest" In 1996, the year of signature of the BIT, both the laws of Venezuela and Canada prohibited compound interest. Pursuant to Article 530 of the Venezuelan Commercial Code, compound interest is indeed prohibited unless agreed otherwise. Moreover, until recently, compound interest was only available under Canadian law where courts exercised their equitable jurisdiction. Thus, Article XII of the BIT does not grant jurisdiction to the Tribunal to award compound interest.[876]

688. In any event, in order for compound interest to be awarded, it must also be proven by the Claimant as having been actually suffered as damages.[877] Unless Claimant proves that in the "but for" scenario it would have earned monthly compounded interest or that it bore compound interest because of the alleged breaches, Claimant is not entitled to compensation. Such evidence is all the more necessary because interest may be compounded on so many distinct ways that without concrete evidence of the situation Air

[871] Counter-Memorial, paras 519, 530.; Rejoinder, para. 440.
[872] Counter-Memorial, para. 515; Rejoinder, paras 441-442, 449, 451.
[873] Rejoinder, paras 450-451 quoting and referring to decisions of various tribunals in fns 55 and 556.
[874] Counter-Memorial, para. 520.
[875] Counter-Memorial, paras 521-526.
[876] Rejoinder, paras 456-457 referring to Exh. RL-165, Commercial Code (Código de Comercio), published in Extraordinary Official Gazette No. 475, dated 21 December 1955, Article 530.
[877] Counter-Memorial, para. 527.

Canada would have faced in the "but for" scenario, any assessment by the Tribunal of Claimant's alleged damages will be purely speculative.[878]

689. In the instant case, Claimant failed to provide any evidence establishing the charges it may have faced or would have faced in the "but for" scenario.[879] Claimant has made no effort to show that it failed to earn compound interest or that it was required to borrow money at compound interest rates as a result of the Republic's conduct. In fact, Dr. Flores analysis of Claimant's Annual Report show the contrary. Thus, the award of compound interest has not been borne out. In such circumstances, awarding compound interest would over-compensate Claimant.[880]

690. If the Tribunal awards compound interest, such interest should be compounded yearly rather than monthly and should only apply to post-award interest. Claimant has not established that it would have earned monthly compounded interest in the "but for" scenario and fails to demonstrate that the constant practice it relies on concerns monthly interest.[881]

3.2 The Tribunal's analysis

691. Having held Respondent liable for the breach of the BIT and the resulting damages, and having assessed those damages, the *question* before the Tribunal at this point is the award of interest.

692. It will be recalled that the Parties disagree on three points in relation to interest: (i) the timing of interest; (ii) the applicable rate of interest and (iii) whether interest should be compounded (see *supra* paras 653-667. On each of these points, and on interest in general, the Tribunal proceeds as follows.

693. *First*, under Article XII(9)(a) of the BIT, the Tribunal "*may award, separately or in combination, only: (a) monetary damages and any applicable interest*". Applicable interest is not defined in the BIT except in the context of a lawful expropriation. Specifically, Article VII(1) states that "[s]*uch compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is earlier, shall be payable from the date of expropriation with interest at a normal commercial rate, shall be paid without delay and shall be effectively realizable and freely transferable*". The BIT gives no indication of "applicable interest" in the context of its other provisions, such as those for which the Tribunal has found a violation.

[878] Rejoinder, para. 454.
[879] Rejoinder, para. 455.
[880] Counter-Memorial, paras 528-529.
[881] Rejoinder, para. 459.

694. The Tribunal finds that a normal commercial rate is an appropriate interest rate on the amounts, for two reasons:

- The parties to the Treaty agreed that the normal commercial rate is an adequate interest rate applicable to a compensation, equaling the value of the investment, in a context of expropriation; in this case, the compensation also equals the value of the investment, there is thus no good reason for applying a different interest rate.

- The Parties in this arbitration accept the application of a normal commercial rate: Claimant suggests that the normal commercial rate is an appropriate standard in this case[882]; Respondent's position is twofold: at first, it avers that the normal commercial rate should only be applied in cases of expropriation, but then Respondent asks the Tribunal to apply purportedly normal commercial interest rates[883].

695. *Second and, therefore, in relation to the timing of interest:* It will be recalled that Claimant is claiming both pre- and post- award interest, the former commencing three months after the filing of Claimant's AADs.[884] Respondent, on the other hand, argues that any interest should not run before the date of the Award, or in the alternative, the date of the Request for Arbitration.[885]

696. The Tribunal recalls that it found that Respondent breached its obligations under Articles VIII and II(1) of the BIT with respect to the 15 AAD requests because it failed to consider those requests in accordance with the relevant foreign exchange regime. The Tribunal has not identified a specific "*time when the international wrongful act*" arose, but notes that, on 26 May 2014 the press released the news that Venezuela had settled the debt with respect to other airlines' AAD requests for 2012 and 2013 returns[886]. The Tribunal considers that the award of pre-award interest on the principal amount should start running from the date in which other airlines obtained the U.S. dollars they were owed (i.e., 26 May 2014) to properly compensate Claimant.

697. *Third and with respect to the applicable rate of interest:* The Tribunal has already determined that Claimant's compensation should accrue interest at a normal commercial rate. This implies that Respondent compensate Claimant for the lack of use in time of the amount awarded to it, at a rate at which Claimant could reasonably have made use of the money at market conditions.

[882] FTI Report, p. 22: "*I am advised by Counsel that this* [normal commercial rate] *is the appropriate standard to apply to pre-award interest in this matter*."
[883] R-PHB, p. 116.
[884] Reply, paras 280-282.
[885] Counter-Memorial, paras 500-504; Rejoinder, paras 429-432.
[886] Exhibit C-52.

698. The Parties have proposed a total of five alternative interest rates:

- The first, based on Venezuela's cost of borrowing because Respondent's failure to permit the repatriation of U.S. dollars effectively amounted to a forced loan to Respondent; the Tribunal, however, finds this rate is inapposite for a compensation due in U.S. dollars.

- The second, based on a short-term risk-free rate, such as the U.S. Treasury bill rate; the Tribunal is of the opinion that such a rate would not be appropriate because a normal commercial rate would reflect a premium on top of a risk-free rate.

- The third, based on Claimant's cost of debt: according to Mr. Rosen, pursuant to the information contained in Air Canada's Annual Report, Air Canada's weighted average cost of debt was 7.22%; the Tribunal notes that the purported interest rate is actually higher than that reflected in the Annual Report,[887] but that no adequate explanation for this discrepancy has been provided. In any event, as will be explained below (see *infra* para. 700), the Tribunal will choose Canada's effective interest rate for business as a proper benchmark for a normal commercial rate – a rate which was at all relevant times significantly lower than the interest rates purported by Mr. Rosen, this seems to suggest that Claimant's cost of debt did not reflect normal commercial rates.

- The fourth, at 1.39%, based on the interest rate on cash, cash equivalents and short-term investments earned by Claimant according to its 2013 Annual Report; the Tribunal notes that this interest rate is calculated *ex post* by Respondent's expert, taking the amount of interest earned as well as the cash, cash equivalents and short term investments figures – it is, thus, an approximate, backwards looking method, unsuitable to quantify interest due at the moment of full payment.

- The fifth, equal to the six-month U.S. dollar London Interbank Offered Rate (LIBOR) plus 1% or 2%: LIBOR is a benchmark interest rate at which global banks lend to another and thus represents a commercial rate; banks borrow without any mark-up, Air Canada would have to pay a margin. However, the Tribunal considers that due to market and regulatory changes such rate is not appropriate.

699. In view of the above, the Tribunal finds that only a rate that compensates the aggrieved party within reasonable market conditions is appropriate. Accordingly, the Tribunal considers that such rate can be found in "Canada's effective interest rate for businesses", which is a business borrowing interest rate published by the Bank of Canada that represents a weighted-average borrowing rate for new lending to non-financial businesses, estimated as a function of bank and market interest rates. Canada's effective

[887] FTI-5, p 110.

interest rate for businesses, seems to adequately reflect a normal commercial rate for a Canada-based business such as Air Canada.

700. *Fourth, on the question of whether interest should be compounded*, it is recalled that Claimant submits that compound interest is appropriate to make it whole and also to prevent Respondent from being unjustly enriched.[888] Respondent objects, stating that this is impermissible under Venezuelan law and that, in any event, Claimant must prove that it actually arose as damages.[889]

701. The Tribunal does not consider that this is a case where compound interest should be awarded to Claimant to put it back in a position it would have been in had the breach of the BIT not occurred. While it is true that compound interest is particularly appropriate in cases where the aggrieved party could have used its principal by depositing it and earning interest on it,[890] such compounding as an element of full redress must be particularly justified.[891] The Tribunal does not find that the present case provides such justification and therefore dismisses Claimant's compound interest claim.

702. Finally, having determined that Claimant's claims are not time-barred (see *supra* para. 265), the Tribunal rejects Respondent's 90-day grace period concerning the payment of interest.

703. In light of the foregoing, the Tribunal decides that interest should accrue on the amount awarded at Canada's effective interest rate for businesses, simple, from 26 May 2014 until payment in full.

3.3 Conclusion

704. In light of the foregoing, the Tribunal decides that ***interest shall accrue on the amount awarded at Canada's effective interest rate for businesses, simple, from 26 May 2014 until payment in full.***

4. Conclusion

705. In light of the foregoing, the Tribunal finds that ***Claimant shall be awarded U.S.$ 20,790,574, with simple interest accruing on the amount awarded at Canada's effective interest rate for businesses from 26 May 2014 until payment in full.***

[888] C-PHB, para. 97; Reply C-PHB, para. 109.
[889] Counter-Memorial, paras 520-529; Rejoinder, paras 456-457.
[890] Exh. RL-120 (Vestey), para. 447; see also Reply, para. 297.
[891] See Exh. RL-116 (ILC Draft Articles Commentary), pp 108-109.

VI. Arbitration costs

1. The issue

706. The question at *issue* is the apportionment and quantification of arbitration costs.

707. ***Claimant*** requests the Tribunal to award Claimant

> "*all costs of this proceeding, including (but not limited to) Claimant's attorney's fees, experts, and all costs associated with the tribunal and the conduct of the proceeding*" [Claim. 4]

and

> "*pre- and post-award compound interest at a 7.12% or 11.75% rate until the date of Venezuela's final satisfaction of the award*" [Claim. 5].

708. ***Respondent*** requests the Tribunal to

> "[o]*rder Claimant to pay all costs incurred by the Republic in connection with this arbitration, including all of the Arbitral Tribunal's and ICSID's fees and expenses, and all legal fees and expenses incurred by the Republic (including but not limited to lawyer's fees and expenses)*" [Resp. 8]

and to

> "[o]*rder Claimant to pay interest as the Arbitral Tribunal may consider appropriate on the amounts owed to the Republic as from the date of the award on costs and complete payment*" [Resp. 9].

2. The Parties' positions

2.1 Claimant

709. Claimant submits that the BIT and the AF Arbitration Rules grant the Tribunal wide discretion to allocate costs between the Parties.[892]

710. Tribunals typically allocate costs between the parties based on a number of factors, including, but not limited to, the extent to which a party has succeeded on its various claims and arguments, and the reasonableness of the costs.[893]

711. For the reasons set out in its prior written and oral submissions, Claimant should prevail in the arbitration. As the prevailing party, Claimant should be awarded all of its costs

[892] C-Costs, para. 3 referring to Exh. C-1 (BIT), Article XII(9) and Exh. CL-95, ICSID Additional Facilities Rules, Article 58(1).
[893] C-Costs, para. 4 referring to various tribunals' decisions in fns 5 to 9.

because (i) Respondent caused serious harm to Claimant's investments and forced Claimant to bring this case to obtain compensation for the damages it has suffered; and (ii) Claimant will not obtain full compensation unless it is awarded the costs and fees related to the bringing of the case. Those arbitration costs are reasonable considering the complexity and length of the case, and are the natural, normal and predictable consequence of Respondent's actions. Further, Respondent's conduct in this arbitration warrants an award of costs in Claimant's favor. Respondent filed an unwarranted request to bifurcate the proceedings; it raised multiple unfounded objections to the Tribunal's jurisdiction; it failed to produce documents in the arbitration despite the Tribunal's order; and it repeatedly refused to advance its share of the arbitration costs. Accordingly, to wipe out as far as possible the consequences of Respondent's illegal acts, the Tribunal should award Claimant its costs and expenses in the present arbitration, in the amounts set forth in its Costs Submission[894] totaling U.S.$ 6,445,505.85.

2.2 Respondent

712. Respondent submits costs generally follow the event and the Republic respectfully requests that costs be allocated in the spirit of this commonly applied rule.[895]

713. Respondent should recover all of its costs because Claimant abusively introduced these proceedings, for all the reasons provided in the Respondent's pleadings, including at the March 2020 Hearing. In particular, because the Tribunal lacks jurisdiction; those claims are in any event ill founded; and Claimant fell short of establishing that it had suffered any damage caused by the Republic. Further, Respondent offers the following specific illustrations of Air Canada's unhelpful and wasteful approach to these proceedings in terms of efficiency, which should also be taken into consideration in the allocation of costs.[896]

714. *First*, Claimant objected to each of the Respondent's attempts to safeguard its due process rights in the vain hope that it could reap the benefits from the illegitimate economic and political pressure imposed on the Respondent by certain countries. Claimant went as far as to request the exclusion from the record of the sole expert report that Respondent had been able to produce in circumstances where Dr. Flores was prevented from acting as an economic expert for the Republic under Executive Order No. 13884 of the President of the United States of America. Respondent maintains in this regard that its right to defend itself from Claimant's claims was hindered and respectfully considers that this should be reflected in the Tribunal's decision on costs.[897]

715. *Second*, although Respondent objected to the jurisdiction of the Tribunal due to the application of the ATA for the first time in its Application for Bifurcation of 15 June 2018, Claimant waited until its June 2020 Post-Hearing Brief to address the Respondent's objection. Claimant's improper conduct went so far as to seek, at the very last minute, the

[894] C-Costs, para. 5.
[895] R-Costs, para. 1.
[896] R-Costs, para. 2.
[897] R-Costs, para. 3.

Tribunal's leave to produce new authorities, in breach of the rules governing the post-hearing phase of this arbitration. Had Claimant fully briefed its position in due time, the scope of the parties' post-hearing pleadings regarding this issue could have and would have been narrowed down, thereby reducing representation costs.[898]

716. *Third*, Claimant attempted to mislead the Tribunal on several occasions. For example, as explained in the Application for Bifurcation, Claimant misleadingly suggested in its Request for Arbitration that the relevant date under Article XII(3)(d) of the BIT is the date of the Notice of Dispute rather than the date of the Request for Arbitration. It did so in order to conceal that its claims were in fact time barred. Another illustration of Claimant's improper conduct lies in the presentation of its already doomed case on expropriation. Claimant misleadingly represented in its Response to the Application for Bifurcation that the funds that it improperly sought to convert into U.S. dollars through this arbitration – thereby bypassing the applicable Venezuelan regulations – were sitting in a bank account in Venezuela; where in fact Respondent demonstrated not only that Claimant had retained control over its funds but, more importantly, that it had freely spent over 99% of those funds prior to the commencement of these proceedings. Had Claimant not misrepresented key aspects of the case, the scope of the Parties' pleadings could have and would have been narrower, thereby reducing representation costs. For these reasons, Respondent respectfully considers that given its conduct, under no circumstances should Claimant be awarded costs.[899]

717. *Fourth*, the Hearing took place in Paris between 10 and 12 March 2020, only a few days before the President of France announced a general lockdown in France due to the COVID-19 pandemic. Given the seriousness of the situation in Paris days before the Hearing, Respondent requested that public health concerns be taken into consideration and that the Hearing be reconvened by videoconference at a later date. Not only would have such a way forward allowed to avoid imposing contact in a confined environment on people having had to travel but it would also have undoubtedly saved costs. Opportunistically refuting the gravity of the situation in France, Claimant strongly opposed such a solution. But for Claimant's defiant stance in this regard, the Hearing could have and would have been held in safer conditions, and important travel expenses would have been saved. Therefore, Respondent respectfully considers that Claimant should bear, in any event, all costs and expenses associated with the Hearing.[900]

718. In light of the above, Respondent respectfully requests that the Tribunal:

- Order Claimant to pay an amount of U.S.$ 7,678,000.80 in reimbursement of the Respondent's representation costs to date;

- Declare that the amount awarded to Respondent shall bear interest as the Tribunal may consider appropriate, as from the date of the Award and until complete payment; and

[898] R-Costs, para. 4.
[899] R-Costs, para. 5.
[900] R-Costs, para. 6.

– Order any additional measure it may deem appropriate.[901]

3. The costs of the proceeding

719. The costs of the proceeding, including the Tribunal's fees and expenses, ICSID's administrative fees, and direct expenses, are as follows: [902]

Tribunal's fees and expenses

Prof. Pierre Tercier	U.S.$ 440,392.12
Dr. Charles Poncet	U.S.$ 79,060.20
Ms. Deva Villanúa	U.S.$ 121,746.99
Tribunal Assistant's Hearing Expenses	U.S$ 2,620.70
ICSID's administrative costs	U.S.$ 200,000.00
Direct expenses	U.S.$ 81,235.44
Total	**U.S.$ 925,055.45**

4. The Tribunal's analysis

720. Both Parties request an award of all costs associated with the arbitration, including the legal fees and expenses incurred in connection with this proceeding.

– Claimant's legal fees and expenses amount to U.S.$ 6,445,505.85 and

– Respondent's legal fees and expenses amount to U.S.$ 7,678,000.80.

721. The fees and expenses of the Tribunal and ICSID amount to U.S.$ 925,055.45.

722. *First*, the Tribunal will make no adjustments with respect to the amounts claimed by each Party as legal fees and expenses. The Tribunal finds these amounts to be reasonable in light of the circumstances of this case, particularly each Party's right to defend its case as it deems appropriate, the complexity of the case, and the number of arguments presented. It therefore affirms these amounts.

723. *Second*, the Tribunal notes that neither the BIT nor the AF Arbitration Rules provide any guidelines for the allocation of costs. The Tribunal therefore has discretion to allocate the costs of the arbitration. The Tribunal considers that an allocation of costs should be made

[901] R-Costs, para. 8.
[902] ICSID will provide a detailed final statement of the case account to the Parties. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

in accordance with the principle that "costs follow the event"[903] and in light of the overall assessment of the case. In particular, the Tribunal notes the following:

- Both Parties have acted properly;
- While Respondent lost all of its jurisdictional objections, those objections were not without merit;
- Claimant was successful on the majority of its claims on the merits; and
- Claimant was awarded a portion of the damages claimed.

724. In light of the above, the Tribunal concludes that a 75% / 25% allocation in favor of Claimant is appropriate. Accordingly:

- Respondent shall bear 75% of the costs of the proceeding (i.e., U.S.$ 693,791.59), while Claimant shall bear 25% of such costs (i.e., U.S.$ 231,263.86); and
- Respondent shall bear its own legal fees and expenses, and Claimant shall be awarded 75% of its legal fees and expenses (i.e., U.S.$ 4,834,129.39).

5. Conclusion

725. ***In view of the foregoing, the Tribunal decides that Respondent shall bear U.S.$ 693,791.59 and Claimant shall bear U.S.$ 231,263.86 of the costs of the proceeding. Respondent shall bear its own legal fees and expenses and Claimant shall be awarded U.S.$ 4,834,129.39 of its legal fees and expenses.***

[903] The Gold Reserve tribunal noted that tribunals "*have awarded costs on a 'loser pays' basis,*" before stating that: "[c]*ompensating Claimant for the cost of bringing this proceeding is required to wipe out the consequences of Respondent's breach of the BIT and is particularly appropriate in the current case given the serious and egregious nature of the breach*." The Rusoro tribunal also "*look*[ed] *favourably upon the criterion, often used in investment arbitration, that the losing party should make a significant contribution to the payment of the arbitration fees and the costs and expenses incurred by the prevailing party*". *Rusoro Mining Ltd. v. The Bolivarian Republic of Venezuela* – a case decided under the same BIT at issue in this case – noted that "[n]*either the Arbitration AF Rules nor the BIT contain any guidelines for the apportionment of costs. Therefore, the Tribunal has ample discretion to decide on how the costs of this proceeding will be apportioned*."

C. AWARD

For the reasons set forth above, the Tribunal decides the following:

1. ***The present dispute is within the Tribunal's jurisdiction and is admissible.***

2. ***Respondent breached its obligations under Articles VIII and II(2) of the BIT.***

3. ***Claimant shall be awarded U.S.$ 20,790,574 with simple interest accruing at the rate reflecting Claimant's cost of debt from 17 March 2014 until payment in full.***

4. ***Respondent shall bear 75% (i.e., U.S.$ 693,791.59) and Claimant shall bear 25% (i.e., U.S.$ 231,263.86) of ICSID's and the Tribunal's fees and costs. Respondent shall bear its own legal fees and expenses and Claimant shall be awarded 75% of its legal fees and expenses (i.e., U.S.$ 4,834,129.39).***

5. ***All other requests are rejected.***

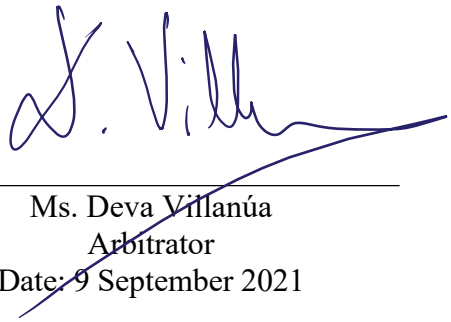
Made in Paris, France

Dr. Charles Poncet
Arbitrator
Date: 9 September 2021

Ms. Deva Villanúa
Arbitrator

Prof. Pierre Tercier
President of the Tribunal

Made in Paris, France



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Arbitrator

Ms. Deva Villanúa
Arbitrator
Date: 9 September 2021

Prof. Pierre Tercier
President of the Tribunal

Made in Paris, France

Dr. Charles Poncet
Arbitrator

Ms. Deva Villanúa
Arbitrator

Prof. Pierre Tercier
President of the Tribunal
Date: 9 September 2021