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)

AWARD

Members of the Tribunal
Prof. Pierre Tercier, President of the Tribunal
Dr. Charles Poncet, Arbitrator
Ms. Deva Villanúa, Arbitrator

Secretary of the Tribunal
Mr. Marco Tulio Montañés-Rumayor

Assistant to the Tribunal
Ms. Maria Athanasiou

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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]

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[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)).

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[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*

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[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.

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[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.***

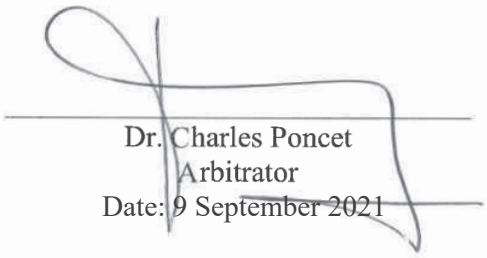
2. ***Respondent breached its obligations under Articles VIII and II(2) of the BIT.***

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

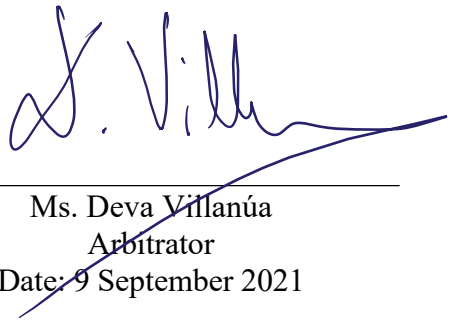


Dr. Charles Poncet
Arbitrator
Date: 9 September 2021

Ms. Deva Villanúa
Arbitrator

Prof. Pierre Tercier
President of the Tribunal

Made in Paris, France



Dr. Charles Poncet
Arbitrator

Ms. Deva Villanúa
Arbitrator
Date: 9 September 2021

Prof. Pierre Tercier
President of the Tribunal

Made in Paris, France

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Annex 627

"Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019", CRC/C/88/D/104/2019, *UN Committee on the Rights of the Child*, 11 November 2021

United Nations CRC/C/88/D/107/2019

Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 107/2019*, **

Communication submitted by:	Chiara Sacchi et al. (represented by counsel Scott Gilmore et al., of Hausfeld LLP, and Ramin Pejan et al., of Earthjustice)
Alleged victims:	The authors
State party:	Germany
Date of communication:	23 September 2019 (initial submission)
Date of adoption of decision:	22 September 2021
Subject matter:	Failure to prevent and mitigate the consequences of climate change
Procedural issues:	Jurisdiction; victim status; failure to exhaust domestic remedies; substantiation of claims
Substantive issues:	Right to life; right of the child to the enjoyment of the highest attainable standard of health; right of the child to enjoy his or her own culture; best interests of the child
Articles of the Convention:	6, 24 and 30, read in conjunction with article 3
Articles of the Optional Protocol:	5 (1) and 7 (e)–(f)

1.1 The authors of the communication are Chiara Sacchi, a national of Argentina; Catarina Lorenzo, a national of Brazil; Iris Duquesne, a national of France; Raina Ivanova, a national of Germany; Ridhima Pandey, a national of India; David Ackley III, Ranton Anjain and Litokne Kabua, nationals of the Marshall Islands; Deborah Adegbile, a national of Nigeria; Carlos Manuel, a national of Palau; Ayakha Melithafa, a national of South Africa; Greta Thunberg and Ellen-Anne, nationals of Sweden; Raslen Jbeili, a national of Tunisia; and Carl Smith and Alexandria Villaseñor, nationals of the United States of America. At the time of the submission of the complaint, the authors were all under the age of 18 years. They claim

* Adopted by the Committee at its eighty-eighth session (6–24 September 2021).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Hynd Ayoubi Idrissi, Rinchen Chophel, Bragi Gudbrandsson, Sopio Kiladze, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, Zara Ratou, José Ángel Rodríguez Reyes, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Benoit Van Keirsbilck. Pursuant to rule 8 (1) (a) of the Committee's rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Philip Jaffé did not participate in the examination of the communication.

that, by failing to prevent and mitigate the consequences of climate change, the State party has violated their rights under articles 6, 24 and 30, read in conjunction with article 3 of the Convention.[1] The Optional Protocol entered into force for the State party on 14 April 2014.

1.2 On 20 November 2019, pursuant to article 8 of the Optional Protocol and rule 18 (4) of the Committee's rules of procedure under the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested the State party to submit its observations on the admissibility of the communication separately from its observations on the merits.

Facts as submitted by the authors

2.1 The authors note that the Earth is 1.1°C hotter than before the industrial revolution, and it is approaching a tipping point of foreseeable and irreversible catastrophic effects. If the Earth becomes 2°C hotter, the exacerbated air pollution alone is forecast to cause 150 million deaths. If the Earth becomes 3–4°C hotter by 2100, which is the current trajectory if States do not make drastic emissions reductions, the impacts of climate change will threaten the lives and welfare of over 2 billion children.

2.2 Hotter temperatures foster the spread of infectious diseases and exacerbate health hazards. In Lagos, Nigeria, one of the authors, Deborah Adegbile, has been repeatedly hospitalized for asthma as hotter temperatures worsen the air quality. Mosquito-borne diseases have spread to new regions. In the Marshall Islands in 2019, another author, Ranton Anjain, contracted dengue, which has now become prevalent in the islands. Author David Ackley III contracted chikungunya, a disease new to the Marshall Islands since 2015. Wildfires are becoming increasingly frequent and intense because of hotter and drier conditions. In Tabarka, Tunisia, author Raslen Jbeili heard screams one night and saw a wildfire approaching his home; he was spared, but his neighbours were not. In the United States of America, author Alexandria Villaseñor suffered smoke inhalation from the wildfire in Paradise, California, and was bedridden for three weeks. Heatwaves and drought are threatening children's lives and creating water scarcity. In Cape Town, South Africa, drought has forced author Ayakha Melithafa's family and 3.7 million other residents to prepare for the day municipal water supplies run dry. In Bordeaux, France, the first summer of author Iris Duquesne's life was the hottest in Europe since 1540 and tens of thousands of people died in the heatwave of 2003. Extreme storms, which were once rare, are now regular events. On Ebeye in the Marshall Islands, a violent storm forced author Litokne Kabua and his family to evacuate to a United States army base. In Haedo, Argentina, an unprecedented windstorm devastated author Chiara Sacchi's neighbourhood. In Hamburg, Germany, author Raina Ivanova waded through knee-deep water on her school grounds during storm Herwart in 2017. South Atlantic storms occur more often in Bahia, Brazil; one damaged the home of author Catarina Lorenzo. Floods and rising sea levels are transforming children's relationships with the land. The Marshall Islands could become uninhabitable within decades. In Palau, author Carlos Manuel sees waves increasingly breach the sea walls and crash into homes as the level of the Pacific Ocean rises. In Haridwar, India, author Ridhima Pandey has seen downpours flood infrastructure and cause sewage to overflow into the sacred Ganges River, increasing the risk of infectious diseases. The subsistence way of life of many indigenous communities is at stake. In northern Sweden, author Ellen-Anne is learning the reindeer herding traditions of the Sami people, passed down over millenniums, but climate change is destroying the reindeers' food sources. In Akiak, Alaska, in the United States, author Carl Smith learned to hunt and fish from the elders of the Yupiaq tribe, but the salmon population on which they rely has been dying from heat stress in record numbers, and the rising temperatures have prevented his tribe from accessing traditional hunting grounds. Climate change has affected children's mental health around the world. As the American Psychological Association has observed, psychologists now grapple with new, twenty-first century disorders, including climate anxiety and solastalgia – mourning the destruction of a cherished place.[2] In Sweden,

[1] The authors have submitted the same complaint against Argentina, Brazil, France, Germany and Turkey. The five complaints are registered as communications No. 104/2019 to No. 108/2019.

[2] The authors refer to Susan Clayton and others, *Mental Health and our Changing Climate: Impacts, Implications, and Guidance* (Washington, D.C., American Psychological Association, 2017), pp. 22–23 and 25–27.

Greta Thunberg states that she was so disturbed by the climate crisis that she fell into depression and stopped eating.

2.3 The authors claim that the State party has known about the harmful effects of its internal and cross-border contributions to climate change for decades. In 1992, it signed the United Nations Framework Convention on Climate Change and undertook to protect children from the foreseeable threats of climate change. It was clear then that every metric ton of carbon dioxide that it emitted or permitted was adding to a crisis that transcends all national boundaries and threatens the rights of all children everywhere. It was even clearer that the emissions were endangering children's lives in 2016, when the State party signed the Paris Agreement, pledging to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels. The State party has not kept or met that pledge, which in itself is inadequate to prevent human rights violations on a massive scale. The State party has failed to prevent foreseeable human rights harms caused by climate change by failing to reduce its emissions to a level that reflects its "highest possible ambition", pursuant to article 4 (3) of the Paris Agreement. It is delaying the steep cuts in carbon emissions needed to protect the lives and welfare of children at home and abroad. It is not on an emissions pathway that is consistent with keeping global warming under 3°C, much less under 1.5°C. In the 20 years that followed the signing in 1997 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the world produced more emissions than in the 20 years before. Every nation has contributed to climate change. For decades, the excuse that no harm can be traced to any particular emission or country, and thus that no State bears responsibility, has led to inaction. Nevertheless, under human rights law, States are individually responsible for, and should be held accountable for, their sovereign actions and inactions that cause and contribute to climate change, and thereby breach their fundamental human rights obligations. As a major historical emitter and influential member of the Group of 20, a forum of the world's 20 leading economies, the State party must lead by example, reducing emissions at the greatest possible rate and at a scale that is scientifically established to protect life. Moreover, emissions from other Group of 20 members, in particular the four major emitters, must also be curbed to ensure respect for children's rights. Therefore, the State party must also use all available legal, diplomatic and economic tools to ensure that the major emitters are also decarbonizing at a rate and scale necessary to achieve the collective goals.[3]

2.4 The authors note that the Committee, in the joint statement on human rights and climate change that it issued with four other treaty bodies, recognized that "States parties have obligations, including extraterritorial obligations, to respect, protect and fulfil all human rights of all peoples". These obligations include a duty "to prevent foreseeable harm to human rights caused by climate change" and "to regulate activities contributing to such harm". In that joint statement, the Committees clarified the fact that: "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."[4] The authors also note that the Committee recognized these principles in its general comment No. 16 (2013), observing that "if children are identified as victims of environmental pollution, immediate steps should be taken by all relevant parties to prevent further damage to the health and development of children and repair any damage done" (para. 31).

[3] The authors argue that the States party's ability to influence international cooperation makes its impact on climate change greater than its actual share of emissions. They argue that the State party can influence other States through trade, aid and diplomacy and that it has a duty to use its influence to protect children from environmental threats caused by the world's other major emitters, especially the top four States or regions, which account for 58 per cent of all emissions: China (26.3 per cent), the United States (13.5 per cent), the European Union (9.4 per cent) and India (7.3 per cent). The authors note that the State party ranks in the top 50 historical emitters between 1850 and 2002, based on fossil fuel emissions. The authors refer to Kevin A. Baumert, Timothy Herzog and Jonathan Pershing, *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy* (Washington D.C., World Resources Institute, 2005), p. 32.

[4] HRI/2019/1, paras. 10–11.

2.5 The authors argue that they are within the State party's jurisdiction as victims of the foreseeable consequences of the State party's domestic and cross-border contributions to climate change. They argue they are all victims of the foreseeable consequences of the carbon pollution knowingly emitted, permitted or promoted by the State party from within its territory. They note that a State's jurisdiction extends beyond its territorial boundaries to territories and persons within its power or over which it has control.[5] A State also has jurisdiction in situations over which its acts or omissions bring about foreseeable effects, whether within or outside its territory.[6] International human rights jurisprudence has now established that control over the individual is sufficient to establish the requisite jurisdictional link, and a sufficient degree of control may be found in the conduct constituting the violation itself, be it environmental damage, cross-border shootings or pushbacks of asylum seekers on land or at sea. The authors note that, in its general comment No. 16 (2013), the Committee indicated that "States also have obligations … to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned" (para. 43). The authors argue that the Committee should recognize that, in the context of human rights violations caused by climate change, a child is within the jurisdiction of a State party when: (a) that State's acts or omissions contribute to a polluting activity originating in its territory; and (b) that polluting activity directly and foreseeably impacts the rights of children within or outside that State's territory. The authors claim that the State party is causing and perpetuating climate change through its historic and current carbon pollution. It does so despite its decades-old knowledge that by contributing to climate change, it risks the lives and welfare of children within and outside its territory. The authors are the foreseeable victims of that pollution; their present injuries and exposure to risks are precisely the life-threatening harm that the State party knew would occur if it failed to use all available means to reduce emissions and cooperate internationally to prevent global warming. As a result, the authors are within the jurisdiction of the State party.

2.6 The authors argue that they would face unique obstacles in exhausting domestic remedies because of the global scope and nature of the harm caused to 16 children worldwide and the breaches of the State party through its individual and collective actions. Exhausting domestic remedies in each State party would be unduly burdensome for the authors and unreasonably prolonged. The authors further argue that their complaint involves legal questions of justiciability of diplomatic relations and foreign sovereign immunity with respect to other States in the domestic courts. The authors allege that the State party has failed to use legal, economic and diplomatic means to persuade other Group of 20 member States and fossil fuel industries to reduce their emissions. This claim implicates a State's obligations of international cooperation and its duty to protect children's rights under the Convention. However, the authors are not aware of any domestic legal avenue in the State party permitting judicial review of its diplomatic relations. The authors recognize that important climate cases are proceeding in Belgium, France, Germany, India, the Netherlands and other countries, which focus on climate policies in the respective countries.[7] Nevertheless, they argue that, for the reasons of immunity and justiciability stated above, those cases do not and could not address the climate policies of foreign States or States' failure to cooperate internationally.

[5] Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation on States parties to the Covenant, para. 10.

[6] The authors refer to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, principle 9 (b).

[7] The authors refer to District Court of The Hague, *Urgenda Foundation v. Kingdom of the Netherlands*, Case No. C/09/456689 / HA ZA 13-1396, Judgment of 24 June 2015; Administrative Court of Paris, *Greenpeace France and Others v. France*, Case Nos. 1904967, 1904968, 1904972 and 1904976/4-1, Decision of 14 October 2021; Administrative Court of Berlin, *Family Farmers and Greenpeace Germany v. Germany*, Case No. VG 10 K 412.18, Judgment of 31 October 2019; General Court of the European Union, *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*, Case No. T-330/18, Judgment of 8 May 2019; United States District Court for the District of Oregon Eugene Division, *Juliana v. United States*, Case No. 339 F. Supp. 3d 1062 (D. Or. 2018), Judgment of 15 October 2018; Court of First Instance, Brussels, *VZW Klimaatzaak v. The Kingdom of Belgium, et al.*, Case No. 2015/4585/A, Judgment of 17 June 2021.

Complaint

3.1 The authors claim that, by recklessly causing and perpetuating life-threatening climate change, the State party has failed to take the necessary preventive and precautionary measures to respect, protect and fulfil their rights to life, health and culture. They claim that the climate crisis is not an abstract future threat. The 1.1°C rise in global average temperature is currently causing devastating heatwaves, forest fires, extreme weather patterns, floods and sea level rise, and fostering the spread of infectious diseases. Given that children are among the most vulnerable, physiologically and mentally, to these life-threatening impacts, they will bear a far heavier burden and for far longer than adults.

3.2 The authors argue that every day of delay in taking the necessary measures depletes the remaining "carbon budget", the amount of carbon that can still be emitted before the climate reaches unstoppable and irreversible ecological and human health tipping points. They argue that the State party, among other States, is creating an imminent risk as it will be impossible to recover lost mitigation opportunities and it will be impossible to ensure the sustainable and safe livelihood of future generations.

3.3 The authors contend that the climate crisis is a children's rights crisis. The States parties to the Convention are obliged to respect, protect and fulfill children's inalienable right to life, from which all other rights flow. Mitigating climate change is a human rights imperative. In the context of the climate crisis, obligations under international human rights law are informed by the rules and principles of international environmental law. The authors argue that the State party has failed to uphold its obligations under the Convention to: (a) prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change; (b) cooperate internationally in the face of the global climate emergency; (c) apply the precautionary principle to protect life in the face of uncertainty; and (d) ensure intergenerational justice for children and posterity.

Article 6

3.4 The authors claim that the State party's acts and omissions perpetuating the climate crisis have already exposed them throughout their childhoods to the foreseeable, life-threatening risks of climate change caused by humans, be they in the forms of heat, floods, storms, droughts, disease or polluted air. A scientific consensus shows that the life-threatening risks confronting them will increase throughout their lives as the world heats up by 1.5°C above the pre-industrial era and beyond.

Article 24

3.5 The authors claim that the State party's acts and omissions perpetuating the climate crisis have already harmed their mental and physical health, with the effects ranging from asthma to emotional trauma. The harm violates their right to health under article 24 of the Convention and will become worse as the world continues to warm up.

Article 30

3.6 The authors claim that the State party's contributions to the climate crisis have already jeopardized the millenniums-old subsistence practices of the indigenous authors from Alaska in the United States, the Marshall Islands and the Sapmi areas of Sweden. Those subsistence practices are not just the main source of their livelihoods, but directly relate to a specific way of being, seeing and acting in the world that is essential to their cultural identity.

Article 3

3.7 By supporting climate policies that delay decarbonization, the State party is shifting the enormous burden and costs of climate change onto children and future generations. In doing so, it has breached its duty to ensure the enjoyment of children's rights for posterity and has failed to act in accordance with the principle of intergenerational equity. The authors note that, while their complaint documents the violation of their rights under the Convention, the scope of the climate crisis should not be reduced to the harm suffered by a small number of children. Ultimately at stake are the rights of every child, everywhere. If the State party, acting alone and in concert with other States, does not immediately take the measures

available to stop the climate crisis, the devastating effects of climate change will nullify the ability of the Convention to protect the rights of any child, anywhere. No State acting rationally in the best interests of the child would ever impose this burden on any child by choosing to delay taking such measures. The only cost-benefit analysis that would justify any of the respondents' policies is one that discounts children's lives and prioritizes short-term economic interests over the rights of the child. Placing a lesser value on the best interests of the authors and other children in the climate actions of the State party is in direct violation of article 3 of the Convention.

3.8 The authors request that the Committee find: (a) that climate change is a children's rights crisis; (b) that the State party, along with other States, has caused and is perpetuating the climate crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change; and (c) that by perpetuating life-threatening climate change, the State party is violating the authors' rights to life, health and the prioritization of the best interests of the child, as well as the cultural rights of the authors from indigenous communities.

3.9 The authors further request that the Committee recommend: (a) that the State party review and, where necessary, amend its laws and policies to ensure that mitigation and adaptation efforts are being accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence to protect the authors' rights and make the best interests of the child a primary consideration, particularly in allocating the costs and burdens of climate change mitigation and adaption; (b) that the State party initiate cooperative international action – and increase its efforts with respect to existing cooperative initiatives – to establish binding and enforceable measures to mitigate the climate crisis, prevent further harm to the authors and other children, and secure their inalienable rights; and (c) that pursuant to article 12 of the Convention, the State party ensure the child's right to be heard and to express his or her views freely, in all international, national and subnational efforts to mitigate or adapt to the climate crisis and in all efforts taken in response to the authors' communication.

State party's observations on admissibility

4.1 On 20 January 2020, the State party submitted its observations on the admissibility of the complaint. It submits that the communication is inadmissible for lack of jurisdiction and victim status, for failure to substantiate the claims for purposes of admissibility and for failure to exhaust domestic remedies.

4.2 The State party submits that the communication is inadmissible for lack of jurisdiction with regard to all the authors except for the one author of German nationality. It notes that under article 2 (1) of the Convention, States parties ensure the rights set forth in the Convention "to each child within their jurisdiction". It argues that the authors who do not reside in Germany are not within its jurisdiction and that a prerequisite for the extraterritorial application of children's rights is that national actions have a direct and foreseeable impact on the rights of the alleged victims in other countries. It notes that in its Advisory Opinion OC-23/17 on the environment and human rights, the Inter-American Court of Human Rights expressly highlighted the fact that "situations in which the extraterritorial conduct of a State constitutes the exercise of its jurisdiction are exceptional and, as such, should be interpreted restrictively".[8] Furthermore, according to the interpretation of the Human Rights Committee, in order to establish jurisdiction, actions need to have a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, while the European Court of Human Rights has held that there needs to be a direct and immediate cause for extraterritorial jurisdiction to be established. There is no such direct or immediate and foreseeable impact on the rights of the authors by way of action or non-action by the State party in the present case. The authors claim that their rights are impaired due to ongoing climate change. Climate change is a consequence of the worldwide emission of greenhouse gases. The emission of greenhouse gases in one State certainly contributes to the worsening of climate change, but it does not directly and foreseeably impair the rights of people in other States. Consequently,

[8] Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 15 November 2017, requested by the Republic of Colombia, on the environment and human rights, para. 81.

jurisdiction under the Convention over individuals affected by climate change worldwide cannot be established. In addition, the State party argues that the authors have not established victim status as, pursuant to article 5 (1) of the Optional Protocol, an individual communication is admissible only if a specific infringement of a right included in the Convention is presented. It notes that the German author has stated that she is concerned because of flooding that occurred in her area, which was very upsetting for her. Although the concern for her own future in view of current environmental changes is understandable, it does not constitute an impairment of any right established under the Convention.

4.3 The State party also submits that the communication is manifestly ill-founded and thus inadmissible under article 7 (f) of the Optional Protocol as the claims raised by the authors do not fall under the Convention or the Optional Protocol. It notes that the authors argue that climate change should be defined as a children's rights crisis and it notes their claims that the State party, along with other States, has caused and is perpetuating climate change by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change. The State party argues that, notwithstanding the actual effects of climate change on the rights of children worldwide, the declaration that climate change is a "children's rights crisis" is not admissible, as neither the Convention nor the Optional Protocol contain the term "children's rights crisis", nor are there criteria within the Convention which determine when an impairment of children's rights might lead to such a crisis. It further argues that the Convention and the Optional Protocol serve the purpose of securing and ensuring children's rights. They do not serve the purpose of an abstract identification of deficits.

4.4 Lastly, the State party submits that the communication is inadmissible for failure to exhaust available domestic remedies under article 7 (e) of the Optional Protocol. In the State party's system of legal protection, this means using available administrative and legal options for legal protection, for example by lodging a communication of unconstitutionality. The authors have not taken any legal action in Germany in order to achieve relief of the impairment of rights as claimed by them. The authors are free to initiate administrative law proceedings pursuant to section 40 of the Code of Administrative Court Procedure. They can make applications for a declaratory finding or "declaratory action" ("Feststellungsklage") under section 43 of the Code or file a "general suit for satisfaction" ("allgemeine Leistungsklage"). The authors could also raise their claims before domestic courts. According to article 59 (2) of the Basic Law of Germany, the Convention has the status of a federal law and therefore has to be considered by the courts ex officio. It would be possible for the authors to bring the alleged wrongdoing of domestic public sector bodies before national courts. In general, any State action which might infringe the rights of individuals can be reviewed by the courts under article 19 (4) of the Basic Law. The assumption that the costs of legal proceedings might be high does not exempt the authors from exhausting all legal remedies. In general, the costs of administrative court proceedings in the State party are not high. In addition, legal aid is available to individuals who, due to their financial situation, are not in a position to cover such costs.

Authors' comments on the State party's observations on admissibility

5.1 In their comments of 4 May 2020, the authors maintain that the communication is admissible and insist that the Committee has jurisdiction to examine the complaint, that the complaint is sufficiently substantiated and that the pursuit of domestic remedies would be futile.

5.2 Regarding the issue of jurisdiction, the authors argue that the State party has effective regulatory control over emissions originating in its territory. Only the State party can reduce those emissions, through its sovereign power to regulate, license, fine and tax. Given that the State party exclusively controls these sources of harm, the foreseeable victims of their downstream effects, including the authors, are within its jurisdiction. Concerning the State party's argument that climate change is a global issue for which it cannot be held responsible, the authors argue that customary international law recognizes that when two or more States contribute to a harmful outcome, each State is responsible for its own acts, notwithstanding

the participation of other States.[9] In article 47 of the articles on responsibility of States for internationally wrongful acts, the International Law Commission provided that: "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act." In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

5.3 The authors reiterate that they have established that each of them has been injured and exposed to a risk of further irreparable harm as a result of climate change caused in substantial part by the State party's failure to reduce emissions. The consequences of the State party's acts and omissions in relation to combating climate change directly and personally harm the authors and expose them to foreseeable risks. Their assertions of harm from climate change do not constitute an *actio popularis*, even if children around the world may share their experiences or be exposed to similar risks.

5.4 The authors further reiterate that pursuing domestic remedies would be futile as they would have no real prospect of success. They argue that domestic courts cannot adjudicate their claims implicating the obligation of international cooperation, and they cannot review whether the State party has failed to use legal, economic and diplomatic means to persuade other Group of 20 member States and fossil fuel industries to reduce their emissions. The State party cannot provide a domestic forum for the claims raised in the communication and remedies sought, which involve transboundary human rights violations caused by multiple States across multiple borders. State immunity vitiates any possible remedy for transboundary harm caused by other States. The authors argue that the remedies they seek are non-justiciable or very unlikely to be granted by courts. Domestic courts would be unlikely or unable to order the legislative and executive branches to comply with their international climate obligations by reducing their emissions. Moreover, domestic courts are likely to provide wide discretion to the legislative and executive branches to determine what constitutes an appropriate climate policy. The remedies here also implicate political decisions in international relations. Domestic courts could not enjoin the Government to cooperate internationally in the fight against climate change. In summary, no court would impel the Government to take effective precautionary measures to prevent further harm to the authors.

5.5 Regarding the domestic remedies available to the authors referred to by the State party, the authors argue that, contrary to its statements, the State party has previously argued that its emissions-reduction policies cannot be challenged in domestic courts. The authors further argue that domestic courts would be most likely to dismiss their claims due to a lack of standing and the separation of powers. The German Climate Protection Act explicitly specifies that it does not create individual rights or grant individuals legal standing to seek judicial review of climate policies. Thus, government action based on the Climate Protection Act is not justiciable. Even if the authors were to invoke rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) or the Convention on the Rights of the Child, State party jurisprudence acknowledges broad executive and legislative discretion with respect to protecting fundamental rights. This wide latitude to the executive and legislative branches is only limited by extreme incapacity, for example if protective measures have not been taken, if the regulations and measures taken are obviously unsuitable or completely inadequate or if they are based on unjustifiable assessments. The first domestic case brought in the State party regarding emissions reductions was dismissed as inadmissible. In *Family Farmers and Greenpeace Germany v. Germany*, the Administrative Court of Berlin dismissed a case in which the plaintiffs alleged that the 2020 emissions reductions target of the federal Government was insufficient and violated its constitutional obligations.[10] The court denied the claim, finding that the Government has wide discretion when fulfilling its constitutional obligations, provided that its actions are not entirely unsuitable or completely inadequate.

[9] The authors refer to Andre Nollkaemper and Dov Jacobs, "Shared responsibility in international law: a conceptual framework", *Michigan Journal of International Law*, vol. 34, No. 2 (Winter 2013), pp. 379–381.

[10] Administrative Court of Berlin, *Family Farmers and Greenpeace Germany v. Germany*, Case No. VG 10 K 412.18, Judgment of 31 October 2019.

5.6 The authors further argue that the unique circumstances of their case would make domestic proceedings unreasonably prolonged as they would have to pursue five separate cases, in each respondent State party, each of which would take years. The State party could not ensure that a remedy would be obtained within the necessary time frame, since any delay in reducing emissions depletes the remaining carbon budget and places the 1.5°C limit on warming further out of reach.

Third-party intervention

6.1 On 1 May 2020, a third-party intervention was submitted before the Committee by David R. Boyd and John H. Knox, the current and former holders of the mandate of Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

6.2 The interveners note that the climate crisis is already having severe effects on human lives and well-being, and therefore human rights. Children are particularly at risk from the climate crisis for several reasons. First, children are more vulnerable than adults to environmental harms of all kinds, which interfere with a vast range of their rights protected by the Convention, including their rights to life, health and development, food, housing, water and sanitation, and play and recreation. They are particularly vulnerable to health problems exacerbated by climate change, including malnutrition, acute respiratory infections, diarrhoea and other water-borne illnesses. In addition, climate change heightens existing social and economic inequalities, intensifies poverty and reverses progress towards improvement in children's well-being.

6.3 Concerning the admissibility of the communication, the interveners note that State obligations extend beyond the situations of effective control to include obligations to protect those whose rights are affected by a State's activities in "a direct and reasonably foreseeable manner".[11] They state that the effects of climate change on the rights of the authors are exactly the type of impact encompassed by the "direct and reasonably foreseeable" standard. It is not only reasonably foreseeable but inevitable that emitting greenhouse gases will have a direct impact on the human rights of the authors and children around the world.

6.4 The five States parties in question are not the largest emitters either historically or currently. Nevertheless, their contributions are not insignificant. Each is in the top 40 of all emitters, based on historical emissions since 1850, and together, they currently contribute 7 per cent of global emissions. The fact that this is a global problem cannot be a valid objection to the admissibility of the communication and the answer cannot be that when multiple States contribute to a global harm, none of them bears any responsibility for its effects. Under the customary international law of State responsibility, when several States have contributed to the same damage by separate wrongful conduct, "the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations".[12] While it may be difficult to trace a precise causal path between the actions of any one of the States parties in question and the harms suffered by the authors, it is definitely possible to determine the responsibility of each of the States in relation to the harms to which it contributes. In that respect, its total current emissions may be only one factor; other factors, such as its level of economic development and its historical contributions, may also be relevant.

6.5 The interveners state that the pursuit of domestic remedies in the present case would be unduly prolonged and unlikely to result in effective relief as there are substantial backlogs in many domestic courts, which have been worsened by court closures in response to the coronavirus disease (COVID-19) pandemic. The ensuing delays are exacerbated in climate litigation asserting human rights violations because of the novelty and complexity of these

[11] Human Rights Committee, general comment No. 36 (2018) on the right to life, para. 63. See also African Commission on Human and Peoples' Rights, general comment No. 3 (2015), para. 14; and European Court of Human Rights, *Andreou v. Turkey*, Application No. 45653/99, Judgment of 27 October 2009.

[12] A/56/10, A/56/10/Corr.1 and A/56/10/Corr.2, chap. IV.E.2, commentary on draft article 47 of the draft articles on the responsibility of States for internationally wrongful acts.

cases. The Urgenda case in the Netherlands took seven years to conclude.[13] The Juliana case in the United States was dismissed on grounds of standing after five years of litigation.[14] Remedies from individual domestic courts will not be effective in isolation, as a single domestic court clearly lacks the jurisdiction to impose obligations on other States to cooperate internationally to resolve the climate crisis. The Committee, in contrast, has the ability to provide effective remedies against multiple States parties. The Committee has the expertise and the mandate to address matters that may not be within the competence of domestic courts, including the obligations of each State under human rights law to address a global challenge to the human rights of all children.

Oral hearing

7.1 Following an invitation by the Committee and pursuant to rule 19 of its rules of procedure under the Optional Protocol, legal representatives of both parties appeared before the Committee on 25 May 2021 by way of videoconference, answered questions from Committee members on their submission and provided further clarifications.

Authors' oral comments

7.2 The authors reiterate their claim that the State party has failed to take all necessary and appropriate measures to keep global temperatures from warming by 1.5°C above the pre-industrial era, thereby contributing to climate change, in violation of their rights. They state that the harms the authors have experienced, and will continue to experience, were foreseeable in 1990, when the Intergovernmental Panel on Climate Change predicted that global warming of just 1°C could cause the water shortages, vector-borne diseases and sea level rise the authors now face. They argue that if States do not take immediate action to vastly reduce their greenhouse gas emissions, the authors will continue to suffer greatly in their lifetimes. The authors insist that there is a direct and foreseeable causal link between the harm to which they have been exposed and the State party's emissions, as the harm suffered by them is attributable to climate change and the State party's ongoing emissions contribute to worsening climate change.

7.3 Regarding the issue of exhaustion of domestic remedies, the authors refer to the recent Constitutional Court judgment in *Neubauer, et al. v. Germany*, in which a group of children from Bangladesh, Germany and Nepal filed a rights-based constitutional challenge to the Climate Protection Act.[15] The authors argue that the judgment demonstrates why a constitutional complaint would not provide them with effective relief. Namely, they would still not be able to enforce their claims against Argentina, Brazil, France and Turkey in German courts because of foreign sovereign immunity; their claims requiring Germany to use all available means of international cooperation to influence climate action would likewise fail; the rights of the authors who are not German citizens would not be sufficiently protected as, in its decision, the Constitutional Court found that the obligations of Germany to foreign claimants were limited and less protective than its obligations to the German claimants. This is because the court noted that, although the legislature must endeavour to limit the temperature increase to 1.5°C, a lower mitigation target of 2°C may be acceptable if adaptation measures could protect the German people. Nevertheless, the authors argue that the 1.5°C target is the absolute minimum necessary to limit dangerous climate change and the most protective standard for all the authors' human rights.

State party's oral observations

7.4 The State party notes that, while it sympathizes with the goals of the communication and shares both the concerns about climate change and the sense of urgency in fighting global warming, it does not accept the communication as the proper way of pursuing these goals.

[13] Supreme Court of the Netherlands, *Kingdom of the Netherlands v. Urgenda Foundation*, Case No. 19/00135, Judgment of 20 December 2019.

[14] United States District Court for the District of Oregon Eugene Division, *Juliana v. United States*, Case No. 339 F. Supp. 3d 1062 (D. Or. 2018), Judgment of 15 October 2018.

[15] Constitutional Court of Germany, *Neubauer, et al. v. Germany*, Case Nos. 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20 and 1 BvR 288/20, Judgment of 24 March 2021.

The Committee is not the right forum for a debate about the advantages and disadvantages of national approaches to the fight against climate change. The State party reiterates that the authors who do not reside in Germany cannot be considered to be within the effective control of the State party for the purposes of establishing jurisdiction. In view of the limits of sovereignty under international law, it is not possible in practice for the State party to take measures outside its territory to protect people living abroad. There is indeed a duty to cooperate internationally and to use all available legal, diplomatic and economic means to persuade other States to adopt sufficient emission reduction pathways. Nevertheless, this serves to illustrate that respect for the sovereignty of each State still lies at the heart of international law. The fact that emissions from one State have a general impact on the global climate cannot establish specific jurisdiction with regard to the territory of any other State. In the present case, no causal link between the alleged acts or omissions of the State party and the alleged harm suffered by the authors has been established. The greenhouse gases emitted in Germany are not directly and immediately causing heatwaves, forest fires or storms thousands of kilometres away. Any emissions from Germany, as from anywhere else, will have an impact on the global climate situation, which may lead to an impact on the authors' living conditions. Yet, a general contribution to the global phenomenon of climate change cannot in law be equated with a direct and specific impact on the authors' living conditions.

7.5 Regarding the issue of exhaustion of domestic remedies, the State party also refers to the Constitutional Court judgment in *Neubauer, et al. v. Germany*. It notes that the court rendered a decision on constitutional complaints brought by several young activists, including some living in Bangladesh and Nepal, against the State party's climate protection policy, specifically the Federal Climate Protection Act of December 2019. Similarly to the submissions of the authors in the present case, the complainants alleged that the efforts of the State party were insufficient in the fight against climate change and constituted, inter alia, a violation of their rights to life, physical integrity and property. The Federal Constitutional Court found the complaints admissible and concluded that the Climate Change Act was insufficient to ensure that the necessary transition to climate neutrality was achieved in time. It therefore required the State party to amend the Act accordingly. Nevertheless, the Court rejected the claim that the State party's climate policy currently constituted a violation of the complainants' rights to life, physical integrity and property. The State party argues that the decision is relevant for the authors' communication in several respects. The decision establishes that: a constitutional complaint against the State party's climate protection policy is admissible and will be heard within a very reasonable time frame;[16] non-nationals who are minors will, as demonstrated by the decisions, have standing before the court; and the State party has the obligation to seek international solutions for the climate crisis. The State party argues that the decision of the Constitutional Court clearly establishes that an application with the same goals as the authors' communication could have been brought by the authors before the Federal Constitutional Court. Such a complaint would also have been free of charge and legal aid would have been available.

7.6 Lastly, the State party reiterates that authors who are directly concerned by certain activities, in addition to bringing a constitutional complaint, could have initiated administrative proceedings in the State party in accordance with general requirements seeking either specific action on the part of the Government (e.g. orders to close coal-based facilities, bans on certain activities, etc.) or a declaratory finding (e.g. to the effect that a particular government policy violates a specific right of the applicant under the Convention).

Oral hearing with the authors

8. Following an invitation by the Committee and pursuant to rule 19 of its rules of procedure under the Optional Protocol, 11 of the authors appeared before the Committee on 28 May 2021 by way of videoconference in a closed meeting, without the presence of State party representatives. They explained to the Committee how climate change has affected their

[16] The State party notes that, in the Neubauer case, the initial complaints were submitted in 2018 and at the beginning of 2020. The authors of the first complaint changed the substance of their submissions in June 2020 after the Federal Climate Protection Act had entered into force in December 2019. The court's decision was rendered on 24 March 2021.

daily lives and expressed their views about what the respondent States parties should do about climate change, and why the Committee should consider their complaints.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether the claim is admissible under the Optional Protocol.

Jurisdiction

9.2 The Committee notes the State party's submission that the communication is inadmissible for lack of jurisdiction and lack of victim status. The Committee also notes the authors' argument that they are within the State party's jurisdiction as victims of the foreseeable consequences of the State party's domestic and cross-border contributions to climate change and the carbon pollution knowingly emitted, permitted or promoted by the State party from within its territory. The Committee further notes the authors' claims that the State party's acts and omissions perpetuating the climate crisis have already exposed them throughout their childhoods to the foreseeable, life-threatening risks of climate change caused by humans.

9.3 Under article 2 (1) of the Convention, States parties have the obligation to respect and ensure the rights of "each child within their jurisdiction". Under article 5 (1) of the Optional Protocol, the Committee may receive and consider communications submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in the Convention. The Committee observes that, while neither the Convention nor the Optional Protocol makes any reference to the term "territory" in its application of jurisdiction, extraterritorial jurisdiction should be interpreted restrictively.[17]

9.4 The Committee notes the relevant jurisprudence of the Human Rights Committee and the European Court of Human Rights referring to extraterritorial jurisdiction.[18] Nevertheless, that jurisprudence was developed and applied to factual situations that are very different to the facts and circumstance of the present case. The authors' communication raises novel jurisdictional issues of transboundary harm related to climate change.

9.5 The Committee also notes Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights on the environment and human rights, which is of particular relevance to the issue of jurisdiction in the present case as it clarified the scope of extraterritorial jurisdiction in relation to environmental protection. In that opinion, the Court noted that, when transboundary damage occurs that affects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory (para. 101). The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and consequent human rights violation (para. 104 (h)). In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing

[17] See, inter alia, Inter-American Court of Human Rights, Advisory Opinion OC-23/17, para. 81, and European Court of Human Rights, *Catan and others v. Moldova and Russia*, Applications Nos. 43370/04, 8252/05 and 18454/06, Judgment of 19 October 2012.

[18] See, inter alia, Human Rights Committee, general comments No. 31 (2004), para. 10, and No. 36 (2018), para. 63, *Munaf v. Romania* (CCPR/C/96/D/1539/2006), para. 14.2, *A.S. et al. v. Malta* (CCPR/C/128/D/3043/2017), paras. 6.3–6.5, and *A.S. et al. v. Italy* (CCPR/C/130/D/3042/2017), paras. 7.3–7.5; European Court of Human Rights, *Andreou v. Turkey*, para. 25, and *Georgia v. Russia (II)*, Application No. 38263/08, Judgment of 21 January 2021, para. 81. See also Committee on the Rights of the Child, general comment No. 16 (2013), para. 39, and CRC/C/NOR/CO/5-6, para. 27.

transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage (para. 102). The Court further noted that accordingly, it can be concluded that the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority (para. 103).

9.6 The Committee recalls that, in the joint statement on human rights and climate change that it issued with four other treaty bodies,[19] it noted that the Intergovernmental Panel on Climate Change had confirmed in a report released in 2018 that climate change poses significant risks to the enjoyment of the human rights protected by the Convention such as the right to life, the right to adequate food, the right to adequate housing, the right to health, the right to water and cultural rights (para. 3). 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 (para. 10).

9.7 Having considered the above, the Committee finds that the appropriate test for jurisdiction in the present case is that adopted by the Inter-American Court of Human Rights in its Advisory Opinion on the environment and human rights. This implies that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question. The Committee considers that, while the required elements to establish the responsibility of the State are a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction.[20]

9.8 The Committee notes the authors' claims that, while climate change and the subsequent environmental damage and impact on human rights it causes are global collective issues that require a global response, States parties still carry individual responsibility for their own acts or omissions in relation to climate change and their contribution to it. The Committee also notes the authors' argument that the State party has effective control over the source of carbon emissions within its territory, which have a transboundary effect.

9.9 The Committee considers that it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect on the enjoyment of rights by individuals both within and beyond the territory of the State party. The Committee considers that, given its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions.

9.10 In accordance with the principle of common but differentiated responsibilities, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.[21]

[19] HRI/2019/1.

[20] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, para. 136. See also paras. 175–180 on the precautionary principle. It is worth noting the textual similarity between article 1 of the Inter-American Convention on Human Rights and article 2 of the Convention on the Rights of the Child, in respect of jurisdiction.

[21] See the preamble to the Convention, article 3 of the United Nations Framework Convention on Climate Change, and the preamble and articles 2 and 4 of the Paris Agreement. See also A/56/10, A/56/10/Corr.1 and A/56/10/Corr.2, chap. IV.E.2, commentary on draft article 47 of the draft articles on the responsibility of States for internationally wrongful acts.

9.11 Regarding the issue of foreseeability, the Committee notes the authors' uncontested argument that the State party has known about the harmful effects of its contributions to climate change for decades and that it signed both the United Nations Framework Convention on Climate Change in 1992 and the Paris Agreement in 2016. In the light of existing scientific evidence showing the impact of the cumulative effect of carbon emissions on the enjoyment of human rights, including rights under the Convention,[22] the Committee considers that the potential harm of the State party's acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party.

9.12 Having concluded that the State party has effective control over the sources of emissions that contribute to causing reasonably foreseeable harm to children outside its territory, the Committee must now determine whether there is a sufficient causal link between the harm alleged by the authors and the State party's actions or omissions for the purposes of establishing jurisdiction. In this regard, the Committee observes, in line with the position of the Inter-American Court of Human Rights, that not every negative impact in cases of transboundary damage gives rise to the responsibility of the State in whose territory the activities causing transboundary harm took place, that the possible grounds for jurisdiction must be justified based on the particular circumstances of the specific case, and that the harm needs to be "significant".[23] In this regard, the Committee notes that the Inter-American Court of Human Rights observed that, in the articles on prevention of transboundary harm from hazardous activities, the International Law Commission referred only to those activities that may involve significant transboundary harm and that "significant" harm should be understood as something more than "detectable" but need not be at the level of "serious" or "substantial". The Court further noted that harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States and that such detrimental effects must be susceptible of being measured by factual and objective standards.[24]

Victim status

9.13 In the specific circumstances of the present case, the Committee notes the authors' claims that their rights under the Convention have been violated by the respondent States parties' acts and omissions in contributing to climate change, and their claims that said harm will worsen as the world continues to warm up. It notes the authors' claims: that smoke from wildfires and heat-related pollution has caused some of the authors' asthma to worsen, requiring hospitalizations; that the spread and intensification of vector-borne diseases has affected the authors, resulting in some of them contracting malaria multiple times a year or contracting dengue or chikungunya; that the authors have been exposed to extreme heatwaves, causing a serious threat to the health of many of them; that drought is threatening water security for some of the authors; that some of the authors have been exposed to extreme storms and flooding; that life at a subsistence level is at risk for the indigenous authors; that, due to the rising sea level, the Marshall Islands and Palau are at risk of becoming uninhabitable within decades; and that climate change has affected the mental health of the authors, some of whom claim to suffer from climate anxiety. The Committee considers that, as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention

[22] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, United Kingdom, Cambridge University Press, 2013) and "Global warming of 1.5°C: summary for policymakers", formally approved at the First Joint Session of Working Groups I, II and III of the Intergovernmental Panel on Climate Change and accepted by the Panel at its forty-eighth session, held in Incheon, Republic of Korea, on 6 October 2018.

[23] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, paras. 81 and 102.

[24] Ibid., para. 136, and A/56/10, A/56/10/Corr.1 and A/56/10/Corr.2, chap. V.E.2, commentary on draft article 2 of the draft articles on the prevention of transboundary harm from hazardous activities.

that children are entitled to special safeguards, including appropriate legal protection, States have heightened obligations to protect children from foreseeable harm.[25]

9.14 Taking the above-mentioned factors into account, the Committee concludes that the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established prima facie that they have personally experienced real and significant harm in order to justify their victim status. Consequently, the Committee finds that it is not precluded by article 5 (1) of the Optional Protocol from considering the authors' communication.

Exhaustion of domestic remedies

9.15 The Committee notes the State party's argument that the communication should be found inadmissible for failure to exhaust domestic remedies. It also notes the State party's argument that domestic remedies were available to the authors, including by lodging a complaint before the Constitutional Court. It further notes the State party's argument that the authors could have initiated administrative law proceedings pursuant to section 40 of the Code of Administrative Court Procedure and that they could also have raised the claims presented in the communication before the domestic courts under article 19 (4) of Basic Law of Germany.

9.16 The Committee recalls that authors must make use of all judicial or administrative avenues that may offer them a reasonable prospect of redress. The Committee considers that domestic remedies need not be exhausted if, objectively, they have no prospect of success, for example in cases where under applicable domestic laws the claim would inevitably be dismissed or where established jurisprudence of the highest domestic tribunals would preclude a positive result. Nevertheless, the Committee notes that mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them.[26]

9.17 In the present case, the Committee notes that the authors have not initiated any domestic proceedings in the State party. The Committee also notes the authors' argument that they would face unique obstacles in exhausting domestic remedies as it would be unduly burdensome for them, unreasonably prolonged and unlikely to bring effective relief. It further notes their argument that domestic courts would most likely dismiss their claims, which implicate the State's obligations to engage in international cooperation, because of the non-justiciability of foreign policy and foreign sovereign immunity. Nevertheless, the Committee considers that the State party's alleged failure to engage in international cooperation is raised in connection with the specific form of remedy that the authors are seeking, and that they have not sufficiently established that such a remedy is necessary to bring effective relief. The authors have also argued, in particular, that government action based on the Climate Protection Act is not justiciable in the State party's domestic courts. In this regard, however, the Committee notes the State party's argument that legal avenues were available to the authors, either a constitutional complaint, administrative proceedings initiated under the Code of Administrative Court Procedure or a review of their claims presented in the communication under the Basic Law of Germany before the domestic courts. It also notes that the authors did not make any attempt to initiate their claims under any of these procedures. The Committee further notes the decision of the Constitutional Court in *Neubauer, et al. v. Germany*, in which the court admitted claims against the Federal Climate Protection Act submitted by children who were neither nationals of or residents in the State party. It notes that the court, in its decision, also specifically emphasized that the State was compelled to engage in internationally oriented activities to tackle climate change at the global level and

[25] Preamble to the Convention on the Rights of the Child; A/HRC/31/52, para. 81, and Committee on the Rights of the Child, "Report of the 2016 day of general discussion: children's rights and the environment", p. 23. Available from https://www.ohchr.org/en/hrbodies/crc/pages/discussion2016.aspx.

[26] *D.C. v. Germany* (CRC/C/83/D/60/2018), para. 6.5.

was required to promote climate action within the international framework.[27] In the absence of further reasoning from the authors as to why they did not attempt to pursue these remedies, other than generally expressing doubts about the prospects of success of any remedy, the Committee considers that the authors have failed to exhaust all domestic remedies that were reasonably effective and available to them to challenge the alleged violation of their rights under the Convention.

9.18 Regarding the authors' argument that foreign sovereign immunity would prevent them from exhausting domestic remedies in the State party, the Committee notes that the issue of foreign sovereign immunity may arise only in relation to the particular remedy that the authors would aim to achieve by filing a case against other respondent States parties together with the State party in its domestic court. In this case, the Committee considers that the authors have not sufficiently substantiated their arguments concerning the exception under article 7 (e) of the Optional Protocol that the application of the remedies is unlikely to bring effective relief.

9.19 The Committee notes the authors' argument that pursuing remedies in the State party would be unreasonably prolonged. It also notes that, while the authors cite cases in other States in which the courts took several years to reach a decision, they have failed to establish the connection with the remedies available within the State party or to otherwise indicate how the time the courts would take to reach a decision in the State party would be unreasonably prolonged, particularly in light of the timely decision in the Neubauer case. The Committee concludes that, in the absence of any specific information from the authors that would justify that domestic remedies would be ineffective or unavailable, and in the absence of any attempt by them to initiate domestic proceedings in the State party, the authors have failed to exhaust domestic remedies.

9.20 Consequently, the Committee finds the communication inadmissible for failure to exhaust domestic remedies under article 7 (e) of the Optional Protocol.

10. The Committee therefore decides:

(a) That the communication is inadmissible under article 7 (e) of the Optional Protocol;

(b) That the present decision shall be transmitted to the authors of the communication and, for information, to the State party.

[27] Ibid., and *Neubauer, et al. v. Germany* (official English translation), para. 2 (c).

Annex 628

Rylands v Fletcher [1868] UKHL 1

BAILII Citation Number: [1868] UKHL 1

HOUSE OF LORDS

Date: 17 July 1868

Between:

JOHN RYLANDS AND JEHU HORROCKS — **PLAINTIFFS**

- v -

THOMAS FLETCHER — **DEFENDANT**

THE LORD CHANCELLOR (Lord *Cairns*):-

My Lords, in this case the Plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The Defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the Plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the Defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the Plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the Defendants.

In that state of things the reservoir of the Defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the Defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the Defendants it passed on into the workings under the close of the Plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred, was argued, was of opinion that the Plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the Judges there unanimously arrived at

the conclusion that there was a cause of action, and that the Plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of Smith v. Kenrick in the Court of Common Pleas(1).

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, - and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. As the case of Smith v. Kenrick is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of Baird v. Williamson(2), which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice *Blackburn* in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie*

(1) 7 C. B. 515.
(2) 15 C. B.(N. S.) 317.

answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* , or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH :-

My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice *Blackburn* in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it

does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a Defendant is liable to a Plaintiff for damage which the Plaintiff may have sustained, the question in general is not whether the Defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of Lambert v. Bessey, reported by Sir *Thomas Raymond* (1). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound . This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of Smith v. Kenrick(2), and Baird v. Williamson(3). In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The Defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the Plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the Defendant to protect the Plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water, in that case, was only left by the Defendant to flow in its natural course.

But in the later case of Baird v. Williamson the Defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the Plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without

(1) Sir T. Raym. 421.
(2) 7 C. B. 564.
(3) 15 C. B. (N. S.) 376.

negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the Plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the Defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The Plaintiff had a right to work his coal through the lands of Mr. *Whitehead* ,and up to the old workings. If water naturally rising in the Defendants' lana (we may treat the land as the land of the Defendants for the purpose of this case) had by percolation found its way down to the Plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the Plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in Smith v. Kenrick, the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against *Whitehead's* land. But that is not the real state of the case. The Defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the Plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the Defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the Defendant in Error.

Annex 629

M.C. Mehta And Anr v Union of India & Ors, Decision of the Supreme Court of India, 1987 SCR (1) 819, AIR 1987 965, 20 December 1986

M.C. Mehta And Anr vs Union Of India & Ors on 20 December, 1986

Equivalent citations: 1987 AIR 1086, 1987 SCR (1) 819, AIR 1987 SUPREME COURT 1086, 1987 (1) SCC 395, 1987 SCC (L&S) 37, (1987) 1 TAC 255, (1987) ACJ 386, (1987) 1 ACC 157, (1987) 1 JT 1 (SC)

Author: P.N. Bhagwati

Bench: P.N. Bhagwati, Misra Rangnath, G.L. Oza, M.M. Dutt, K.N. Singh

PETITIONER:
M.C. MEHTA AND ANR.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT20/12/1986

BENCH:
BHAGWATI, P.N. (CJ)
BENCH:
BHAGWATI, P.N. (CJ)
MISRA RANGNATH
OZA, G.L. (J)
DUTT, M.M. (J)
SINGH, K.N. (J)

CITATION:
1987 AIR 1086 1987 SCR (1) 819
1987 SCC (1) 395 JT 1987 (1) 1
1986 SCALE (2)1188
CITATOR INFO :
F 1989 SC1642 (24)
RF 1990 SC 273 (28,43)
E&D 1992 SC 248 (13,14,15,16,28,100)

ACT:
Constitution of India 1950--Articles 12 & 21-- Private corporation-Engaged in industry vital to public interest with potential to affect life and health of people--Whether 'other authority'--Extent of availability of Article 21.
Article 32--Jurisdiction and Power of Court--Not only injunctive in ambit--Remedial in scope and provides relief for infringement of fundamental right--Power to award com-pensation.

Public Interest Litigation--Maintainability of--Whether letters addressed even to an individual judge entertainable--Whether preferred form of address applicable--Whether letters to be supported by affidavits--Hyper-technical approach to be avoided by the Court--Court must look at the substance and not the form--Court's power to collect relevant material and to appoint commissions.

Law of Torts--Liability of an enterprise engaged in a hazardous and inherently dangerous industry for occurrence of accident--Strict and absolute--Quantum of compensation payable for harm caused--Determination of--Rule laid in Rylands v. Fletcher--Whether applicable in India.

Jurisprudence--Law--Should keep pace with changing socioeconomic norms---Where a law of the past does not fit in to the present context, Court should evolve new law.

Interpretation of Constitution--Creative and innovative interpretation in consonance with human rights jurisprudence emphasised.

Interpretation of statutes--Foreign case law--Supreme Court of India not bound to follow.

HEADNOTE:

The petitioners, in this writ petition under Art. 32 , sought a direction for closure of the various units of Shriram Foods & Fertilizers
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Industries on the ground that they were hazardous to the community. During the pendency of the petition, there was escape of oleum gas from one of the units of Shriram. The Delhi Legal Aid and Advice Board and the Delhi Bar Association filed applications for award of compensation to the persons who had suffered harm on account of escape of oleum gas.

A Bench of three Hon'ble Judges while permitting Shriram to restart its power plant as also other plants subject to certain conditions, referred the applications for compensation to a larger Bench of five Judges because issues of great constitutional importance were involved, namely, (1) What is the scope and ambit of the jurisdiction of the Supreme Court under Art. 32 since the applications for compensation are sought to be maintained under that Article; (2) Whether Art. 21 is available against Shriram which is owned by Delhi Cloth Mills Limited, a public company limited by shares and which is engaged in an industry vital to public interest and with potential to affect the life and health of the people; and (3) What is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in Rylands v. Fletcher, (1866 Law Report 1 Excheq-

uer 265) apply or is there any other principle on which the liability can be determined.

Disposing of the applications,

HELD: 1. The question whether a private corporation like Shriram would fall within the scope and ambit of Art. 12 so as to be amenable to the discipline of Art. 21 is left for proper and detailed consideration at a later stage if it becomes necessary to do so. [844F-G]

Rajasthan Electricity Board v. Mohan Lal, [1967] 3 SCR 377; Sukhdev v. Bhagwat Ram, [1975] 1 SCC 421; Ramanna Shetty v. International Airport Authority, [1979] 3 SCR 1014; Ajay Hasia v. Khalid Mujib, [1981] 2 SCR 79; Som Prakash v. Union of India, [1981] 1 S.C.C. 449; Appendix I to Industrial Policy Resolution, 1948; Industries (Development and Regulation) Act, 1951; Delhi Municipal Act, 1957 Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Eurasian Equipment and Chemicals Ltd. v. State of West Bengal, [1975] 2 SCR 674; Rasbehari Panda v. St.ate, [1969] 3 SCR 374; Kasturi Lal Reddy v. State of Jammu & Kashmir, [1980] 3 SCR 1338, referred to.

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2. The Delhi Legal Aid and Advice Board is directed to take up the cases of all those who claim to have suffered on account of oleum gas and to file actions on their behalf in the appropriate Court for claiming compensation and the Delhi Administration is directed to provide necessary funds to the Board for the purpose. [844G-H; 845A]

3.(i) Where there is a violation of a fundamental or other legal right of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a Court of law for justice, it would be open to any public-spirited individual or social action group to bring an action for vindication of the fundamental or other legal right of such individual or class of individuals and this can be done not only by filing regular writ petition under Art. 226 in the High Court and under Art. 32 in this Court, but also by addressing a letter to the Court. [828B-C; E-F]

3.(ii) Even if a letter is addressed to an individual Judge of the Court, it should be entertained, provided of course it is by or on behalf of a person in custody or on behalf of a woman or a child or a class or deprived or disadvantaged persons. [829B-C]

3.(iii) Letters addressed to individual Justices of this Court should not be rejected merely because they fail to conform to the preferred form of address nor should the Court adopt a rigid stance that no letters will be entertained unless they are supported by an affidavit. If the Court were to insist on an affidavit as a condition of entertaining the letters the entire object and purpose of epistolary jurisdiction would be frustrated because most of the poor and disadvantaged persons will then not be able to

have easy access to the Court and even the social action groups will find it difficult to approach the Court. [828H; 829B]

Bandhua Mukti Morcha v. Union of India & Ors., [1984] 2 SCR 67; S.P. Gupta v. Union of India, [1981] (Suppl) SCC 87 and Union for Democratic Rights & Ors. v. Union of India, [1983] 1 SCR 456, relied upon.

4.(i) Article 32 does not merely confer power on this Court to issue direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. It is in realisation of this constitutional obligation that this Court

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has, in the past, innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning. [827F-828A]

4.(ii) The power of the Court is not only injunctive in ambit, that is, preventing the infringement of fundamental right but it is also remedial in scope and provides relief against a breach of the fundamental right already committed. [830A-B]

4.(iii) The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. The infringement of the fundamental right must be gross and patent, that is incontrovertible and exfacie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons or it should appear unjust or unduly harsh or oppressing on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the Civil Courts. [830D; E-F]

4. (iv) Ordinarily a petition under Art. 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of Civil Court. It is only in exceptional cases that compensation may be awarded in a petition under Art. 32. [830F-G]

4.(v) The applications for compensation in the instant writ petition are for enforcement of the fundamental right to life enshrined in Art. 21 of the Constitution and while dealing with such applications the Court cannot adopt a hyper-technical approach which would defeat the ends of justice. The Court must look at the substance and not the form. Therefore, the instant applications for compensation are maintainable under Art. 32. [827A-B]

Bandhua Mukti Morcha v. Union of India & Ors., [1984] 2 SCR 67; S.P. Gupta v. Union of India, [1981] (Suppl.) SCR 87; Union for Democratic Rights & Ors. v. Union of India, [1983] 1 SCR 456 and Rudul Shah v. State of Bihar, AIR 1983 SC 1086, relied upon.

5. The rule in Rylands v. Fletcher (supra) laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does
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damage to another, he is liable to compensate for the damage caused. This rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. This rule evolved in the 19th century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. In a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry on as part of developmental programme, the Court need not feel inhibited by this rule merely because the new law does not recognise the rule of strict and absolute liability in case of an enterprise engaged in hazardous and dangerous activity. [842D-G]

Halsburry Laws of England, Vol. 45 Para 1305, relied upon.

6.(i) Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static. The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Although this Court should be prepared to receive light from whatever source it comes, but it has to build up its own jurisprudence, evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. If it is found that it is necessary to construct a new principle of law to deal with -an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concommitant to an industrial economy the Court should not hesitate to evolve such principles of liability merely because it has not been so done in England. [843A-E]

6(ii) This Court has throughout the last few years expanded the horizon of Art. 12 primarily to inject respect for human-rights and social conscience in corporate structure. The purpose of expansion has not been to destroy the

raison d'etre of creating corporations but to advance the human rights jurisprudence. The apprehension that including within the ambit of Art. 12 and thus subjecting to the discipline of Art. 21 those private corporations whose activities have the potential of affecting the life and health of the people, would deal a death blow to
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the policy of encouraging and permitting private enterpreneurial activity is not well founded. It is through creative interpretation and bold innovation that the human-rights jurisprudence has been developed in India to a remarkable extent and this forward march of the humanrights movement cannot be allowed to be halted by unfounded apprehensions expressed by status quoists. [841C-E]

7.(i) An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute non-delegable duty to the community to ensure that if any harm results to anyone, the enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity must be conducted with the highest standards of safety and if any harm results on account of such activity the enterprise must be absolutely liable to compensate for such harm irrespective of the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part. [843E-G]

7.(ii) If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads. The enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. [844A-B]

7.(iii) The measure of compensation in such kind of cases must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in carrying on of the hazardous or inherently dangerous activity by the enterprise. [844E-F]

8. The historical context in which the American doctrine of State action evolved in the united States is irrelevant for the purpose of Indian Courts, especially in view of Art. 15(2) of the Indian Constitution. But, it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action which can be applied to the limited extent to which it can be Indianised and harmoniously blended with Indian constitutional

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jurisprudence. Indian Courts are not bound by the American exposition of constitutional law. The provisions of American Constitution cannot always be applied to Indian conditions or to the provisions of Indian Constitution and whilst some of the principles adumberated by the American decisions may provide a useful guide, close adherence to those principles while applying them to the provisions of the Indian Consti- tution is not to be favoured, because the social conditions in India are different. [840D-H]

Ramanna Shetty v. International Airport Authority, [1979] 3 SCR 1014; Jackson v. Metropolitan Edison Co., 42 L.ed. (2d) 477; Air India v. Nargesh Mirza, [1982] 1 SCR 438 and General Electric Co. Maratha v. Gilbert, 50 L.ed (2d) 343, relied upon.

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition (Civil) No. 12739 of 1985.

(Under Article 32 of the Constitution of India.) Petitioner-in-person.

B. Datta, Additional Solicitor General, A.B. Diwan, F.S. Nariman, B.R.L. lyengar, Hardev Singh, Hemant Sharma, C.V.S. Rao, R.D. Aggarwal, Ms. S. Relan, R.S. Sodhi, S. Sukumaran, Ravinder Narain, D.N. Mishra, Aditya Narayan, Ms. Lira Goswami, S. Kachwaha, Mohan, Ravinder Bana, K.C. Dua, K. Kumaramangalam, O.C. Jain and K.R.R. Pilai for the Respond- ents.

Raju Ramachandran for the Intervener.

Soli J. Sorabji for Citizens Action Committee. The Judgment of the Court was delivered by BHAGWATI, CJ. This writ petition under Article 32 of the Constitution has come before us on a reference made by a Bench of three Judges. The reference was made because cer- tain questions of seminal importance and high constitutional significance were raised in the course of arguments when the writ petition was originally heard. The facts giving rise to the writ petition and the subsequent events have been set out in some detail in the Judgment given by the Bench of three Judges on 17th February 1986, and it is therefore not necessary to reiterate the same. Suffice it to state that the Bench of three Judges permitted Shriram Foods and Fertiliser Industries (hereinaf- ter referred to as Shriram) to restart its power plant as also plants for manufacture of caustic chlorine including its by-products and recovery plants like soap, glycerine and technical hard oil, subject to the conditions set out in the Judgment. That would have ordinarily put an end to the main controversy raised in the writ petition which was filed in order to obtain a direction for closure of the various units of Shriram on the ground that they were hazardous to the community and the only point in dispute which would have survived would have been whether the units of Shriram should be directed to be removed from the place where they are presently situate and relocated in another place where there would not be much human habitation so that there would not be any real danger

to the health and safety of the people. But while the writ petition was pending there was escape of oleum gas from one of the units of Shriram on 4th and 6th December, 1985 and applications were filed by the Delhi Legal Aid & Advice Board and the Delhi Bar Association for award of compensation to the persons who had suffered harm on account of escape of oleum gas. These applications for compensation raised a number of issues of great constitu- tional importance and the Bench of three Judges therefore formulated the issues and asked the petitioner and those supporting him as also Shriram to file their respective written submissions so that the Court could take up the hearing of these applications for compensation. When these applications for compensation came up for hearing it was felt that since the issues raised involved substantial questions of law relating to the interpretation of Articles 21 and 32 of the Constitution, the case should be referred to a larger Bench of five Judges and this is how the case has now come before us.

Mr. Diwan, learned counsel appearing on behalf of Shri- ram raised a preliminary objection that the Court should not proceed to decide these constitutional issues since there was no claim for compensation originally made in the writ petition and these issues could not be said to arise on the writ petition. Mr. Diwan conceded that the escape of oleum gas took place subsequent to the filing of the writ petition but his argument was that the petitioner could have applied for amendment of the writ petition so as to include a claim for compensation for the victims of oleum gas but no such application for amendment was made and hence on the writ petition as it stood, these constitutional issues did not arise for consideration. We do not think this preliminary objection raised by Mr. Diwan is sustainable. It is undoubt- edly true that the petitioner could have applied for amend- ment of the writ petition so as to include a claim for compensation but merely because he did not do so, the applications for compensation made by the Delhi Legal Aid & Advice Board and the Delhi Bar Association cannot be thrown out. These applications for compensation are for enforcement of the fundamental right to life en- shrined in Article 21 of the Constitution and while dealing with such applications, we cannot adopt a hypertechnical approach which would defeat the ends of justice. This Court has on numerous occasions pointed out that where there is a violation of a fundamental or other legal right of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a Court of law for justice, it would be open to any public spirited individual or social action group to bring an action for vindication of the fundamental or other legal right of such individual or class of individuals and this can be done not only by filing a regular writ petition but also by addressing a letter to the Court. If this Court is prepared to accept a letter complaining of violation of the fundamental right of an individual or a class of individuals who cannot approach the Court for justice, there is no reason why these applications for compensation which have been made for enforcement of the fundamental right of the persons affected by the oleum gas leak under Article 21 should not be entertained. The Court while dealing with an application for enforcement of a fundamental right must look at the substance and not the form. We cannot therefore sustain the preliminary objection raised by Mr. Diwan. The first question which requires to be considered is as to what is the scope and ambit of the jurisdiction of this Court under Article 32 since the applications for compensa- tion made by the Delhi Legal Aid and Advice Board and the Delhi Bar Association are applications sought to be main- tained under that Article. We have already had occasion to consider the ambit and coverage of Article 32 in the Bandhua Mukti Morcha v. Union of India & Ors., [1984] 2 SCR 67 and we wholly endorse what has been stated by one of us namely, Bhagwati, J. as he then was in his judgment in that case in regard

to the true scope and ambit of that Article. It may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to' enforce the fundamental rights. It is in reali- sation of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.

Thus it was in S,P. Gupta v. Union of India, [1981] Supp. SCC 87 that this Court held that "where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitution- al or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authori- ty of law or any such legal wrong or legal injury or illegal burden is threatened, and any such person or determinate class of persons is by reason of poverty or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of the public or social action group can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of per- sons." This Court also held in S.P. Gupta's case (supra) as also in the People's Union for Democratic Rights and Ors. v. Union of India, [1983] 1 SCR 456 and in Babdhua Mukti Mor- cha's case (supra) that procedure being merely a hand-maden of justice it should not stand in the way of access to justice to the weaker sections of Indian humanity and there- fore where the poor and the disadvantaged are concerned who are barely eking out a miserable existence with their sweat and toil and who are victims of an exploited society without any access to justice, this Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting probono publico would suffice to ignite the jurisdiction of this Court. We wholly endorse this statement of the law in regard to the broadening of locus standi and what-has come to be known as epistolary jurisdiction.

We may point out at this stage that in Bandhua Mukti Morcha's case (supra) some of us apprehending that letters addressed to individual justices may involve the court in frivolous cases and that possibly the view could be taken that such letters do not invoke the jurisdiction of the court as a whole, observed that such letters should not be addressed to individual justices of the court but to the Court or to the Chief Justice and his companion judges. We do not think that it would be right to reject a letter addressed to an individual justice of the court merely on the ground that it is not addressed to the court or to the Chief Justice and his companion Judges. We must not forget that letters would ordinarily be addressed by poor and disadvan- taged persons or by social action groups who may not know the proper form of address. They may know only a particular Judge who comes from their State and they may therefore address the letters to him. If the Court were to insist that the letters must be addressed to the court, or to the Chief Justice and his companion Judges, it would exclude from the judicial ken a large number of letters and in the result deny access to justice to the deprived and vulnerable sec- tions of the community. We are therefore of the view that even if

a letter is addressed to an individual Judge of the court, it should be entertained, provided of course it is by or on behalf of a person in custody or on behalf of a woman or a child or a class of deprived or disadvantaged persons. We may point out that now there is no difficulty in enter- taining letters addressed to individual justice of the court, because this Court has a Public Interest Litigation Cell to which all letters addressed to the Court or to the individual justices are forwarded and the staff attached to this Cell examines the letters and it is only after scrutiny by the staff members attached to this Cell that the letters are placed before the Chief Justice and under his direction, they are listed before the Court. We must therefore hold that letters addressed to individual justice of the court should not be rejected merely because they fail to conform to the preferred form of address. Nor should the court adopt a rigid stance that no letters will be entertained unless they are supported by an affidavit. If the court were to insist on an affidavit as a condition of entertaining the letters the entire object and purpose of epistolary juris- diction would be frustrated because most of the poor and disadvantaged persons will then not be able to have easy access to the Court and even the social action groups will find it difficult to approach the Court. We may point out that the court has so far been entertaining letters without an affidavit and it is only in a few rare cases that it has been found that the allegations made in the letters were false. But that might happen also in cases where the juris- diction of the Court is invoked in a regular way:

> So far as the power of the court under Article 32 to gather relevant material bearing on the issues arising in this kind of litigation, which we may for the sake of con- venience call.social action litigation, and to appoint Commissions for this purpose is concerned, we endorse. what one of us namely, Bhagwati, J., as he then was, has said in his Judgment in Bandhua Mukti Morcha's case (supra). We need not repeat what has been stated in that judgment.' It has our full approval.
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> We are also of the view that this Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a funda- mental right and under Article 32(2) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only in- junctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide Bandhua Mukti Morcha's case (supra). If the Court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases.

We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the Court in a petition under Article 32. The infringement of the funda- mental right must be gross and patent, that is, incontro- vertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of theft poverty or disability or socially or economically, disadvantaged posi- tion to require the person or persons affected by such infringement to initiate and pursue action in the civil courts. Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamen- tal right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32. This is the principle on which this Court award- ed compensation in Rudul Shah v. State of Bihar, (AIR 1983 SC 1086). So also, this Court awarded compensation to Bhim Singh, whose fundamental right to personal liberty was grossly violated by the State of Jammu and Kashmir. If we make a fact analysis of the cases where compensation has been awarded by this Court, we will find that in all the cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil court for claim- ing compensation.

The next question which arises for consideration on these applications for compensation is whether Article 21 is available against Shriram which is owned by Delhi Cloth Mills Limited, a public company limited by shares and which is engaged in an industry vital to public interest and with potential to affect the life and health of the people. The issue of availability of Article 21 against a private corpo- ration engaged in an activity which has potential to affect the life and health of the people was vehemently argued by counsel for the applicants and Shriram. It was emphatically contended by counsel for the applicants, with the analogical aid of the American doctrine of State Action and the func- tional and control test enunciated by this Court in its earlier decisions, that Article 21 was available, as Shriram was carrying on an industry which, according to the Govern- ment's own declared industrial policies, was ultimately intended to be carried out by itself, but instead of the Government immediately embarking on that industry, Shriram was permitted to carry it on under the active control and regulation of the Government. Since the Government intended to ultimately carry on this industry and the mode of carry- ing on the industry could vitally affect public interest, the control of the Government was linked to regulating that aspect of the functioning of the industry which could vital- ly affect public interest. Special emphasis was laid by counsel for the applicants on the regulatory mechanism provided under the Industries Development and Regulation Act, 1951 where industries are included in the schedule if they vitally affect public

interest. Regulatory measures are also to be found in the Bombay Municipal Corporation Act, the Air and Water Pollution Control Acts and now the recent Environment Act, 1986. Counsel for the applicants also pointed to us the sizable aid in loans, land and other facilities granted by the Government to Shriram in carrying on the industry. Taking aid of the American State Action doctrine, it was also argued before us on behalf of the applicants that private activity, if supported, controlled or regulated by the State may get so entwined with govern- mental activity as to be termed State action and it would then be subject to the same constitutional restraints on the exercise of power as the State.

On the other hand, counsel for Shriram cautioned against expanding Article 12 so as to bring within its ambit private corporations. He contended that control or regulation of a private corporations functions by the State under general statutory law such as the Industries Development and Regula- tion Act, 1951 is only in exercise of police power of regu- lation by the State. Such regulation does not convert the activity of the private corporation into that of the State. The activity remains that of the private corporation, the State in its police power only regulates the manner in which it is to be carried on. It was emphasised that control which deems a corporation, an agency of the State, must be of the type where the State controls the management policies of the Corporation, whether by sizable representation on the board of management or by necessity of prior approval of the Government before any new policy of management is adopted, or by any other mechanism. Counsel for Shriram also pointed out the inappositeness of the State action doctrine to the Indian situation. He said that in India the control and function test have been evolved in order to determine wheth- er a particular authority is an instrumentality or agency of the State and hence 'other authority' within the meaning of Article 12. Once an authority is deemed to he 'other author- ity' under Article 12, it is State for the purpose of all its activities and functions and the American functional dichotomy by which some functions of an authority can be termed State action and others private action, cannot oper- ate here. The learned counsel also pointed out that those rights which are specifically intended by the Constitution makers to be available against private parties are so pro- vided in the Constitution specifically such as Articles 17, 23 and 24. Therefore, to so expand Article 12 as to bring within its ambit even private corporations would be against the scheme of the Chapter on fundamental rights.

In order to deal with these rival contentions we think it is necessary that we should trace that part of the devel- opment of Article 12 where this Court embarked on the path of evolving criteria by which a corporation could be termed 'other authority' under Article 12.

In Rajasthan Electricity Board v. Mohan Lal, [1967] 3 SCR 377 this Court was called upon to consider whether the Rajasthan Electricity Board was an 'authority' within the meaning of the expression 'other authorities' in Article 12. Bhargava, J. who delivered the judgment of the majority pointed out that the expression 'other authorities' in Article 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned Judge also said that if any

body of persons has authority to issue directions, the dis-

obedience of which would be publishable as a criminal of- fence, that would be an indication that the concerned au- thority is 'State'. Shah, J., who delivered a separate judgment agreeing with the conclusion reached by the majori- ty, preferred to give a slightly different meaning to the expression 'other authorities'. He said that authorities, constitutional or statutory, would fail within the expres- sion "other authorities" only if they are invested with the sovereign power of the State, namely, the power to make rules and regulations which have the force of law. The ratio of this decision may thus be stated to be that a constitu- tional or statutory authority would be within the expression "other authorities" if it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law.

This test was followed by Ray, C J, in Sukhdev v. Bhagat Ram, [1975] 1 SCC 421. Mathew, J. however, in the same case propounded a broader test. The learned Judge emphasised that the concept of 'State' had undergone drastic changes in recent years and today 'State' could not be conceived of simply as a coercive machinery wielding the thunderbolt of authority; rather it has to be viewed mainly as a service corporation. He expanded on this dictum by stating that the emerging principle appears to be that a public corporation being an instrumentality or agency of the 'State' is subject to the same constitutional limitations as the 'State' it- self. The preconditions of this are two, namely, that the corporation is the creation of the 'State' and that there is existence of power in the corporation to invade the consti- tutional rights of the individual. This Court in Ram anna Shetty v. International Airport Authority, [1979] 3 SCR 1014 accepted and adopted the rational of instrumentality or agency of State put forward by Mathew, J., and spelt out certain criteria with whose aid such an inference could be made. However, before we come to these criteria we think it necessary to refer to the concern operating behind the exposition of the broader test by Justice Mathew which is of equal relevance to us today, especially considering the fact that the definition under Article 12 is. an inclusive and not an exhaustive definition. That concern is the need to curb arbitrary and unregulated power wherever and howsoever reposed.

In Ramanna D. Shetty v. International Airport Authority (supra) this Court deliberating on the criteria on the basis of which to determine whether a corporation is acting as instrumentality or agency of Government said that it was not possible to formulate an all inclu-

sive or exhaustive test which would adequately answer this question. There is no out and dried formula which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not. The Court said whilst formulating the criteria that analogical aid can be taken from the concept of State Action as developed in the United States wherein the U.S. Courts have suggested that a private agency if supported by extra-ordinary assistance given by the State may be subject to the same constitutional limitations as the State. It was pointed out that the State's general common- law and statutory structure under which its people carry on their private affairs, own property and enter into con- tracts, each enjoying equality in terms of legal capacity, is not such assistance as would transform private conduct into State Action. "But if extensive and unusual financial assistance is given and the

purpose of such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of the Government".

On the question of State control, the Court in R.D. Shetty's case (supra) clarified that some control by the State would not be determinative of the question, since the State has considerable measure of control under its police power over all types of business organisations. But a find- ing of State financial support plus an unusual degree of control over the management and policies of the corporation might lead to the characterisation of the operation as State Action.

Whilst deliberating on the functional criteria namely, that the corporation is carrying out a governmental func- tion. the Court emphasised that classification of a function as governmental should not be done on earlier day percep- tions but on what the State today views as an indispensable part of its activities, for the State may deem it as essen- tial to its economy that it owns and operate a railroad, a mill or an irrigation system as it does to own and operate bridges street lights or a sewage disposal plant. The Court also reiterated in R.D. Shetty's case (supra) what was pointed out by Mathew, J. in Sukhdev v. Bhagatram that "Institutions engaged in matters of high public interest or public functions are by virtue of the nature of the func- tions performed government agencies. Activities which are too fundamental to the society are by definition too impor- tant not to be considered government functions." The above discussion was rounded off by the Court in R.D. Shetty's case (supra) by enumerating the following five factors namely, (1) financial assistance given by the State and magnitude of such assistance (2) any other form of assistance whether of the usual kind or extraordinary (3) control of management and policies of the corporation by the State-nature and extent of control (4) State conferred or State protected monopoly status and (5) functions carried out by the corporation, whether public functions closely related to governmental functions, as relevant criteria for determining whether a corporation is an instrumentality or agency of the State or not, though the Court took care to point out that the enumeration was not exhaustive and that it was the aggregate or cumulative effect of all the rele- vant factors that must be taken as controlling. The criteria evolved by this Court in Ramanna Shetty's case (supra) were applied by this Court in Ajay Hasia v. Khalid Mujib, [1981] 2 SCR 79 where it was further empha- sised that:

> "Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool for constitu- tional law must seek the substance and not the form. Now it is obvious that the Government may through the instrumental- ity or agency of natural persons or it may employ the in- strumentality or agency of judicial persons to carry out its functions. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government ..... (for if the Government acting through its officers is subject to certain constitu- tional limitations it must follow a fortiorari that the Government acting through the instrumentality or agency of a corporation should be equality subject to the same

limita- tions".

On the canon of construction to be adopted for interpreting constitutional guarantees the Court pointed out:

> ".... constitutional guarantees ... should not be allowed to be emasculated in their application by a narrow and con- structed judicial interpretation. The Courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activi- ties, whether through natural persons or through corporate entities to the basic obligation of the fundamental rights."

In this case the Court also set at rest the controversy as to whether the manner in which a corporation is brought into existence had any relevance to the question whether it is a State instrumentality or agency. The Court said that it is immaterial for the purpose of determining whether a corpora- tion is an instrumentality or agency of the State or not whether it is created by a Statute or under a statute: "the inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by statute or it may be a Government company or a company formed under the Compa- nies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar stat- ute". It would come within the ambit of Article 12, if it is found to an instrumentality or agency of the State on a proper assessment of the relevant factors.

It will thus be seen that this Court has not permitted the corporate device to be utilised as a barrier ousting the constitutional control of the fundamental rights. Rather the Court has held:

> "It is dangerous to exonerate corporations from the need to have constitutional conscience, and so that inter- pretation, language permitting, which makes governmental agencies whatever their main amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio". Som Prakash v. Union of India, [1981] 1 SCC 449. Taking the above exposition as our guideline, we must now proceed to examine whether a private corporation such as Shriram comes within the ambit of Article 12 so as to be amenable to the discipline of Article 21.
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> In order to assess the functional role allocated to private corporation engaged in the manufacture of chemicals and fertilisers we need to examine the Industrial Policy of the Government and see the public interest importance given by the State to the activity carried on by such private corporation. Under the Industrial Policy Resolution 1956 industries were classified into three categories having regard to the part which the State would play in each of them. The first category was to be the exclusive responsibility of the State. The second category comprised those industries

which would be progressively State owned and in which the State would therefore generally take the initiative in establish- ing new undertakings but in which private enterprise would also be expected to supplement the effort of the State by promoting and development undertakings either on its own or with State participation. The third category would include all the remaining industries and their future development would generally be left to the initiative and enterprise of the private sector. Schedule B to the Resolution enumerated the industries.

Appendix I to the Industrial Policy Resolution, 1948 dealing with the problem of State participation in industry and the conditions in which private enterprise should be allowed to operate stated that there can be no doubt that the State must play a progressively active role in the development of industries. However under the present condi- tions, the mechanism and resources of the State may not permit it to function forthwith in Industry as widely as may be desirable. The Policy declared that for some time to come, the State could contribute more quickly to the in- crease of national wealth by expanding its present activi- ties wherever it is already operating and by concentrating on new units of production in other fields.

On these considerations the Government decided that the manufacture of arms and ammunition, the production and control of atomic energy and the ownership and management of railway transport would be the exclusive monopoly of the Central Government. The establishment of new undertakings in Coal, Iron and Steel, Aircraft manufacture, Ship building, manufacture of telephone telegraph and wireless apparatus and mineral oil were to be the exclusive responsibility of the State except where in national interest the State itself finds it necessary to secure the co-operation of private enterprise subject to control of the Central Government.

The policy resolution also made mention of certain basic industries of importance the planning and regulation of which by tile Cent-

ral Government was found necessary in national interest. Among the eighteen industries so mentioned as requiring such Central control. heavy chemicals and fertilisers stood included.

In order to carry out the objective of the Policy Reso- lution the Industries (Development and Regulation) Act of 1951 was enacted which, according to its objects and rea- sons, brought under central control the development and regulation of a number of important industries the activi- ties of which affect the country as a whole and the develop- ment of which must be governed by economic factors of all India import. Section 2 of the Act declares that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. Chemicals and Fertilisers find a place in the First Schedule as Items 19 and 18 respectively. If an analysis of the declarations in the Policy Resolu- tions and the Act is undertaken, we find that the activity of producing chemicals and fertilisers is

deemed by the State to be an industry of vital public interest, whose public import necessitates that the activity should be ultimately carried out by the State itself, in the interim period with State support and under State control, private corporations may also be permitted to supplement the State effort. The argument of the applicants on the basis of this premise was that in view of this declared industrial policy of the State, even private corporations manufacturing chemi- cals and fertilisers can be said to be engaged in activities which are so fundamental to the Society as to be necessarily considered government functions. Sukhdev v. Bhagat Ram, Ramanna Shetty and Ajay Hasia (supra).

It was pointed out on behalf of the applicants that as Shriram is registered under the InduStries Development and Regulation Act 1951, its activities are subject to extensive and detailed control and supervision by the Government. Under the Act a licence is necessary for the establishment of a new industrial undertaking or expansion of capacity or manufacture of a new article by an existing industrial undertaking carrying on any of the Scheduled Industries included in the First Schedule of the Act. By refusing licence for a particular unit, the Government can prevent over concentration in a particular region or over-investment in a particular industry. Moreover, by its power to specify the capacity in the licence it can also prevent over-devel- opment of a particular industry if it has already reached target capacity. Section 18 G of the Act empowers the Gov- ernment to control the supply, distribution, price etc. of the articles manufactured by a scheduled industry and under Section 18A Government can assume manage- ment and control of an industrial undertaking engaged in a scheduled industry if after investigation it is found that the affairs of the undertaking are being managed in a manner detrimental to public interest and under Section 18AA in certain emergent cases, take-over is allowed even without investigation. Since Shriram is carrying on a scheduled industry, it is subject to this stringent system of regis- tration and licensing. It is also amenable. to various directions that may be issued by the Government from time to time and it is subject to the exercise of the powers of the Government under Sections 18A, and 18G.

Shriram is required to obtain a licence under the Facto- ries Act and is subject to the directions and orders of the authorities under the Act. It is also required to obtain a licence for its manufacturing activities from the Municipal authorities under the Delhi Municipal Act, 1957. It is subject to extensive environment regulation under the Water (Prevention and Control) of Pollution Act, 1974 and as the factory is situated in an air pollution control area, it is also subject to the regulation of the Air (Prevention and Control of Pollution) Act, 1981. It is true that control is not exercised by the Government in relation to the internal management policies of the Company. However, the control is exercised on all such activities of Shriram which can jeop- ardize public interest. This functional control is of spe- cial significance as it is the potentiality of the fertiliz- er industry to adversely affect the health and safety of the community and its being impregnated with public interest which perhaps dictated

the policy decision of the Government to ultimately operate this industry exclusively and invited functional control. Along with this extensive functional control, we find that Shriram also receives sizable assist- ance in the shape of loans and overdrafts running into several crores of rupees from the Government through various agencies. Moreover, Shriram is engaged in the manufacture of caustic soda, chlorine etc. Its various units are set up in a single complex surrounded by thickly populated colonies. Chlorine gas is admittedly dangerous to life and' health. If the gas escapes either from the storage tank or from the filled cylinders or from any other point in the course of production, the health and wellbeing of the people living in the vicinity can be seriously affected. Thus Shriram is engaged in an activity which has the potential to invade the right to life of large sections of people. The question is whether these factors are cumulatively sufficient to bring Shriram within the ambit of Article 12. Prima facie it is arguable that when the States' power as economic agent, economic entrepreneur and allocator of economic benefits is subject to the limitations of fundamental rights. (Vide Eurasian Equipment and Chemicals Ltd. v. State of West Bengal, (1975) 2 SCR 674, Rashbehari Panda v. State, [1983] 3 SCR 374, Ramanna Shetty v. International Airport Authori- ty, (supra) and Kasturilal Reddy v. State of Jammu & Kash- mir, [1980] 3 SCR 1338) why should a private corporation under the functional control of the State engaged in an activity which is hazardous to the health and safety of the community and is imbued with public interest and which the State ultimately proposes to exclusively run under its industrial policy, not be subject to the same limitations. But we do not propose to decide this question and make any definite pronouncement upon it for reasons which we shall point out later in the course of this judgment. We were during the course of arguments, addressed at great length by counsel on both sides on the American doc- trine of State action. The learned counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against the State, the Courts, in order to thwart racial discrimination by private parties, devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the Slate in a significant measure, such activity took the colour of State action and was subject to the constitutional limitations of the Fourteenth Amendment. This historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Article 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indian- ized and harmoniously blended with our constitutional juris- prudence. That we in no way consider ourselves bound by American exposition of constitutional law is well demos- trated by the fact that in Ramanna Shetty, (supra) this Court preferred the minority opinion of Douglas, J. in Jackson v. Metropolitan Edison Company, 42 L.ed. (2d) 477 as against the majority opinion of Rehnquist, J. And again in Air India v. Nargesh Mirza, [1982] 1 SCR 438 this Court whilst preferring the minority view in General Electric Company Martha v. Gilbert, 50 L.ed. (2d) 343 said that the provisions of the American Constitution

cannot always be applied to Indian conditions or to the provisions of our Constitution and whilst some of the principles adumbrated by the American decisions may provide a useful guide, close adherence to those principles while applying them to the provisions of our Constitution is not to be favoured, be- cause the social conditions in our country are different. The learned counsel for Shriram stressed the inapposite-

ness of the doctrine of State action in the Indian context because, according to him, once an authority is brought within the purview of Article 12, it is State for all intents and purposes and the functional dichotomy in America where certain activities of the same authority may be cha- raterised as State action and others as private action cannot be applied here in India. But so far as this argument is concerned, we must demur to it and point out that it is not correct to say that in India once a corporation is deemed to be 'authority', it would be subject to the consti- tutional limitation of fundamental rights in the performance of all its functions and that the appellation of 'authority' would stick to such corporation, irrespective of the functional context.

Before we part with this topic, we may point out that this Court has throughout the last few years expanded the horizon of Article 12 primarily to inject respect for human-rights and social conscience in our corporate struc- ture. The purpose of expansion has not been to destroy the raison d'eter of creating corporations but to advance the human rights jurisprudence. Prima facie we are not inclined to accept the apprehensions of learned counsel for Shriram as well-founded when he says that our including within the ambit of Article 12 and thus subjecting to the discipline of Article 21, those private corporations whose activities have the potential of affecting the life and health of the peo- ple, would deal a death blow to the policy of encouraging and permitting private entrepreneurial activity. Whenever a new advance is made in the field of human rights, apprehen- sion is always expressed by the status quosits that it will create enormous difficulties in the way of smooth function- ing of the system and affect its stability. Similar appre- hension was voiced when this Court In Ramanna Shetty's case (supra) brought public sector corporations within the scope and ambit of Article 12 and subjected them to the discipline of fundamental rights. Such apprehension expressed by those who may be affected by any new and innovative expansion of human rights need not deter the Court from widening the scope of human rights and expanding their reach ambit, if otherwise it is possible to do so without doing violence to the language of the constitutional provision. It is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our country to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded appre-

hensions expressed by status quoists. But we do not propose to decide finally at the present stage whether a private corporation like Shriram would fall within the scope and ambit of Article 12, because we have not had sufficient time to consider and reflect on this question in depth- The

hearing of this case before us concluded only on 15th December 1986 and we are called upon to deliver our judgment within a period of four days, on 19th December 1986. We are therefore of the view that this is not a question on which we must make any definite pro- nouncement at this stage. But we would leave it for a proper and detailed consideration at a later stage if it becomes necessary to do so.

We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is en- gaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in Rylands v. Fletcher apply or is there any other principle on which the liability can be determined? The rule in Rylands v. Fletcher was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he falls to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide Halsbury Laws of England, Vol. 45 para 1305. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous indus- tries are necessary to carry out part of the developmental programme. This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the chal- lenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms Which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the new law does not recog- nise the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in Rylands v. Fletcher as is developed in England recognises certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new. principle of liability which English courts have not done. We have to

develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dan- gerous industries which are concommitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and nondelegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous prepara- tion of substance or any other related element that caused the harm must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permit- ted to carry on an hazardous or inherently dangerous activi- ty for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enter- prise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activ- ity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guard- against hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an acci- dent in the operation of such hazardous or inherently dan- gerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher (supra). We would also like to point out that the measure of compensation in the kind of cases referred to in the preced- ing paragraph must be co-related to the magnitude and capac- ity of the enterprise because such compensation must have a deferent effect. The larger and more prosperous the enter- prise, the greater must be the amount of compensation pay- able by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

Since we are not deciding the question as to whether Shriram is an authority within the meaning of Article 12 so as to be subjected to the discipline of the fundamental right under Article 21, we do not think it would be justi- fied in setting up a special machinery for investigation of the claims for compensation made by those who allege that they have been the victims of oleum gas escape. But we would direct that Delhi Legal Aid and Advice Board to take up the cases of all those who claim to

have suffered on account of oleum gas and to file actions on their behalf in the appro- priate court for claiming compensation against Shriram. Such actions claiming compensation may be filed by the Delhi Legal Aid and Advice Board.within two months from today and the Delhi Administration is directed to provide the necessary funds to the Delhi Legal Aid and Advice Board for the purpose of filing and prosecuting such actions. The High Court will nominate one or more Judges as may be neces- sary for the purpose of trying such actions so that they may be expeditiously disposed of. So far as the issue of reloca- tion and other issues are concerned the writ petition will come up for hearing on 3rd February, 1987.

A.P.J. Petition dis-
posed of.

Annex 630

Supreme Tribunal of Justice of Brazil, No. 769.753/SC (2d Panel), 8 September 2009
(Portuguese original and English machine translation)

Translated Extract of Supreme Tribunal of Justice of Brazil, No. 769.753/SC (2d Panel), 8 September 2009, paragraph 11

[. . .]

11. The STJ's jurisprudence is clear that, under the terms of art. 14, § Paragraph 1 of Law 6.938/1981, the degrader, as a result of the polluter pays principle, set out in Article 4, VII (first part) of the same statute, is obliged, regardless of fault, to repair - obviously at his own expense - all the damage he causes to the environment and to third parties affected by his activity, and it is not necessary to inquire about the subjective element, which consequently makes any good or bad faith irrelevant for the purposes of determining the nature, content and extent of the duties of the degrader.

[. . .]

Processo

REsp 769753 / SC
RECURSO ESPECIAL
2005/0112169-7

Relator

Ministro HERMAN BENJAMIN (1132)

Órgão Julgador

T2 - SEGUNDA TURMA

Data do Julgamento

08/09/2009

Data da Publicação/Fonte

DJe 10/06/2011

Ementa

PROCESSUAL CIVIL E ADMINISTRATIVO. AMBIENTAL. AÇÃO CIVIL PÚBLICA. RESPONSABILIDADE POR DANO CAUSADO AO MEIO AMBIENTE. ZONA COSTEIRA. LEI 7.661/1988. CONSTRUÇÃO DE HOTEL EM ÁREA DE PROMONTÓRIO. NULIDADE DE AUTORIZAÇÃO OU LICENÇA URBANÍSTICO-AMBIENTAL. OBRA POTENCIALMENTE CAUSADORA DE SIGNIFICATIVA DEGRADAÇÃO DO MEIO AMBIENTE. ESTUDO PRÉVIO DE IMPACTO AMBIENTAL - EPIA E RELATÓRIO DE IMPACTO AMBIENTAL - RIMA. COMPETÊNCIA PARA O LICENCIAMENTO URBANÍSTICO-AMBIENTAL. PRINCÍPIO DO POLUIDOR-PAGADOR (ART. 4°, VII, PRIMEIRA PARTE, DA LEI 6.938/1981). RESPONSABILIDADE OBJETIVA (ART. 14, § 1°, DA LEI 6.938/1981). PRINCÍPIO DA MELHORIA DA QUALIDADE AMBIENTAL (ART. 2°, CAPUT, DA LEI 6.938/1981).

1. Cuidam os autos de Ação Civil Pública proposta pela União com a finalidade de responsabilizar o Município de Porto Belo-SC e o particular ocupante de terreno de marinha e promontório, por construção irregular de hotel de três pavimentos com aproximadamente 32 apartamentos.

2. O Tribunal Regional Federal da 4ª Região, por maioria, deu provimento às Apelações da União e do Ministério Público Federal para julgar procedente a demanda, acolhendo os Embargos Infringentes, tão-só para eximir o proprietário dos custos com a demolição do estabelecimento.

3. Incontroverso que o hotel, na Praia da Encantada, foi levantado

em terreno de marinha e promontório, este último um acidente geográfico definido como "cabo formado por rochas ou penhascos altos" (Houaiss). Afirma a união que a edificação se encontra, após aterro ilegal da área, "rigorosamente dentro do mar", o que, à época da construção, inclusive interrompia a livre circulação e passagem de pessoas ao longo da praia.
4. Nos exatos termos do acórdão da apelação (grifo no original): "O empreendimento em questão está localizado, segundo consta do próprio laudo pericial às fls. 381-386, em área chamada promontório. Esta área é considerada de preservação permanente, pela legislação do Estado de Santa Catarina por meio da Lei n° 5.793/80 e do Decreto n° 14.250/81, bem como pela legislação municipal (Lei Municipal n° 426/84)".
5. Se o Tribunal de origem baseou-se em informações de fato e na prova técnica dos autos (fotografias e laudo pericial) para decidir a) pela caracterização da obra ou atividade em questão como potencialmente causadora de significativa degradação do meio ambiente - de modo a exigir o Estudo Prévio de Impacto Ambiental (Epia) e o Relatório de Impacto Ambiental (Rima) - e b) pela natureza non aedificandi da área em que se encontra o hotel (fazendo-o também com fulcro em norma municipal, art. 9°, item 7, da Lei 426/1984, que a classifica como "Zona de Preservação Permanente", e em legislação estadual, Lei 5.793/1980 e Decreto 14.250/1981), interditado está ao Superior Tribunal de Justiça rever tais conclusões, por óbice das Súmulas 7/STJ e 280/STF.
6. É inválida, ex tunc, por nulidade absoluta decorrente de vício congênito, a autorização ou licença urbanístico-ambiental que ignore ou descumpra as exigências estabelecidas por lei e atos normativos federais, estaduais e municipais, não produzindo os efeitos que lhe são ordinariamente próprios (quod nullum est, nullum producit effectum), nem admitindo confirmação ou convalidação.
7. A Lei 7.661/1988, que instituiu o Plano Nacional de Gerenciamento Costeiro, previu, entre as medidas de conservação e proteção dos bens de que cuida, a elaboração de Estudo Prévio de Impacto Ambiental - Epia acompanhado de seu respectivo Relatório de Impacto Ambiental - Rima.
8. Mister não confundir prescrições técnicas e condicionantes que integram a licença urbanístico-ambiental (= o posterius) com o próprio Epia/Rima (= o prius), porquanto este deve, necessariamente, anteceder aquela, sendo proibido, diante da imprescindibilidade de

motivação jurídico-científica de sua dispensa, afastá-lo de forma implícita, tácita ou simplista, vedação que se justifica tanto para assegurar a plena informação dos interessados, inclusive da comunidade, como para facilitar o controle administrativo e judicial da decisão em si mesma.
9. Indubitável que seria, no plano administrativo, um despropósito prescrever que a União licencie todo e qualquer empreendimento ou atividade na Zona Costeira nacional. Incontestável também que ao órgão ambiental estadual e municipal falta competência para, de maneira solitária e egoísta, exercer uma prerrogativa - universal e absoluta - de licenciamento ambiental no litoral, negando relevância, na fixação do seu poder de polícia licenciador, à dominialidade e peculiaridades do sítio (como áreas representativas e ameaçadas dos ecossistemas da Zona Costeira, existência de espécies migratórias em risco de extinção, terrenos de marinha, manguezais), da obra e da extensão dos impactos em questão, transformando em um nada fático-jurídico eventual interesse concreto manifestado pelo Ibama e outros órgãos federais envolvidos (Secretaria do Patrimônio da União, p. ex.).
10. O Decreto Federal 5.300/2004, que regulamenta a Lei 7.661/1988, adota como "princípios fundamentais da gestão da Zona Costeira" a "cooperação entre as esferas de governo" (por meio de convênios e consórcios entre União, Estados e Municípios, cada vez mais comuns e indispensáveis no campo do licenciamento ambiental), bem como a "precaução" (art. 5°, incisos XI e X, respectivamente). Essa postura precautória, todavia, acaba esvaziada, sem dúvida, quando, na apreciação judicial posterior, nada mais que o fato consumado da degradação ambiental é tudo o que sobra para examinar, justamente por carência de diálogo e colaboração entre os órgãos ambientais e pela visão monopolista-exclusivista, territorialista mesmo, da competência de licenciamento.
11. Pacífica a jurisprudência do STJ de que, nos termos do art. 14, § 1°, da Lei 6.938/1981, o degradador, em decorrência do princípio do poluidor-pagador, previsto no art. 4°, VII (primeira parte), do mesmo estatuto, é obrigado, independentemente da existência de culpa, a reparar - por óbvio que às suas expensas - todos os danos que cause ao meio ambiente e a terceiros afetados por sua atividade, sendo prescindível perquirir acerca do elemento subjetivo, o que, consequentemente, torna irrelevante eventual boa ou má-fé para fins de acertamento da natureza, conteúdo e extensão dos deveres de

restauração do status quo ante ecológico e de indenização.
12. Ante o princípio da melhoria da qualidade ambiental, adotado no Direito brasileiro (art. 2°, caput, da Lei 6.938/81), inconcebível a proposição de que, se um imóvel, rural ou urbano, encontra-se em região já ecologicamente deteriorada ou comprometida por ação ou omissão de terceiros, dispensável ficaria sua preservação e conservação futuras (e, com maior ênfase, eventual restauração ou recuperação). Tal tese equivaleria, indiretamente, a criar um absurdo cânone de isonomia aplicável a pretenso direito de poluir e degradar: se outros, impunemente, contaminaram, destruíram, ou desmataram o meio ambiente protegido, que a prerrogativa valha para todos e a todos beneficie.
13. Não se pode deixar de registrar, em obiter dictum, que causa no mínimo perplexidade o fato de que, segundo consta do aresto recorrido, o Secretário de Planejamento Municipal e Urbanismo, Carlos Alberto Brito Loureiro, a quem coube assinar o Alvará de construção, é o próprio engenheiro responsável pela obra do hotel.
14. Recurso Especial de Mauro Antônio Molossi não provido. Recursos Especiais da União e do Ministério Público Federal providos.

Acórdão

Vistos, relatados e discutidos os autos em que são partes as acima indicadas, acordam os Ministros da Segunda Turma do Superior Tribunal de Justiça: "A Turma, por unanimidade, negou provimento ao recurso do particular e deu provimento aos recursos da União e Ministério Público Federal, nos termos do voto do(a) Sr(a). Ministro(a)-Relator(a)." Os Srs. Ministros Mauro Campbell Marques, Eliana Calmon, Castro Meira e Humberto Martins votaram com o Sr. Ministro Relator.

Notas

Tema: Meio Ambiente.

Referência Legislativa

LEG:FED LEI:006938 ANO:1981
ART:00002 ART:00004 INC:00007 ART:00014 PAR:00001

LEG:EST LEI:005793 ANO:1980
(SC)

LEG:EST DEC:014250 ANO:1981
ART:00042 INC:00002 ART:00043 INC:00003 ART:00047
INC:00002 INC:00003 PAR:ÚNICO
(SC)

LEG:MUN LEI:000426 ANO:1984
ART:00009 ITEM:00007
(PORTO BELO - SC)

LEG:FED SUM:******
***** SUM(STJ) SÚMULA DO SUPERIOR TRIBUNAL DE JUSTIÇA
SUM:000007

LEG:FED SUM:******
***** SUM(STF) SÚMULA DO SUPREMO TRIBUNAL FEDERAL
SUM:000280

LEG:FED LEI:007661 ANO:1998
ART:00003 INC:00001 INC:00002 INC:00003 ART:00006
PAR:00001 PAR:00002
(REGULAMENTADA PELO DECRETO 5.300/2004)

LEG:FED DEC:005300 ANO:2004
ART:00005 INC:00010 INC:00011

LEG:FED CFB:****** ANO:1988
***** CF-1988 CONSTITUIÇÃO FEDERAL DE 1988
ART:00020 INC:00007 ART:00225 PAR:00004 PAR:00001
INC:00004

Jurisprudência Citada

(DANO AMBIENTAL - RESPONSABILIDADE OBJETIVA)
STJ - REsp 1045746-RS, REsp 604725-PR,
REsp 570194-RS, REsp 745363-PR

Annex 631

Decision of the Supreme Court of South Korea, 2009Da66549, 19 May 2016

Supreme Court en banc Decision 2009Da66549 Decided May 19, 2016【Damages】

【Main Issues and Holdings】

Where a previous landowner sells land after either causing soil pollution by discharging, leaking, dumping, or neglecting soil contaminants without subsequently purifying the contaminated soil, or illegally burying waste without subsequently treating the waste, whether such act can be deemed a tort committed against a counterparty or current owner of the relevant land (affirmative in principle)

Whether the previous landowner, as the tortfeasor, is liable for compensating the current landowner for damages amounting to costs incurred or likely to incur for purifying the contaminated soil or treating the buried waste (affirmative)

【Summary of Decision】

【Majority Opinion】In light of the relevant laws and legal principles as to a soil polluter's duty to compensate for damages, duty to purify contaminated soil, duty to treat waste, etc. along with the purport of Article 35(1) of the Constitution, the former Framework Act on Environmental Policy (wholly amended by Act No. 10893, Jul. 21, 2011), the former Soil Environment Conservation Act (amended by Act No. 10551, Apr. 5, 2011), and the former Wastes Control Act (amended by Act No. 8260, Jan. 19, 2007), where a previous landowner (first buyer) who caused soil pollution by discharging, leaking, dumping, or neglecting soil contaminants sells the land without purifying the contaminated soil, or who illegally buried waste sells the land without treating the waste, such act can be deemed a tort committed against a counterparty or current owner of the relevant land (subsequent buyer) barring special circumstances. Furthermore, if the current landowner is in a position of having incurred or expecting to incur costs for contaminated soil purification or waste treatment as a means to fully exercise one's land ownership right (e.g., developing and using the land including subterranean areas where the contaminated soil or waste is buried), or is put in the same position after being ordered to take necessary measures, etc. from a competent administrative agency pursuant to the former Soil Environment Conservation Act, the current landowner can be said to have realistically incurred damages (i.e., shouldering the costs for purifying contaminated soil or treating waste). Therefore, the previous landowner who either caused soil contamination or buried waste is deemed liable, as the tortfeasor, to compensate the current landowner for damages amounting to costs incurred or expected to incur for purifying contaminated soil or treating waste.

【Dissenting Opinion by Justice Park Poe-young, Justice Kim Chang-suk, Justice Kim Shin, and Justice Jo Hee-de】Where the previous landowner (first buyer) who caused soil contamination and subsequently sold that land or who contaminated another's land which was then sold, the previous landowner cannot be deemed liable for compensating the current owner of the relevant land

(subsequent buyer) with whom the previous landowner has no direct transactional relationship for damages amounting to the costs for contaminated soil purification or waste treatment, based solely on the grounds that the previous landowner was the one who illegally buried the waste or caused the soil to be contaminated.

【**Reference Provisions**】Article 35(1) of the Constitution of the Republic of Korea; Articles 2, 5, 6, 7, and 31 (*see* current Articles 2(1), 5, 6, 7, and 44) of the former Framework Act on Environmental Policy (Wholly amended by Act No. 10893, Jul. 21, 2011); Articles 2 subparag. 1, 10-3(1) and (3)1 (*see* current Article 10-4(1)1), 11, and 15 of the former Soil Environment Conservation Act (Amended by Act No. 10551, Apr. 5, 2011); Articles 1, 6, 7(2), 12, 45, 58-2, and 60 (*see* current Articles 1, 7, 8(2), 13(1), 48, 63, and 65) of the former Wastes Control Act (Amended by Act No. 8260, Jan. 19, 2007); Articles 214 and 750 of the Civil Act

Article 35 of the Constitution of the Republic of Korea

(1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

Article 2 of the Framework Act on Environmental Policy (Fundamental Ideas)

(1) The State, local governments, business entities, and citizens shall ensure that the current generation of citizens can fully enjoy environmental benefits and future generations will continue to enjoy such benefits by endeavoring to maintain and create a better environment, by considering environmental preservation first while engaging in any activities utilizing the environment, and by combining their efforts to prevent any environmental harms on the earth, in view of the fact that the creation of a delightful environment through a qualitative improvement and preservation of the environment and the maintenance of harmony and balance between human beings and the environment therethrough are indispensable elements for citizens' health and enjoyment of a cultural life, for the maintenance of the territorial integrity, and for the everlasting development of the nation. *<Amended by Act No. 11268, Feb. 1, 2012>*

Article 5 of the Framework Act on Environmental Policy (Obligations of Business Entities)

Any business entity shall voluntarily take measures required for preventing any environmental pollution and environmental damage that may result from one's business activities and shall have the obligation to participate and cooperate in environmental preservation policies of the State or local governments.

Article 6 of the Framework Act on Environmental Policy (Rights and Duties of Citizens)

(1) All citizens shall have the right to live in a healthy and agreeable environment.

(2) All citizens shall cooperate in environmental preservation policies of the State and local governments.

(3) All citizens shall endeavor to reduce any environmental pollution and environmental damage that may result from their daily lives and to preserve the national land and natural environment.

Article 7 of the Framework Act on Environmental Policy (Principle of Liability of Persons Causing Pollution)

Any person who causes any environmental pollution or environmental damage due to his/her business or other activities shall, in principle, be liable to prevent the relevant pollution or damage and to recover and restore the polluted or damaged environment, as well as to bear expenses incurred in restoring the damage resulting from the environmental pollution or environmental damage.

Article 44 of the Framework Act on Environmental Policy (Absolute Liability for Sufferings by Environmental Pollution)

(1) If any suffering is caused by environmental pollution or environmental damage, the person who has caused the environmental pollution or environmental damage shall compensate for the suffering.

(2) If the persons who have caused environmental pollution or environmental damage are two or more, they shall compensate for the suffering under paragraph (1) jointly where it is impossible to find out which person has caused the suffering.

Article 2 of the Soil Environment Conservation Act (Definitions)

The definitions of terms used in this Act shall be as follows: *<Amended by Act No. 12522, Mar. 24, 2014>*

1. The term "soil contamination" means contamination of soil caused by business or other human activities, damaging the health and property of people or the environment[.]

Article 10-3 of the Soil Environment Conservation Act (Strict Liability, etc. for Damages Resulting from Soil Contamination)

(1) Where any damage occurs due to the soil contamination, a person who has caused the contamination shall compensate for such damage and take measures, such as purifying the contaminated soil: *Provided*, That the same shall not apply to cases where the soil contamination has been caused by a natural disaster, war, or *force majeure*. *<Amended by Act No. 12522, Mar. 24, 2014>*

Article 10-4 of the Soil Environment Conservation Act (Responsibility, etc. for Purification of Soil Contamination)

(1) Any of the following persons shall, as a person responsible for purification, carry out a detailed soil survey, purification of contaminated soil under Articles 11(3), 14(1), or 15(1) and (3), or a project for improving contaminated soil under Article 19(1):

1. Any person who causes soil contamination by discharging, leaking, dumping, neglecting soil contaminants, or committing other acts[.]

Article 11 of the Soil Environment Conservation Act (Reports on Soil Contamination, etc.)

(1) In any of the following cases, the relevant person shall file a report to the Governor of the competent Special Self-Governing Province or the head of the competent Si/Gun/Gu without delay: *<Amended by Act No. 12522, Mar. 24, 2014>*

1. Where a person who produces, transports, stores, handles, processes, or treats soil contaminants, discharges or leaks them in the process;
2. Where a person who owns, occupies, or operates facilities subject to the control of soil contamination finds the soil of the site on which such facilities are installed or its neighboring areas has been contaminated;
3. Where the proprietor or occupant of land finds the land he/she owns or occupies contaminated.

(2) When the Governor of the competent Special Self-Governing Province or the head of the competent Si/Gun/Gu receives a report referred to in paragraph (1) or otherwise finds the discharge or leakage of soil contaminants, he/she may have public officials belonging thereto enter the relevant land and survey the cause and the level of soil contamination.

(3) With respect to any soil whose level of contamination is found to exceed the worrisome level of soil contamination (hereinafter referred to as the "contaminated soil") as a result of the survey referred to in paragraph (2), the Governor of the competent Special Self-Governing Province or the head of the competent Si/Gun/Gu may order the person responsible for purification to ask the soil-related specialized agency for conducting a detailed soil survey and to take measures to purify the contaminated soil within a prescribed period, as prescribed by the Presidential Decree. *<Amended by Act No. 12522, Mar. 24, 2014>*

(4) If the soil-related specialized agency conducts the detailed soil survey pursuant to paragraph (3), it shall inform without delay the Governor of the competent Special Self-Governing Province or the head of the competent Si/Gun/Gu of the results of the detailed soil survey.

(5) Public officials who intend to enter any land of other person under paragraph (2) shall carry certificates showing their authority and produce them to the relevant persons.

(6) Where the Governor of the competent Special Self-Governing Province or the head of the competent Si/Gun/Gu has public officials belonging thereto enter the relevant land to survey the cause and the level of soil contamination pursuant to paragraph (2), he/she shall inform the head of a regional environment office of such fact without delay. *<Newly inserted by Act No. 12522, Mar. 24, 2014>[This Article wholly amended by Act No. 10551, Apr. 5, 2011]*

Article 15 of the Soil Environment Conservation Act (Orders, etc., to Take Preventive Measures against Soil Contamination)

(1) The mayor/provincial governor or the head of a Si/Gun/Gu may order a person responsible for purification in an area falling under Article 5(4)1 or 2 to undergo a detailed soil survey conducted by a soil-related specialized agency by fixing a period, as prescribed by the Presidential Decree. <*Amended by Act No. 10551, Apr. 5, 2011; Act No. 11464, Jun. 1, 2012; Act No. 12522, Mar. 24, 2014*>

(2) Where the soil-related specialized agency has conducted a detailed soil survey under paragraph (1), it shall notify without delay the person responsible for purification and the competent mayor/provincial governor or the head of a Si/Gun/Gu of the inspection results. <*Amended by Act No. 10551, Apr. 5, 2011; Act No. 12522, Mar. 24, 2014*>

(3) Where the level of soil contamination exceeds the worrisome level as a result of the regular measuring, the survey of the actual state of soil contamination, or the detailed soil survey, the mayor/provincial governor or the head of a Si/Gun/Gu may order the person responsible for purification to take any of the following measures by fixing a period prescribed by the Presidential Decree: *Provided*, That where it is impracticable to identify the person responsible for purification, or it is deemed impracticable for the person responsible for purification to purify the contaminated soil, the mayor/provincial governor or the head of a Si/Gun/Gu may purify such contaminated soil: <*Amended by Act No. 10551, Apr. 5, 2011; Act No. 12522, Mar. 24, 2014*>

1. To improve or relocate the facilities subject to the control of soil contamination;
2. To limit or stop the use of relevant soil contaminants;
3. To purify contaminated soil.

(4) and (5) *Deleted.* <*by Act No. 7291, Dec. 31, 2004*>

(6) The Minister of Environment may, where any soil contamination is found to exceed the worrisome level as a result of the measurement of soil contamination under Article 5, request the mayor/provincial governor or the head of a Si/Gun/Gu having jurisdiction over an area to take measures referred to in paragraph (3). <*Amended by Act No. 10551, Apr. 5, 2011*>

(7) The mayor/provincial governor or the head of a Si/Gun/Gu shall, upon receiving a request from the Minister of Environment under paragraph (6), take measures referred to in paragraph (3) and report the results thereof to the Minister of Environment, as prescribed by the Ordinance of the Ministry of Environment. <*Amended by Act No. 10551, Apr. 5, 2011*>*[This Article wholly amended by Act No. 6452, Mar. 28, 2001]*

Article 1 of the Wastes Control Act (Purpose)

The purpose of this Act is to contribute to environmental conservation and the enhancement of people's standard of living by minimizing the production of wastes and disposing of generated wastes in an environment-friendly manner. <*Amended by Act No. 10389, Jul. 23, 2010*>

Article 7 of the Wastes Control Act (Citizens' Duties)

(1) Every citizen shall keep natural and living environments clean and endeavor to reduce and recycle wastes.

(2) Every owner, occupant, and manager of a parcel of land or a building shall endeavor to keep clean the parcel of land or building owned, occupied, or managed by him/her, and shall implement general clean-up in accordance with the plan prepared by the Mayor of a Special Self-Governing City, the Governor of a Special Self-Governing Province, or the head of a Si/Gun/Gu. <*Amended by Act No. 8613, Aug. 3, 2007; Act No. 11914, Jul. 16, 2013*>

Article 8 of the Wastes Control Act (Prohibition against Dumping Wastes)

(2) No one shall bury or incinerate wastes in any area other than the landfill sites licensed, approved or reported under this Act: *Provided*, That the foregoing shall not apply to incineration at places specified under the proviso to Article 14(1), as prescribed by the ordinance of the competent Special Self-Governing City, Special Self-Governing Province, or Si/Gun/Gu. <*Amended by Act No. 8613, Aug. 3, 2007; Act No. 11914, Jul. 16, 2013*>

Article 13 of the Wastes Control Act (Standards for Waste Treatment, etc.)

(1) Anyone who intends to treat wastes shall comply with the standards and methods prescribed by the Presidential Decree: with respect to wastes that are made readily recyclable in view of the purposes or methods of use under Article 13-2 (hereinafter referred to as "intermediately processed wastes"), relaxed standards and methods may separately be prescribed by the Presidential Decree. <*Amended by Act No. 10389, Jul. 23, 2010*>

Article 48 of the Wastes Control Act (Orders to Take Action for Treatment of Wastes)

If it is discovered that wastes have been treated in a manner inconsistent with the standards and methods of waste treatment under Article 13 or the purposes or methods of recycling wastes under Article 13-2, or have been disposed of or buried, in violation of Article 8(1) or (2), the Minister of Environment, the competent mayor/provincial governor or the head of the competent Si/Gun/Gu may order any of the following persons to change the method of treating such wastes, to suspend the treatment or carrying-in of wastes, or to take any other necessary action, specifying a period:

1. The person who has treated such wastes;
2. The person who has commissioned another person to treat such wastes without ascertainment under Article 17(1)3;
3. The owner of the land in which such wastes have been disposed of or buried, if the landowner him/herself has treated such wastes in the land or has allowed another person to use the land for treatment of such wastes.*[This Article wholly amended by Act No. 10389, Jul. 23, 2010]*

Article 63 of the Wastes Control Act (Penalty Provisions)

Any of the following persons shall be punished by imprisonment with labor for not more than seven years, or by a fine not exceeding 70 million won. In such cases, imprisonment with labor and a fine may be imposed concurrently: <*Amended by Act No. 11914, Jul. 16, 2013; Act No. 12321, Jan. 21, 2014*>

1. A person who disposes of commercial wastes in violation of Article 8(1);
2. A person who buries or incinerates commercial wastes in violation of Article 8(2).

Article 65 of the Wastes Control Act (Penal Provisions)

Any one of the following persons shall be punished by imprisonment for not more than three years, or by a fine not exceeding 30 million won: *Provided*, That imprisonment and a fine may be imposed concurrently in cases falling under subparagraphs 1, 1-2, or 2: <*Amended by Act No. 8613, Aug. 3, 2007; Act No. 10389, Jul. 23, 2010; Act No. 11465, Jun. 1, 2012; Act No. 11914, Jul. 16, 2013; Act No. 12321, Jan. 21, 2014*>

1. A person who buries wastes in violation of Articles 13 or 24-3(4);
1-2. A person who collects, transports, or recycles food wastes, among commercial wastes, in violation of Article 15-2(3);
2. A person who treats commercial wastes or imported wastes, in violation of Articles 18(1) or 24-3(1);
2-2. A person who fails to comply with an order to take an action under Article 24-2(3);
3. A person who exports imported wastes as the same state or condition as they were imported, in violation of Article 24-3(5);
4. A person who alters an item contained in a license for a waste treatment business without an amended license under Article 25(11);
5. A person who continues his/her business during the business suspension period under Article 27;
6. A person who installs a waste disposal facility without approval in violation of Article 29(2);
7. A person who operates a waste disposal facility without an inspection or a confirmation on conformity in violation of any provision of Article 30(1) through (3);
8. A person who fails to comply with an order of improvement under Article 31(4) or who violates an order to suspend the operation;
8-2. A person who fails to comply with an order under Articles 39-2, 39-3, or 40(2), (3) or (4)1;
9. A person who fails to comply with an order to take an action under Article 47(4);
10. A person who fails to comply with an order to take an action under Article 48;

10-2. A person who fails to undergo an inspection in violation of the latter part of Article 50(1) or who discontinues the operation of a landfill facility for wastes or closes such facility without successfully passing the inspection on conformity;
10-3. A person who fails to undergo a periodic inspection in violation of Article 50(3);
11. A person who fails to comply with an order of correction under Article 50(4).

Article 214 of the Civil Act (Claim for Removal and Prevention of Disturbance against Article Owned)
An owner may demand the cessation of disturbance from a person who disturbs ownership, and may demand either prevention of the disturbance or security for damages from the person who might disturb ownership.

Article 750 of the Civil Act (Definition of Torts)
Any person who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising therefrom.

【Reference Case】 Supreme Court Decision 99Da16460 decided Jan. 11, 2002 (overruled)

【Plaintiff-Appellee-Appellant】 Prime Development Co., Ltd. (Law World LLC, Attorney Moon Hyeong-sik, Counsel for the plaintiff-appellee-appellant)

【Intervenor joining the plaintiff】 Kia Motors Co., Ltd. (Attorneys Lee Im-soo et al., Counsel for the intervenor joining the plaintiff)

【Defendant-Appellant-Appellee】 Kia Motors Co., Ltd. and one other (Attorneys Lee Im-soo et al., Counsel for the defendant-appellant-appellee)

【Judgment of the court below】 Seoul High Court Decision 2008Na92864 decided July 16, 2009

【Disposition】 The part of the lower judgment against the Plaintiff is reversed, and that part of the case is remanded to the Seoul High Court. All appeals by the Defendants are dismissed.

【 Reasoning 】 The grounds of appeal (to the extent of supplement in case of supplemental appellate briefs not timely filed) are examined.

1. Determination as to Defendant Seah Besteel's grounds of appeal

A. Regarding grounds of appeal Nos. 1, 2, 3, and 6

(1) (a) Creating a pleasant atmosphere by qualitatively improving and preserving the environment and thus, maintaining harmony and balance between the environment and human beings is an essential element to ensure the public enjoys a healthy life and takes part in cultural activities; the preservation of national land; and the lasting development of a nation. For the benefit of present and future generations, a state and local governments, businesses, and citizens must all endeavor to create and sustain a healthy environment, prioritize environmental preservation whenever engaging in environment-related activities, and partake in multilateral efforts to prevent any form of environmental harm.

The above is declared as a fundamental ideology under Article 2 of the former Framework Act on Environmental Policy (wholly amended by Act No. 10893, Jul. 21, 2011; hereinafter "former Framework Act"). Based on such ideology, Article 6 of the former Framework Act provides that "[a]ll citizens shall have the right to live in a healthy and agreeable environment" (parag. (1)) and "[a]ll citizens shall endeavor to reduce any environmental pollution and environmental damage that may result from their daily lives and to preserve the national land and natural environment" (parag. (3)), and Article 5 provides, "Any business entity shall voluntarily take measures required for preventing any

environmental pollution and environmental damage that may result from [one's] business activities and shall have the obligation to participate and cooperate in environmental preservation policies of the State or local governments."

Furthermore, Article 7 of the former Framework Act stipulates, "Any person who causes any environmental pollution or environmental damage due to his/her business or other activities shall, in principle, be liable to prevent the relevant pollution or damage and to recover and restore the polluted or damaged environment, as well as bear expenses incurred in restoring the damage resulting from the environmental pollution or environmental damage," and Article 31 (*see* current Article 44) provides that "[i]f any suffering is caused by environmental pollution or environmental damage, the person who has caused the environmental pollution or environmental damage shall compensate for the suffering" (parag. (1)) and "[i]f the persons who have caused environmental pollution or environmental damage are two or more, they shall compensate for the suffering under paragraph (1) jointly where it is impossible to determine which person has caused the suffering" (parag. (2)).

The aforesaid provisions under the former Framework Act have been enforced since August 1, 1990. Although partial amendments and supplements have been enacted thus far, the details and purport have remained unchanged as to imposing upon an environmental polluter the duty to prevent environmental pollution or damage and to recover and restore the polluted or damaged environment, as well as holding the environmental polluter liable for damages.

Article 35(1) of the Constitution holds the State as well as citizens responsible for improving the environment and preventing environmental pollution by providing that, "All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment." The provisions set forth under the former Framework Act *supra* were established in order to specify the constitutional responsibility of the State and citizens declared under the Constitution. Therefore, the Constitution's spirit to preserve the environment and the former Framework Act's basic ideology should be fully taken into consideration when interpreting and applying the aforementioned provisions on environmental pollution as well as relevant legal principles.

(b) According to the former Soil Environment Conservation Act (amended by Act No. 10551, Apr. 5, 2011), the main text of Article 10-3(1) provides that "[w]here any damage occurs due to soil contamination, a person who has caused the contamination shall compensate for such damage and take measures, such as purifying the contaminated oil," and Article 10-3(3)1 (*see* current Article 10-4(1)1) regards "[a]ny person who causes soil contamination by discharging, leaking, dumping, or neglecting soil contaminants" as a person who caused contamination and recognizes such person as being ultimately responsible.

Concurrently, Articles 11 and 15 of the former Soil Environment Conservation Act grants a competent administrative agency the authority to issue an order for purification against a polluter in order to prevent any harm to the public's health and environment as well as to the soil eco-system, given that soil contamination — out of all environment pollutions — lasts for a long time unless the contaminated soil is purified; damages therefrom occur cumulatively over a lengthy period; and diffusion of soil contaminants can lead to other forms of soil contamination. Furthermore, such authority is granted in order to preserve the

soil eco-system and enable the public to live a healthy and pleasant life by adequately managing, purifying, etc. the contaminated soil. That being said, a person who caused soil contamination by discharging, leaking, dumping, or neglecting soil contaminants is not only liable for damages due to the continuation of the soil contamination but also owes the current landowner the duty to purify the contaminated soil under Article 10-3 of the former Soil Environment Conservation Act.

(c) Contaminated soil subject to purification based on the former Soil Environment Conservation Act and waste subject to treatment based on the former Wastes Control Act (wholly amended by Act No. 4363, Mar. 8, 1991 and amended by Act No. 8260, Jan. 19, 2007) shall be distinguishable (*see* Supreme Court Decision 2008Do2907, May 26, 2011).

The former Wastes Control Act does not provide for damages liability or purification duty, such as that of Article10-3 of the former Soil Environment Conservation Act; however, given that waste — along with air, water, noise, vibration, odor, etc. — is an environmental element that relates to human daily life, a person responsible for environmental pollution or damage caused by waste bears the responsibility of restoration and recovery as well as prevention of further environmental pollution or damage pursuant to the former Framework Act.

In addition, Article 1 of the former Wastes Control Act provides, "The purpose of this Act is to contribute to environmental conservation and the enhancement of people's standard of living by minimizing the production of wastes and disposing of generated wastes in an environment-friendly manner." Article 6(1) and (2) (*see* current Article 7) of the same Act stipulates, "All citizens, including an owner or occupant of a land and building, shall endeavor to keep the natural environment and living environment clean, and to reduce and recycle waste," and Articles 7(2), 12, 45, 58-2, and 60 (*see* current Articles 8(2), 13(1), 48, 63, and 60) stipulates, "No one shall bury waste in places other than waste treatment facilities as approved by this Act and shall treat the wastes accordingly based on the standards and methods as prescribed by Presidential Decree. In cases where commercial wastes are either buried or treated, those responsible shall be subject to administrative order and criminal punishment."

Moreover, in cases where waste is buried on a parcel or plot of land, insofar as the buried waste does not comprise part of the land but is blended into the land to the extent that differentiation from earth and soil is impossible, it is deemed that the state of buried waste existing on the land continues to infringe a landowner's ownership right. Thus, the person responsible may also owe the current owner of the land in which the said waste is buried the duty of waste treatment, which is deemed a duty of removal of disturbance with respect to an article owned as prescribed under the Civil Act (*see* Supreme Court Decision 2002Da46331, Oct. 22, 2002).

(d) In light of the relevant statutes and legal principles as to a soil polluter's duty to compensate for damages, duty to purify contaminated soil, duty to treat waste, etc. along with the purport of Article 35(1) of the Constitution, the former Framework Act on Environmental Policy, the former Soil Environment Conservation Act, and the former Wastes Control Act, where a previous landowner (first buyer) who caused soil pollution by discharging, leaking,

dumping, or neglecting soil contaminants sells the land without purifying the contaminated soil, or who illegally buried waste sells the land without treating the waste, such act can be deemed a tort committed against a counterparty or current owner of the relevant land (subsequent buyer) barring special circumstances. Furthermore, if the current landowner is in a position of having incurred or expecting to incur costs for contaminated soil purification or waste treatment as a means to fully exercise one's land ownership right (e.g., developing and using the land including subterranean areas where the contaminated soil or waste is buried), or is put in the same position after being ordered to take necessary measures, etc. from a competent administrative agency pursuant to the former Soil Environment Conservation Act, the current landowner can be said to have realistically incurred damages (i.e., shouldering the costs for purifying contaminated soil or treating waste). Therefore, the previous landowner who either caused soil contamination or buried waste is deemed liable, as the tortfeasor, to compensate the current landowner for damages amounting to costs incurred or expected to incur for purifying contaminated soil or treating waste.

On the other hand, Supreme Court Decision 99Da16460 Decided January 11, 2002 (even if a landowner illegally buried waste, etc. on one's own land, it cannot be said that tort was committed against a person who purchased the said land and acquired ownership right) shall be overruled within the extent inconsistent with the Supreme Court's opinion regarding the instant case.

(2) The reasoning of the first instance judgment cited by the lower court, the reasoning of the judgment below, and the evidence duly adopted by the lower court reveal the following facts.

(a) Seah Besteel Co., Ltd. (hereinafter "Defendant Seah Besteel") (the company name at the time was Daehan Heavy Machinery Co., Ltd.) had been operating a casting foundry for roughly 20 years since 1973 on more than 30 plots of land totaling 35,011 square meters (hereinafter "Instant Land") located in Guro-gu, Seoul (address omitted), and since 1982, had been the owner of 32,244 square meters of land attached to the Instant Land it purchased (hereinafter "Purchased Land") excluding 2,767 square meters of city/state-owned land it had been using on a loan (hereinafter "State-owned Land").

(b) On December 21, 1993, Defendant Seah Besteel (the company name at the time was Kia Special Steel Co., Ltd.) sold one-half of the Purchased Land, respectively, to Kia Motors Co., Ltd. (hereinafter "Defendant Kia Motors") and Gisan Co., Ltd. (hereinafter "Gisan"), and on December 30 of the same year, completed the registration of transfer of ownership right.

(c) On August 27, 1993, Gisan demolished the casting foundry and underwent reclamation works (project outsourced by Defendant Seah Besteel), and around late 1993, proceeded to perform works such as surface grading and asphalt overlaying on concrete in order to build an automobile shipment factory (project outsourced by Defendant Kia Motors). Gisan tore down the surface structures excluding the subterranean structures (e.g., utility tunnels) located below the surface of the Instant Land and buried construction waste (e.g. waste concrete) underground, and then carried out surface grading and asphalt overlaying works. Since around July 1994, Defendant Kia Motors had been using the Instant Land as an automobile shipment factory.

(d) On June 28, 2000, LG Investment & Securities Co., Ltd. (hereinafter "LG I&S") purchased Gisan's share of the land previously owned by the Korea Real Estate Investment & Trust Co., Ltd. (hereinafter "KOREIT"). In planning to build a multi-electronics distribution center "Shindorim Techno Mart" (hereinafter "Project") on the Instant Land, the Plaintiff — without being aware of the soil contamination, etc. — purchased one-half of the land from LG I&S on December 17, 2001 and the remaining half from Defendant Kia Motors on February 15, 2002; completed the registration of transfer of ownership right as to the Purchased Land on July 9, 2002; and entrusted ownership of the land to Korea Asset Investment & Trust Co., Ltd. (hereinafter "KAIT") on October 11, 2004. Around the same time, the Plaintiff also purchased the State-owned Land, completed the registration of transfer of ownership right, and entrusted ownership of the land to KAIT.

(e) Following the Plaintiff's land acquisition, it was ascertained that: (i) contaminated soil — caused by contaminants (e.g., fluorine, zinc, nickel, and copper) as prescribed under the former Soil Environment Conservation Act — existed six meters below the surface of the Instant Land; (ii) 20 to 50 centimeter-thick concrete slabs (foundational layers of the casting foundry) as well as subterranean utility tunnels and concrete mats existed one meter below the surface of the entire or part of the Instant Land; and (iii) waste (e.g., broken concrete, waste slate, waste asphalt concrete, waste tires, bricks, plastic, vinyl, and coal briquette ash) were deliberately buried across most of the Instant Land. Soil contamination occurred while Defendant Seah Besteel operated the casting foundry for roughly 20 years (the contaminated soil and buried waste existing in the Instant Land hereinafter referred to as "the contaminated soil, etc.").

(f) Of the 30,849 square meters of land the Plaintiff purchased to carry out the Project, the Plaintiff at its own expense outsourced relevant companies — as stated in the lower judgment — to treat the contaminated soil, etc. existing on the building site on March 24, 2005; the road site on January 25, 2007; and the park site on March 6 and September 20, 2007. The anticipated costs for treating the contaminated soil, etc. existing on 4,162 square meters of land (excluding the aforesaid square meters of land) are stated in the lower court's judgment.

(3) Examining the above facts in light of the legal principles *supra*, the contaminated soil and buried waste are directly attributable to Defendant Seah Besteel's act of discharging, leaking, dumping, or neglecting soil contaminants on the Instant Land. The relevant share of land was then sold in such condition to the Plaintiff who was not aware of such fact and obtained ownership, thereby incurring damages, i.e., costs (or anticipated costs) related to purifying the contaminated soil and treating the buried waste in order to carry out the Project. Therefore, Defendant Seah Besteel, as the tortfeasor, is liable for compensating the Plaintiff for such damages.

(4) Of the grounds of appeal, the portion challenging the lower court's fact-finding merely pertains to selecting evidence and determining its probative value, which fall under the principle of free evaluation of evidence, and thus, not tenable. However, the judgment below is justifiable and tenable which held that Defendant Seah Besteel, as the tortfeasor, was liable for compensating the Plaintiff for the costs to treat the contaminated soil, etc. In so determining, contrary to what is alleged in the grounds of appeal, the lower court did not err

by misapprehending the legal principles as to the establishment of tort, the scope of liability, etc., which led to the failure to exhaust all necessary deliberations, or by exceeding the bounds of the principle of free evaluation of evidence.

B. Regarding ground of appeal No. 4

As to Defendant Seah Besteel's assertion — since there is an exemption clause under the sales agreement between the Plaintiff and LG I&S which exempt LG I&S from liability as to the contaminated soil, etc., and thus, the Plaintiff cannot hold Defendant Seah Besteel liable — the lower court, on the premise to the effect of acknowledging Defendant Seah Besteel's liability for damages despite such exemption clause, partially took into account the circumstances regarding the asserted fact as one of the grounds for limiting liability.

Examining the reasoning of the lower judgment in view of the legal principles *supra* and the body of evidence duly adopted, the lower court's conclusion is tenable despite insufficient reasoning. In so determining, contrary to what is alleged in the ground of appeal, the lower court did not err by misapprehending the legal principles on the validity of an exemption clause or the establishment of tort, thereby adversely effecting the conclusion of the judgment.

C. Regarding ground of appeal No. 5

In reckoning the period of extinctive prescription (statute of limitation) of a claim for damages due to an unlawful act, the "date when the unlawful act was committed" as prescribed under Article 766(2) of the Civil Act does not mean the date when the wrongdoing was committed but the date when actual damages incurred (*see*, *e.g.*, Supreme Court Decision 2004Da71881, May 13, 2005), and whether such actual damages incurred should be objectively and reasonably determined in light of social norm (*see*, *e.g.*, Supreme Court Decision 2000Da53038, Apr. 8, 2003).

Based on the understanding that damages materialize when a land buyer discovers the fact that contamination occurred and takes action to remove such contamination, the lower court: (a) deemed the extinctive prescription concerning the right to claim for damages caused by Defendant Seah Besteel's unlawful act to run from around March 2005 when the Plaintiff incurred costs relating to outsourcing the treatment of the contaminated soil, etc. on the building site; and subsequently, (b) rejected Defendant Seah Besteel's assertion that the 10-year prescription period lapsed since the act of burying the contaminated soil, etc. occurred prior to selling the Purchased Land on December 21, 1993.

Reviewing the reasoning of the lower judgment below in light of the record, the point in time when the Plaintiff incurred actual damages (costs for purifying the contaminated soil and treating the buried waste) was after December 17, 2001 when the Plaintiff acquired each share of the Purchased Land and conducted soil surveys. Therefore, even if reckoning the extinctive prescription starting from that period, it is apparent that the 10-year period did not lapse as the instant lawsuit was filed on January 27, 2006 which cannot be disputed as it is documented in the record. Hence, the lower court's rejection of Defendant Seah Besteel's assertion — the 10-year extinctive prescription period of the right to claim for damages began to run from the date of committing the unlawful act — is tenable. In so doing, contrary to what is alleged in the ground of appeal, the

lower court did not err by misapprehending the legal principle on the period of extinctive prescription (statute of limitation), thereby adversely affecting the conclusion of the judgment.

2. Determination as to Defendant Kia Motors' grounds of appeal

A. Regarding grounds of appeal Nos. 2 and 3

Article 202 of the Civil Procedure Act provides, "A court shall determine, by its free conviction, whether or not an allegation of facts is true, taking account of the whole purport of pleadings and the results of examination of evidence, on the basis of the ideology of social justice and equity in accordance with the principle of logic and experience," and Article 432 provides, "The facts lawfully established by a judgment of the original court [without exceeding the bounds of the principle of free evaluation of evidence] shall be binding on the court of final appeal."

Based on its stated reasoning, the lower court: (a) determined to the effect that, barring special circumstances, Defendant Kia Motors — as the seller of one-half of the Purchased Land — was liable to compensate for damages concerning the contaminated soil, etc.; (b) deemed that the provisions under Articles 374 and 462 of the Civil Act did not exempt all liabilities of a seller who merely delivered an article in its defective condition which existed at the time the delivery thereof was due, and thus, rejected Defendant Kia Motors' claim asserting otherwise; and (c) denied Defendant Kia Motors' assertion — not liable to compensate for nonperformance as it was unaware of the contaminated soil, etc. — on the grounds that the evidence alone submitted by Defendant Kia Motors was insufficient to deem that the sale of the defective land was not attributable to Defendant Kia Motors.

The grounds of appeal claiming that the lower court was erroneous as to the judgment of reasons attributable merely pertains to challenging the lower court's fact-finding, i.e., selecting evidence and determining its probative value which falls under the principle of free evaluation of evidence. Moreover, examining the reasoning of the lower judgment in light of the aforementioned legal principles and duly adopted evidence, the lower court did not err by misapprehending the legal principles on the obligation of delivery of specific goods, liability for nonperformance, etc., or by exceeding the bounds of the principle of free evaluation of evidence going against logical and empirical rules, as otherwise asserted in the grounds of appeal.

B. Regarding ground of appeal No. 1

Where interpreting the intention of contracting parties becomes an issue due to differences of opinion, it should be reasonably interpreted according to the logical and empirical rules by factoring as a whole the literal content, the motive, details, and purpose of the parties' entering into an agreement, the true intent of the contracting parties, etc. (*see*, *e.g.*, Supreme Court Decisions 2004Da60065, May 27, 2005; 2006Da15816, Sept. 20, 2007); *Provided*, in cases where the objective meaning is clear, the existence and details of expression of intention should be acknowledged in its literal form (*see*, *e.g.*, Supreme Court Decisions 2000Da72572, May 24, 2002; 2012Da44471, Nov. 29, 2012).

Furthermore, where the contractual details argued by one party either imposes a heavy responsibility on the other party and/or infringes or limits the other party's rights (such as ownership right), the literal content should be interpreted

more strictly (*see*, *e.g.*, Supreme Court Decisions 93Da3103, Oct. 26, 1993; 2014Da14115, Jun. 26, 2014).

The lower court held as follows: (i) Under the agreement between the Plaintiff and Defendant Kia Motors as to the sale of one-half of the Purchased Land, Article 5 prescribes that "As to the profits generated and the costs incurred from the Property for Sale, between the outstanding payment date and the completion date of the ownership right transfer, it shall revert to Defendant Kia Motors on the date which arrives first and to the Plaintiff on the date which arrives later." (ii) The above fact alone is insufficient to acknowledge that the Plaintiff, at the time of concluding the aforesaid sales agreement with Defendant Kia Motors, agreed to bear probable costs for purifying contaminated soil or treating waste. (iii) Taking account of the circumstances, the term "costs" prescribed under Article 5 of the aforesaid agreement does not refer to costs likely to be incurred for purifying contaminated soil or treating waste, but rather costs expected to be incurred as to overlaying asphalt on concrete on the Purchased Land.

The above determination accords with the legal principles when examining the reasoning of the lower judgment in light of the duly adopted evidence. In so determining, contrary to what is alleged in the ground of appeal, the lower court did not err by misapprehending the legal principle on the interpretation of exemption clause.

3. Determination as to the Plaintiff's grounds of appeal

A. Regarding ground of appeal No. 1

Based on its stated reasoning, the lower court held that beyond the sale of one-half of the Purchased Land, Defendant Kia Motors cannot be deemed liable as a joint tortfeasor in regard to the contaminated soil, etc. since Defendant Kia Motors cannot be said to have taken part in the aforementioned tortious act in conspiracy with Defendant Seah Besteel.

The ground of appeal claiming that the lower court was erroneous merely pertains to challenging the lower court's fact-finding, i.e., selecting evidence and determining its probative value which falls under the principle of free evaluation of evidence. Moreover, examining the reasoning of the lower judgment in light of the aforementioned legal principles, duly adopted evidence, and record, the lower court did not err by misapprehending the legal principles as to the establishment of tort, the rule of confession, etc., or by exceeding the bounds of the principle of free evaluation of evidence going against principle of logic and experience, as otherwise alleged in the ground of appeal.

B. Regarding ground of appeal No. 2

The lower court deemed that damages amounting to costs, which increased due to the rise in cost at the time of treating the contaminated soil, etc. existing on the remaining sites rather than on the building site, constituted "damages caused by special circumstances" as prescribed by Article 393(2) of the Civil Act. Given that there is no evidence proving otherwise that the Defendants were aware or could have known of such circumstances, the lower court determined to the effect that the Plaintiff's claim is meritless in seeking compensation for costs with respect to treating the contaminated soil, etc. existing on the remaining sites (excluding the building site), exceeding the "soil contamination and waste treatment cost" set under the sub-contract the Plaintiff entered into with Daewoo Engineering & Construction Co., Ltd. at the time.

As seen earlier, the Plaintiff, upon becoming aware of the contaminated soil, etc., incurred actual damages amounting to purification and treatment costs thereafter. Further, there does not appear to be any compelling reason to differentiate the contaminated soil, etc. existing on the building site and the remaining sites. Examining the reasoning of the lower judgment in light of such circumstances and the body of evidence duly adopted, the above determination is justifiable and tenable. In so determining, contrary to what is alleged in the ground of appeal, the lower court did not err by misapprehending the legal principle regarding special circumstances.

Moreover, inasmuch as there is no illegality regarding the lower court's determination, whether the lower court was erroneous as to the assumptive and additional holding — the increased portion of costs for treating the contaminated soil, etc. existing on the remaining sites excluding the building site is attributable to the Plaintiff and should thus be considerably reduced — does not adversely affect the conclusion of this judgment. Accordingly, the ground of appeal as to dual deduction, etc. is without merit.

C. Regarding ground of appeal No. 5

(1) The lower court, when calculating compensatory damages amounting to the purification and treatment costs as to the Instant Land, it excluded the costs thereof pertaining to the State-owned Land, and denied the Plaintiff's portion of claim seeking compensation from the Defendants.

(2) Defendant Kia Motors is deemed liable, as seen earlier, for nonperformance regarding one-half of the Purchased Land it sold; therefore, the purification and treatment costs as to the State-owned Land, in contrast to the portion of the land sold, do not fall under Defendant Kia Motors' scope of liability for damages due to nonperformance.

Hence, the above determination by the lower court is tenable, and accordingly, did not adversely affect the conclusion of the judgment by omission, etc.

(3) However, Defendant Seah Besteel is responsible, as seen earlier, for the soil contamination and illegal waste burial on the Instant Land, including the State-owned Land. Therefore, barring special circumstances, the aforesaid acts committed by Defendant Seah Besteel on the State-owned Land (which is owned by another) constitutes a tort.

Yet the lower court, without deciding on whether Defendant Seah Besteel is liable to compensate the Plaintiff for damages caused by such unlawful act, excluded the purification and treatment costs as to the State-owned Land from the amount to be compensated by Defendant Seah Besteel. In so doing, the lower judgment as to the claim for damages against Defendant was erroneous, and the allegation contained in the ground of appeal on this point is with merit.

D. Regarding ground of appeal No. 4

(1) Where either consideration of the same purport is sought for co-existing claims or realization of the same legal effect is sought for co-existing legal relationships, the selective joinder of claims is a method in which a court proceeding is sought as to several claims under the resolutive condition that one of the claims is accepted. In a selective joinder, several claims are indivisibly joined in one litigation proceeding; thus, partially accepting one of the selected claims and failing to decide on the remainder of the claims is legally untenable

(*see, e.g.*, Supreme Court Decisions 81Daka1120, Jul. 13, 1982; 96Da99 Decision, Jul. 24, 1998).

(2) In view of the record, the Plaintiff — along with the claims against the Defendants as seen earlier — selectively sought restitution for unjust enrichment as follows: "Notwithstanding that the Defendants are responsible for treating the contaminated soil, etc. existing on the Instant Land, the Defendants, without legitimate cause, profited from the Plaintiff's treatment of the contaminated soil, etc. and caused the Plaintiff to incur considerable damages therefrom. Therefore, the Defendants who were unjustly enriched are obliged to make restitution to the Plaintiff."

Although the lower court accepted only part of the claim for damages due to Defendant Seah Besteel's tortious act and only part of the claim for damages due to Defendant Kia Motors' nonperformance, it dismissed the Plaintiff's remainder of claims without deciding on the claim for restitution of unjust enrichment against the Defendants.

(3) Hence, the lower court erred by misapprehending the legal principles related to the selective joinder and omitting judgment as to the Plaintiff's claim for restitution of unjust enrichment. The allegation contained in the ground of appeal on this point is with merit.

Provided, even if the Plaintiff shouldered the costs for purifying the contaminated soil or treating the buried waste, the restitution claim can only be sought within the scope of damages incurred by the Plaintiff and unjust profits gained by the Defendants. After that part of the case was remanded to the lower court, the following matters should have been deliberated: (i) whether Defendant Kia Motors, which did not take part in the soil contamination or burial of waste in conspiracy with Defendant Seah Besteel, was unjustly enriched; and (ii) whether the claim for restitution of unjust enrichment, which exceeded the amount of compensatory damages caused by an unlawful act, etc. calculated by the lower court, is tenable.

4. Conclusion

Therefore, without further proceeding to decide on the remaining grounds of appeal of the Plaintiff, the part of the lower judgment against the Plaintiff is reversed and that part of the case is remanded to the lower court for further proceedings consistent with this Opinion. All appeals by the Defendants are dismissed. It is so decided as per Disposition by the assent of all participating Justices on the bench, except for a dissent by Justice Park Poe-young, Justice Kim Chang-suk, Justice Kim Shin, and Justice Jo Hee-de as to whether Defendant Seah Besteel is liable for tort against the Plaintiff; a concurrence by Justice Kim Yong-deok as to the Majority Opinion on whether Defendant Seah Besteel is liable for tort against the Plaintiff; and another concurrence by Justice Kim Chang-seok and Justice Jo Hee-de as to the Dissenting Opinion.

5. Dissent by Justice Park Poe-young, Justice Kim Chang-suk, Justice Kim Shin, and Justice Jo Hee-de

A. The gist of this case's factual basis is as follows: (i) While operating a casting foundry on the Instant Land for roughly 20 years since 1973, Defendant Seah Besteel caused soil contamination and illegally buried waste in the course of demolishing the said foundry in 1993. (ii) Around December of 1993, the Defendant respectively sold one-half of the Purchased Land which it owned (of

the Instant Land) to Gisan and Defendant Kia Motors. (iii) The ownership of the portion of land that Gisan purchased was subsequently transferred to KOREIT and in turn to LG I&S. (iv) The Plaintiff purchased one-half of the aforesaid land from LG I&S around December 2001 and the remaining half from the Defendant Kia Motors around February 2002. (v) Thereafter, the Plaintiff purchased the State-owned Land to ultimately become the owner of the entire Instant Land.

The Majority provides a new legal principle in that, where a previous landowner (first buyer) who caused soil pollution by discharging, leaking, dumping, or neglecting soil contaminants and then sold the land without purifying the contaminated soil, or who illegally buried waste and then sold the land without treating the waste, such act can be deemed a tort committed against a counterparty or current owner of the relevant land (subsequent buyer) barring special circumstances.

Based on such premise, the Majority held that Defendant Seah Besteel (previous landowner or first buyer) — responsible for contamination by discharging, leaking, dumping, or neglecting soil contaminants and illegally burying waste on the Purchased Land — sold the land in such condition to the Plaintiff (current landowner or subsequent buyer), who purchased and obtained ownership of the land without being aware of such fact, and caused the Plaintiff to incur damages, i.e., costs or expected costs for purifying the contaminated soil and treating the waste in order to carry out the Project, and as such, the Defendant was liable for damages as the tortfeasor. Furthermore, as Defendant Seah Besteel was also responsible for soil contamination and waste burial on the State-owned Land (owned by another), the Majority held that the Defendant was liable as the tortfeasor to compensate the Plaintiff, who subsequently purchased the said land, for damages amounting to purification and treatment costs.

However, the Majority's standing not only goes against the ideology of the tort system but also defies all logic and sense from the perspective of legal stability and justice, and thus, not tenable.

B. We first examine the portion as to soil contamination.

(1) Whether Defendant Seah Besteel's act of selling its own land without purifying the contaminated soil constitutes a cause for incurring damages amounting to purification costs on the part of the counterparty or the current landowner, i.e., whether there exist considerable causal relationship

(a) Land, even contaminated land, can be offered for sale in various forms of private transactions. A buyer may have or may not have known of the soil contamination, which in turn may have or may not have impacted the buyer's purpose of purchase.

However, if a buyer was well aware of the soil contamination and confirmed that such fact did not affect the purpose of purchase, and thereafter decided on the price and made the purchase, the buyer cannot be said to have incurred damages. In such a case, so long as damages are not inflicted on the buyer, the seller is not liable for tort against the buyer.

On the other hand, if a buyer without knowledge of the soil contamination (which could have impacted the purpose of purchase had the buyer been aware) decided on the price and made the purchase, the buyer may have incurred damages. In such cases, if there are circumstances to deem that unlawful acts

such as deception were committed willfully or negligently by the seller during the transaction process, the seller can be held liable for tort against the buyer.
That being said, whether the costs incurred or likely to incur by a current landowner related to purifying contaminated soil constitutes "damage" as prescribed under Article 750 of the Civil Act is matter of discussion between the relevant counterparties rather than between a previous landowner (first buyer) and current landowner (subsequent buyer). In short, even if the subsequent buyer incurred damages amounting to purification costs, it cannot be said that such costs are attributed to the first buyer, the seller responsible for soil contamination.
(b) Turning back to this case, Defendant Seah Besteel, around December 1993, each sold one-half of the Purchased Land (of the Instant Land) it owned to Gisan and Defendant Kia Motors. Yet at the time of the transaction, Gisan as well as Defendant Kia Motors appeared to have known of the soil contamination, when comprehensively taking account of the following as revealed in the reasoning of the judgment below and records: (i) The seller Defendant Seah Besteel and buyers Gisan and Defendant Kia Motors were affiliated with the same corporation. (ii) On August 27, 1993, Gisan demolished the casting foundry and underwent reclamation works (project outsourced by Defendant Seah Besteel), and around late 1993, Gisan carried out works such as surface grading and asphalt overlaying on concrete in order to build an automobile shipment factory (project outsourced by Defendant Kia Motors). At the time, Defendant Kia Motors instructed Gisan to perform the surface grading and asphalt overlaying works while leaving the subterranean structures intact. (iii) Gisan tore down the surface structures excluding the facilities (e.g., utility tunnels) located below the surface of the Instant Land, buried construction waste (e.g., waste concrete) underground, and underwent surface grading and asphalt overlaying works. Furthermore, the Instant Land's contamination did not appear to be a critical matter of consideration since the purpose of purchase was to use it as an automobile shipment factory. Accordingly, it cannot be deemed that Defendant Seah Besteel's act of selling the Purchased Land to Gisan and Defendant Kia Motors constituted a tort.
Thereafter, however, the Plaintiff, around December of 2001, acquired from LG I&S one-half of the Purchased Land that had been consecutively sold by Defendant Seah Besteel to Gisan, to KOREIT, and to LG I&S; and around February of 2002, acquired from Defendant Kia Motors the remaining half of the Purchased Land that had been sold by Defendant Seah Besteel to Defendant Kia Motors. In order to build a multi-electronics distribution center, the Plaintiff purchased the aforesaid land and bore the costs for purifying the contaminated soil in order to use the subterranean areas.
The Plaintiff would not have incurred unexpected damages had it been aware of the Purchased Land's contamination and factored in the purification costs when setting the purchase price, or had entered into the sales agreement after setting aside issues related to purification costs, etc. As such, there are no grounds to compensate the Plaintiff for the purification costs, and thus, tort is not established.
In the end, the Plaintiff can be said to have incurred damages due to not having perceived the soil contamination and not reflecting the purification costs likely to

incur therefrom in the price when purchasing the relevant portion of land from LG I&S or Defendant Kia Motors (meanwhile, the sales agreement between the Plaintiff and LG I&S appears to exempt LG I&S in regards to soil contamination and waste burial), rather than from either the soil contamination or the sale of contaminated land *per se*. Accordingly, there is no reasonable causal relationship between the damages incurred by the Plaintiff and the soil contamination or sale of the contaminated land. Therefore, the previous landowner (first buyer) responsible for the soil contamination cannot be deemed to have committed an unlawful act against the current landowner (subsequent buyer).

(c) Yet if the Majority's logic is followed and the Plaintiff's claim for purification costs against Defendant Seah Besteel, who is not even the counterparty to the aforesaid sales agreement, is acknowledged, the Defendant itself is likely to incur unexpected damages beyond affordability.

The Plaintiff's damages incurred during the transaction between the Plaintiff (buyer) and LG I&S and Defendant Kia Motors (sellers), rather than from Defendant Seah Besteel's act of contaminating soil or selling the contaminated land. Further, it is apparent that Defendant Seah Besteel is not in a contractual position to satisfy the Plaintiff's trust or expectation. Nonetheless, the Majority holds Defendant Seah Besteel responsible for the damages incurred by the Plaintiff. This can only be viewed as distorting matters of liability for damages, thereby shaking the foundation of the tort system which operates based on the principle of equality and reasonable division of damages.

Also, notwithstanding that the seller Defendant Seah Besteel and the buyers Gisan and Defendant Kia Motors rationally entered into the land transaction agreement by factoring in the downsides and upsides from the soil contamination, and as such, the Defendant's sale of the Purchased Land cannot be deemed an unlawful act, Defendant Seah Besteel — in order to avoid liability for tort against a third party to whom the buyers sold the said land — has no other choice but to relinquish the opportunity to transact with Gisan and Defendant Kia Motors in order to avoid such liability. In short, negating the salability of the said land on the grounds that it is contaminated not only overlooks the fact that land (even if contaminated) can become a subject matter of transaction but also deprives Defendant Seah Besteel the freedom to conclude contracts. The Majority's legal interpretation can be said to infringe the guarantee of property right under Article 23(1) of the Constitution.

In conclusion, were Defendant Seah Besteel's act of selling land — which initially did not constitute an unlawful act — is deemed to constitute an unlawful act with the subsequent selling of land by Defendant Kia Motors and Gisan, this would mean holding Defendant Seah Besteel, as the tortfeastor, liable for such transactional activities by Defendant Kia Motors and Gisan as well as for any transactional activities in the future. This basically results in one assuming responsibility for another person's actions, thus going against the principle of self-responsibility. The reason underlying the Majority's stance completely breaking away from the tort system is in trying to apply absolute liability even toward the subsequent buyer of the contaminated land based on the act of contamination in and of itself. Holding someone accountable for offering contaminated land for sale is equivalent to holding the same person responsible for the act of contamination. Yet the Majority's view appears to have disregarded this point.

(2) Whether the legal principle as to determining tort liability related to selling one's own contaminated land is applicable to contaminating another's land

The act of causing soil contamination on another's land in itself leaves room to hold the said land's owner liable for tort, but if the land is sold, tort liability cannot be said to apply to the buyer. In such cases, the damages incurred by the buyer are not due to the soil contamination itself or the sale of the contaminated land itself, but rather based on whether the buyer was aware of the soil contamination and that awareness impacted the purpose of purchase and whether it was factored in when determining the sale price.

Therefore, in this case, even if Defendant Seah Besteel was responsible for contaminating the State-owned Land, the landowner at the time when the contamination occurred can be held liable for committing an unlawful act but not so in the case of the Plaintiff who purchased the contaminated land later on.

(3) Meanwhile, the Majority imposes the duty of purification under Article 10-3(1) of the former Soil Environment Conservation Act on the soil polluter, stating it as the basis for establishing tort liability against the polluter.

Article 10-3(1) of the aforesaid Act provides, "Where any damage occurs due to soil contamination, a person who has caused the contamination shall compensate for such damage and take measures, such as purifying the contaminated soil: *Provided*, That the same shall not apply to cases where the soil contamination has been caused by a natural disaster, war, or *force majeure*." However, in light of the fact that Article 2 subparag. 1 of the same Act defines the term "soil contamination" as "contamination of soil caused by business or other human activities, damaging the health and property of people or the environment," damages caused by soil contamination refer to cases where a person's health is put at risk from having drunk underground water polluted by soil contamination or where a person directly incurred damages from soil contamination (as in the case of contaminating a nearby land owned by another). Therefore, the meaning should not be extensively interpreted to include pecuniary damage (i.e., costs for purifying contaminated soil) that may be incurred on the part of a buyer who was unable to adequately factor in the contamination before completing the transaction of the contaminated land. If the Majority considers pecuniary damage to be included under "damages caused by soil contamination" as referred to in the aforesaid Article 10-3(1), then it cannot but be seen as going beyond the interpretative limitation.

Even if the Majority is of the position that the "duty of purification" under Article 10-3(1) includes imposing such duty on a person responsible for soil contamination and thus liable to a current landowner, such view is also considered as exceeding the interpretative limitation. From a literal standpoint, it is clear that the "duty of purification" as prescribed under Article 10-3(1) is based on the premise that "damages due to soil contamination" incurred; therefore, it cannot be said that the polluter owes the duty of purification to the current landowner who did not incur damages from the soil contamination. Moreover, as stated in the Majority, if the polluter — premised on the fact that the duty of purification was not performed — is deemed owing the duty of compensating the current landowner for damages amounting to costs incurred or expected to be incurred for purifying contaminated soil, this would mean that the responsible person is required to compensate for pecuniary damages

incurred from having purchased the contaminated land. This is no different from the view that "damages caused by soil contamination" as prescribed under Article 10-3(1) includes pecuniary damages (i.e., costs for purifying contaminated soil).

Furthermore, the Majority's aforementioned interpretation as to Article10-3(1) is untenable from a teleological interpretation standpoint. If following the Majority's interpretation, liability to compensate the buyer for purification costs would retroactively shift to the polluter without applying any time constraints.

Of note, Article 15(3) of the former Soil Environment Conservation Act provides that a competent authority may order the person responsible for contamination to purify the contaminated soil in cases where the level of contamination exceeds the worrisome level. However, as such purification duty merely falls under a duty under public law, it cannot be deemed that the responsible person owes such duty to a land buyer.

(4) Other parts of the Majority Opinion raises issues as to the point of time damages incurred or regarding the period of extinctive prescription (statutory limitation).

The Majority reasons that a buyer of contaminated land, if in a situation of having to pay purification costs, may seek compensation for costs incurred or likely to incur, but failed to clarify what that situation is. What is all the more incomprehensible is that, according to the Majority, the buyer arbitrarily decides whether to purify contaminated soil (premise for incurring purification costs), and whether tort is established is based on such subjective opinion of the buyer. Also, if following the Majority's logic, in cases where the buyer of contaminated land who was compensated sells the land without purifying the contaminated soil, the person responsible for contamination faces the burden of having to doubly compensate for damages to a new buyer.

According to the Majority, the point in time when the buyer of contaminated land incurred purification costs (rather than when the buyer became aware of the soil contamination) is regarded as when actual damages incurred; that is, the day when the unlawful act was committed which is the starting period for reckoning extinctive prescription. However, as seen earlier, such point in time is opaque and can also be arbitrarily determined by the buyer, which in turn makes it possible for the buyer to arbitrarily set the starting period for reckoning extinctive prescription. This is no different from excluding the applicability of the extinctive prescription (statutory limitation) clause as to unlawful acts involving soil contamination.

C. Next we examine the portion as to waste burial.

Aside from the issues raised above as to the Majority's position on soil contamination, there are other aspects we do not agree with.

(1) The Majority, based on the provisions under the former Wastes Control Act (e.g., waste should not be buried in places other than licensed landfill sites) and the Civil Act (duty of removal and prevention of disturbance against article owned), states that the person responsible for burying waste owes the current owner of the land in which the waste is buried the duty of treatment, and that such duty is the basis for holding the responsible person liable for tort.

However, the provisions under the former Wastes Control Act merely stipulates the duty of a person responsible for waste treatment under public law, and thus,

cannot be regarded as prescribing who is responsible for treatment and division of the costs incurred in the event that a buyer faces issues related to waste treatment after the land in which the waste was buried was sold. Thus, based on the above, determining the duty of waste treatment between the aforesaid private persons is difficult.

We also cannot agree with the following Majority Opinion: "In cases where waste is buried on a parcel of plot of land, so long as the buried waste does not comprise part of the land but is blended into the land to the extent that differentiation from earth and soil is impossible, the state of the buried waste existing on the land is deemed to continue to infringe a landowner's ownership right. Thus, the person responsible may also owe the current owner of the land in which the said waste is buried the duty of treatment, which is deemed a duty of removal of disturbance with respect to an article owned as prescribed under the Civil Act."

The Majority's above view is based on Supreme Court Decision 2002Da46331 Decided October 22, 2002 pertaining to the case where jumbo bags each containing 500 kilograms of industrial waste that were piled on a land site were regarded as an independent article separate from the land, and thereby does not correspond to this case. Where construction waste is buried underground (as seen from this case), it is questionable as to whether such waste, even after a considerable time has passed, can be regarded as an independent article; rather, it may be considered as part of an immovable property if the waste cannot be separated without changing its current condition or if excessive costs are needed to separate the waste. This, in turn, may cause confusion as to the legal principle on establishing adjunction.

(2) Supreme Court Decision 99Da16460 Decided January 11, 2002 held, "[A]s asserted by the Plaintiff, while waste buried in this case's land may fall under a defect — setting aside the fact that the Defendant, without obtaining approval from the Minister of Environment, etc. as prescribed by the Wastes Control Act, illegally buried the waste in this case's land it owned and thereby having received administrative sanction or criminal punishment — the Defendant's act was committed against oneself rather than a third party, and thus, tort is not established. In addition, as the Defendant's act in and of itself cannot be deemed to have caused any damages whatsoever to the Plaintiff, it cannot be concluded that the Defendant committed an unlawful act against the Plaintiff who obtained ownership of this case's land after the Defendant buried the waste. Although tort can be established in cases where the Defendant's act of burying the waste caused damages to owners of a nearby land (including public landowners) or residents, the Defendant cannot be said to be liable for tort committed against the Plaintiff (new buyer) and the Plaintiff does not have the right to claim damages incurred therefrom." The Supreme Court expressed that, even if a person illegally buried waste in one's own or another's land, the said person cannot be held liable for tort committed against the buyer of the relevant land.

As seen in the above case, the Majority's overrule of the aforementioned reasonable view is beyond comprehension.

D. In conclusion, where the previous landowner (first buyer) who caused soil contamination and subsequently sold that land or who contaminated another's

land which was then sold, the previous landowner cannot be deemed liable to compensate the current owner of the relevant land (subsequent buyer), whom the previous landowner has no direct transactional relationship, for damages amounting to the costs for contaminated soil purification or waste treatment, based solely on the grounds that the previous landowner was the one who illegally buried the waste or caused the soil to become contaminated.

Nevertheless, the lower court determined otherwise and held Defendant Seah Besteel liable for tort involving the Purchased Land. In doing so, it erred by misapprehending the legal principle on tort liability, thereby adversely affecting the conclusion of the judgment. Thus, the part of the lower judgment against Defendant Seah Besteel should be reversed. Concurrently, the lower court's holding that did not recognize Defendant Seah Betseel of having committed tort involving the State-owned Land is justifiable. Accordingly, of the Plaintiff's ground of appeal No. 5, the portion as to Defendant Seah Besteel is not tenable.

For the foregoing reasons, we respectfully dissent from the Majority.

6. Concurrence with the Majority by Justice Kim Yong-deok

A. (1) As stated in the Majority, the act of causing soil contamination or burying waste on a land is prohibited as it results in environmental harm by infringing the duty of environmental preservation (i.e., preserving the soil ecosystem and preventing environmental harm) prescribed under the Constitution and the former Framework Act, and a person committing such wrongdoing is responsible for recovering and restoring the contaminated or damaged environment. Such responsibility equally applies in the event a landowner causes environmental contamination or damage in one's own land, and the landowner — as the polluter — is responsible for purifying the contaminated soil or treating the buried waste. In short, a landowner's act of causing soil contamination or burying waste on one's own land in itself is regarded as causing environmental pollution or harm by violating the aforesaid duty to preserve the environment under the Constitution and the former Framework Act, and as such, cannot be deemed lawfully exercising one's land ownership right as well as going against social justice and social rules.

Yet the term "unlawful act" under Article 750 of the Civil Act is established in cases where an act committed intentionally or negligently causes damage to another person. Therefore, in cases where a land in which soil was contaminated or waste was buried is owned by the polluter, or continues to be owned by the polluter thereafter, this does not violate another person's legally protected interests and tort is thus not established.

However, it is a different matter if the aforementioned land is offered for sale, given that the act of contaminating soil or burying waste directly results in infringing the legally protected interests of a counterparty or subsequent buyer. In the end, the unlawful act of causing soil contamination or burying waste on one's own land affects others (such as the subsequent buyer) upon the land being offered for sale. Therefore, just as in cases of causing soil contamination or burying waste on another's land, such unlawful act committed on one's own land can result in committing a tortious act against, or infringing the legally protected interests of, another person, thereby falling under the scope of tort liability. In the event that another person incurs damages from such unlawful act, the person responsible, as the tortfeasor, is liable for compensation.

(2) In general, contaminated soil or buried waste exists underground where it cannot be easily detected from the surface. Therefore, even if the said land offered for sale by the owner (polluter) changed hands on several occasions in which the buyers were not told of the contamination, etc., and such fact was not revealed until the said land was purchased by someone who wished to use and profit from the land (including subterranean areas), the current landowner is bound to incur damages amounting to purifying the contaminated soil or treating the buried waste. Barring special circumstances, such damages naturally occur when land in which contaminated soil or buried waste exists is sold and are not predictable; thus, causal relationship is established and the person responsible is held liable to compensate for damages. Also, in cases where soil is contaminated or waste is buried on another's land, the above causal relationship is established between a previous landowner and current landowner.

B. (1) A person who caused risks to society is required to remove such risks so that others are not placed in harm's way and is liable for compensating the person(s) who incurred damages therefrom, which is known as risk liability associated with the tort theory. Therefore, in cases of environmental contamination of considerable risk, i.e. undermining the public's health, causing environmental harm, and destroying the soil ecosystem, the person who caused contamination is responsible for environmental recovery and restoration based on the legal principle as to establishing tort.

(2) The main text of Article 10-3(1) of the former Soil Environment Conservation Act imposes the duty of purifying contaminated soil on the person responsible for contamination, which well reflects the dangers arising from soil contamination. Therefore, it is reasonable to conclude that the purification duty is a type of civil duty which the person responsible owes to the current landowner who has become exposed to such danger.

The main text of Article 10-3(1) of the aforesaid Act provides for the person responsible for causing soil contamination to compensate for any damages incurred and to purify the contaminated soil. However, Article 2 subparag. 1 defines "soil contamination" as "contamination of soil caused by business or other human activities, damaging the health and property of people or the environment," and Article 15-3 (*see* current Article 15-4) requires contaminated soil to be purified based on the standard and method prescribed by the Presidential Decree. Therefore, in cases where soil contamination is acknowledged as unlawful, going beyond the degree of contamination that can hurt a human being's health or threaten plans and animals (*see* Article 4-2 of the former Social Environment Conservation Act), it is already deemed to have caused property or environmental damage and the duty of purification is thus incurred as prescribed under Article 10-3(1) of the same Act.

Soil contamination, if left intact without undergoing purification, can lead to serious violation of legally protected rights related to a human being's body or property, etc. Compensating for damages caused by soil contamination and performing the duty of purification are mutually complementary, i.e., if the purification duty is performed, further soil contamination or damages caused therefrom can be prevented, barring special circumstances. Thus, the aforementioned interpretation is reasonable even if viewed from the standpoint

of the former Soil Environment Conservation Act's legislative purpose, which is to prevent any risks to the public's health and environment and to preserve the soil ecosystem.

The duty of purification is distinguishable from the "duty of compensation for damages due to soil contamination" as prescribed under the main text of the aforesaid Article 10-3(1). As such, there is no need to discuss the scope of compensation liability, etc. in connection with the purification duty, nor are there grounds to view otherwise based on such discussion as to the purification duty or tort liability.

C. In the event a person causes soil contamination and buries waste even on one's own land and sells the land to a third party, the responsible person is required to purify the contaminated soil and treat the buried waste under public and private laws.

Yet there may be cases where a buyer, who already knew about the contaminated soil or buried waste, negotiated with the seller (person responsible for environmental damage) as to contractual matters such as lowering the selling price. In such special circumstances, the buyer undergoes purification or treatment at one's expense according to the agreed or adjusted terms of contract; therefore, there is no need for the counterparties to discuss duties of purification or treatment and/or tort liability incurred by the person who caused contamination.

Even though a seller who caused soil contamination or buried waste on one's own land and a buyer who was aware of such fact (hereinafter "malicious buyer") entered into a land transaction agreement premised on the existence of contaminated soil or buried waste, such an agreement only has an obligatory effect between the contracting parties and does not affect a buyer who purchased the said land from the malicious buyer (hereinafter "subsequent buyer"), and the renunciation of authority to use and profit from the subterranean area where contaminated soil and waste exists is not applicable to the subsequent buyer (*see* Supreme Court Decision 2009Da228, Mar. 26, 2009).

Therefore, even if a seller who caused environmental damage, while transferring ownership right of the relevant land, entered into an agreement with a buyer as to treatment of environmental damage, so long as the land is sold in the current state without purifying the contaminated soil or treating the buried waste, the seller is not exempt from liability to the subsequent buyer. Moreover, if the subsequent buyer faces a situation of having to incur costs for purifying the contaminated soil or treating the buried waste, such costs should be deemed to have incurred due to failure to perform the ultimate responsibility of restoring and recovering the contaminated or damaged environment. *Provided*, there may be special circumstances in which the above general principle is not applicable *per se*, and in those cases, such special circumstances can be factored in when determining tort liability.

As seen in this case, even if the buyers Gisan and Defendant Kia Motors had known about the buried waste, etc. at the time when Defendant Seah Besteel each sold one-half of the Purchased Land, solely based on the grounds that the Plaintiff (subsequent buyer) purchased the said land without being aware of such fact, Defendant Seah Besteel (responsible for causing environmental damage) cannot be said to be altogether exempt from tort liability.

D. Unlike cases where a land was contaminated due to permeation of soil contaminants, wastes are material things and cannot be concluded that it is part of the land based solely on the fact that it is buried on the land.

In order for a movable property to be acknowledged as part of an immovable property pursuant to Article 256 of the Civil Act, it should be based on the determination of whether the said movable property is mixed or integrated with the land to the extent that it can only be separated by damaging it or incurring excessive costs, and whether the said movable property (in terms of physical structure, usage, and function) possesses economic efficiency independent from existing immovable property and can be subject to ownership based on transaction (*see*, *e.g.*, Supreme Court Decision 2009Da15602, Sept. 24, 2009); as such, the adjunction of movable property is deemed a cause for acquiring ownership since separating it leads to considerable socioeconomic losses. Yet wastes that contaminate or damage the living environment should be treated according to the standards and methods and are prohibited from being arbitrarily buried on a land prescribed under the former Wastes Control Act; thus, it is no different even if waste is buried on such land since it cannot be kept in its current condition and substantial costs are incurred to separate and treat the wastes via lawful means. Accordingly, it is beneficial from both a socioeconomic standpoint and from the efficiency or value of immovable property that waste not be equally regarded as a general movable property and recognized as part of the land.

In this case, Gisan only demolished the surface structures while leaving the subterranean structures (e.g., utility tunnels) intact, buried construction waste (e.g., waste concrete) underground, and carried out surface grading and asphalt overlaying works. Inasmuch as massive subterranean structures, etc. are relatively easy to separate, it cannot be concluded solely based on the fact that considerable time has passed since waste was buried that it comprises part of the Instant Land to the extent of not being physically separable from the surrounding earth and soil. In cases where the exercise of ownership right as to the Instant Land is disturbed therefrom, there are no reasons to negate the imposition of the duty of treatment on the person responsible for burying waste, as seen from the Supreme Court's precedent.

E. Given that the right to claim damages due to tort is established when damages actually occur, the Supreme Court had maintained its legal reasoning that, in reckoning the period of extinctive prescription (statute of limitation) of a claim for damages due to an unlawful act, the "date when the unlawful act was committed" under Article 766(2) of the Civil Act does not mean the date when the wrongdoing was committed but the date when actual damages incurred, and whether such actual damages incurred should be objectively and reasonably determined in light of social norms (*see*, *e.g.*, Supreme Court Decisions 2000Da53038, Apr. 8, 2003; 2004Da71881, May 13, 2005).

The Majority applied the above legal principle as to the case where a land was sold in which contaminated soil and buried waste existed. Therefore, whether the current landowner incurred actual damages due to being in a situation of having to incur costs for purifying contaminated soil or treating waste should be objectively and reasonably determined in light of social norm based on the aforementioned legal principle.

F. In conclusion, the act of harming the environment by causing soil contamination and burying waste is an unlawful act that should be tolerated neither nationally nor socially, the same applies even if the polluter owns the relevant land. For the purpose of preserving the soil ecosystem, protecting the public's health, and preventing environmental harm, and further, for the purpose of realizing social justice and equity, the act of causing environmental damage and neglecting environmental issues should be strictly regulated above other unlawful acts.

Considering that contaminated soil or buried waste are not easily revealed, buyers generally do not have the opportunity to reasonably negotiate as to matters regarding purification and treatment due to not having known of the contamination, etc. beforehand. Therefore, rather than leaving the issue to be coordinated between the polluter and counterparty, it must be reasonably determined by law as to who is liable for damages incurred by a buyer (or subsequent buyer) related to purifying the contaminated soil or treating the buried waste; otherwise, it goes against the principle of equal division of damages due to the unlawful act of environmental harm.

Therefore, in cases where a landowner who harmed the environment by contaminating soil and burying waste sells the land in the current state, thereby putting a buyer or third party at risk therefrom, establishing tort liability and scope of liability for damages incurred should take into consideration that such act is of an anti-normative nature, and the buyer or third party should be compensated accordingly.

The Majority, which holds the person who caused environmental harm — as the tortfeasor — ultimately responsible for purifying the contaminated soil and treating the buried waste, accords with the concept of justice by taking into account the exceptional nature of environmental contamination or damage while harmonizing with existing legal principles.

For the foregoing reasons, I concur with the Majority.

7. Concurrence with the Dissent by Justice Kim Chang-suk

A. Confusion as to the tort system arising from the Majority's acknowledgement of the previous landowner being liable for committing an unlawful act against the current landowner is examined below.

Based on the assumption that a landowner (first seller) who caused soil contamination or buried waste on one's land sold that land to another party (first buyer) at the price of KRW 100 million, and several decades thereafter (land category changed to site), the first buyer sold the land at the price of KRW 10 billion to a second buyer who wished to use the land to build apartment units, and the second buyer spent KRW 2 billion to purify the contaminated soil or treating the buried waste, it can be easily deduced that development areas expanded and land prices rose over several decades.

Where the second buyer files a claim against the first seller to pay for the purification and treatment costs (KRW 20 billion), if following the Majority's logic, the first seller is liable for compensating the second buyer in good faith for damages due to tort; that is, KRW 1.4 billion assuming 70% of liability is acknowledged as can be seen from the lower court's ruling on this case.

However, the reason why the second buyer acquired the land from the first buyer at KRW 10 billion was because the land value increased due to the land

category having changed and the land price having risen over several decades. In addition, the second buyer had to spend another KRW 2 billion for purifying the contaminated soil and treating the buried waste in order to use the land to build apartment units. As can be seen, even though the purification and treatment costs incurred during the transaction between the first and second buyers, and the first buyer enjoyed capital gains (including land price hikes and development gains) that were generated after the landowner sold the land to the first buyer, imposing the purification and treatment duty on the landowner (first seller) who sold the land in its condition at a low price several decades ago cannot be seen as according with the concept of justice.

Also, as the Plaintiff and LG I&S agreed on an exemption clause, the second buyer may have agreed to hold the first buyer free and clear of liability in the event contaminated soil or buried waste were discovered. Moreover, even if the second buyer can seek compensation for damages from the first buyer through contract or tort, the second buyer may not take such action. In such a case, based on the Majority's legal reasoning, the second buyer can be compensated KRW 1.4 billion if seeking compensation from the first seller. Unless special circumstances exist (e.g., the first buyer assumed the risk associated with soil contamination or waste), the first seller has no way of transferring even part of the compensation liability to the first buyer and is obligated to compensate the second buyer. According to the Majority's reasoning, the first buyer may be exempt from liability depending on the second buyer's decision (i.e., imposing liability only on the first seller), but this goes against the principle of equity.

Meanwhile, where the second buyer — after receiving KRW 1.4 billion in compensation from the first seller — seeks compensation for damages amounting to KRW 2 billion from the first buyer through contract or tort, how much should the court acknowledge? On the contrary, where the second buyer who seeks compensation for damages amounting to KRW 2 billion and receives KRW 1.4 billion from the first buyer and thereafter seeks KRW 2 billion in compensation for damages from the first seller, how much should the court acknowledge? In short, the issue is whether to acknowledge only KRW 600 million in the latter suit instigated by excluding KRW 1.4 billion which was compensated upon filing of the first suit, or whether to set an amount based on an independent, objective criteria. A standard for division needs to be in place before the court calculates the amount excluding the compensated amount in any subsequent suit. If the court separately calculates the compensation amount for each lawsuit, the second buyer may be overly compensated (higher than the purification and treatment costs it incurred). The Majority's reasoning, however, does not provide such division standard. It would make sense to have a system in place for a follow-up coordination, but unless there are exceptional cases where the first seller transferred the responsibility for soil contamination or waste to the first buyer, the first seller has no right whatsoever to transfer even part of the responsibility to the first buyer. Yet the Majority failed to provide any clear explanation as to this point.

B. I concur as follows with the Dissent that Article 10-3(1) of the former Soil Environment Conservation Act cannot be the basis for holding the previous landowner (polluter) liable for tort against the current landowner.

(1) Article 4-2 of the former Social Environment Conservation Act provides, "The level of contamination, which is likely to obstruct the health and properties of persons or rearing of animals and plants (hereinafter referred to as the "worrisome level") shall be prescribed by the Ordinance of the Ministry of Environment." Article 15(3) stipulates that, where the level of soil contamination exceeds the worrisome level, a competent authority may order the person responsible to take measures such as purification, and Article 10-3(3) (see current Article 10-4(1) and (2)) prescribes that, unless a person who acquired facilities subject to control of soil contamination acted in good faith and was not negligent in preventing soil contamination, such person can be regarded as the responsible party for soil contamination. Also, Article 10-4(4) of the current Soil Environment Conservation Act provides, "Where a person responsible for purification, ordered to conduct soil purification, etc. [...] has performed soil purification, etc. at his/her own expense, he/she may claim reimbursement for the expenses to be borne by other persons responsible for purification."

The aforementioned provisions were prescribed as a duty under public law in order to protect the "public interest" (which is not feasible under private law alone as it centers on realizing equity); that is, in order to "prevent potential hazard to public health and environment caused by soil contamination, to conserve the soil ecosystem by properly maintaining and preserving soil including purifying contaminated soil, etc. [...] and to enable all citizens of the nation to live in a healthy and comfortable environment" (*see* Article 1 of the Soil Environment Conservation Act).

Therefore, based on the above, the duty of purification is not automatically established between private persons. *Provided*, in cases where one of the persons responsible for purification is ordered to purify contaminated soil and performs soil purification at one's own cost, there is room to deem that the said person may exercise the right to claim reimbursement as to expenses borne by another person responsible for purification, and the reimbursement duty is not necessarily imposed on the person who caused contamination.

(2) The main text of Article 10-3(1) of the former Soil Environment Conservation Act holds the person who caused contamination liable to another under private law by providing, "[w]here any damage occurs due to soil contamination, a person who has caused the contamination shall compensate for such damage and take measures, such as purifying the contaminated soil." Taking account of the fact that the aforesaid provision imposes the duty of purification even among private persons, the Concurrence with the Majority Opinion states that soil contamination in and of itself is deemed to have caused damage to property or environment, and as such, the person who caused soil contamination owes the duty to purify under the civil law to the current landowner (subsequent buyer).

However, such provision — as stated in the Dissent — intends to protect those who were damaged by another person due to contamination (for instance, where an owner of a nearby land incurred pecuniary damages due to contamination having spread) by holding the person who caused contamination liable without fault which reflects the theory of risk liability. This is because there is greater need to protect the victims (as seen above) who had no transactional relationship with the person responsible for contamination but could not avoid incurring damages.

As stated in the Majority, if the current landowner who paid for the purification cost is considered a victim, the current landowner may seek compensation amounting to the purification cost from the person who caused contamination, in cases where the soil contamination does not exceed the worrisome level. However, this does not accord with the legal principle as to Article 15(3) of the former Social Environment Conservation Act which imposes the duty of purification under public law only in cases where contamination surpasses the worrisome level and ensures the right to claim reimbursement as to expenses incurred by another person responsible for purification.

(3) The problem with the Majority's legal reasoning is that it aims to implement *de facto* sanctions, exceeding the bounds of private law which seeks to achieve equity and thereby justice, and furthermore, the purification duty under Article 10-3(1) of the former Soil Environment Conservation Act is in discord with the purification duty under public law as prescribed under Article 15(3) of the same Act. That being said, the Majority Opinion expansively interpreted the doctrine of liability without fault under Article 10-3(1), exceeding the scope of the purification duty under public law expressly acknowledged under Article 15(3), thereby imposing a purification duty that is absolute and unreasonable under private law. All in all, this goes beyond the limitation of interpretation.

C. The Dissent also raises the issue of the duty of removal of disturbance against an article owned, which was argued as the Majority's basis for imposing the duty of waste treatment. According to the Concurrence with the Dissenting Opinion, even though considerable costs are required to separate and treat the waste, just because it is much more beneficial from a socioeconomic standpoint as well as considering the efficiency or value of immovable property, it cannot be identically treated as movable property and deemed part of a land; thus, waste is not considered as part of the land and the person who buried the waste owes the current owner of land the duty to remove disturbance.

However, the above is interpreted to mean that whether a movable property (waste) is part of an immovable property (land) shall be determined based on its efficiency or value rather than by the degree of its mixture or integration with the soil on the land. This is the same as interpreting that it is basically up to the relevant party's decision whether to establish an ownership right, which should be objectively and clearly determined. When determining adjunction, the degree to which the said movable property is mixed or integrated with an immovable property should be considered first and foremost. Also, even based on Supreme Court Decision 2009Da15602, *supra*, as cited in the Concurring Opinion, the degree of mixture or integration as well as whether the movable property possesses independent economic efficiency and can be regarded as having separate ownership when traded should be considered. There is room for doubt as to whether waste buried underground fits the above description of movable property.

For the foregoing reasons, I concur with the Dissent.

8. Concurrence with the Dissent by Justice Jo Hee-de

A. The Majority reasons that, where a landowner who caused soil contamination or buried waste violates the duty of purifying soil contamination under Article 10-3(1) of the former Social Environment Conservation Act or infringes the duty of removal of disturbance with respect to an article (land) owned under the Civil

Act and sells that land in its current state without purifying the contaminated soil or removing the buried waste, the said landowner (first seller) — as the tortfeasor — is held liable for compensating the current landowner (subsequent buyer) for damages amounting to purification and treatment costs.

B. In this case, between the Plaintiff and Defendant Seah Bestseel, the duty of purifying contaminated soil and the duty of removing disturbance with respect to an article owned are not recognized, nor is tort due to violating such duties or liability to compensate for the purification and treatment costs established. Even if tort is established, the Plaintiff's period of extinctive prescription (statute of limitation) for claiming damages has already run. Therefore, I do not fully agree with either the Majority Opinion or the Concurrence with the Majority.

(1) Even though the duty of purifying contaminated soil under the aforesaid Article 10-3(1) is not a duty under public law but a duty under civil law as expressed in the Concurrence with the Majority, Defendant Seah Besteel cannot be deemed liable for tort against the Plaintiff on such basis.

The main text of Article 10-3(1) of the former Soil Environment Conservation Act stipulates, "Where any damage occurs due to soil contamination, a person who has caused the contamination shall compensate for such damage and take measures, such as purifying the contaminated soil." If the Majority views the above as a special provision related to tort under the Civil Act, it is apparent from a literal standpoint that where a person who caused soil contamination is deemed a tortfeasor, the person responsible has the duty to purify the contaminated soil. However, the Majority appears to regard the duty of purification which is prescribed as taking effect after tort was committed as an element to establish tort related to soil contamination, which is not only inconsistent in logic but also erroneous due to circular reasoning. In addition, "damage" refers to damaging a person's health, property, or environment and does not include the contaminated soil or purification costs. If so and based on the above provision, in order to acknowledge the duty of purifying contaminated soil, damages other than the contamination itself or purification costs need to have occurred. In this case where there was no allegation or evidence to support that other damages occurred, it cannot be said that Defendant Seah Besteel owes the duty of purification pursuant to Article 10-3(1).

Even if the purification duty under the aforesaid Article 10-3(1) is regarded as a special provision on the right to claim removal of disturbance with respect to an article owned under the Civil Act (rather than as a provision taking effect after a tort was committed), Defendant Seah Besteel should be considered as not being in a position to purify the contaminated soil — barring special circumstances — for having lost any right of ownership in having already sold the Purchased Land. The phrase "where it is impracticable for the person responsible to purify the contaminated soil" under Article 15(3) of the former Soil Environment Conservation Act appears to have foreseen such circumstances. Therefore, unless it can be either alleged or proven otherwise that the owner of this case's land, while transferring ownership, had Defendant Seah Besteel assume the duty of purifying the contaminated soil, it cannot be deemed that Defendant Seah Besteel, which having already sold the Purchased Land, violated the duty of purifying the contaminated soil existing on the Purchased Land.

According to this case's factual background, Defendant Seah Besteel caused soil contamination while operating a casting foundry on the Instant Land from around 1973, and respectively sold one-half of the Purchased Land to Gisan and Defendant Kia Motors around December of 1993 and completed the registration of ownership transfer, and the Plaintiff thereafter purchased each portion of the land from Gisan and Defendant Kia Motors. However, the provision as to imposing the duty of purifying contaminated soil on the person responsible for contamination was stipulated under Article 23 of the former Soil Environment Conservation Act (amended by Act No. 6452 as of Mar. 28, 2011 and enacted as of Jan. 1, 2002), and the said provision was changed to the proviso of Article 10-3 under the former Soil Environment Conservation Act (amended by Act No. 7291 as of Dec. 31, 2004 and enacted as of Jul. 1, 2005). Setting aside as to whether the above duty could be retroactively applied to Defendant Seah Besteel, the Defendant does not owe such duty under the law existing at the time when it ceased operation of the casting foundry and then sold the land. Furthermore, following the stipulation of the purification duty under Article 10-3 of the former Soil Environment Conservation Act enforced eight years later, Defendant Seah Betseel could not have anticipated that such duty would be imposed. Thus, on the grounds that the current landowner incurred costs amounting to purifying the contaminated soil, Defendant Seah Besteel cannot be said to be liable — as the tortfeasor — for compensating the purification cost as it had sold the land prior to the enactment of the aforesaid Act.

(2) The Supreme Court has maintained the position that, where ownership right is or likely to be disturbed, the right to demand cessation of disturbance pursuant to Article 214 of the Civil Act could be exercised against a person in a position to control the circumstance of disturbance (*see* Supreme Court Decisions 65Da218, Jan. 31, 1966; 95Da51182, Sept. 5, 1997; 2003Da5917, Mar. 28, 2003; 2005Da54951, Sept. 20, 2007; 2010Da27663, Jul. 14, 2011). The "person in a position of controlling the circumstance of disturbance" is irrespective to the person having caused the disturbance, so only the person who has control over an existing disturbance can be the counterparty to the claim.

In this case, Defendant Seah Besteel sold one-half of the Purchased Land around December of 1993 to Gisan and Defendant Kia Motors, respectively, and thus, ceased to have *de facto* ownership of the Purchased Land. Therefore, even if deeming that the right to claim removal of waste is included under the right to demand cessation of disturbance based on ownership right pursuant to Article 214 of the Civil Act, the Plaintiff cannot be seen as being able to exercise such right to claim removal against Defendant Seah Besteel.

Accordingly, notwithstanding that Defendant Seah Betseel does not owe the duty to remove waste pursuant to Article 214 of the Civil Act, the Majority was erroneous in assuming that Defendant Seah Besteel bore the duty to remove waste and thereby concluding that the Defendant committed a tort when violating such duty.

(3) Even if the duty to purify contaminated soil pursuant to Article 10-3(1) of the former Soil Environment Conservation Act was violated or the duty to remove disturbance of an article owned under the Civil Act was violated, it is a complete different matter from establishing a tort. Therefore, establishing a tort solely based on the grounds of the above duties having been infringed lacks logic. In

cases where a previous landowner who caused soil contamination or buried waste owes a current landowner the duty of purifying the contaminated soil or the duty of removing the buried waste, elements to establish a tort (such as whether the duty was violated intentionally or negligently, whether it was unlawful, whether damages incurred, causal relationships, etc.) need to be recognized in order to deem the previous landowner as a tortfeasor.

(4) If the Majority views Defendant Seah Besteel's act of selling the land to another party without purifying the contaminated soil or removing the buried waste as infringing the buyer's ownership right and thus constituting a tort, the purification and treatment costs are damages incurred in relation to the Purchased Land due to Defendant Seah Besteel's unlawful act, and as such, deemed to have already incurred at the time of selling the land. Therefore, the 10-year period had already lapsed around the time when this case's lawsuit was instigated, thereby the statute of limitation can be deemed to have run.

C. In cases where soil contamination or waste burial put another person's life, body, health, etc. at risk, it is obvious that the person responsible is held liable under Article 10-3(1) of the former Soil Environment Conservation Act or is acknowledged as having committed a tort under the Civil Act, and that reckoning the period of extinctive prescription starts from the time when damages occur. In this case, the damages incurred by the Plaintiff amounting to costs for purifying the contaminated soil or treating the buried waste are merely pecuniary damages that occurred related to the Purchased Land, and such damages do not fall under "damage" as prescribed by the aforesaid Article 10-3(1). Hence, differentiation is required between cases where a landowner caused soil contamination or buried waste and then sold the land, thereby harming another person's life, body, health, or property and cases where damages incur directly related to the land for sale such as purification and treatment costs. Given that this case falls under the latter, whether tort liability is established should be examined centering on the latter case. However, while the Majority separately regarded the Plaintiff's purification and treatment costs with the duty to compensate for damages as prescribed under Article 10-3(1) of the former Soil Environment Conservation Act, it more or less concluded that such costs fall under "damage" as prescribed by Article 10-3(1) by applying a new theory on tort. There is no question as to the need for strengthening liability related to environmental contamination or damage, and the aforesaid Article 10-3(1) can be said to have reflected such need. Yet acknowledging tort liability requires caution as it is a general liability of issues involving unspecified persons. In that respect, there is a certain limit to establishing tort liability as to environmental contamination or damage, and expanding the scope of liability without any justifiable grounds is not encouraged. The Majority Opinion, primarily focused on stringently holding those responsible for environmental contamination or damage, appears to have reached a somewhat farfetched conclusion exceeding the scope of positive law interpretation and going against the theory of tort and the overall legal system.

For the foregoing reasons, I concur with the Dissent.

Chief Justice Yang Sung-tae (Presiding Justice)
Justices Lee In-bok

Lee Sang-hoon
Park Byoung-dae
Kim Yong-deok (Justice in charge)
Park Poe-young
Kim Chang-suk
Kim Shin
Kim So-young
Jo Hee-de
Kwon Soon-il
Park Sang-ok
Lee Ki-taik

Annex 632

EarthLife Africa Johannesburg v The Minister of Environmental Affairs and Others,
Judgment of the High Court of 8 March 2017

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 65662/16

In the matter between:

EARTHLIFE AFRICA JOHANNESBURG Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....

DATE SIGNATURE

THE MINISTER OF ENVIRONMENTAL AFFAIRS First Respondent

CHIEF DIRECTOR: INTEGRATED ENVIRONMENTAL AUTHORISATIONS DEPARTMENT OF ENVIRONMENTAL AFFAIRS Second Respondent

THE DIRECTOR: APPEALS AND LEGAL REVIEW DEPARTMENT OF ENVIRONMENTAL AFFAIRS Third Respondent

THABAMETSI POWER PROJECT (PTY) LTD Fourth Respondent

THABAMETSI POWER COMPANY (PTY) LTD Fifth Respondent

JUDGMENT

Murphy J

1. This application raises concerns about the environmental impacts of the decision to build a 1200MW coal-fired power station near Lephalale in the Limpopo Province.

The power station is to be built by the fifth respondent ("Thabametsi") and is intended to be in operation until at least 2061.

2. A party seeking to construct a new coal-fired power station requires, amongst other things, an environmental authorisation to be granted by the relevant decision-makers in the Department of Environmental Affairs ("DEA"). Section 24 of the National Environmental Management Act[1] ("NEMA") provides that any activities which are listed or specified by the Minister of Environmental Affairs must obtain an environmental authorisation before they may commence. The construction of a coal-fired power station is one such listed activity and the third respondent, the Chief Director of the DEA ("the Chief Director"), is designated as the competent authority to decide on environmental authorisations for these power stations. On 25 February 2015, the Chief Director granted Thabametsi an environmental authorisation for the proposed power station. The applicant, Earthlife Africa ("Earthlife"), appealed against the grant of authorisation[2] to the first respondent, the Minister of Environmental Affairs ("the Minister"), who, on 7 March 2016, upheld the decision. Earthlife now seeks to review both the decision to grant the environmental authorisation and the appeal decision of the Minister.

3. Earthlife is a non-profit organisation founded to mobilise civil society around environmental issues and is an interested and affected party ("IAP") as contemplated in section 24(4)(v)(a) of NEMA and is thus entitled to a reasonable opportunity to participate in public information and participation procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment. It also has standing in terms of section 32(1) of NEMA to bring a review application in its own interest as an IAP, in the public interest and in the interest of protecting the environment.

[1] Act 107 of 1998
[2] In terms of section 43 of NEMA

An overview of the issues

4. Earthlife maintains that the Chief Director was obliged to consider the climate change impacts of the proposed power station before granting authorisation and that he failed to do so. The government's National Climate Change Response White Paper of 20012 ("the White Paper") defines climate change as an on-going trend of changes in the earth's general weather conditions as a result of an average rise in the temperature of the earth's surface (global warming) due, primarily, to the increased concentration of greenhouse gases ("GHGs") in the atmosphere that are emitted by human activities. These gases intensify a natural phenomenon called the "greenhouse effect" by forming an insulating layer in the atmosphere that reduces the amount of the sun's heat that radiates back into space and therefore has the effect of making the earth warmer.

5. Section 24(1) of NEMA requires that the environmental impacts of a listed activity must be considered, investigated, assessed and reported on to the competent authority tasked with making a decision on environmental authorisation. Therefore, once an application for environmental authorisation has been made, an environmental impact assessment process must be undertaken. An environmental impact assessment is meant to provide competent authorities with all relevant information on the environmental impacts of the proposed activity.[3] Section 24O(1) of NEMA obliges competent authorities to take account of all relevant factors in deciding on an application for environmental authorisation, including any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused. Earthlife asserts that the climate change impacts of a proposed coal-fired power station are relevant factors and contends that at the time the Chief Director took his decision, the climate change impact of the power station had not been completely investigated or considered in any detail.

6. A climate change impact assessment in relation to the construction of a coal fire power station ordinarily would comprise an assessment of (i) the extent to which a proposed coal-fired power station will contribute to climate change over its lifetime,

[3] J Glazewski (ed) *Environmental Law in South Africa* (2013) para 10.1.1.

by quantifying its GHG emissions during construction, operation and decommissioning; (ii) the resilience of the coal-fired power station to climate change, taking into account how climate change will impact on its operation, through factors such as rising temperatures, diminishing water supply, and extreme weather patterns; and (iii) how these impacts may be avoided, mitigated, or remedied.

7. In her appeal decision, dated 7 March 2016, the Minister recognised that the climate change impacts of the proposed development were not "comprehensively assessed and/or considered" prior to the issuance of the environmental authorisation by the Chief Director. She accordingly chose to amend the authorisation, (seemingly relying on the power to vary a decision on appeal in section 43(6) of NEMA), by the insertion of an additional condition.

8. The new condition in the environmental authorisation, namely clause 10.5, provides:

> "The holder of this authorisation must undertake a climate change impact assessment prior to the commencement of the project, which is to commence no later than six months from the date of signature of the Appeal Decision. The climate change impact assessment must thereafter be lodged with the Department for review and the recommendations contained therein must be considered by the Department."

9. Despite the Minister finding that a fuller assessment was required, she upheld the environmental authorisation, subject to the added condition. Earthlife contends that in so doing the Minister acted unlawfully and undermined the purpose of the climate change impact assessment and the environmental authorisation process, because in the event of the envisaged climate change impact assessment indicating that environmental authorisation ought not to have been granted in the first place, the Chief Director and the Minister would have no power to withdraw the environmental authorisation on this basis.

10. Earthlife contends therefore that it was unlawful, irrational and unreasonable for the Chief Director and the Minister to grant the environmental authorisation in the

absence of a proper climate change impact assessment and hence that the decision should be set aside in terms of section 8 of the Promotion of Administrative Justice Act[4] ("PAJA"). It is not disputed that decisions granting environmental authorisation constitute administrative action in terms of the PAJA.[5]

11. Earthlife relies on various grounds of review. First, it claims that there was material non-compliance with the mandatory preconditions of section 24O(1) of NEMA which requires the consideration of all relevant factors in reaching a decision on environmental authorisation, including the climate change impact of the proposed coal-fired station.[6] It maintains furthermore that the absence of a climate change impact assessment rendered both the impugned decisions irrational and unreasonable[7] and finally that the Minister committed material errors of law in reaching her decision.[8] Earthlife therefore prays for the matter to be remitted back to the Chief Director in terms of section 8(1)(c)(i) of PAJA for reconsideration and a fresh decision on environmental authorisation after the final climate change impact assessment report has been completed. This, it asserted, is necessary to preserve the integrity and lawfulness of the environmental authorisation process.

12. Earthlife's case centres on the proposition that section 24O(1) of NEMA, properly interpreted, requires, as a mandatory pre-requisite, a climate change impact assessment to be conducted and considered before the grant of an environmental authorisation. It infers this from the wording of section 24O(1) of NEMA, read together with various provisions of the Environmental Impact Assessment Regulations,[9] ("the Regulations") interpreted in light of South Africa's domestic environmental policies, section 24 of the Constitution, and South Africa's obligations under international climate change conventions. The application for review accordingly invites determination of whether the DEA is obliged to fully assess the climate change impacts of a proposed coal-fired power station before environmental

[4] Act 3 of 2000.

[5] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at para 38.
[6] Section 6(2)(b) and section 6(2)(e)(iii) of PAJA.
[7] Section 6(2)(h) and section 6(2)(f)(ii) of PAJA.
[8] Section 6(2)(d) of PAJA.
[9] Environmental Impact Assessment Regulations GNR543, GG 33306, 18 June 2010

authorisation is granted in terms of NEMA; the argument of Earthlife essentially being that a climate change impact assessment must be conducted before environmental authorisation is granted in order for the relevant decision-makers to determine firstly whether the construction of a coal-fired power station should be allowed at all, or, if authorised, the conditions and safeguards that should be imposed to limit and address its climate change impacts.

13. Section 24O(1) imposes peremptory requirements.[10] Decision-makers must make their decisions in compliance with NEMA and must consider all relevant factors. Section 24O(1) reads:

> "If the Minister, the Minister of Minerals and Energy, an MEC or identified competent authority considers an application for an environmental authorisation, the Minister, Minister of Minerals and Energy, MEC or competent authority must —
> (a) comply with this Act;
> (b) take into account all relevant factors, which may include —
> (i) any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;
> (ii) measures that may be taken —
> (aa) to protect the environment from harm as a result of the activity which is the subject of the application; and
> (bb) to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;
> (iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;
> (iv) where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment;
> (v) any information and maps compiled in terms of section 24(3), including any prescribed environmental management frame-works, to the extent that such information, maps and frame-works are relevant to the application;
> (vi) information contained in the application form, reports, comments, representations and other documents submitted in terms of this Act to the Minister, Minister of Minerals and Energy, MEC or competent authority in connection with the application;

[10] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at para 12.

(vii) any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application; and

(viii) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application; and

(c) take into account the comments of any organ of state charged with the administration of any law which relates to the activity in question."

14. Section 24O(1) of NEMA is to be read with the relevant provisions of the Regulations, which prescribe what must be contained in an environmental impact assessment report. Regulation 31(2) provides that the environmental impact assessment report must contain all information that is necessary for the competent authority to consider the application and to reach a decision. The relevant information includes a description of the environment that may be affected by the activity and the manner in which the physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity and a description of identified potential alternatives to the proposed activity with regard to the activity's advantages and disadvantages.[11] Regulation 31(2)(k) requires the report also to include a description of all environmental issues identified during the assessment process and an indication of the extent to which the issues could be addressed by the adoption of mitigation measures. The report furthermore must address each identified potentially significant impact, including: (i) cumulative impacts; (ii) the nature of the impact; (iii) the extent and duration of the impact; (iv) the probability of the impact occurring; (v) the degree to which the impact can be reversed; (vi) the degree to which the impact may cause irreplaceable loss of resources; and (vii) the degree to which the impact can be mitigated.[12] Regulation 34(2)(b) obliges the competent authority to reject the environmental impact assessment report if it does not substantially comply with the requirements in regulation 31(2).

15. These provisions signify that if a climate change impact assessment is a relevant factor as envisaged in section 24O(1)(b) of NEMA then it will follow that the information is necessary for the purposes of regulation 31(2). Where relevant

[11] Regulation 31(2)(d) and (g)
[12] Regulation 31(2)(l)

information is missing the environmental impact assessment report must be rejected under regulation 34(2)(b) and environmental authorisation should be refused.

16. The DEA (the first, second and third respondents) argued that Earthlife's interpretation of the governing legislation is unsustainable. In their submission, there is no provision in our domestic legislation, regulations or policies that expressly stipulates that a climate change assessment must be conducted before the grant of an environmental authorisation. Likewise, no such provision exists as part of South Africa's obligations under international law. South Africa's international obligations to reduce GHG emissions are broadly framed and do not prescribe particular measures that the government must implement to reduce emissions. Such measures, in its opinion, fall within the government's discretion. In the exercise of its discretion, the government is taking steps to address the issue of climate change and is in the process of developing a complex set of mitigation measures.

17. The DEA pointed out that it has committed to developing policies and measures to be formulated at a national level for application at a sectoral and company level to be reviewed and adjusted in light of the latest available science. The approach envisages that the DEA will intervene periodically to change the conditions imposed on GHG emitters in environmental authorisations.

18. The mitigation measures and sectoral plans are aimed at balancing South Africa's development needs with its climate change imperatives. The country is facing acute energy challenges that hamper economic development and is currently heavily dependent on coal and reliant on a significant proportion of its liquid fuels being generated from coal. In the short-term (up to 2025), South Africa faces significant rigidity in its economy and any policy driven transition to a low carbon and climate resilient society must take into account and emphasise its over-riding priority to address poverty and inequality.

19. The DEA, in view of these considerations, and while conceding that coal-fired power stations are heavy GHG emitters, argued that Earthlife's submissions lose sight of the broader developmental context and rest on its general opposition to the use of coal-generated power. Its stance fails to recognise that South Africa is facing an energy crisis and that the government is given scope within the domestic and

international environmental law regime to make adjustments to address that crisis. Some measure of coal-generated energy is necessary to meet South Africa's current and medium-term energy needs. It is against this background, the DEA contended, that the Minister's decision must be assessed.

20. The Minister in her answering affidavit averred that the Chief Director had adequately considered the climate change effects, but had not conducted a comprehensive assessment, and she imposed condition 10.5 requiring a fuller climate change impact assessment for that reason. She reasoned that condition 10.5 would serve a dual purpose. First, it would enable the gathering of emissions data to be used, *inter alia,* for monitoring and reporting purposes. Secondly, it would enable the DEA to determine if it was necessary to amend or supplement the conditions of the environmental authorisation to introduce additional mitigation measures, for instance where it was found that the emissions were significantly higher than provided in its carbon budget, or posed an unexpected and unacceptable health risk to surrounding communities. In the context of the prevailing regulatory regime and socio-economic context, she submitted, her decision cannot be impugned as irrational, unreasonable, or unlawful.

21. Thabametsi aligned with the DEA and advanced similar arguments, though emphasising different aspects. It submitted that the review should not succeed for two principal reasons - which echo those relied on by the DEA. Firstly, in its view, Earthlife's challenge to the outcome of the internal appeal is based on a fundamental misreading of the Minister's decision. The decision did not concede that a relevant factor had not been considered. The Minister accepted that climate change had been adequately considered by the Chief Director for the purposes of the environmental authorisation, but called for a climate change impact assessment to be undertaken for future use. Her decision and approach were reasonable, rational and lawful. Secondly, while climate change is a relevant factor for the DEA to consider, the regulatory regime does not require the conduct of a climate change impact assessment as a mandatory prerequisite to the grant of an environmental authorisation. There is no statutory or other basis for reading such an obligation into the regime.

22. Thabametsi went somewhat further and advanced other grounds for dismissal of the application on the basis of an allegation that Earthlife has brought the review in pursuit of its political or strategic objectives. Besides seeking to introduce a requirement of a comprehensive climate change impact assessment as a jurisdictional prerequisite to the grant of an environmental authorisation, Earthlife, it alleged, seeks to prevent Thabametsi from ever being permitted to construct and operate its proposed power station. This, Thabametsi maintains, is apparent from Earthlife's public statements recording its absolute opposition to the establishment of any new coal-fired power stations in South Africa and its admitted use of litigation as part of a broader strategy to halt the construction of any coal-fired power stations.

23. Earthlife understandably considers coal-fired power stations an inappropriate means to generate electricity since other forms of power generation are more sustainable and less damaging to the environment. In its opinion, a climate change impact assessment is necessary not only to ascertain what conditions and safeguards should be imposed to limit the power station's climate change impact, but also to determine whether a proposed coal-fired power station should be permitted at all. It is motivated by a vision that all coal-fired power stations should not be permitted because they contribute to CO_2 emissions globally. The review undeniably (but not in my opinion illegitimately) is directed at derailing the establishment of the Thabametsi power station by depriving Thabametsi of the environmental authorisation it requires to be appointed as an independent power producer.

24. Thabametsi, however, developed two preliminary arguments, (going beyond the issues of the rationality, reasonableness and legality of the two impugned decisions), which supposedly flow from the alleged strategic positioning by Earthlife. It argued that the objectives pursued by Earthlife cannot be competently achieved through these review proceedings. Earthlife's attempt to introduce a mandatory assessment, if it is to succeed, requires a challenge to the legislative regime governing environmental impact assessments. And any attempt to prohibit coal fired power stations entirely, obliged Earthlife to attack the Minister of Energy's determination that 2500 MW of baseload energy must be generated from coal.[13] The review must fail, moreover, in Thabametsi's view, because it is, in truth, a challenge to a

[13] Made on 19 December 2012 in terms of section 34(1) of the Electricity Regulation Act 4 of 2006

regulatory framework which Earthlife failed to challenge when it was promulgated and cannot indirectly and belatedly challenge in the present proceedings. For reasons which will appear later, I do not accept this argument. The review sought by Earthlife is premised on a narrower basis aimed at the decision of the competent authorities and is within the scope of PAJA. Thabametsi additionally accused Earthlife of blowing hot and cold in relation to the Minister's decision: it has engaged extensively in the climate impact assessment process required by the Minister's decision and in so doing has used the decision, which it contends is invalid, to seek to impose substantial additional obligations on Thabametsi. Consequently, it argued that the review is incompatible with the election that Earthlife made in deciding to engage with the climate impact assessment process that flowed from the Minister's decision.

Government's climate change and energy policies

25. South Africa is significant contributor to global GHG emissions as a result of the significance of mining and minerals processing in the economy and our coal-intensive energy system. Coal is an emissions-intensive energy carrier and coal-fired power stations emit significant volumes of GHGs, which cause climate change. Coal-fired power stations are the single largest national source of GHG emissions in South Africa. South Africa is therefore particularly vulnerable to the effects of climate change due to our socio-economic and environmental context. Climate variability, including the increased frequency and intensity of extreme weather events will be consequential for society as a whole. South Africa is moreover a water-stressed country facing future drying trends and weather variability with cycles of droughts and sudden excessive rains. Coal-fired power stations thus not only contribute to climate change but are also at risk from the consequences of climate change. As water scarcity increases due to climate change, this will place electricity generation at risk, as it is a highly water intensive industry.

26. Be that as it may, coal-fired power stations are an essential feature of government medium-term electricity generation plans. The clearest expressions of government policy are contained in the White Paper, the Integrated Resource Plan for Electricity 2010-2030 ("the IRP") and the Department of Energy's binding

determination ('the Determination") on the mix of electricity generation technologies, adopted in terms of the Electricity Regulation Act.

27. The White Paper sets out South Africa's vision for an effective climate change response and the long-term, just transition to a climate-resilient and low-carbon economy and society. It proposes that climate change be addressed through interventions that build and sustain its social, economic and environmental resilience and making a fair contribution to the global effort to stabilise GHG concentrations in the atmosphere. The DEA has confirmed, in its answering affidavit, that it has taken steps to give effect to the policy objectives identified in the White Paper, including the development and implementation of a National Climate Change Response Adaptation Strategy; the development and implementation of a GHG emission reduction system; and the adoption of a national GHG mitigation framework. But the White Paper expressly recognises that South Africa's reliance on coal for electricity generation will continue to be a significant contributor to GHG emissions. A shift to low-carbon electricity generation options will only be possible in the medium term, and not immediately. Consequently, South Africa's GHG emissions are expected to increase and peak in the short term, before plateauing and declining over time.

28. The steps being taken by the DEA mentioned earlier include developing a set of mitigation measures, *inter alia* identifying desired sectoral mitigation contributions. This entails defining desired emission reduction outcomes for each sector and sub-sector of the economy, based on in-depth assessment of the mitigation potential, best available mitigation options, science, evidence and a full assessment of the costs and benefits. Where appropriate, these desired emission reduction outcomes will flow down to the individual company or entity level.

29. The policy also aims at defining company-level carbon budgets for significant GHG emitting sectors. This involves drawing up carbon budgets for significant GHG emitting sectors and sub-sectors. The carbon budget for each sector or sub-sector will then be translated into company-level desired emission reduction outcomes. Mitigation plans will be sought from companies and economic sectors for whom desired emission outcomes have been established.

30. As stated earlier, these measures are still under development and must be formulated at a national level and then applied at a sectoral and company level. In order to develop and implement these measures, the DEA requires detailed, complete, accurate and up-to-date emissions data. Two essential elements for the definition of desired emission reduction outcomes and the development of carbon budgets are (i) emission data and (ii) data to monitor the outcome of specific mitigation actions. The data gathered in the climate change impact assessment for the Thabametsi power station will contribute toward a pool of baseline data that can be used for monitoring purposes. The mitigation system is intended to be dynamic and flexible. The prescribed measures will be regularly reviewed and adjusted in light of the latest available science, the success of this mix of mitigation policies and measures, new accessible and affordable technology, increased capability and emerging mitigation opportunities. This approach envisages that the Department will intervene periodically to change the conditions imposed on GHG emitters. For example, the Department may amend the conditions of an emitter's environmental authorisation to impose a reduced carbon budget or new mitigation requirements.

31. South Africa's electricity generation plans for the period 2010 to 2030 are set out in the IRP which records government's policy on the future use of different technologies to meet South Africa's energy requirements. The IRP was prepared by the Department of Energy in consultation with various government departments (including the DEA), and was amended pursuant to a public participation process. Concerns about the threat of climate change and the need to reduce carbon emissions were given attention. The IRP was ultimately adopted by Cabinet, and thus represents the policy of government as a whole.

32. The IRP determines that additional energy-generating capacity is required to meet South Africa's energy requirements for 2030 and that such capacity must be provided by a mix of generation technologies. When deciding on the required mix, the Department of Energy sought to achieve an appropriate balance between the expectations of different stakeholders. It carefully considered key constraints and risks, including: reducing carbon emissions; new technology uncertainties such as costs, operability and lead time to build; water usage; localisation and job creation; regional development and integration; and security of supply. Ultimately, the IRP

determined that in order to secure the continued and uninterrupted supply of energy, the following mix of generation technologies were required: a nuclear fleet of 9,6 GW; 6,3 GW of coal; 17,8 GW of renewables; and 8,9 GW of other generation sources. That entailed bringing forward anticipated coal generation projects, originally expected only after 2026, for earlier implementation and envisaged that coal-fired power plants would be established by independent power producers in order to avoid security supply concerns.

33. Section 34 of the Electricity Regulation Act[14] ("the Electricity Act") empowers the Minister of Energy, in consultation with the National Energy Regulator, *inter alia* to determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity; determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources; require that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective; and to provide for private sector participation.

34. On 19 December 2012, the Minister of Energy, in consultation with the National Energy Regulator, in terms of section 34(1) of the Electricity Act, determined that 2500 megawatts of new electricity generation capacity would be generated from coal, and that such coal-generated electricity would be produced by independent power producers ("the Determination"). The Determination gave binding effect to aspects of the electricity generation policy outlined in the IRP including those aspects of the IRP that required the construction by independent power producers of coal power stations using fluidised bed combustion technology like that proposed by Thabametsi. The government has at a general and national level had due regard to the climate change implications of such an approach in order to safeguard the security of South Africa's energy supply and to strike a balance between environmental protection and sustainable development.

35. South Africa's international obligations similarly anticipate and permit the development of new coal-fired power stations in the immediate term. South Africa

[14] Act 4 of 2006

has signed and ratified the UN Framework Convention on Climate Change, acceded to the Kyoto Protocol and signed the Paris Agreement (but not yet enacted it domestically). The UN Framework Convention and the Kyoto Protocol oblige developed countries, identified in Annex I to the Convention, to adopt measures to mitigate climate change and to limit GHGs to set emissions targets. South Africa is not an Annex I country, and is not bound to any emissions targets under these treaties. The Paris Agreement requires State parties to commit to Nationally Determined Contributions ("NDC"), which describe the targets that they seek to achieve and the climate mitigation measures that they will pursue. South Africa's NDC expressly anticipates the establishment of further coal-fired power stations and an increased carbon emission rate until 2020 and records that climate change action takes place in a context where poverty alleviation is prioritised, and South Africa's energy challenges and reliance on coal are acknowledged. South Africa has adopted a system that is reliant on new coal-generated power, but anticipates decreased reliance on coal across all emissions sources, over time.

The decision of the Chief Director to grant environmental authorisation

36. The Thabametsi Project is viewed by the Department of Energy as a critical project to meet the country's electricity demand in terms of government policy under the IRP and Determination and has been registered as a strategic infrastructure project due to its economic and social importance. Thabametsi submitted a bid to the Department of Energy to be appointed as an independent power producer (IPP) under the Department of Energy's Coal Baseload IPP Programme to construct the 1200MW coal-fired power station. The Department of Energy has now appointed Thabametsi as a preferred bidder meaning that it is on the path to approval. However, Thabametsi is still required to secure outstanding regulatory approvals as well as satisfying various commercial requirements before it can reach financial and commercial close.

37. The construction of the Thabametsi power station will occur in two phases of 600MW each. Tenders under the Coal Baseload IPP Procurement Programme are awarded following a competitive bidding process, as detailed in the Request for

Qualifications and Proposals for New Generation Capacity ("Request for Proposals"), which sets out the procedures and requirements for this bidding process. The Legal Qualification Criteria, incorporated as volume 2 in the Request for Proposals, states that in order for a bid to be considered, a project must have an environmental authorisation, issued under NEMA, together with a number of other environmental licences and approvals.

38. Thabametsi's application for environmental authorisation was made and considered under the Regulations,[15] which specify the procedure that must be followed in conducting an environmental impact assessment. In accordance with the Regulations, Thabametsi appointed an independent environmental assessment practitioner, Savannah Environmental (Pty) Limited ("Savannah"), to carry out the environmental impact assessment process. Savannah was then required to conduct a scoping and environmental impact reporting process.[16] The scoping process is designed to allow the competent authority to give direction on the environmental impacts that must be investigated and reported on, taking into account comments received from interested and affected parties. The Chief Director approved the scoping report, without imposing any requirement to consider climate change impacts. Savannah proceeded to conduct the environmental impact assessment. It then prepared draft and final environmental impact assessment reports ("the EIR") which were submitted to the Chief Director.

39. On 25 February 2015, the Chief Director granted the environmental authorisation for the Thabametsi power station, subject to several conditions. The Department of Environmental Affairs issued an amended integrated environmental authorisation on 17 March 2015. The authorisation authorises the applicant to undertake various listed activities subject to the conditions stipulated. None of the conditions relates specifically or explicitly to the question of climate change or GHG emissions. However, various listed activities are made conditional upon the applicant obtaining other environmental licences under other environmental legislation. Thus, for example, the authorisation subjects the construction of facilities or infrastructure for

[15] In 2014 the Regulations were substituted by the 2014 EIA Regulations in GG 38282. In terms of the transitional provisions in Chapter 8 the 201 Regulations continue to apply to all pending applications and appeals. As a result, the Regulations of 2010 continue to apply to Thabametsi.
[16] Regulation 20

the storage of ore or coal to the acquisition of an atmospheric emissions licence ("AEL") in terms of the National Environmental Management: Air Quality Act[17] ("NEMAQA"). Under Item 26 it is recorded that an AEL is required under NEMAQA for the release of emissions to the atmosphere and that such process will also require an environment impact assessment.

40. Annexure 1 to the authorisation is titled: "Reasons for Decision". Under the heading "key factors considered in making the decision", it is recorded that the DEA in reaching its decision took the following into consideration – a) the information in the environmental impact report of May 2014; b) the mitigation measures included in that report, and the environmental management plan; c) the comments received from the Directorate: Authorisations and Waste Disposal Management; d) comments from interested and affected parties as included in the report; and e) the objectives and requirements of relevant legislation, policies and guidelines, including section 2 of NEMA. The following conclusions are then recorded:

> "After consideration of the information and factors listed above the Department reached the following conclusions:
>
> > a) The identification and assessment of impacts are detailed in the EIR dated May 2014; and sufficient assessment of the key identified issues and impacts have been completed.
> >
> > b) The procedure followed for impact assessment is adequate for the decision-making process.
> >
> > c) The proposed mitigation of impacts identified and assessed adequately curtails the identified impacts.
> >
> > d) A sufficient public participation process was undertaken and the applicant has satisfied the minimum requirements as prescribed in the EIA regulations, 2010, for public involvement."

[17] Act 39 of 2004

41. Earthlife first became aware of the proposed power station on publication of the draft EIR in early 2014. It therefore missed the opportunity to make representations on the scoping report. It presented comments on the draft EIR in April 2014 submitting that it be rejected or at least be sent back to Savannah for amendment. Its criticism of the draft EIR was that it was superficial with insufficient detail. In addition, it took issue with the lack of information regarding the water allocation for the project and the need for the project to be assessed together with the coal mine which will be the main source of coal supply to the power station. It noted that a waste management licence ("WML"), water use licence ("WUL") and an atmospheric emissions licence ("AEL") are all required. It placed on record that it desired the opportunity to participate in all of these processes and to be kept informed of their progress. It pointed out that the sourcing of water and water treatment cannot be left to the operational phase of the project as there had to be a prior determination of availability. It raised various concerns in relation to the assessment of impacts on inter alia fauna and flora, wetlands, surface water, groundwater, air quality, noise, visual impact, traffic and biodiversity. It did not however raise the issue of climate change.

42. As indicated in Annexure 1 to the authorisation, Savannah filed its final EIR report in May 2014. It too failed to address the climate change impacts of the proposed coal-fired power station in any detail. The only reference to climate change is contained in an air quality impact assessment forming part of the final EIR and attached as Annexure AA14 to the answering affidavit. It recognised that indirect impacts associated with sulphur dioxide and nitrogen dioxide emissions relate to acidification, and those associated with carbon monoxide and carbon dioxide relate to global warming. It asserted that climate change impacts are expected to be relatively small and low. The sole observation on the matter in the final EIR stated:

> "The magnitude of indirect impacts associated with the operational scenarios relates to the relative contribution to acidification and global warming. While quantification of the relative contribution of the Thabametsi Power Station is difficult, the contribution is considered to be relatively small in the national and global context. The significance of the indirect impacts is therefore anticipated to be low for all operational scenarios.

43. The final EIR did not quantify the anticipated GHG emissions from the power station, more specifically the likely CO_2 and methane (CH_4) emissions from the coal-fired power station – the primary contributors to climate change. Instead, the report focused on emissions of SO_2, NO_2, and particulates. Earthlife believes this oversight was due to the report focusing on localised issues of air quality rather than considering broader climate change impacts.

44. Nor did the EIR address the impact that climate change may have on water scarcity in the region and how this will impact on the power station. The power station will require 1,500,000m^3 of water each year in a highly water stressed region and hence is likely to aggravate the impact of climate change in the region by contributing to water scarcity, raising in turn questions about the viability of the power station over its lifetime. Climate change thus poses risks to the Thabametsi coal-fired power station over its lifetime.

45. Subsequent to the Minister's appeal decision imposing condition 10.5 in the environmental authorisation, Savannah prepared a climate change impact assessment report ("the climate change report") and made it accessible for public review on 27 January 2017. This prompted Earthlife to file a supplementary affidavit dealing with some aspects of this report. The respondents collectively objected to the admissibility and relevance of this evidence. I am satisfied that the climate change report is admissible and that the filing of the supplementary affidavit should be permitted. Admittedly, the climate change report was not before the decision-makers when they made their decisions. It cannot be said that they acted unreasonably by ignoring a report that did not exist. But the climate change report does not introduce new facts that should have been dealt with in the founding papers. It speaks directly to the question in issue: were the impacts of climate change properly considered before authorisation was granted? The climate change report contradicts certain of the allegations made in the decisions under review and in the answering affidavits, and casts doubt upon the reasons and conclusions contained in Annexure 1 to the authorisation. It is relevant to the sufficiency of the consideration given by the Chief Director to the impact of climate change at the time he granted the environmental authorisation.

46. The climate change report addresses climate change in two parts. Appendix D comprises a detailed assessment of the likely GHG emissions from the Thabametsi power station over the period of its construction, operation and decommissioning ("the GHG emissions report"). Appendix F is a climate change resilience assessment ("the resilience report") dealing with how climate change will impact the power station over its lifetime.

47. The GHG emissions report estimates that the power station will generate over 8.2 million tonnes of carbon dioxide per year and over 246 million tonnes of carbon dioxide over its lifetime**.** The report characterises these emissions as very large by international standards based on a GHG magnitude scale drawn from standards set by various international lender organisations such as the International Finance Corporation, the European Bank for Reconstruction and Development. The expected emissions could constitute 1,9% to 3,9% of South Africa's total GHGs - the larger percentage hopefully reflecting a higher ratio of a declining emissions rate after 2025 when other coal fired power stations are decommissioned. The GHG emissions report compares the project favourably with the existing fleet of power stations run by Eskom, South Africa's sole producer of electricity. It states:

> "The Project has relatively high emissions intensity…compared to coal-fired plants, and a similar emissions intensity to that of Eskom's current fleet… and coal fired plants specifically…However, the emissions intensity of the plant represents an improvement on the three oldest Eskom coal-fired power plants that are due to be decommissioned before 2025."

48. These relatively high GHG emissions stem from the technological limitations in the design of the power station and the fact that it will not be able to make use of carbon capture and storage, an acknowledged effective emissions mitigation technique.

49. The EIR made no attempt to consider how climate change may impact on the power station itself over its lifetime and how this power station may aggravate the effects of climate change. The resilience report confirms that climate change in fact poses several "high risks" that cannot be effectively mitigated, most significant being the threat of increasing water scarcity in the Lephalale district. Increasing water scarcity in the region will affect the operation of the plant and deprive local communities of water. It expresses doubt that the Mokolo Crocodile Water

Augmentation Project (“the MCWAP” involving piping water from the Mokolo dam and the Crocodile River catchment area) will be able to provide sufficient water for the power station as climate change increases in pace. The risks of water scarcity cannot be fully mitigated.

50. The findings and conclusions of the GHG emissions report and the resilience report are accordingly undeniably at variance with the EIR that served before the Chief Director in May 2014 and upon which he relied to grant authorisation, which, unlike the detailed analysis in the GHG emissions report, contained no quantification of CO_2 emissions. The EIR made only passing mention of climate change impacts, describing these as being of “low” and “relatively small” significance, when it now seems these impacts are potentially substantial.

51. In his reasons for his decision filed in the appeal to the Minister, the Chief Director repeated the assertions on climate change contained in the EIR that while quantification of the relative contribution of the Thabametsi power station to climate change was difficult, the contribution to GHG emissions was considered to be relatively small in the national and global context and that the significance of the indirect impacts was anticipated to be low for all operational scenarios. There is no evidence convincingly supporting that conclusion, which subsequently has been demonstrated to be false by the GHG emissions report. It is for that reason that Earthlife contends the decision of the Chief Director is reviewable as irrational and unlawful in that relevant considerations were ignored and the uncritical repetition of the EIR’s claims of low impact is suggestive of a failure by the Chief Director to apply his own mind to the climate change impacts.

Earthlife’s appeal to the Minister

52. Section 43(1) of NEMA provides that any person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under NEMA or a specific environmental management Act. In terms of section 43(6) of NEMA, after considering such an appeal the Minister may confirm, set aside or vary the decision or may make any other appropriate decision.

53. Earthlife lodged an appeal with the Minister in terms of section 43 of NEMA on 11 May 2015 in which it raised the question of climate change directly for the first time. The appeal requested the Minister to set aside the decision to grant the environmental authorisation on various grounds. Most relevantly for present purposes, the fourth ground of appeal alleged that the Chief Director had failed to take into account the state's international and national obligations to mitigate and take positive steps against climate change.

54. In paragraphs 89-105 of the appeal, Earthlife emphasised that climate change will continue to impact on water resources, air quality, human health, biodiversity and marine fisheries and that South Africa has an international obligation to commit to the reduction of GHG emissions as part of a global solution to a global problem. The government has confirmed its commitments in the White Paper where it has listed as one of its strategic priorities the need to prioritise "the mainstreaming of climate change considerations and responses into all relevant sector, national, provincial and local planning regimes". Earthlife thus concluded that, as part of the integrated environmental authorisation process envisaged by Chapter 5 of NEMA and the requirement in section 24O(1)(b) to consider relevant policy and information in deciding whether or not to grant an authorisation, the GHG emissions and climate change impacts of the project should have been taken into account by the Chief Director before granting the authorisation.

55. According to Earthlife, in order to meet these legislative and policy requirements, the environment impact assessment process as a matter of policy should include climate change considerations in full as part of "climate change screening". Such screening must tackle both mitigation (potential contribution to further GHG emissions) as well as adaptation measures. Every development decision must be based on its contribution to both mitigation and adaptation aimed at maximising reduction in direct and indirect GHG emissions, maximising the potential for further mitigation and optimising adaptation to impacts over the full life of the development. Earthlife submitted to the Minister that such was not considered by the Chief Director "either adequately or at all". In addition, water availability is "a severe climate change concern for South Africa". It cautioned that the access to water in the Lephalale area

is anticipated to be a problem in the future and pointed out that the authorisation process had not adequately addressed the problem. Its concerns have subsequently been taken on board and are now reflected in the discussion of the MCWAP in the resilience report of January 2017.

56. Paragraph 105 of the appeal summarises Earthlife's ultimate concern about the climate change issue in relation to the authorisation process. It reads:

> "The failure to consider climate change implications shows a lack of policy coherence with the national climate change response policy and a disregard for the provisions of NEMAQA and NEMA which require consideration of international obligations and GHG emissions as set out above. Furthermore, this shows a failure to consider the anticipated and fast-approaching impacts of climate change, in this particular instance, diminishing water resources, which will, no doubt, have a significant impact on this project, as well as other projects and people living within the area and the surrounding environment."

57. The other grounds of Earthlife's appeal ranged across a variety of issues, some touching indirectly on climate change. They alleged variously that the Chief Director and the DEA failed to apply the principles of national environmental management; failed give effect to the general objectives of integrated environmental management in relation to waste management; did not properly consider representations from IAPs; and did not consider alternatives, in particular the "no-go option", being the abandonment of the project entirely and developing renewable energy sources in the interests of effective mitigation of climate change.

58. Earthlife's second ground of appeal was that the Chief Director failed to take into account the air quality impacts of the project and in so doing contravened NEMAQA. The object of NEMAQA is to protect the environment by providing reasonable measures for the protection and enhancement of the quality of air; the prevention of air pollution and ecological degradation; securing ecologically sustainable development while promoting justifiable economic and social development; and generally to give effect to section 24(b) of the Constitution in order to enhance the

quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people.[18]

59. Thus, although NEMAQA is primarily concerned with the quality of ambient air, it is secondarily concerned with other kinds of pollution and environmental degradation. Section 39(b) of NEMAQA provides that when considering an application for an AEL, the licensing authority must take into account inter alia the pollution being or likely to be caused by the carrying out of the listed activity and the effect or likely effect of that pollution on the environment, including health, social conditions, economic conditions, cultural heritage and ambient air quality. Likewise, in terms of section 39(c) of NEMAQA, the licensing authority must take into account the best practicable environmental options available to prevent, control, abate or mitigate that pollution and to protect the environment from harm as a result of that pollution. Section 1 of NEMAQA defines "pollution" as having the meaning assigned to it in section 1 of NEMA, which defines it to include any change in the environment caused by substances emitted from any activity where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future. This all-embracing definition of pollution thus encompasses the emission of GHG as a form of pollution. Emission is essentially defined to mean any emission or entrainment process that results in air pollution.

60. In paragraph 93, dealing with the issue of climate change under its fourth ground of appeal, Earthlife referred to section 43(1) of NEMAQA, to reinforce the point that national legislation recognises the need to curb GHG emissions and address climate change in that NEMAQA requires that an AEL must specify GHG measurements and reporting requirements. Likewise, the National Framework for Air Quality Management[19] ("the 2012 National Framework") acknowledges that "specialist air quality impact assessments must consider greenhouse gas emissions as well". Section 43(1) of NEMAQA requires an AEL to specify inter alia: i) the maximum allowed amount, volume, emission rate or concentration of pollutants that may be

[18] Section 2 of NEMAQA.
[19] GN 919 GG 37078 of 29 November 2013

discharged in the atmosphere over the life of the listed activity;[20] ii) point source (a single identifiable source and fixed location of atmospheric emission) emission measurement and reporting requirements;[21] iii) any other operating requirements relating to atmospheric discharges, including non-point source or fugitive emissions;[22] and iv) greenhouse gas emission measurement and reporting requirements.[23]

61. Earthlife disputed the claim in the EIR that air quality impacts had been adequately considered in the environmental authorisation process and complained that it had not had proper notice of the process. However, it emerged in argument before me that the AEL process is still to be finalised and Earthlife is participating in that process. The implications of that has become a matter of importance and debate.

The Minister's appeal decision

62. On 7 March 2016, the Minister handed down her decision on the appeal. The decision deals *ad seriatim* and thoroughly with all the grounds of appeal. In response to the appeal grounds that the DEA had contravened the principles of NEMA and the existing environmental policies the Minister made significant relevant observations and findings. Thus she noted Earthlife's contention that a detailed climate impact study needed to be conducted to assess the impacts of climate change, in particular for water resources estimated to be available for the project, as well as the impacts of the project on GHG emissions and adaptation to a changed climate, and that the IAPs should have been granted an opportunity to make submissions in relation to such studies and that the DEA should have considered these studies and the comments received before making any decision in relation to the environmental authorisation. She noted also Thabametsi's contention that the impacts of GHG emissions and climate change were considered in the air quality assessment and the risk assessment study. She stated:

[20] Section 43(1)(g) of NEMAQA
[21] Section 43(1)(i) of NEMAQA
[22] Section 43(1)(h) of NEMAQA
[23] Section 43(1)(l) of NEMAQA

> "In evaluating this ground of appeal..I note furthermore that the Atmospheric Impact Report, which will form part of the AEL application process, will provide details of the facility's impact on human health and the receiving environment. Since this application was not submitted as an integrated application, information in this regard will consequently be required during the AEL application process."

63. Earthlife's third ground of appeal alleged that the Chief Director failed to take into account the cumulative impacts of the project. The impacts it addressed included biodiversity, habitat destruction and the associated loss of species, and importantly the cumulative impact of the project on the water supply and hence the resilience issue, in that the water supply from the MCWAP might prove insufficient. The Minister in her decision did not address this concern with much specificity. She merely stated that the EIR had taken note of the significant cumulative impacts and concluded with the following general observation:

> "I note furthermore that a project of this nature will have certain impacts which will not be comprehensively mitigated or prevented, but that these concerns must be weighed against the interests of the project, as well as the social and economic benefits derived from the project. Certain negative impacts are consequently unavoidable in a development of this nature, but I am satisfied that these impacts were identified and adequately assessed, and that mitigation measures were put in place, having considered all relevant specialist recommendations."

64. The failure of the Minister to specifically address the water supply issue when discussing the question of "cumulative impacts" is ameliorated to some extent by her ultimate decision to compel a fuller climate change assessment, where the matter could and subsequently has been investigated.

65. In dealing with the fourth ground of appeal, the Minister clearly accepted that a climate change assessment was a relevant factor in deciding whether to grant the authorisation. She evidently accepted Earthlife's contention that as part of the integrated environmental process envisaged by chapter 5 of NEMA and the requirement of section 24O(1)(b) of NEMA the Chief Director was required to take into account the GHG emissions and climate change impacts of the project. She noted Earthlife's contention that "these factors were not considered, either adequately or at all". Her finding and ruling on the issue reads as follows:

> "In evaluating this ground of appeal, I am aware that climate change issues were

> addressed, to some extent, in the air quality assessment and impact study, and the Department considered these factors prior to the issuance of the EA.
>
> I must emphasise that in order for the country to meet its long-term electricity demand, a mix of power generation technologies must be pursued, which includes coal-fired power stations. I must stress furthermore that the Department's commitment to identifying cleaner power technologies in the medium and longer term.
>
> However, I concur with the appellant in that climate change impacts of the proposed development were not comprehensively assessed and/or considered prior to the issuance of the EA.
>
> In view of the above, the EA is accordingly amended by the insertion of condition 10.5 of the EA".

66. The new condition obliged Thabametsi to undertake a climate change impact assessment prior to the commencement of the project to be lodged with the DEA for review and consideration of the recommendations. This assessment, as discussed, is underway. A draft climate change report has been published and is the subject of an on-going process in which Earthlife is an active participant.

67. Despite agreeing with Earthlife that the climate change impact had not been properly assessed, the Minister went on to uphold the environmental authorisation, such according to Earthlife amounting to a reviewable irregularity.

Events subsequent to the appeal to the Minister

67. Subsequent to the Minister's decision various extensions of time were granted for submitting the climate change report. There was also some uncertainty about the nature and scope of the Minister's decision, leading to correspondence and further engagement between the parties.

68. On 23 March 2016, the third respondent, the Director: Appeals and Legal Review of the DEA ("the Appeals Director"), wrote to Earthlife and stated that the instruction by the Minister that Thabametsi undertake a climate change assessment did not constitute an acknowledgement by the Minister that the

decision to issue the environmental authorisation was unlawful and further that the directive made it clear that Thabametsi could not commence with the project until such time as the assessment had been concluded and submitted to the DEA for consideration.

69. At a meeting with the Appeals Director on 13 April 2016, the legal representatives of Earthlife were advised that the DEA may decide to amend or revoke the environmental authorisation, depending on the findings of the assessment. There was debate in subsequent correspondence about whether the revocation of the authorisation at a later date would be legally feasible.

70. The draft scope of work report for the climate change impact assessment was made available for comment by IAPs on 22 April 2016. On 25 May 2016 Earthlife submitted comments and detailed recommendations on what the climate change impact assessment should consider. These recommendations included submissions that: i) the boundary definition take cognisance of activities giving rise to indirect emissions, namely mining and the transportation of coal; ii) the baseline study must not be limited only to the project's GHG emissions but must consider the baseline environment; iii) the assessment must include consideration of the project's cumulative and life cycle emissions and the external costs associated with climate change impacts - being changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services; iv) the basis of the assessment of impacts on the built environment be broadened to adopt the protocols of the Sabin Centre for Climate Change Law for consideration of relevant factors using multiple scenarios including the most severe climate change projections; and v) the use of recognised global standards on how to measure, manage and report on GHG emissions.

71. After further dispute about Earthlife's opportunity to influence the report, the final scope of work report was made available to the IAPs for comment on 9 October 2016, with comments due on 10 November 2016. It appears that the DEA took on board some of Earthlife's recommendations and proposed that: i) the full life cycle of the project be considered; ii) the carbon footprint of the project be calculated for construction and decommissioning; and iii) the resilience to the

impacts of climate change be addressed. Earthlife would prefer other of its recommendations to be taken into account, such as cumulative emissions, the social cost of the emissions associated with the project and the specific impact on the Waterberg region in Limpopo. It also emphasised that all these tasks should have been completed before the environmental authorisation was granted by the Chief Director.

72. Earthlife thus has participated in and sought to influence the outcome of the climate change impact assessment currently being conducted in terms of the condition imposed by the Minister on appeal. Its participation has put Thabametsi to further expense of approximately R1 million to date to accommodate the additional concerns that it has raised in its response to the draft scope of works report.

73. Thabametsi, as mentioned earlier, contends that Earthlife's participation in the process conducted pursuant to the dismissal of the appeal is fundamentally at odds with its decision to bring the review. The former is premised on the finding that the environmental authorisation is valid, while the latter seeks to set the authorisation aside. Thabametsi argues that Earthlife should not be permitted to blow hot and cold by participating in both of these mutually exclusive processes. A party cannot approbate and reprobate by asserting that an adjudicator's decision is valid, entitling it to participate in the scoping process and at the same time seek to challenge the validity of the decision. By taking a benefit under an adjudicator's decision, the party will generally be taken to have elected a particular course and will be precluded from challenging the adjudicator's decision.[24]

74. Earthlife in its replying affidavit rejected this contention, claiming that it has made it clear throughout that its participation in the climate change impact assessment process does not constitute a waiver of its rights to bring the review. In paragraph 5 of its comments on the draft scope of work report its legal representatives stated:

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[24] *PT Building Services Ltd v ROK Build Limited* [2008] EWHC 3434 (TCC) para 26; *Chamber of Mines of South Africa v National Union of Mineworkers and Another* 1987 (1) SA 668 (A) at 690D–G; and *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) para 54.

> "Our client's rights to take the Minister's appeal decision on review remain fully reserved. The following submissions are made without prejudice to those rights. Nonetheless, our client recognises the need for the CCIA to be conducted properly, irrespective of the outcome of any potential litigation."

I see no basis upon which Earthlife should be denied its reservation. The election rule is not an absolute bar. There has been no prejudice to the other parties through its participation. While Thabametsi has incurred additional expense by reason of the scope of works report, the ultimate reason for that is because the DEA accepted the objective merit of the proposals. Earthlife added in its replying affidavit that no matter what the outcome of the litigation, the climate change impact assessment will need to be completed and it must be done properly and will need to be considered in taking a fresh decision. That proposition is true and will have a bearing upon the remedy for any proven irregularity.

75. As discussed earlier, Savannah in fulfilment of condition 10.5 of the authorisation introduced by the Minister on appeal has now finalised the climate change report and made it accessible for public review on 27 January 2017. The report and its annexures run to more than 400 pages. The report states that it "is made available for public review for a commenting period of 30 days, beginning 27 January 2017, and ending 27 February 2017".

The review of the decision of the Chief Director

76. Although the appeal to the Minister is an appeal in the wide sense, that is, a rehearing of, and fresh determination of the merits of the matter,[25] it is still necessary to review the decision of the Chief Director. Irregularities committed by the Chief Director are relevant to the extent that they have not been overtaken by or cured in the appeal proceedings.

77. The position taken by the Minister in relation to the decision of the Chief Director is somewhat ambiguous. Her decision to vary the conditions of the authorisation suggests that she regarded the decision as irregular. However, in the answering affidavit the Minister averred that she considered the decision of the Chief Director to

[25] *Tikly and others v Johannes NO* and others 1963 (2) SA 588 (T) at 590G-591A

be valid and rejected the fourth ground of appeal accordingly. As will appear more clearly later, the alleged failure of the Chief Director to properly exercise his discretion, if proven, could only have been cured on appeal had the Minister substituted her own decision on the authorisation after receiving and taking into consideration the relevant information purportedly ignored.[26] She did not do that. Nor did she set aside the Chief Director's decision and remit it. She upheld it and varied the conditions of the authorisation. It is still necessary therefore to decide whether the administrative action of the Chief Director was tainted by irregularity.

78. The answer depends partly on whether climate change impacts had to be considered in granting Thabametsi environmental authorisation. A plain reading of section 24O(1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered. The injunction to consider any pollution, environmental impacts or environmental degradation logically expects consideration of climate change. All the parties accepted in argument that the emission of GHGs from a coal-fired power station is pollution that brings about a change in the environment with adverse effects and will have such an effect in the future. All the relevant legislation and policy instruments enjoin the authorities to consider how to prevent, mitigate or remedy the environmental impacts of a project and this naturally, in my judgement, entails an assessment of the project's climate change impact and measures to avoid, reduce or remedy them.

79. Section 24O(1)(b) of NEMA expressly requires the competent authority considering an application for an environmental authorisation to take into account all relevant factors including: i) any pollution, environmental impacts or environmental degradation likely to be caused; ii) measures that may be taken to protect the environment from harm as a result of the activity and to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation; iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted; iv) any feasible and reasonable alternatives to the activity and any feasible and reasonable modifications or changes to the activity that may minimise harm to

[26] *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at paras 80-81

the environment; and v) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application. These requirements, as mentioned earlier, are peremptory. The Regulations also require that the environmental impact assessment report to contain all information that is necessary for the competent authority to consider the application and to reach a decision including an assessment of each identified potentially significant impact.

80. NEMA, like all legislation, must be interpreted purposively and in a manner that is consistent with the Constitution, paying due regard to the text and context of the legislation.[27] Section 2 of NEMA sets out binding directive principles that must inform all decisions taken under the Act, including decisions on environmental authorisations. The directive principles serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment. They guide the interpretation, administration and implementation of NEMA, and any other law concerned with the protection or management of the environment. Competent authorities must take into account the directive principles when considering applications for environmental authorisation.[28] The directive principles promote sustainable development and the mitigation principle that environmental harms must be avoided, minimised and remedied. The environmental impact assessment process is a key means of promoting sustainable development, by ensuring that the need for development is sufficiently balanced with full consideration of the environmental impacts of a project with environmental impacts. The directive principles caution decision-makers to adopt a risk-averse and careful approach especially in the face of incomplete information.

81. As a matter of general principle, the courts when interpreting legislation are duty bound by section 39(2) of the Constitution to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.[29] The

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[27] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.
[28] Sections 23 and 24 of NEMA

[29] See *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at paras 87-89

approach mandated by section 39(2) is activated when the provision being interpreted implicates or affects rights in the Bill of Rights, including the fundamental justiciable environmental right in section 24 of the Constitution. Section 24 reads:

> "Everyone has the right –
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

82. Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[30] Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences.

83. NEMA must also be interpreted consistently with international law. Section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with

[30] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

international law. Therefore, the various international agreements on climate change are relevant to the proper interpretation of section 24O(1)(b) of NEMA. Article 3(3) of the UN Framework Convention enacts a precautionary principle requiring all states parties to take precautionary measures to anticipate, prevent or minimise causes of climate change. Article 4(1)(f) of the UN Framework Convention imposes an obligation on all states parties to take climate change considerations into account in their relevant environmental policies and actions, and to employ appropriate methods to minimise adverse effects on public health and on the environment.

84. As explained earlier, the DEA argued that there is no provision in our domestic legislation, regulations or policies that expressly stipulates that a climate change impact assessment must be conducted before the grant of an environmental authorisation and no such express provision exists as part of South Africa's obligations under international law to reduce GHG emissions, which are broadly framed and do not prescribe particular measures. Thabametsi similarly disputed whether section 24O of NEMA and regulation 31 of the Regulations will better advance policy if interpreted to require such an assessment.

85. They emphasised that the absence of a legislated framework and prescribed limits for GHG emissions rates means there is no standard to which the DEA could hold Thabametsi for the grant of an environmental authorisation. Thabametsi in particular argued that it is anathema to the rule of law to hold a party to requirements or constraints that have not been so enacted. The rule of law, enshrined in section 1 of the Constitution, requires that rules must be enacted and publicised in a clear and accessible manner, to enable people to regularise their affairs with reference to them. Substantive requirements of the kind pressed for by Earthlife should not be read in to the legislative regime, particularly so where the DEA has deliberately refrained from adopting regulations that require a GHG emission assessment and pollution prevention plan.

86. Thabametsi argued further that if Earthlife considers section 24 of the Constitution to require a detailed climate change impact assessment to be conducted for the environmental authorisation of coal-fired power stations, then it must challenge NEMA and/or the EIA regulations as unconstitutional for the failure to adopt such a requirement. It cannot disregard the absence of the requirement from

the relevant legislation, and seek to invoke the constitutional right directly to read it in. Doing so violates the principle of subsidiarity.

87. These arguments, to my mind, are something of a mischaracterisation of what Earthlife seeks to achieve with this review. Admittedly though, Earthlife in its heads of argument and founding papers did take the position that the decisions were unlawful because the absence of a climate change impact assessment constituted material non-compliance with the mandatory requirements of section 24O(1) of NEMA read with the 2010 EIA Regulations. On this basis, the impugned decisions would be reviewable for want of jurisdiction in terms of the constitutional principle of legality, section 6(2)(b) of PAJA (which permits review for non-compliance with a mandatory procedure or condition), and perhaps in terms of sections 6(2)(f)(i) and 6(2)(i) of PAJA on the ground that the decision contravened a law or was not authorised by the empowering provision or was otherwise unconstitutional or unlawful. In argument, however, Mr Budlender, who appeared for Earthlife, retreated from this position and confined his criticism of the Chief Director's decision to the assertion that in granting the environmental authorisation without having sight of a climate change impact assessment report he overlooked relevant considerations. The decision accordingly falls to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA.

88. The absence of express provision in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change as a relevant consideration and does not answer the interpretative question of whether such a duty exists in administrative law. Allowing for the respondents' argument that no empowering provision in NEMA or the Regulations explicitly prescribes a mandatory procedure or condition to conduct a formal climate change assessment, the climate change impacts are undoubtedly a relevant consideration as contemplated by section 240 of NEMA for the reasons already discussed. A formal expert report on climate change impacts will be the best evidentiary means of establishing that this relevant factor in its multifaceted dimensions was indeed considered, while the absence of one will be symptomatic of the fact that it was not.

89. The respondents' complaint that without explicit guidance in the law on climate change impact assessments, Thabametsi could not be required to conduct a climate

change impact assessment, as there is no clarity on what is required, is unconvincing. As Earthlife correctly pointed out, an environmental impact assessment process is inherently open-ended and context specific. The scoping process that precedes an environmental impact assessment provides opportunity for delineating the exercise and guidance on the nature of the climate change impacts that must be assessed and considered.

90. The respondents further argued that the power station project is consistent with South Africa's NDC under the Paris Agreement, which envisages that South Africa's emissions will peak between 2020 and 2025. Again I agree with Earthlife that this contention misses the point. The argument is not whether new coal-fired power stations are permitted under the Paris Agreement and the NDC. The narrow question is whether a climate change impact assessment is required before authorising new coal-fired power stations. A climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa's peak, plateau and decline trajectory as outlined in the NDC and its commitment to build cleaner and more efficient than existing power stations.

91 In conclusion, therefore, the legislative and policy scheme and framework overwhelming support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process, and that consideration of such will best be accomplished by means of a professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra- and extra-statutory context of section 24O(1) of NEMA support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation.

92. I turn now to consider whether the Chief Director did in fact consider or ignore the relevant climate change impacts.

93. In its founding affidavit, Earthlife proceeded from the supposition that the Minister in the appeal had found that the Chief Director had failed to consider the relevant factors of climate change impacts as evidenced by her decision to impose the new condition in the authorisation. As it saw the situation, there was no information before

the Chief Director dealing with the direct GHG emissions of the power station, the cumulative emissions from all the activities associated with the power station, the problem of water scarcity or any analysis on how climate change will impact on the efficiency and continued operation of the power station over its expected lifetime.

94. There is no denying, when regard is had to the scope of work report and the climate change report issued after the Minister's appeal decision that when the Chief Director made his decision he was possessed of scant climate change information consisting of the single paragraph in the EIR, which in comparison to that in the scope of work report and the climate change report was wholly insufficient. As explained, the EIR did not deal with the project's full life-cycle emissions, the carbon footprint of the project calculated for construction and decommissioning, the activities associated with the project – mining and coal transportation, and the project's resilience. The Minister and the DEA fully appreciated this, as is reflected in the Minister's decision and the constructive approach followed subsequently by the DEA in relation to the scope of the works report. Additionally, the air quality assessments do not meaningfully attempt to quantify the GHG emissions from the power stations, though it must be kept in mind that the AEL process under NEMAQA is still underway.

95. The DEA and Thabametsi sought to rely on the IRP and the Determination to support their submission that the relevant climate change considerations had been considered by the Chief Director. There is no evidence to support the assertion that the IRP and the Determination gave adequate consideration to climate change. But in any event, as Mr Budlender correctly submitted on behalf of Earthlife, an abstract, macro-level assessment of the climate change impact of additional coal-fired power could not cast any light on the specific climate change impacts and mitigation strategies of specific coal-fired power stations located at specific sites. These relevant considerations are context specific and have to be distinctively considered.

96. The policy instruments naturally will inform a competent authority assessing the environmental impact of a proposed coal-fired power station. But the respondents' assertion that the instruments constitute binding administrative decisions not to be circumvented to frustrate the establishment of authorised coal-fired power stations is

unsustainable, as is the notion that their mere existence precludes the need for a climate change impact assessment in the environmental authorisation process. Policy instruments developed by the Department of Energy cannot alter the requirements of environmental legislation for relevant climate change factors to be considered.

97. The contention that the climate change impacts of additional coal-fired power stations were considered in making the IRP and the Determination, precluding any further need for this assessment of climate change impacts in the environmental impact assessment process, is also not legally sustainable by virtue of the decision of the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department Of Agriculture, Conservation And Environment, Mpumalanga Province.*[31] That case concerned an environmental authorisation granted for the construction of a petrol service station. In granting the authorisation, the competent authority made a similar argument to the one advanced here, suggesting that it was unnecessary to consider the socio-economic impacts of the project, as these impacts had been fully considered by the local authority in granting zoning approval in terms of an Ordinance. The Ordinance required an assessment of the need and desirability of the proposed project. The Constitutional Court held that NEMA required more than a mere assessment of need and desirability, with the consequence that the competent authority had misunderstood the nature of the NEMA requirements. It stated:

> "The environmental authorities assumed that the duty to consider need and desirability in the context of the Ordinance imposes the same obligation as the duty to consider the social, economic and environmental impact of a proposed development as required by the provisions of NEMA. They were wrong in that assumption. They misconstrued the nature of their obligations under NEMA and as a consequence failed to apply their minds to the socio-economic impact of the proposed filling station, a matter which they were required to consider. This fact alone is sufficient to warrant the setting aside of the decision."[32]

[31] 2007 (6) SA 4 (CC).

[32] para 86.

98. In the final analysis, the respondents' reliance on the IRP and the Determination to excuse the lack of consideration of the specific climate change impacts in relation to the Thabametsi power station basically misconstrues the nature of their duties under section 24O(1) of NEMA.

99. The DEA argued that Earthlife's complaint is not that the climate change impacts of the project were not considered but rather that insufficient weight was placed on these impacts. This, it said, does not constitute a ground of review. The sufficiency or the relative weight to be accorded to a relevant consideration is properly a matter for the decision-maker. It relied in this regard upon *MEC for Environmental Affairs and Development Planning v Clairison's CC*[33] where the Supreme Court of Appeal stated:

> "It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision is that of the decision-maker. As it was stated by Baxter:
>
> > 'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'
>
> …The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere".

100. The respondents submitted that the Chief Director considered and weighed the relevant factors and made a decision in good faith and accordingly there is no basis for the court to interfere with those decisions. I do not agree. The issue we have to do with in this case is not whether the weighing of the factors was reasonable. Earthlife's case is that the Chief Director was unable to perform the weighing exercise because they did not have the relevant information to balance the climate change factors against the other relevant factors. As Mr Budlender put it, it is simply

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[33] 2013 (6) SA 235 (SCA) para 20 and para 22

impossible to strike an appropriate equilibrium where the details of one of the key factors to be balanced are not available to the decision-maker.

101. On this basis, there was indeed non-compliance with the provisions of section 24O(1) of NEMA, with the result that the impugned decisions stand to be reviewed on the grounds that the Chief Director overlooked relevant considerations. His decision accordingly would normally fall to be reviewed in terms of section 6(2)(e)(iii) of PAJA. There is also merit in the submission that the Chief Director's decision was not rationally connected to the information before him. In upholding the environmental authorisation, the Chief Director relied exclusively on the statement in the EIR that the climate change impacts of the project were relatively small and low. These assertions were not supported by any evidence in the EIR. Without a full assessment of the climate change impact of the project, there was no rational basis for the Chief Director to endorse these baseless assertions. This, as Earthlife correctly asserted, is an indication that the Chief Director failed to apply his mind. The decision is thus reviewable under section 6(2)(f)(ii) of PAJA as well.

The review of the decision of the Minister

102. Earthlife submitted that it is plain from the Minister's appeal decision that she accepted that a climate change impact assessment was relevant to the environmental authorisation and that it should have been completed and considered before taking a final decision on whether to grant the authorisation and this had not happened.

103. Earthlife, the DEA argued, proffers an incorrect reading of the Minister's decision. On a proper interpretation, it said, the Minister did not find that the climate change impact of the project had not been adequately assessed. The Minister merely stated that she concurred with Earthlife "in that the climate change impacts of the proposed development were not comprehensively assessed and/or considered prior to the issuance of the EA". Earthlife, the DEA argued, has erroneously equated the term "comprehensively" with "adequately" or "properly", thereby distorting the meaning of the Minister's statement. The true import of the Minister's decision is that

the climate change impact of the project was adequately assessed in the EIR, had been considered, “to some extent”, in the air quality assessment and the water impact study, and that the Chief Director considered these factors prior to the issuance of the authorisation.

104. The Minister, the DEA argued, was moreover fully aware of the IRP and the Determination which were discussed in the EIR and raised by Thabametsi in the internal appeal. As a consequence, the Minister decided to uphold the environmental authorisation. However, she recognised that the climate change impacts of the project had been adequately, but not comprehensively, assessed. As such, she ordered that a climate change impact assessment of the Thabametsi power station be carried out. As mentioned, the Minister saw a climate change impact assessment as being intended to collect data for use in the formulation of policy and mitigation measures, to assess and monitor the climate change impact of the Thabametsi power station and to determine whether and when it is necessary to amend or supplement the conditions in its environmental authorisation.

105. This understanding of the Minister’s reasons is contradicted by the appeal decision itself. Nowhere in the decision does the Minister state or imply that the climate change impact had been adequately addressed. If the climate change impact had been adequately addressed then there was no logical reason for ordering a full climate change impact assessment before construction of the power station. A careful reading of condition 10.5 shows that the Minister has placed the project on hold until the climate change assessment is completed. It is doubtful that the climate change impact assessment was intended exclusively as a future emissions’ monitoring exercise when condition 10.5 requires that it must be completed before any construction of the power station can commence.

106. The interpretation of the DEA is also belied by the fact that the DEA now purports to recognise that the outcome of the climate change assessment might necessitate an amendment or even ultimately a withdrawal of the environmental authorisation granted. In its founding affidavit Earthlife averred that the Chief Director and the Minister are *functus officio* and have no express powers under NEMA or the Regulations to withdraw the authorisation if they later change their mind, in light of

the final climate change impact report. While the Chief Director does have the power to amend the conditions attached to the authorisation if that is considered necessary,[34] Earthlife pointed out that a power of amendment is not a power of withdrawal. The DEA in response argued that the environmental authorisation may be amended and subsequently withdrawn if the climate change impact assessment warrants this outcome. In so arguing, the DEA in effect conceded that the purpose of condition 10.5 was to consider climate impacts for the purpose of the authorisation.

107. For that reason, I am persuaded that the Minister did find that the Chief Director had not sufficiently considered relevant considerations and sought to remedy the irregularity or defect. The Minister appreciated that climate change impacts were relevant and had not been sufficiently assessed, necessitating an investigation of these impacts. She correctly found that a climate change impact assessment needed to be conducted. But she perhaps erred in upholding the environmental authorisation. Instead of sustaining the fourth ground of appeal and remitting the matter back to the Chief Director, as she might prudently have done, she upheld the authorisation and ordered to be done that which should have been done before the authorisation was granted. The appeal under section 43 of NEMA is a wide appeal involving a determination *de novo* where the decision in question is subjected to reconsideration, if necessary on new or additional facts, with the body exercising the appeal power free to substitute its own decision for the decision under appeal.[35] The Minister therefore could have (and perhaps should have) adjourned the appeal and similarly directed Thabametsi to undertake a climate change impact assessment for consideration in the appeal process and thereafter to have substituted the Chief Director's decision with her own. This the Minister did not do.

108. The DEA's answering affidavit introduced an explanation for the Minister's decision that was not initially presented by the Minister in her decision or in the correspondence between Earthlife's legal representatives and the DEA seeking clarification of the appeal decision. At paragraphs 76 to 80 of the founding affidavit, Earthlife alleged that if the final climate change impact report warrants the withdrawal of the environmental authorisation, then the Minister's hands will be tied, as she has

[34] Regulation 43 of the Regulations.
[35] *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) at para 41

no automatic powers of withdrawal. In response, at paragraph 86 of the DEA's answering affidavit, the respondents admitted that even if the final climate change impact assessment merits it, the withdrawal of the environmental authorisation would not be permitted, but a similar result might be achieved using the powers of amendment under Regulation 43 of the Regulations, coupled with the non-compliance process under sections 31L and 31N of NEMA.

109. This begs the question of what the Minister can do legally if the climate change impact assessment ultimately concludes that the project should not go ahead on account of the climate change risks. If the Minister has the power to withdraw or revoke the authorisation on receiving an unfavourable climate change impact report then her appeal decision could conceivably be reasonable, rational and lawful. But if she lacks that power, then Earthlife and other IAPs have been denied full opportunity to influence the outcome and a decision that ought rightly not have been made in the first place will have to stand.

110. It is common cause that NEMA contains no express provision permitting revocation of an authorisation by a competent authority on the grounds that it was granted without consideration of relevant factors. In terms of regulation 43 of the Regulations, the Chief Director may amend an environmental authorisation, after providing IAPs an opportunity to make representations and allowing a right of appeal. After an amendment has been effected a compliance officer may issue a notice under section 31L of NEMA where there is non-compliance. A failure to comply with a compliance notice will permit the Minister to revoke the environmental authorisation under section 31N of NEMA. Earthlife submitted that the power of amendment cannot be used for the ulterior purpose, no matter how well intended, of engineering the ultimate revocation of Thabametsi's environmental authorisation for the initial failure to consider climate change impacts, and any attempt to do so would be reviewable. The only remedy, it submitted, is for the authorisation to be set aside by the court and the process to begin afresh.

111. Mr Marcus SC, on behalf of the Minister, submitted that the protective nature of NEMA and the duty of the Minister to act in the environmental interest might permit a finding that the Minister has an implied power under NEMA to revoke the authorisation. Mr Budlender countered that such would be inconsistent with the

functus officio principle which dictates that a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. The result is that once such a decision has been given it is (subject to any right of appeal) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.[36]

112. The doctrine of *functus officio* is primarily intended to foster certainty, fairness and finality in the administrative process. However, in *Retail Motor Industry v Minister of Water* [37] Plasket AJA qualified the application of the principle by stating that the principle is not absolute in that certainty and fairness at times have to be balanced against the equally important and practical consideration that requires the reassessment of decisions in order to achieve efficient and effective public administration in the public interest.

113. Professor De Ville in his seminal work *Judicial Review of Administrative Action in South Africa*[38] discusses the approach to this question in German administrative law. There the revocation of a beneficial administrative decision in the absence of explicit legislative authority is permissible where, because of a subsequent change in circumstances, the organ of state would have been entitled not to have made the disposition and a failure to revoke the action would jeopardise the public interest, or secondly in order to prevent or eliminate serious harm to the public good. The principle is a salutary one. However, there is no such power provided in PAJA and I doubt that our common law has been developed to include such in our body of administrative law. The predominant view in our law remains that the *functus officio* principle will apply to final decisions where rights or benefits have been granted and when it would be unfair to deprive a person of an entitlement that has already vested.

114. That being the case, once the Minister made the decision to uphold the environmental authorisation, despite the absence of a climate change impact assessment, her decision was final and vested significant rights in Thabametsi.

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[36] DM Pretorius: *The origins of the functus officio doctrine with specific reference to its application in administrative law* (2005) 122 *SALJ* 832 at 832
[37] 2014 (3) SA 251 (SCA) at para 24
[38] At pg. 78

Although there are various powers in NEMA to amend and suspend the authorisation, if the climate change report demonstrates that the power station will cause irremediable harm to the extent that the authorisation ought not to have been given, none of these provisions can be lawfully relied upon to revoke the authorisation.

116. Accepting that the Minister and other officials have no power to withdraw the environmental authorisation if the climate change impact assessment warrants that outcome, the Minister's belief that other remedial powers might achieve a similar result was mistaken and to the extent that she took her decision on this mistaken belief then her decision was based on a material error of law. Section 6(2)(d) of PAJA permits judicial review where the action was materially influenced by an error of law affecting the ultimate outcome. Material errors of law are also grounds for review under the principle of legality. In the premises, the Minister's appeal decision is reviewable on this ground. Earthlife submitted that the decision was also irrational and unreasonable for similar reasons. There is merit in that proposition too.

Remedy

117. The court in proceedings for judicial review in terms of section 8 of PAJA may grant any order that is just and equitable including an order setting aside the administrative action and remitting it for reconsideration. In the notice of motion Earthlife seeks orders setting aside both the authorisation and the appeal decision in their entirety, remitting the application for environmental authorisation back to the Chief Director for reconsideration and directing him to consider a climate change impact assessment report, a paleontological impact assessment report, comments on these and any additional information that he may require in order to reach a decision. Such an order would basically require the environmental authorisation process to commence anew, and would be predicated upon the proposition that for obviously sound reasons the climate change impact assessment should precede the decision to authorise the project.

118. Mr Budlender referred to *Communities for a Better Environment v City of Richmond*,[39] a decision of the Court of Appeal of the State of California, to underscore the point that in environmental cases the time to consider the climate change impact is before, not after, granting approval. In that case the City of Richmond approved Chevron's application to construct an energy and hydrogen renewal project subject to a requirement that Chevron hire an independent expert to identify emissions and possible mitigation measures within a year. The Court of Appeal endorsed the view that the City had improperly deferred the formulation of greenhouse gas mitigation measures by allowing Chevron to prepare a mitigation plan up to a year after the project's approval for the obvious reason that a study conducted after approval of a project will inevitably have a diminished influence on decision-making. Mitigation measures ought to be identified and formulated during the environmental impact report process and before final approval was sought. The Court of Appeal held:

> "The solution was not to defer the specification and adoption of mitigation measures until a year after Project approval; but, rather, to defer approval of the Project until proposed mitigation measures were fully developed, clearly defined, and made available to the public and interested agencies for review and comment."[40]

119. The judgment is obviously on point by virtue of its facts being analogous to the facts in this case. I accept fully that the decision to grant the authorisation without proper prior consideration of the climate change impacts is prejudicial in that permission has been granted to build a coal-fired power station which will emit substantial GHGs in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting the authorisation. And at first glance that may justify the environmental authorisation being reviewed and set aside, and the matter being remitted to the Chief Director for a fresh decision upon final completion of the climate change impact assessment. However, such a remedy in the circumstances of this case might be disproportionate.

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[39] 184 Cal.App.4th 70 (2010).

[40] At 497.

120. Courts are obliged to fashion just and equitable remedies aimed at the proven irregularities. Ordinarily, a remedy will be just and equitable if it aims to rectify the administrative action to the extent of its inconsistency with the law. In accordance with the principles of severance and proportionality a court, where appropriate, should not declare the whole of the administrative action in issue invalid, but only the objectionable part. Where it is possible to separate the good from the bad in administrative action, the good should be given effect.[41]

121. Although the decision of the Chief Director was irregular, the essential and most consequential defect was the Minister's treatment of Earthlife's fourth ground of appeal during the appeal process. As explained earlier, had the Minister upheld the fourth ground of appeal, as she should have, she would have had two options. Either she could have referred the matter back to the Chief Director, to whom she had delegated the function in the first place, or more appropriately, she could have adjourned the *de novo* appeal, directed Thabametsi to obtain a climate change impact report, and on the basis of the new evidence reconsidered the application for environmental authorisation afresh - something she would have been entitled to do in terms of section 43 of NEMA. Consequently, the more proportional remedy is not to set aside the authorisation, but rather to set aside the Minister's ruling on the fourth ground of appeal and to remit the matter of climate change impacts to her for reconsideration on the basis of the new evidence in the climate change report. The appeal process must be reconstituted, not the initial authorisation process. Although undoubtedly a less intrusive remedy, section 43(7) of NEMA operates to suspend the environmental authorisation pending the finalisation of the appeal.

122. None of the parties pleaded for such a remedy, nor was it, beyond an oblique reference to the possibility of curing defects by way of a wide appeal, canvassed in argument. The discretion bestowed upon courts by section 8 of PAJA to do what is just and equitable, and proportional, nonetheless permits me to grant such relief. I am minded to this result also by the fact that the initial climate change report has been completed and made available for public comment. The reconstituted appeal process can proceed with requisite speed to the advantage of all parties and will be

[41] *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822D

restricted to consideration of whether environmental authorisation should be granted in light of the potential climate change impacts.

123. The chosen remedy gives some recognition to the arguments advanced by Mr Chaskalson SC on behalf of Thabametsi in relation to Earthlife's participation in the process pursuant to the appeal. Although he submitted that Earthlife's decision to participate in the climate change impact assessment precluded the present review proceedings, such as to justify their dismissal, he accepted that the underlying facts equally support restraint in the grant of remedy. Earthlife's participation in the process subsequent to the appeal warrants confining its continued participation to the narrow issue in contention, namely the climate change impacts, and not opening up the authorisation process *ab initio* to reconsideration before the Chief Director and another fresh appeal before the Minister.

124. Much time was expended in argument on the implications of NEMAQA requiring consideration of climate change impacts in the AEL process. The argument was advanced by Mr Marcus SC and Mr Chaskalson SC that there was no need to remedy any failure to consider climate change impacts in the authorisation process under NEMA because they will be fully considered in the AEL process. While it is correct that GHG emissions will be dealt with in the AEL process, there is some doubt about the scope and extent of such an investigation. The power to grant or refuse an AEL does not vest in the DEA at national level. The licensing authority will be the air quality officer of the Waterberg District Municipality. While the NEMAQA process will involve an investigation of GHG emissions in determining whether to grant an AEL, that does not alter the peremptory statutory duty of the Chief Director and the Minister to thoroughly investigate climate change impacts in terms of section 24O of NEMA with regard to national and international consequences.

125. Earthlife has had success and I see no reason why it should not be awarded its costs. The complexity and national importance of the matter justified the employment of two counsel.

Orders

126. The following orders are made:

126.1 The ruling of the first respondent, forming part of her decision of 7 March 2016 in terms of section 43 of the National Environmental Management Act 107 of 1998, and dismissing the applicant's fourth ground of appeal set out in paragraphs 89 to 105 of its appeal dated 11 May 2015, is reviewed and set aside.

126.2 The applicant's fourth ground of appeal is remitted back to the first respondent for reconsideration in terms of section 43 of the National Environmental Management Act 107 of 1998.

126.3 The first respondent is directed to consider:

126.3.1 a climate change impact assessment report;

126.3.2 a paleontological impact assessment report;

126.3.3 comment on these reports from interested and affected parties;

126.3.4 any additional information that the first respondent may require in order to reach a decision on the applicant's fourth ground of appeal.

126.4 The costs of this application are to be paid, jointly and severally, by the respondents, such costs to include the costs of employing two counsel.

JR MURPHY
JUDGE OFTHE HIGH COURT

Date Heard:	2 and 3 March 2017
Date of Judgement:	8 March 2017
Counsel for Applicant:	Adv S Budlender Adv P Seseane Adv C McConnachie
Instructed by:	Centre for Environmental Rights
Counsel for the First to Third Respondents:	Adv G Marcus SC Adv M Maenetje Adv E Webber
Instructed by:	State Attorney, Pretoria
Counsel for the Fifth Respondent:	Adv M Chaskalson SC Adv I Goodman
Instructed by:	Baker & McKenzie

Annex 633

On some issues of application of legislation on compensation for damage caused to the environment, Decision of the Plenum of the Supreme Court of the Russian Federation No. 49, 30 November 2017

RULING
OF THE PLENARY SESSION
OF THE SUPREME COURT
OF THE RUSSIAN FEDERATION

No. 49

Moscow 30 November 2017

On Certain Issues of Application of Legislation Regarding Restitution of Environmental Damage

Everyone's right to a favourable environment is recognised and guaranteed by the Constitution of the Russian Federation (Article 42).

One of the vital means of environmental protection and ensuring the citizens' right to a favourable environment is the imposition of duty to restore the damage in full upon a person that caused damage to the environment, as well as the imposition of duty to suspend, limit or terminate activities that create a danger of future damages. Thus the measures aimed at restoration of the environment, negatively impacted by economic and (or) other activities, are taken, and violation of environmental protection requirements, future environmental damage are prevented.

In order to ensure the correct and uniform court application of legislation stipulating the duty to restore environmental damage, the Plenary Session of the Supreme Court of the Russian Federation, guided by Article 126 of the Constitution of the Russian Federation, Articles 2 and 5 of Federal Constitutional Law No. 3 of 5 February 2014 "On the Supreme Court of the Russian Federation", hereby rules to provide the following explanations:

1. Environmental damage is restored in accordance with the Civil Code of the Russian Federation (hereinafter referred to as the CC RF), the Land Code of the Russian Federation, the Forest Code of the Russian Federation (hereinafter – the

ForC RF), the Water Code of the Russian Federation (hereinafter – the WC RF), Federal Law No. 7 of 10 January 2002 "On Environmental Protection" (hereinafter – the Law on Environmental Protection), other laws and normative legal acts regarding environmental protection and natural resource management.

When considering such disputes, the courts should take into account the principles of environmental protection, on which economic and other activities must be based. In accordance with Article 3 of the Law on Environmental Protection, these principles include, in particular, the "user pays" principle of natural resource management and restitution of environmental damage, presumption of ecological danger of planned economic and other activities, obligatory assessment of environmental impact in adoption of decisions regarding economic and other activities, admissibility of influence of economic and other activities upon the natural environment based on environmental protection requirements, duty of legal persons and individual entrepreneurs, engaged in economic and (or) other activities that lead or may lead to pollution, to finance the measures of prevention and (or) minimisation of negative environmental impact, clear the consequences of such impact.

2. In accordance with Article 75 of the Law on Environmental Protection, property, disciplinary, administrative and criminal liability is stipulated for violation of environmental protection legislation.

If a person is not held administratively, criminally or disciplinarily liable, this does not exclude the possibility that a duty to restore environmental damage will be imposed upon that person. Likewise, if a person is held administratively, criminally or disciplinarily liable, this does not constitute grounds to exempt that person from the duty to rectify the committed violation and to restore the damages caused.

3. Authorised public authorities of the Russian Federation, of constituent entities of the Russian Federation, a prosecutor, citizens, public associations and non-commercial organisations engaged in activities in the sphere of environmental protection may file claims for restitution of environmental damage (Articles 45, 46 of the Civil Procedure Code of the Russian Federation (hereinafter – the CPC RF), Article 53 of the Commercial Procedure Code of the Russian Federation (hereinafter – the ComPC RF), Articles 5, 6, 11, 12, 66 of the Law on Environmental Protection). Local self-government bodies may also file such claims, taking into account that the sixth paragraph of Article 3 of the Law on

Environmental Protection makes them responsible for ensuring a favourable environment and ecological safety in the corresponding territories.

4. By implication of Article 79 of the Law on Environmental Protection, environmental damage is subject to restitution independent of whether the damage caused by negative impact of the environment (resulting from economic and (or) other activities) to the health of citizens or the property of natural and legal persons, has been restored. Likewise, if a person restores environmental damage, this does not constitute grounds to exempt that person from liability for damage to health of citizens or the property of natural and legal persons, caused by negative environmental impact resulting from its engagement in commercial and (or) other activities and violation of environmental protection legislation. For example, if a person uses toxic chemicals for agriculture, which do not dissolve in the environment, this person may be obliged to restore the environmental damage, as well as losses caused to certain owners (users) of land (forest) plots (in particular due to crop failure, death of animals belonging to those persons, etc.).

5. If a person owns a land plot, and its activities lead to pollution or other deterioration of that land plot, this cannot by itself serve as grounds for exemption of that person from the duty to restore the land plot to its initial state and restore the environmental damage (Article 1064 of the CC RF, Item 1 of Article 77 of the Law on Environmental Protection).

6. Causing of damages in the form of adverse changes of the environment (in particular its pollution, depletion, deterioration, destruction of natural resources, degradation and destruction of natural ecosystems, perishing or injury of flora and fauna species, as well as other unfavourable consequences) constitutes grounds for property liability of a person (Articles 1, 77 of the Law on Environmental Protection).

7. By implication of Article 1064 of the CC RF, Article 77 of the Law on Environmental Protection, the person filing a claim for restitution of environmental damage presents evidence that confirms the existence of damage, substantiates, with a reasonable degree of certainty, the amount of damage and the causal link between the actions (failure to act) of the defendant and the damage caused.

If a legal person, individual entrepreneur exceeds the stipulated norms of authorised environmental impact, it is supposed that its actions result in damage (Article 3, Item 3 of Article 22, Item 2 of Article 34 of the Law on Environmental

Protection). The burden of proof of the facts indicating that the negative consequences were caused by other factors and (or) that they would appear independently from the committed violation lies on the defendant.

8. By general rule, in accordance with Article 1064 of the CC RF and Article 77 of the Law on Environmental Protection, the person that caused environmental damage is obliged to restore it, if it is guilty of damage. The law may also stipulate restitution of damage in the absence of guilt of the person causing the damage.

For example, by virtue of Article 1079 of the CC RF, legal persons and citizens engaged in ultrahazardous activities are obliged to restore damages caused by the source of the hazard independent of their guilt, unless they prove that the damages were caused due to a force majeure (Item 1 of Article 1079 of the CC RF). In this regard, for example, the owner of an oil pipeline will be held responsible for environmental damage caused by third persons that made an illegal stub-in.

The lists of hazardous and extremely hazardous activities are stipulated, for example, in the City-Planning Code of the Russian Federation (Part 1 of Article 48^{1}), Merchant Shipping Code of the Russian Federation (Sub-item 3 of Item 2 of Article 327), Inland Water Transport Code of the Russian Federation (Item 1 of Article 86), Federal Law No. 29 of 3 April 1996 "On Financing of Extremely Radiation-Hazardous and Nuclear-Hazardous Activities and Facilities" (Article 1), Federal Law No. 116 of 21 July 1997 "On Industrial Safety of Hazardous Production Facilities" (Annexes 1 and 2), Federal Law No. 225 of 27 July 2010 "On Mandatory Civil Liability Insurance of Owners of Hazardous Facilities against Damages Resulting from Accidents at Hazardous Facilities" (Article 5).

By implication of Item 2 of Article 1079 of the CC RF, the owner of an ultrahazardous object is not liable for the damage caused by that object, if it proves the simultaneous existence of two conditions: that the ultrahazardous object went out of its possession as a result of unlawful actions of other persons, and herewith that the owner is not guilty of losing possession of that object (in particular, since third persons had (were granted) access to the object, since the object was not duly guarded, etc.).

The law may stipulate the grounds on which the owner of an ultrahazardous object may be exempt from liability, e.g. Articles 317, 328, 336^{2} of the Merchant Shipping Code of the Russian Federation.

9. Persons that jointly caused environmental damage are jointly and severally liable (first paragraph of Article 1080 of the CC RF). The joint nature of such actions may be confirmed by their consistency, coordination and common intent. For example, a customer that ordered the performance of works that damage the environment and the contractor that performed the works may be held jointly and severally liable. The customer may be exempt from liability if it proves that the contractor exceeded the limits of the task set before it by the customer.

10. If environmental damage is caused by several ultrahazardous objects, their owners bear joint and several liability (Item 3 of Article 1079 of the CC RF). For example, the owner of an oil pipeline and the owner of construction equipment may bear joint and several liability for the spill of oil products occurring as a result of use of that equipment.

11. By implication of Article 1064 of the CC RF, if several persons acted independently from each other and the actions of each of them resulted in environmental damage, these persons, by general rule, bear shared liability. In particular, the volume of share of each of the persons that caused the damage may be determined by the hazardousness of their activities, their intensity, etc. For example, if two persons independently store solid waste on a land plot that is not designated for such purposes, they may be held liable in shares proportionate to the volume of waste (e.g. calculated with regard to the number of transport vehicles used to take away the waste, their load capacity, hazard category of waste resulting from the activities of the aforementioned persons, as well as to other factors). If it is impossible to establish the share of each person's responsibility for the damage caused, they are held liable in equal shares (Article 321 of the CC RF).

12. Environmental damage is subject to restitution in full volume (Item 1 of Article 77 of the Law on Environmental Protection, Article 1064 of the CC RF). The court may decrease the volume of restitution of environmental damage caused by a citizen, taking her/his property status into account, unless the damage resulted from deliberate actions (Item 3 of Article 1083 of the CC RF).

13. Restitution of damage may take the form of recovery of damages and (or) the imposition of duty to restore the damage to the environment upon the defendant (Article 1082 of the CC RF, Article 78 of the Law on Environmental Protection). When applying to court, the plaintiff chooses the manner of restitution of damage.

Herewith, taking into account the need for effective measures aimed at restoration of the previous state of the environment, the public interest for a favourable environment, the court may, taking into account the position of persons participating in the case and the concrete facts of the case, apply such a manner of restitution of damage that most suits the aims and tasks of environmental protection legislation (Items 1 and 2 of Article 78 of the Law on Environmental Protection, Part 1 of Article 196 of the CPC RF, Part 1 of Article 168 of the ComPC RF).

14. The rates and methods of calculation of damage (harm), caused to the environment, separate components of the natural environment (lands, waters, forests, the fauna, etc.), established in the stipulated manner, are subject to application by the courts in order to determine the amount of restitution of damage caused by a legal person or an individual entrepreneur (Item 3 of Article 77, Item 1 of Article 78 of the Law on Environmental Protection, Parts 3, 4 of Article 100 of the ForC RF, Part 2 of Article 69 of the WC RF, Article 51 of the Law of the Russian Federation No. 2395-I "On Subsoil").

If there are no rates and methods, the amount of environmental damage caused by violation of legislation in the sphere of environmental protection and natural resource management is determined based on the actual costs that were incurred or must be incurred in order to restore the damage to the environment, taking into account the incurred losses (including lost profits), as well as in accordance with the plans of recultivation and other remedial works (second paragraph of Item 1 of Article 78 of the Law on Environmental Protection).

The aforementioned provisions are likewise subject to application in calculation of the amount of environmental damage caused by citizens (Item 1 of Article 77 of the Law on Environmental Protection).

15. The costs incurred by the person that caused the environmental damage in restoring that damage are to be taken into account when determining the amount of damage subject to restoration in monetary form in accordance with the rates and methods. The manner and conditions of taking those costs into account are stipulated by the authorised federal executive bodies (Item 2^1 of Article 78 of the Law on Environmental Protection).

Until the aforementioned manner is adopted, the courts need to proceed from the premise that in determining the amount of damage subject to restitution it is

allowed to take into account the costs incurred by the wrongdoer in rectifying the environmental pollution, where a person unintentionally causes environmental damage and then (before enforcement acts are adopted in its regard) acts in good faith, actively engaging in actual rectification of the environmental damage (rectification of the violation) at own expense, thereby incurring material costs. When said acts are being adopted, the facts determining the form and degree of guilt of the wrongdoer must be taken into account (except where the law stipulates restitution of damage in the absence of guilt); whether the violation was perpetrated for economic profit, the wrongdoer's following behaviour and the consequences of the violation, the amount of costs incurred by the wrongdoer in rectifying the violation must also be taken into account.

16. 100 % of the compensation sums awarded by courts in claims on restitution of environmental damage are to be directed to the budgets of municipal districts, city circuits, city circuits with intracity division, federal cities of Moscow, Saint-Petersburg and Sevastopol at the place where the environmental damage was caused (second paragraph of Item 6 of Article 46 of the Budgetary Code of the Russian Federation).

It is not necessary to draw the corresponding financial bodies to participation in the case.

17. When resolving whether to satisfy a claim for restitution of environmental damage in kind (in accordance with Item 2 of Article 78 of the Law on Environmental Protection), the court determines whether it is objectively possible to take the measures aimed at restoring the damage to the environment. With regard to Item 1 of Article 308^3 of the CC RF, the court should proceed from whether it is possible to rectify the adverse environmental changes, if the defendant conducts remedial works using its own resources (if it has the technical and other capacities), as well as by calling upon third persons.

If it is only possible to partly restore the original state of the environment through remedial works (in particular due to irretrievable and (or) hardly retrievable ecological losses), the restitution of damage in the remaining part is possible in monetary form.

18. By virtue of Item 2 of Article 78 of the Law on Environmental Protection it is possible to oblige the defendant to restore the damage to the environment depending on whether there is a plan of remedial works, elaborated and adopted in

accordance with the requirements of acting legislation. Therefore, when the court satisfies the claim for restitution of damage in kind, it should base its decision on the corresponding plan and refer to it in the operative part of the decision (Part 5 of Article 198 of the CPC RF, Part 5 of Article 170 of the ComPC RF). If there is no such plan, the court adopts a decision on restitution of damage in monetary form.

19. The court may, upon the request of the plaintiff, oblige the wrongdoer (its legal successor) to present the authorised public authority or local self-government body in the sphere of environmental protection with reports regarding the measures aimed at restoration of the environment, taken on the basis of the court decision, regarding their effectiveness and results (Article 206 of the CPC RF, Article 174 of the ComPC RF).

20. Based on Item 1 of Article 308^3 of the CC RF, in order to prompt the defendant to timely take measures aimed at restoration of damage to the environment, the court may award monetary funds to the creditor-recoveror in the event of failure to execute the corresponding judicial act (court forfeit).

In its decision, the court may also indicate that the plaintiff has the right to perform remedial works in accordance with the plan of remedial works, using its own resources or with the help of third persons, recovering the necessary costs from the defendant, if the defendant fails to execute the court decision within the stipulated time (Article 397 of the CC RF, Part 1 of Article 206 of the CPC RF, Part 3 of Article 174 of the ComPC RF).

21. In order to correctly resolve issues that require special knowledge (in particular in order to determine, what is the source of damage, how the damage was caused, to determine the amount of damage, the volume of necessary remedial works, whether it is possible to conduct them and how much time is required for those works), corresponding expert examinations may be held in the case, and specialists (environmental experts, environmental health officers, zoologists, ichthyologists, game managers, soil analysts, foresters, etc.) may be drawn to participation (Article 79 of the CPC RF, Article 82 of the ComPC RF).

22. Claims for restitution of environmental damage may be filed within twenty years (Item 3 of Article 78 of the Law on Environmental Protection). The statute of limitations in claims for restitution of damage caused by radiation impact on the environment is three years from the day on which a person learned or must have

learned about the violation of its rights (Article 58 of Federal Law No. 170 of 21 November 1995 “On the Use of Atomic Energy”).

23. If the defendant (its legal successor) fails to perform the necessary works in full volume and in full accordance with the plan of remedial works, or if there are other circumstances indicating that it is hard or impossible to execute the judicial act, the parties to the dispute or a bailiff may apply to court with an application for amendment of the way of execution of the judicial act by recovery of damages, calculated in accordance with the rates and methods of calculation of damage, and in their absence – based on the actual costs that were incurred or must be incurred for the restoration of damage to the environment and of the lost profits (Article 203 of the CPC RF, Article 324 of the ComPC RF).

24. If the damages caused are consequences of use of a factory, building or of other activities undertaken in violation of environmental protection legislation, and these activities continue to cause damage or present a danger of new damage, the plaintiff may apply to court with a claim to oblige the defendant to limit, suspend or terminate the corresponding activities (Item 2 of Article 1065 of the CC RF, Articles 34, 56, 80 of the Law on Environmental Protection).

The violation of environmental protection requirements that constitutes grounds for limiting, suspending or terminating the corresponding activities may, in particular, take the form of use of a factory or building without the necessary permits or licenses issued for the purpose of compliance with the environmental protection requirements, or such use in violation of terms of those permits or licenses, excess of limits of emission or discharge of polluting agents and microorganisms into the environment, violation of requirements in the sphere of waste processing, failure to comply with industrial safety requirements.

25. The court may adopt a decision to limit or suspend the activities undertaken in violation of the environmental protection requirements, if such violations are remediable (e.g. wastewater discharge in excess of the effluent standard or emission of harmful (polluting) substances into the atmosphere without the necessary permit).

When adopting a decision, the court must indicate the conditions under which such activities may be renewed in the future (e.g. positive ecological expert conclusion, introduction of treatment facilities, acquisition of a permit for emission of polluting

substances), as well as the time within which it is necessary to rectify the violations (Part 2 of Article 206 of the CPC RF, Parts 1, 2 of Article 174 of the ComPC RF).

Failure to rectify the violation within the stipulated time may constitute grounds for application to court with a claim for termination of the corresponding activities.

26. If the violations of environmental protection legislation are irremediable, the court may oblige the defendant to terminate the corresponding activities (e.g. in case of storage of production and consumption waste at sites not subject to entry into the state registry of waste disposal sites).

If there is no evidence in the case that there are sufficient grounds for termination of the defendant's activities, undertaken in violation of environmental protection legislation, the court may, taking into account the public interest in ensuring ecological safety and preservation of a favourable environment, suggest it to the persons participating in the case to discuss the issue of limiting or suspending such activities (Article 56 of the CPC RF, Article 65 of the ComPC RF).

27. When considering disputes on limitation, suspension or termination of activities undertaken in violation of environmental protection legislation, the court must keep the balance between the public need for preservation of a favourable environment and ensuring of ecological safety, on the one hand, and the realisation of socioeconomic objectives, on the other hand. Herewith, the court should take into account not only the factors that ensure the normal life of people and organisations (e.g. where this applies to the activities of town-forming enterprises, co-generation power plants, treatment facilities), but also the proportionality of consequences of termination (suspension, limitation) of activities to the environmental damage that may occur both if such activities continue or are terminated.

In order to clarify whether there is such a contradiction to the public interests, the court may suggest it to the persons participating in the case to discuss this issue and to submit the corresponding evidence (Article 56, Part 1 of Article 57 of the CPC RF, Article 65, Part 2 of Article 66 of the ComPC RF).

The court may refuse to satisfy the claim for limitation, suspension or termination of activities undertaken in violation of environmental protection legislation, if such suspension or termination is contrary to the public interests (second paragraph of Item 2 of Article 1065 of the CC RF).

Refusal to satisfy such claims does not preclude from filing a claim for restitution of damage caused by such activities.

28. The courts should take into account that the danger of future environmental damage, in particular due to the use of a factory, building or other activities, may constitute grounds for prohibition of activities creating such a danger (Item 1 of Article 1065 of the CC RF). The plaintiff must prove that the activities of the defendant present a real danger, both if such activities violate the stipulated environmental protection requirements and if they correspond to those requirements at the moment of filing the claim, and must prove that it is necessary to prohibit the corresponding activities (e.g. during planning of construction or during construction of new industrial facilities at the habitat of rare and endangered animals, plants and mushrooms).

If the defendant has the necessary approvals and permits for activities that present a danger to the environment or a positive ecological expert conclusion, this does not constitute grounds for refusal to accept the claim for proceedings.

29. In view of adoption of this Ruling, Items 30, 35, 36, 37, 38, 39, 40, 41, 43, 46 of the Ruling of the Plenary Session of the Supreme Court of the Russian Federation No. 21 of 18 October 2012 "On Court Application of Legislation regarding Liability for Violations in the Sphere of Environmental Protection and Natural Resource Management" (as amended by Ruling of the Plenary Session No. 19 of 26 May 2015) are abrogated.

Ruling of the Plenary Session of the Supreme Commercial Court of the Russian Federation No. 22 of 21 October 1993 "On Certain Issues of Application of the Law of the RSFSR "On Protection of the Natural Environment" is not subject to application.

Chief Justice of the Supreme Court of
the Russian Federation V.M. Lebedev

Secretary of the Plenary Session, Judge of
the Supreme Court of the Russian Federation V.V. Momotov

Annex 634

Amparo en Revisión 610/2019, Judgment of the Suprema Corte de Justicia de la Nación of 15 January 2020 (Spanish original and English translation of pages 22-23, 78, 80)

Translated Extract of *'Amparo en Revisión 610/2019,* Judgment of the Suprema Corte de Justicia de la Nación of January 15, 2020'

[. . .]
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In the opinion of this Second Chamber, the reason of dissent just summarized is unfounded, since, as will be demonstrated below, the normative hypothesis, in its correct interpretation, is in accordance with the requirements and obligations, both constitutional and conventional, imposed on the Mexican State by virtue of the human right to a healthy environment.

That is, in environmental matters, in order to comply with the aforementioned normative hypothesis, it is indispensable to be faced with the existence of truly extraordinary facts or circumstances that allow to understand, in a notorious, evident and incontrovertible manner, that the causes that motivated the issuance of the respective Mexican Official Norm have ceased to subsist, in such a way that, under such exceptional circumstances, it is justified that the regular procedure for the alteration of the Mexican Official Norms is not carried out, since it would not lead to any practical purpose to consult the citizenship in the case of irrefutable facts.

In order to demonstrate the reasons for this, in principle, the content and scope of the precautionary principle will be examined, as well as the right of citizen participation in environmental matters and, based on this, it will be explained why, in this matter, the scope of article 51, second paragraph, of the Federal Law on Metrology and Standardization, must be determined in accordance with these constitutional axioms.

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The precautionary principle in environmental matters. In recent decades, the world community has begun to become aware of the link between human rights and the environment. Few issues have been occupying as much space on the contemporary international agenda as those that make up this binomial. Human rights and the environment are intimately related and are the common denominator of the great cycle of World Conferences at the end of the 20th century, triggered by the United Nations Conference on Environment and Development (Rio de Janeiro

1992), the Second World Conference on Human Rights (Vienna 1993), the International Conference on Population and Development (Cairo 1994), and the Second United Nations Conference on Human Settlements (Habitat II, Istanbul 1996), among others.

From the 1960s to the present, the modern environmental movement has transformed the human relationship with the environment. Virtually every state in the world has enacted laws aimed at reducing air and water pollution, regulating toxic substances and preserving natural resources, among other goals[1].

Indeed, it is internationally recognized that we have reached a moment in history when every activity must take into account the consequences it may have on the environment: through ignorance or indifference, immense and irreparable damage is caused to the environment on which life and well-being depend. On the contrary, with knowledge and more prudent action, it will be possible to achieve better living conditions in an environment that is more in tune with the needs and aspirations of the people[2].

[. . .]
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Thus, in view of the above, this Constitutional Court considers that the present case is a prototypical example that requires that the ordinary procedure for the modification of the Mexican official standards be observed and followed. This is because, since the magnitude of the damage to air quality that could be caused by the use of ethanol as an oxygenating agent in hydrocarbons is in doubt, the precautionary principle is fully applicable, which requires a detailed evaluation of the potential risks or uncertainties regarding this state of affairs, in order to determine whether or not it is feasible to modify or cancel such regulation and to what extent.

That is, the precautionary principle, applied to the case of modifications or cancellations of the official Mexican standards, demands that the determination of the subsistence of the damage or risk of damage to the environment, which led to the issuance of the respective official

[1] UN. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox. December 24, 2012. Paragraph 8.
[2] Sixth Proclamation of the Stockholm Declaration on the Human Environment, adopted at the United Nations Conference of June sixteenth, nineteen hundred and seventy-two, in which Mexico participated -non-binding-.

Mexican standard, must be studied and attended in a plurilateral manner by the members of the National Consultative Committees of Standardization in question, and through citizen participation, that is, it demands that the ordinary procedure for the alteration or cancellation of such standard be carried out.

Hence, in this case, no modification could be made to NOM-016-CRE-2016, unilaterally and summarily, as the Energy Regulatory Commission improperly did, since this entails the risk of allowing serious and irreversible damage to the environment and to the health of the population, since the magnitude of the problem in question was not duly assessed, which is precisely what the precautionary principle seeks to avoid.

[. . .]
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Indeed, according to the United Nations Intergovernmental Panel on Climate Change, tropospheric ozone "is the third most important greenhouse gas after carbon dioxide -CO2- and methane -CH4-"[3]. In this regard, it should be noted that in April two thousand sixteen, the Mexican State approved the so-called Paris Agreement, which was ratified on September twenty-first of the same year[4].

In this Agreement, the parties recognized that "climate change is a problem for all humankind and that, in taking action to address it, Parties should respect, promote and take into account their respective human rights obligations". Thus, among other considerations, the States Parties set out to ensure that "global greenhouse gas emissions peak as soon as possible [. . .] and thereafter to reduce greenhouse gas emissions rapidly, in accordance with the best available scientific information, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks in the second half of the century"[5].

[. . .]

[3] Report entitled: "TAR Climate Change 2001: The Scientific Basis". Chapter 4: "Atmospheric Chemistry and Greenhouse Gases". Available at: https://www.ipcc.ch/site/assets/uploads/2018/03/TAR-04.pdf.
[4] As specified in the Decree Promulgating such International Agreement, published in the Official Gazette of the Federation on November 4, 2016.
[5] Article 4.1. of the aforementioned Agreement.

AMPARO EN REVISIÓN 610/2019.
QUEJOSO: **********

SUMARIO[1]

Esta Segunda Sala considera que **resulta inconstitucional** que la Comisión Reguladora de Energía (CRE) haya modificado, por sí misma, la Norma Oficial Mexicana *"NOM-016-CRE-2016"*, para incrementar el porcentaje máximo de etanol como oxigenante en las gasolinas Magna y Premium (esto es, hasta un 10 %).

Ello, pues al encontrarse a debate *la magnitud de daños a la calidad del aire que podría producir el empleo del etanol como oxigenante en gasolinas*, **cobra plena aplicación el llamado "principio de precaución ambiental",** el cual obliga a que *se lleve a cabo una evaluación con la mayor información científica posible, respecto a los potenciales daños que el incremento de etanol para esos fines podría generar en el medio ambiente.*

Es decir, a juicio de esta Corte que, *no puede ser una sola voz, ni una sola valoración,* la que determine la posibilidad de que en el Estado Mexicano, se modifiquen los porcentajes máximos de empleo de etanol como oxigenante de las gasolinas*;* **pues ello podría tener como consecuencia el permitir daños serios e irreversibles al ambiente, al no valorarse debidamente la magnitud del problema en cuestión, lo cual precisamente, pretende evitarse mediante el principio de precaución ambiental.**

Así, ante la necesidad de proteger tanto a la población, como a diversas especies animales y vegetales que se encuentran en nuestro territorio**,**

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[1] Emitido conforme al "Acuerdo General 1/2019 de diez de abril de dos mil diecinueve, de la Segunda Sala de la Suprema Corte de Justicia de la Nación que regula el procedimiento a seguir en los asuntos de su conocimiento que involucren personas o grupos de personas en situación de vulnerabilidad".

previo a determinar si resulta adecuado el incremento de etanol como oxigenante en gasolinas, es *indispensable la intervención y valoración tanto de profesionales especializados en la materia, centros de investigación científica o tecnológica, así como de colegios de profesionales, que formen parte de los llamados "Comités Consultivos Nacionales de Normalización".*

Asimismo, **debe permitirse la participación ciudadana previo a la modificación o cancelación de tal norma;** a fin de que los ciudadanos académicos, organizaciones no gubernamentales **y, el público en general, tenga la oportunidad de poder expresar sus opiniones y que éstas sean tomadas en cuenta** al momento de adoptar tal decisión, ya que esa modificación regulatoria puede afectar su derecho humano a un medio ambiente sano.

Por otra parte, esta Corte considera que esa regulación debe analizarse y ser motivo de discusión estatal, con la mayor información científica posible, **bajo el contexto más amplio de los compromisos internacionales adquiridos por nuestro país para combatir el calentamiento global,** conforme lo establece el llamado "Acuerdo de París", ya que **el cambio climático puede poner en peligro el disfrute de una gran variedad de derechos humanos, en particular los derechos a la vida, a la salud, a la alimentación y al agua.**

Así, se considera que **los beneficios puramente económicos** que, en su caso, pueda generar el incremento del porcentaje de etanol en las gasolinas, como oxigenante (al abaratar presuntamente el precio de tales combustibles), **deben ser ponderados y confrontados contra los potenciales riesgos que ello podría deparar al medio ambiente y las obligaciones estatales de reducir las llamadas emisiones de "gases invernadero"** (gases contaminantes) **y por tanto, combatir el fenómeno del cambio climático.**

Ello, pues el hecho de que **el crecimiento y desarrollo económico en el Estado Mexicano deba ser sustentable, constituye un principio rector establecido por la propia Constitución** y por diversos tratados internacionales de los que nuestro país es parte, por lo que es la obligación de esta Corte vigilar que las autoridades cumplan con los derechos humanos, como lo es el derecho a un medio ambiente sano, a fin de que estos derechos fundamentales tengan una incidencia real en nuestro país *y no se reduzcan en meros ideales o buenos deseos.*

Atento a las anteriores razones, esta Segunda Sala propone **amparar al quejoso** y, consecuentemente, **invalidar los cambios a la referida Norma Oficial Mexicana "NOM-016-CRE-2016"**, para el efecto de que se mantengan los límites máximos de etanol como oxigenante en las gasolinas nacionales, *tal y como se encontraba previsto antes de la modificación que realizó la CRE* (es decir, hasta el 5.8 % y no hasta un 10 %).

AMPARO EN REVISIÓN 610/2019.
QUEJOSO Y RECURRENTE: ********.**

PONENTE:
MINISTRO ALBERTO PÉREZ DAYÁN.

SECRETARIOS: IVETH LÓPEZ VERGARA
E ISIDRO MUÑOZ ACEVEDO.

Ciudad de México. Acuerdo de la Segunda Sala de la Suprema Corte de Justicia de la Nación, correspondiente al día **quince de enero de dos mil veinte.**

VISTOS para resolver el recurso de revisión identificado al rubro y;

RESULTANDO:

PRIMERO. Trámite y resolución del juicio de amparo. Por escrito presentado el siete de agosto de dos mil diecisiete en la Oficina de Correspondencia Común de los Juzgados de Distrito en Materia Administrativa en la Ciudad de México, ************,** por su propio derecho, demandó el amparo y protección de la Justicia Federal, contra las siguientes autoridades y actos:

> **"III. AUTORIDADES RESPONSABLES:**
>
> A. Congreso de la Unión de los Estados Unidos Mexicanos (el "Congreso de la Unión") conformado por la Cámara de Diputados y la Cámara de Senadores.
>
> B. Presidente Constitucional de los Estados Unidos Mexicanos.
>
> C. Órgano de Gobierno de la Comisión Reguladora de Energía ("CRE"), a quien se le llama por conducto de su Presidente, Guillermo Ignacio García Alcocer.

D. Petróleos Mexicanos (PEMEX).

IV. ACTOS RECLAMADOS:

A. Del Congreso de la Unión se reclama la discusión, aprobación y expedición de la Ley Federal sobre Metrología y Normalización (la LFMN).

De dicha norma se reclama específicamente su artículo 51, segundo párrafo, cuyo texto es el siguiente: […].

Asimismo, del precepto en cita se reclama su tercer párrafo, únicamente en cuanto a la porción que dice: "más estrictas". A continuación se transcribe dicho párrafo, subrayando la parte que se impugna: […].

B. Del Presidente se reclama la promulgación del Decreto por el que se expidió la LFMN.

C. De la CRE se reclama el Acuerdo número **********, de 15 de junio de 2017, intitulado "ACUERDO de la Comisión Reguladora de Energía que modifica la Norma Oficial Mexicana NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos, con fundamento en el artículo 51 de la Ley Federal sobre Metrología y Normalización" (el "Acuerdo de Modificación"), mismo que aparece publicado en el Diario Oficial de la Federación (el "DOF") del 26 de junio de 2017.

Del Acuerdo de Modificaciones se reclaman vicios formales durante su proceso de emisión, el cual se sustentó, entre otras disposiciones, en el inconstitucional artículo 51 de la LFMN.

Adicionalmente, del Acuerdo de Modificaciones se reclaman vicios materiales. En concreto, se reclama la adición de una Observación 5 en la Tabla 1 "Especificaciones de presión de vapor y temperaturas de destilación de las gasolinas según la clase de volatilidad", contenida en el numeral 4.2 de la "Norma Oficial Mexicana NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos" (la "NOM 016"), cuyo texto se copia enseguida: […].

Asimismo, del Acuerdo de Modificación se reclama la reforma a la Observación 4 y la adición de una observación 7 de la Tabla 6 "Especificaciones adicionales de gasolinas por región", contenida en el numeral 4.2. de la NOM 016. De dicha tabla también se reclama el incremento en el parámetro de oxígeno permitido a las gasolinas adicionadas hasta en 10% en volumen de etanol. A continuación se copian las porciones impugnadas, mismas que resaltan mediante el subrayado […].

Especialmente, de la observación 4 se reclama la permisión de un contenido máximo de 10% en volumen de etanol anhidro como oxigenante en gasolinas Regular y Premium fuera de la Zona

> Metropolitana del Valle de México (la “ZMVM”), la Zona Metropolitana de Guadalajara (la “ZMG”) y la Zona Metropolitana de Monterrey (la “ZMM”).
>
> **D. De PEMEX,** quien ejecutará el Acuerdo de Modificación, se reclama la utilización hasta en un 10% en volumen de etanol anhidro como oxigenante en las gasolinas Regular y Premium que produce, transporta y almacena y/o distribuye**".**

El quejoso señaló como derechos violados los contenidos en los artículos 4, 14 y 16 de la Constitución Política de los Estados Unidos Mexicanos, todos ellos en relación con el primer párrafo del artículo 25 de la propia Constitución Política de los Estados Unidos Mexicanos, que encarga al Estado Mexicano la rectoría del desarrollo nacional para garantizar que éste sea integral y sustentable. Narró los antecedentes del caso y expresó los conceptos de violación que estimó pertinentes.

Correspondió conocer de la demanda de amparo, por cuestión de turno, al Juzgado Séptimo de Distrito en Materia Administrativa en la Ciudad de México, donde mediante auto de nueve de agosto de dos mil diecisiete se registró el expediente con el número **************. En proveído de quince de agosto del año en cita -y previa prevención al quejoso para que realizara diversas aclaraciones a su demanda y exhibiera las copias necesarias para las autoridades responsables-, se **admitió** a trámite la demanda de garantías.

Agotados los trámites de ley la Juez de Distrito **dictó sentencia** el cuatro de octubre de dos mil diecisiete que concluyó con los siguientes puntos resolutivos:

> **"PRIMERO.** Este Juzgado Séptimo de Distrito en Materia Administrativa en la Ciudad de México, **declara carecer de competencia** por razón de materia para resolver el presente juicio de amparo, promovido por **************.
>
> **SEGUNDO.** Remítase el original del expediente en que se actúa y guardas relativas al mismo, así como los cuadernos incidentales (original y duplicado del incidente de suspensión) a la **Oficina de Correspondencia Común que presta servicios a los Juzgados Primero y Segundo de**

> **Distrito del Centro Auxiliar de la Primera Región, con residencia en la Ciudad de México,** para que por su conducto se turne al Juzgado que corresponda, a quien se solicita atentamente el acuse de recibo de estilo correspondiente y comunique su determinación**".**

SEGUNDO. Recepción y avocamiento de la demanda por el Juzgado Auxiliar. Mediante auto de nueve de octubre de dos mil diecisiete, la Juez Primera de Distrito del Centro Auxiliar de la Primera Región, con residencia en la Ciudad de México, tuvo por recibido el expediente, registrándolo al efecto con el expediente ************;** en el mismo proveído se declaró **legalmente impedida para conocer de ese asunto,** por posibles conflictos de interés por mantener un vínculo de amistad estrecha con los abogados autorizados por la parte quejosa, y ordenó su envío al Tribunal Colegiado en Materia Administrativa del Primer Circuito, que por turno corresponda, para efecto de la calificativa correspondiente.

TERCERO. Calificación del impedimento. Correspondió conocer del asunto al Décimo Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito, donde se registró con el expediente **************. En sesión de veintitrés de noviembre de dos mil diecisiete **declaró legal la causa de impedimento** y **ordenó su remisión** al **Juzgado Segundo** de Distrito del Centro Auxiliar de la Primera Región, con residencia en la Ciudad de México.

CUARTO. Recursos de queja y revisión. Mediante escritos presentados el dieciséis de octubre de esa anualidad ante la Oficina de Correspondencia Común de los Juzgados de Distrito en Materia Administrativa en la Ciudad de México, la autorizada de la parte quejosa **********, interpuso **recursos de queja y de revisión;** el primero contra los acuerdos pronunciados en la audiencia constitucional, **por virtud de los cuales la Juez Federal desechó la prueba pericial ofrecida** por

la parte quejosa; y el segundo **contra el fallo de incompetencia dictado en la misma audiencia constitucional y de los propios acuerdos.**

Correspondió conocer **del recurso de revisión** por razón de turno al Décimo Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito, donde por auto de seis de febrero de dos mil dieciocho lo registró con el expediente ********** y lo **desechó por improcedente.**

Por su parte, tocó conocer del **recurso de queja** al Décimo Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito, donde mediante acuerdo de trece de febrero de dos mil dieciocho se registró y se **admitió** con el expediente **********.

Mediante acuerdo Plenario de treinta y uno de mayo de dos mil dieciocho, el Tribunal Colegiado **consideró carecer de competencia para resolver el referido recurso, al estimar que se actualizaba el supuesto de conocimiento previo** y, en consecuencia, **remitió los autos del referido recurso al Décimo Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito,** el que por acuerdo de siete de junio de dos mil dieciocho, lo registró con el número **********, y se avocó al conocimiento del asunto. En sesión de seis de septiembre siguiente, dicho tribunal dictó sentencia en la que **desechó por improcedente el referido recurso de queja.**

QUINTO. Conflicto competencial. Recibida la demanda en el Juzgado Segundo de Distrito del Centro Auxiliar de la Primera Región, con residencia en la Ciudad de México, mediante auto de diecinueve de diciembre de esa misma anualidad, el encargado del despacho por vacaciones del titular la registró con el expediente ********** y en el mismo proveído **declinó la competencia** por razón de materia para

conocer del juicio y ordenó la devolución de los autos al Juzgado Séptimo de Distrito en Materia Administrativa en la Ciudad de México.

Mediante acuerdo de veintiuno de diciembre de dos mil diecisiete, el Juzgado Séptimo de Distrito en Materia Administrativa en la Ciudad de México tuvo por recibidos los autos del expediente y manifestó nuevamente **carecer de competencia legal** para conocer del asunto y ordenó su remisión al Tribunal Colegiado en Materia Administrativa del Primer Circuito en turno **para resolver el conflicto competencial planteado.**

Del conflicto competencial conoció el Décimo Segundo Tribunal Colegiado en Materia Administrativa del Primer Circuito, donde mediante auto de tres de enero de dos mil dieciocho se registró y se **admitió** con el expediente **************. En sesión de once de enero siguiente el Tribunal Colegiado **determinó** que es **legalmente competente** para resolver el **Juzgado Séptimo** de Distrito en Materia Administrativa en la Ciudad de México.

SEXTO. Resolución del juicio de amparo ********.** En cumplimiento a la determinación anterior, la Juez Séptimo de Distrito en Materia Administrativa en la Ciudad de México, **dictó sentencia** el veinticuatro de octubre de dos mil dieciocho, en la que **sobreseyó** en el juicio, con base en las consideraciones que se refieren a continuación:

- **Inexistencia de los actos.** En principio, la juzgadora consideró que debía sobreseerse en el juicio respecto **del acto reclamado del Titular de Petróleos Mexicanos** consistente en la ejecución del Acuerdo ********** publicado en el Diario Oficial de la Federación el veintiséis de junio de dos mil diecisiete, específicamente en cuanto a la implementación del incremento del porcentaje de etanol –diez por ciento– y de la presión máxima de vapor –una libra por pulgada cuadrada– superior a la especificada

en las gasolinas Regular y Premium que produce, transporta y almacena y/o distribuye en el territorio nacional a excepción de las zonas metropolitanas del Valle de México, Guadalajara y Monterrey, **ya que tal autoridad negó la existencia de tal acto, sin que el quejoso aportara prueba alguna que desvirtuara tal inexistencia.**

- **Falta de interés legítimo para reclamar los restantes actos de autoridad.** Una vez precisado lo anterior, la Juez Federal consideró que, por lo que hace: al acto reclamado del Congreso de la Unión y del Presidente de la República *consistente en el artículo 51, párrafos segundo y tercero, de la Ley Federal sobre Metrología y Normalización* y al *Acuerdo* ********** *que* modifica la Norma Oficial Mexicana "NOM-016-CRE-2016, especificaciones de calidad de los petrolíferos", publicado en el Diario Oficial de la Federación el veintiséis de junio de dos mil diecisiete, **se actualiza la causal de improcedencia prevista en el artículo 61, fracción XII, de la Ley de Amparo.**

  Es así, pues con relación al acuerdo **********, la parte quejosa no acreditó su interés en la medida en que las pruebas que exhibe revelan que es residente de la zona metropolitana del Valle de México y, por ende, **de un área en donde no es aplicable dicho acuerdo,** específicamente en cuanto al aumento de etanol al 10% (diez por ciento) y de la presión máxima de vapor en 1.0 lb/pulg2 (una libra por pulgada cuadrada) superior a la especificada en la gasolina Regular y Premium.

- Habida cuenta que **no se aprecia que los actos reclamados tengan un impacto actual o futuro pero inminente y cierto a la situación de la parte quejosa** en relación con sus derechos al medio ambiente sano y a la salud, ya sea por su circunstancia personal o por una regulación sectorial o grupal; ni siquiera como resultado de la libre circulación de vehículos y de la dispersión

natural del aire por la permisión en otras regiones del país.

Siendo que la improcedencia del juicio contra el Acuerdo **********, **provoca que tampoco pueda entrarse al estudio de la constitucionalidad del artículo 51, párrafos segundo y tercero, de la Ley Federal sobre Metrología y Normalización.**

SÉPTIMO. Segundo recurso de revisión. Inconforme con la determinación anterior, el quejoso **********, por conducto de su autorizada **********, interpuso recurso de revisión en su contra, del cual conoció el Décimo Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito con el expediente ************.**

Por escrito presentado el veintinueve de noviembre de dos mil dieciocho en la Oficina de Correspondencia Común de los Tribunales Colegiados en Materia Administrativa del Primer Circuito, la **Directora General Adjunta de lo Contencioso en suplencia por ausencia del Abogado General de la Secretaría de Economía, quien actúa en representación del Presidente de la República,** interpuso **recurso de revisión adhesiva,** el cual se admitió a trámite mediante proveído de tres de diciembre siguiente.

En sesión de veintisiete de junio de dos mil diecinueve, *se dictó sentencia* en la que el Tribunal Colegiado de Circuito, por una parte, **dejó firme** el sobreseimiento decretado en relación con el acto reclamado del Titular de Petróleos Mexicanos y, por otra, declaró **ilegal el sobreseimiento** por ausencia de interés con base en las consideraciones siguientes:

- La Primera Sala, al fallar el amparo en revisión 307/2016, precisó que el medio ambiente es un elemento indispensable para la conservación de la especie humana y, por ende, un bien público cuyo disfrute o daño no sólo afecta a una persona sino a la

comunidad en general, por lo que si un determinado ecosistema se pone en riesgo o se ve afectado, la persona o comunidad que se beneficia o aprovecha los servicios ambientales que dicho ecosistema brinda cuenta con interés para acudir al juicio de amparo.

La Segunda Sala, al resolver el amparo en revisión 641/2017, sostuvo que resulta inadecuado que se realice una interpretación restrictiva de los requisitos de procedibilidad de las acciones en materia ambiental, porque es suficiente que sea “razonable” la existencia de una afectación al medio ambiente y la correlativa responsabilidad que se imputa a las autoridades.

- Para efectos de la procedencia del juicio de amparo en el que se aborden temas en materia ambiental, **resulta excesivo imponer como carga al particular acreditar científica y técnicamente el daño que el acto reclamado le ocasiona; máxime que dilucidar si se ha generado o no una violación al derecho humano al medio ambiente debe ser materia del estudio de fondo.**

  De las constancias que obran en autos, **el quejoso acredita de manera razonable la posible existencia de un riesgo susceptible de causar afectación al medio ambiente, en específico a la calidad del aire de la Ciudad de México, lugar donde él reside,** dado que la Solicitud de Autorización para Emergencias presentada por la Comisión Reguladora de Energía ante la ahora Comisión Nacional de Mejora Regulatoria, **señala que el uso de etanol en las gasolinas y el aumento de la presión de vapor deriva en un aumento drástico de emisiones de compuestos orgánicos volátiles que son precursores de ozono.**

- De ahí que las modificaciones consistentes **en el aumento a un 10% (diez por ciento) de etanol y en 1.0 lb/pulg2 (una libra sobre pulgada cuadrada) de presión de vapor en las gasolinas Regular y Premium,** aun cuando no aplican en la Ciudad de México, **afectan el ambiente en esta zona pues es un hecho notorio que diariamente ingresan y circulan en el Valle de México vehículos automotores con gasolina que provienen de las entidades federativas,** lo que conlleva una concentración de partículas contaminantes que contribuyen al detrimento en la calidad del aire de esta ciudad.

- Además, **dada la interconexión de las cuencas atmosféricas en el centro de México, se transportan partículas inertes de los compuestos orgánicos volátiles desde las diferentes entidades federativas que rodean el Valle de México,** con lo que se acredita la existencia de un riesgo susceptible de producir una afectación al medio ambiente de la Ciudad de México, lugar en el que habita la parte quejosa.

  Desestimó una causal de improcedencia planteada en la revisión adhesiva, a saber, la prevista en el artículo 61, fracción XXIII, en relación con el diverso 73, párrafo primero, de la Ley de Amparo (relatividad de los efectos de una eventual sentencia protectora); **de ahí que declaró infundada esa adhesión –lo que se reflejó en el resolutivo correspondiente–.**

- Desestimó diversos motivos de improcedencia que la Juez de Distrito dejó de analizar, previstos en el artículo 61 de la Ley de Amparo, en específico, en las fracciones XII (ausencia de interés por no existir acto de aplicación y no afectación a derechos fundamentales); XIV (actos consentidos tácitamente); y XXIII en relación con el diverso 63, fracción V (imposibilidad de reclamar omisiones legislativas).

> Finalmente, consideró procedente remitir los autos a esta Suprema Corte de Justicia de la Nación para que resolviera el tema de fondo materia de su competencia.

Recibidos los autos en este Alto Tribunal, mediante proveído de seis de agosto de dos mil diecinueve, su Presidente determinó que éste **asumiría su competencia originaria** para conocer de los recursos de revisión principal y su adhesivo, y ordenó su registro con el número de amparo en revisión **610/2019;** asimismo, turnó el expediente para su estudio al **Ministro Alberto Pérez Dayán;** ordenó su radicación en la Segunda Sala de este Alto Tribunal y, en la misma providencia, ordenó notificar al Agente del Ministerio Público de la Federación.

Por acuerdo de cuatro de octubre de dos mil diecinueve, el Presidente de la Segunda Sala, determinó el **avocamiento** al conocimiento del asunto y ordenó remitir el expediente relativo al Ministro ponente para la elaboración del proyecto de resolución respectivo.

El proyecto de sentencia fue publicado de conformidad con lo dispuesto en los artículos 73 y 184 de la Ley de Amparo en vigor; y

C O N S I D E R A N D O :

PRIMERO. Competencia. Esta Segunda Sala de la Suprema Corte de Justicia de la Nación es competente para conocer y resolver este recurso de revisión, de conformidad con lo dispuesto en los artículos 107, fracción VIII, inciso a), de la Constitución Política de los Estados Unidos Mexicanos; 81, fracción I, inciso e), de la Ley de Amparo; y, 21, fracción II, inciso a), de la Ley Orgánica del Poder Judicial de la Federación, con relación a lo previsto en los puntos

primero y segundo, fracción III, del Acuerdo General 5/2013 del Pleno de este Alto Tribunal, publicado en el Diario Oficial de la Federación el veintiuno de mayo de dos mil trece, en virtud de que se interpuso en contra de una sentencia dictada en la audiencia constitucional en un juicio de amparo indirecto en la que subsiste el problema de constitucionalidad respecto del artículo 51, segundo párrafo, de la Ley Federal sobre Metrología y Normalización, además de que no resulta necesaria la intervención del Tribunal Pleno.

Asimismo, esta Segunda Sala **se pronunciará de manera integral sobre el fondo del asunto** en ejercicio de la facultad de atracción prevista en los artículos 107, fracción VIII, penúltimo párrafo, de la Constitución Política de los Estados Unidos Mexicanos; y 85 en relación con el 40 de la Ley de Amparo, **dado que, por una parte, la legalidad del Acuerdo ********** que modifica la NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos, constituye un tema de relevancia nacional sobre todo por la connotación ambiental de su contenido que conlleva el análisis de los principios y derechos fundamentales que rigen en esa materia.**

Y por otra, esos aspectos de legalidad trascienden al análisis de temas constitucionales, pues la determinación de la manera en que opera la modificación o cancelación de normas oficiales mexicanas, que fueron expedidas para prevenir daños al medio ambiente, **tiene repercusiones tanto en el principio de precaución, como en el diverso de participación ciudadana, reconocidos por diversos instrumentos internacionales.**

SEGUNDO. Oportunidad y legitimación. Este aspecto no será materia de análisis por esta Segunda Sala, toda vez que el Tribunal

Colegiado de Circuito que previno en el conocimiento del asunto, determinó que los recursos de revisión principal y adhesivo se interpusieron **oportunamente** y por **partes legitimadas** para ello[1].

TERCERO. Causales de improcedencia. Previo a examinar los conceptos de violación planteados por el quejoso y cuyo estudio fue omitido por el Juez Federal, debe tenerse en cuenta que, en términos de lo dispuesto en el punto noveno, fracción II, del Acuerdo General Plenario 5/2013 publicado en el Diario Oficial de la Federación de veintiuno de mayo de dos mil trece[2], con relación al artículo 93, fracción I, de la Ley de Amparo[3], se **advierte que el Tribunal Colegiado que previno en el conocimiento del asunto analizó diversos temas de procedencia, pero no los agotó.**

Así, aun cuando de conformidad con esas disposiciones corresponde a los tribunales colegiados analizar todo lo relativo a la procedencia del juicio de amparo, esta Segunda Sala, por una cuestión de economía procesal y de manera excepcional, **procede a analizar el motivo de improcedencia que fue omitido.**

Al respecto, el Presidente de la República, al rendir su informe justificado, **invoca la causal de improcedencia prevista en el artículo**

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[1] Fojas 144 a 188 del amparo en revisión **********.

[2] "NOVENO. En los supuestos a que se refiere el inciso A) de la fracción I del punto cuarto del presente acuerdo general, el tribunal colegiado de circuito procederá en los términos siguientes: (…).
II. Abordará el estudio de los agravios relacionados con las causas de improcedencia del juicio y, en su caso, examinará las formuladas por las partes cuyo estudio hubieren omitido el juez de distrito o el magistrado unitario de circuito, así como las que advierta de oficio; (…)".

[3] "Artículo 93. Al conocer de los asuntos en revisión, el órgano jurisdiccional observará las reglas siguientes:
I. Si quien recurre es el quejoso, examinará, en primer término, los agravios hechos valer en contra del sobreseimiento decretado en la resolución recurrida.
Si los agravios son fundados, examinará las causales de sobreseimiento invocadas y no estudiadas por el órgano jurisdiccional de amparo de primera instancia, o surgidas con posterioridad a la resolución impugnada; (…)".

61, fracción XVI, de la Ley de Amparo, porque la promulgación de la Ley Federal Sobre Metrología y Normalización –especialmente de su artículo 51-, *se consumó en el momento de su emisión.*

A juicio de esta Segunda Sala, **no se actualiza la causal en comento** y que prevé la improcedencia del juicio "**contra actos consumados de modo irreparable",** porque, a partir de la consideración de que la promulgación de una norma forma parte de su proceso de formación que constituye una unidad indisoluble, es claro que, al proceder el juicio de amparo en contra de disposiciones generales*, la norma reclamada, incluyendo cada una de las etapas de su formación –entre ellas la promulgación–, constituyen actos que no deben considerarse irreparablemente consumados*, porque una eventual sentencia protectora deberá materializarse conforme al artículo 78, párrafo segundo, de la Ley de Amparo, que dispone que **"los efectos se traducirían en la inaplicación únicamente respecto del quejoso".**

Sirve de apoyo a tal consideración, en su contenido sustancial, la tesis pronunciada por esta Segunda Sala de la Suprema Corte de Justicia de la Nación, intitulada: **"LEYES, AMPARO CONTRA EXPEDICIÓN, REFRENDO, PROMULGACIÓN Y PUBLICACIÓN DE LAS[4]".**

CUARTO. Consideraciones que han quedado firmes. Una vez agotado el estudio de procedibilidad del presente medio de control constitucional, es oportuno precisar que **no será materia de análisis la improcedencia decretada en la sentencia recurrida respecto al acto reclamado al Titular de Petróleos Mexicanos.** Es así, toda vez que el Tribunal Colegiado de Circuito del conocimiento *dejó firme el sobreseimiento decretado por el Juez de Distrito.*

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[4] Publicada en el Semanario Judicial de la Federación. Tomo 205-216. Tercera Parte. Página: 117. Séptima Época.

Asimismo, **tampoco será materia de análisis en la presente revisión, lo relativo al interés legítimo de la parte quejosa para combatir los restantes actos reclamados.** Es así, pues tal aspecto de procedibilidad *ya fue examinado por el Juez Federal*, quien sobreseyó en el juicio al considerar que el quejoso carecía de tal interés. Siendo que el Tribunal Colegiado del conocimiento **analizó los agravios encaminados a controvertir esa determinación** y, al respecto, **levantó el referido sobreseimiento,** al estimar que el quejoso sí demostró contar con interés legítimo para impugnar el precepto y acuerdo reclamados, **lo cual constituye cosa juzgada y rige el sentido del presente fallo.**

Lo anterior porque, conforme al artículo 93, fracción I, de la Ley de Amparo –que dispone que el órgano jurisdiccional revisor, "si quien recurre es el quejoso, examinará, en primer término, los agravios hechos valer contra el sobreseimiento decretado en la resolución recurrida"–, la improcedencia decretada por un Juez de Distrito sólo puede ser analizada cuando medie agravio de la parte afectada, **sobre lo cual, como ha quedado apuntado, este Alto Tribunal delegó a los Tribunales Colegiados de Circuito la competencia para pronunciarse en términos del punto noveno, fracción II, del Acuerdo General Plenario 5/2013** publicado en el Diario Oficial de la Federación de veintiuno de mayo de dos mil trece.

Esto es, es a esos tribunales colegiados a quienes, aun tratándose de recursos de revisión en los que subsiste el problema de constitucionalidad de normas generales –incluso leyes federales–, corresponde pronunciarse sobre esos agravios vinculados con la procedencia del juicio y, **por ende, su decisión al efecto rige el sentido de la ejecutoria correspondiente.**

Por tanto, dado que en el caso, **sobre el tema del interés como presupuesto de procedencia del juicio de amparo, ya se ocupó el Tribunal Colegiado de Circuito** que previno en el conocimiento del asunto, en la medida en que **calificó como fundados los agravios respectivos, plasmó el estudio respectivo y concluyó que la parte quejosa demostró su interés para acudir al juicio de amparo** dada su especial situación objetiva y particular frente al sistema normativo que constituye la materia de la litis, es evidente que tanto las consideraciones que al respecto expuso como la decisión correspondiente **no pueden ser objeto de una nueva revisión por parte de esta Suprema Corte de Justicia de la Nación.**

Máxime que no se actualiza el supuesto a que se refiere la tesis XXIV/2015 de esta Segunda Sala de rubro: **"REVISIÓN EN AMPARO INDIRECTO. SI AL EJERCER SU COMPETENCIA DELEGADA LOS TRIBUNALES COLEGIADOS DE CIRCUITO DESESTIMAN ALGUNA CAUSA DE IMPROCEDENCIA QUE INVOLUCRE EL ESTUDIO DEL FONDO DEL ASUNTO O LOS EFECTOS DE UNA POSIBLE CONCESIÓN DE LA PROTECCIÓN FEDERAL, TAL DECISIÓN NO VINCULA A LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN"**[5], porque las argumentaciones expuestas por el tribunal a quo no involucraron aspectos vinculados con el fondo del asunto, *es decir, no constituyen razonamientos relacionados con la constitucionalidad o*

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[5] Gaceta del Semanario Judicial de la Federación. Décima Época. Libro 17. Abril de 2015. Tomo I. Página 841, de texto:
"Como consecuencia de los diversos acuerdos generales para delegar en los tribunales colegiados de circuito, entre otras, la facultad para analizar las causas de improcedencia de los juicios de amparo indirecto en revisión de la competencia originaria de esta Suprema Corte de Justicia de la Nación, esos órganos jurisdiccionales deben limitarse a depurar las cuestiones de improcedencia y, en su caso, remitir el asunto a este Alto Tribunal para la resolución de fondo procedente; supuesto en el cual, en principio, debe respetarse lo resuelto por aquéllos, porque en los aspectos de procedencia se erigen como órganos terminales de decisión. No obstante, cuando las razones ofrecidas por los tribunales colegiados de circuito para desestimar las cuestiones de improcedencia involucren pronunciamientos sobre el fondo del asunto, no hay obstáculo para estudiar de nueva cuenta la procedencia del juicio, particularmente los razonamientos relacionados con la constitucionalidad o inconstitucionalidad de los actos reclamados, pues tales órganos no deben fijar criterios que rebasen la competencia delegada que les fue conferida, ni vincular al Máximo Tribunal a estudiar los conceptos de violación, con base en una sentencia previa que implícita o explícitamente dispuso respecto de la concesión del amparo o los efectos que a ésta deben darse".

inconstitucionalidad de los actos reclamados que pudieran considerarse un exceso en la competencia delegada que le fue conferida.

QUINTO. Fijación de la litis. Ahora bien, de la relatoría de antecedentes realizada en los considerandos de la presente ejecutoria, así como de los motivos de disenso formulados por la parte quejosa -los cuales no se reproducen ya que serán sintetizados al momento de ser examinarlos individualmente en los siguientes apartados del presente fallo-, se advierte que la litis en la presente vía estriba en determinar:

I. Si el artículo 51, segundo párrafo, de la Ley Federal sobre Metrología y Normalización, *resulta contrario al derecho humano a un medio ambiente sano*;

II. Si fue apegado a derecho que la Comisión Reguladora de Energía haya empleado tal hipótesis normativa para modificar unilateralmente la "**NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos"**; y

III. Si el Acuerdo de número **********, intitulado **"ACUERDO de la Comisión Reguladora de Energía que modifica la Norma Oficial Mexicana NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos",** resulta violatorio del derecho humano a un medio ambiente sano.

A continuación se procede a examinar los puntos jurídicos referidos, en el orden ya establecido.

1. Regularidad constitucional del artículo 51, segundo párrafo, de la Ley Federal sobre Metrología y Normalización. En su segundo concepto de violación, el quejoso aduce, sustancialmente, que el precepto citado al rubro resulta inconstitucional, *ya que vulnera el*

derecho humano a un medio ambiente sano, con relación al derecho de participación ciudadana en tal materia, al exentar a la autoridad de observar el procedimiento regular de modificación de normas oficiales mexicanas, *siempre que no subsistan las causas que motivaron su emisión.*

A juicio de esta Segunda Sala, resulta **infundado** el motivo de disenso acabado de sintetizar, ya que, como se demostrará a continuación, la hipótesis normativa, **en su correcta interpretación, se ajusta a las exigencias y débitos, tanto constitucionales, como convencionales, impuestas al Estado Mexicano en virtud del derecho humano a un medio ambiente sano.**

Esto es, en tratándose de la materia ambiental, para que pueda actualizarse la referida hipótesis normativa, **es indispensable que se esté frente a la existencia de hechos o circunstancias verdaderamente extraordinarias que permitan inteligir, en forma *notoria, evidente e incontrovertible,* que las causas que motivaron la emisión de la Norma Oficial Mexicana respectiva han dejado de subsistir,** de tal suerte que, bajo tales circunstancias excepcionales**,** resulte justificado que no se desahogue el procedimiento regular para la alteración de las normas oficiales mexicanas, ya que *a ningún fin práctico conduciría consultar a la ciudadanía en tratándose de hechos irrefutables.*

A fin de demostrar las razones de ello, en principio, se examinará el contenido y alcance **del principio de precaución, así como el derecho de participación ciudadana en materia ambiental** y, a partir de ello, se explicará el por qué, en esta materia, el alcance del artículo 51, segundo párrafo, de la Ley Federal sobre Metrología y Normalización, *debe ser determinado al tenor de esos axiomas constitucionales.*

1.1. El principio de precaución en materia ambiental. En las últimas décadas la comunidad mundial ha comenzado a tomar conciencia sobre *el vínculo entre derechos humanos y medio ambiente*. Pocos son los temas que vienen ocupando tanto espacio en la agenda internacional contemporánea como los que componen este binomio. Derechos humanos y medio ambiente se encuentran íntimamente relacionados entre sí, y configuran, el denominador común del gran ciclo de Conferencias Mundiales del final de siglo XX desencadenado por la Conferencia de las Naciones Unidas sobre Medio Ambiente y Desarrollo -Río de Janeiro 1992-, la II Conferencia Mundial de Derechos Humanos -Viena 1993-, la Conferencia Internacional sobre Población y Desarrollo -Cairo 1994-, la II Conferencia de las Naciones Unidas sobre Asentamientos Humanos -Hábitat II, Estambul 1996-, entre otras.

Desde el decenio de 1960 hasta la actualidad, el movimiento medioambiental moderno ha *transformado la relación del ser humano con el medio ambiente*. Prácticamente todos los Estados del mundo han promulgado leyes encaminadas a reducir la contaminación atmosférica y del agua, reglamentar las sustancias tóxicas y preservar los recursos naturales, entre otros objetivos[6].

En efecto, en el plano internacional se reconoce que se ha llegado a un momento de la historia en que toda actividad debe *atender las consecuencias que puedan arrojar al medio ambiente*: por ignorancia o indiferencia, se causan daños inmensos e irreparables al medio ambiente del que dependen la vida y el bienestar. Por el contrario, *con un conocimiento más profundo y una acción más prudente, se podrán*

[6] ONU. Informe del Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, John H. Knox. 24 de diciembre de 2012. Párrafo 8.

conseguir condiciones de vida mejores en un medio ambiente más en consonancia con las necesidades y aspiraciones del hombre[7]*.*

En ese contexto, la **"defensa y el mejoramiento del medio ambiente humano para las generaciones presentes y futuras se ha convertido en meta imperiosa de la humanidad, que ha de perseguirse al mismo tiempo que las metas fundamentales ya establecidas de la paz y el desarrollo económico y social en todo el mundo, y de conformidad con ellas"**[8]**.**

Así, a la postura sostenida tradicionalmente del crecimiento económico a cualquier precio, le ha seguido *una idea más integral de desarrollo,* que no atiende sólo al aspecto económico, sino que considera otros elementos, *tales como la dimensión humana de la economía y la dimensión medio ambiental*. **El paradigma de esta concepción es la idea de *desarrollo sustentable*,** que persigue el logro de tres objetivos esenciales:

> **(I)** Un objetivo *puramente económico*, consistente en la eficiencia en la utilización de los recursos y el crecimiento cuantitativo;
>
> **(II)** Un objetivo *social y cultural*, a saber, la limitación de la pobreza, el mantenimiento de los diversos sistemas sociales y culturales y la equidad social; y
>
> **(III)** Un objetivo ecológico, relativo a la preservación de los sistemas físicos y biológicos -recursos naturales, en sentido amplio- *que sirven de soporte a la vida de los seres humanos, tutelando con ello diversos derechos inherentes a las personas, como lo son el derecho a la vida, a la salud, a la alimentación y al agua, entre otros.*

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[7] Proclamación Sexta de la Declaración de Estocolmo sobre el Medio Ambiente Humano, adoptada en la Conferencia de las Naciones Unidas de dieciséis de junio de mil novecientos setenta y dos, en la que participó México –no vinculante–.
[8] Ídem.

> El hombre es a la vez obra y artífice del medio ambiente que lo rodea, el cual le da el sustento material *y le brinda la oportunidad de desarrollarse intelectual, moral, social y espiritualmente*. En la larga evolución de la raza humana, se ha llegado a una etapa en que, gracias a la rápida aceleración de la ciencia y la tecnología, el hombre ha adquirido el poder de transformar, de innumerables maneras y en una escala sin precedentes, cuanto lo rodea. Así, los dos aspectos del medio ambiente humano, el natural y el artificial **"son esenciales para el bienestar del hombre y para el goce de los derechos humanos fundamentales, incluso el derecho a la vida misma"[9].**

Ahora bien, en conjunción con ese cambio de paradigma y, a fin de evitar de manera más oportuna y eficaz los daños ambientales, **diversos tratados internacionales han reconocido el principio de precaución** conforme al cual, para que proceda la protección al medio ambiente y a la salud pública, **basta con un principio de prueba.**

En efecto, el Principio 15 de la Declaración de Río sobre el Medio Ambiente y el Desarrollo[10] establece que, con el fin de proteger el medio ambiente, los Estados **"deberán aplicar ampliamente el criterio de precaución conforme a sus capacidades. Cuando haya peligro de daño grave o irreversible, la falta de certeza científica absoluta no deberá utilizarse como razón para postergar la adopción de medidas eficaces en función de los costos para impedir la degradación del medio ambiente".**

Asimismo, en el preámbulo del Convenio sobre la Diversidad

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[9] Proclamación Primera de la Declaración de Estocolmo sobre el Medio Ambiente Humano, adoptada en la Conferencia de las Naciones Unidas de dieciséis de junio de mil novecientos setenta y dos, en la que participó México –no vinculante–.

[10] Adoptada en la Conferencia de las Naciones Unidas del tres al catorce de junio de mil novecientos noventa y dos, en la que participó México –no vinculante–.

Biológica[11] se estipula que **"cuando exista una amenaza de reducción o pérdida sustancial de la diversidad biológica no debe alegarse la falta de pruebas científicas inequívocas como razón para aplazar las medidas encaminadas a evitar o reducir al mínimo esa amenaza".**

Esa estipulación fue reiterada en el Protocolo de Cartagena sobre Seguridad de la Biotecnología[12], en tanto en su Preámbulo se establece que las Partes, ***"Reafirmando* el enfoque de precaución que figura en el Principio 15 de la Declaración de Río sobre el Medio Ambiente y el Desarrollo",** han convenido, contribuir a garantizar un nivel adecuado de protección en la esfera de la transferencia, manipulación y utilización seguras de los organismos vivos modificados resultantes de la biotecnología *moderna que puedan tener efectos adversos para la conservación y la utilización sostenible de la diversidad biológica, teniendo también en cuenta los riesgos para la salud humana,* y centrándose concretamente en los movimientos transfronterizos.

Para lo cual, en su artículo 10 establece que **"[e]l hecho de que no se tenga certeza científica por falta de información o conocimientos científicos pertinentes suficientes sobre la magnitud de los posibles efectos adversos de un organismo vivo modificado en la conservación y utilización sostenible de la diversidad biológica en la Parte de importación, teniendo también en cuenta los riesgos para la salud humana, no impedirá a la Parte de importación, a fin de evitar o reducir al mínimo esos posibles efectos adversos, adoptar una decisión, según proceda".**

En esa inteligencia, el principio de precaución **"ha experimentado una consolidación progresiva en el Derecho internacional del medio ambiente que lo ha convertido en un verdadero principio de derecho internacional de alcance**

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[11] Instrumento internacional jurídicamente vinculante que México firmó el trece de junio de mil novecientos noventa y dos y ratificó el once de marzo de mil novecientos noventa y tres.
[12] Acuerdo internacional vinculante que entró en vigor el once de septiembre de dos mil tres; previamente fue firmado por México el veinticuatro de mayo de dos mil y ratificado el veintisiete de agosto de dos mil dos.

general"[13]. En efecto, desde su incorporación en la Declaración de Río, el principio de precaución **"se ha convertido en un principio central del desarrollo sustentable"[14],** esto es, se ha erigido como un valioso principio jurídico **"para atender las amenazas de daños importantes o irreversibles, así como sus consecuencias adversas, en aquellos casos en que la ausencia de una absoluta certeza científica, podría impedir la adopción de acciones o medidas protectoras al ambiente o la salud del ser humano"[15].**

Lo anterior resulta relevante, si se tiene en cuenta que *pocos asuntos sociales son tan altamente dependientes de la existencia de información y validación científica, como acontece con los problemas medioambientales*. En tal materia, **las determinaciones científicas juegan un papel clave respecto a las respuestas sociales y estatales a las problemáticas ambientales,** lo que, desde luego, tiene un impacto en las políticas públicas respectivas. Es por ello que *el principio de precaución constituye un axioma fundamental para determinar y orientar la actuación de las autoridades.*

Dicho principio, a grandes rasgos, implica que **"cuando una actividad genere un riesgo de daño a la salud del ser humano o al medio ambiente, deben ser adoptadas medidas precautorias, aunque las causas-efectos [de la actividad determinada] no hayan sido absolutamente precisadas por la ciencia".** Tal axioma fue reconocido en el Derecho Internacional de los Derechos Humanos, ante la percepción de que los esfuerzos y medidas encaminadas para combatir y solventar diversos problemas ambientales, como lo son, el cambio climático, la degradación de los

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[13] Comisión Europea. "*Comunicado de la Comisión sobre el principio de precaución*". Bruselas, 2.2.2000 COM (2000) 1 final. Pág. 10.
[14] Science for Enviromental Policy. "*The precautionary principle: Decision-making under uncertainty"*. Produced for the European Commission DG Environment by the Science Communication Unit, UWE. Bristol. 2017. Pág. 20.
[15] Ídem.

ecosistemas y el agotamiento de recursos, *no se han implementado con la prontitud necesaria.* Esto es, el principio de precaución resulta relevante ante el reconocimiento de que **"los problemas ambientales continúan acrecentándose en forma más acelerada a la capacidad social para identificarlos y corregirlos [oportunamente]"[16].**

El principio de precaución, por tanto, se dirige a asegurar que **"el bien público se encuentre presente en toda decisión [estatal] adoptada en el contexto de incertidumbre científica".** Por ende, cuando existe controversia científica respecto a los riesgos y beneficios que depara determinada actividad o empleo tecnológico, **"la formulación de las políticas públicas debe ser realizada de manera tal que sea preferible errar en el diagnóstico de la necesidad de adoptar medidas precautorias, que en el diverso de que [mediante tal actividad] no se ocasionan daños al ambiente y a la salud pública"[17].**

Al respecto, no puede obviarse que el ser humano *se encuentra inextricablemente obligado a convivir con otras formas de vida en el planeta y su conducta tiene efectos en las mismas.* De ahí que las actividades humanas tienen repercusiones intra-especie –entre humanos–, inter-generacional –entre generaciones humanas– e inter-especie –entre seres humanos y demás especies–[18], lo cual sujeta al hombre, desde la perspectiva del derecho humano a un medio ambiente sano, a una posición de armonía con relación a las otras especies vivientes**. Todo ello derivado de la responsabilidad moral del hombre como principal motor del destino de las demás especies, de sus ecosistemas y, en general, del medio ambiente[19].**

Así, si bien el ser humano tiene una responsabilidad primordial

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16 Kriebel, David et. al. *"The Precautionary Principle in Environmental Science*". Environmental Health Perspectives. Vol. 109. N° 9. 2001. Pág. 871.
17 Ibídem. Pág. 871.
18 Vid. Gran Sala del Tribunal Europeo de Derechos Humanos. Caso "*Herrmann vs Alemania*". 26 de junio de 2012. Voto particular del Juez Pinto de Albuquerque. Pág. 37.
19 Vid. Ibídem. Pág. 38.

respecto al debido cuidado y preservación de todas las especies vivientes y sus entornos -incluyendo a la propia humanidad-, lo cierto es que, atento a la complejidad que conlleva el debido entendimiento de los ecosistemas y las múltiples interconexiones y relaciones entre cada uno de sus organismos, es dable reconocer que *en diversos escenarios la ciencia es incapaz de proveer respuestas claras y certeras respecto a los potenciales daños que determinada actividad humana pueda deparar al medio ambiente.*

En estas circunstancias, **"esperar a que se presente evidencia científica incontrovertible sobre la generación de daños, antes de permitir la adopción de medidas preventivas o remediales, incrementa el riesgo de incurrir en errores sumamente costosos que pueden causar serios e irreversibles daños al ecosistema y a la salud y bienestar humano, e inclusive a la economía[20]".** Así, el principio de precaución presupone que se han identificado los efectos potencialmente peligrosos derivados de un fenómeno, un producto o un proceso y la evaluación científica no permite determinar el riesgo con la certeza suficiente; *de ahí que ante esa incertidumbre o plenitud de conocimiento científico, lo procedente es adoptar medidas tendientes a proteger el ambiente, a fin de evitar daños injustificados e indebidos en los ecosistemas y a las especies.*

De tal suerte que el incorporar el principio de precaución a la toma de decisiones públicas en la materia, permite la formulación de **"procesos sólidos y racionales tendientes a la prevención de impactos negativos en el ser humano y en el bienestar de los ecosistemas, producidos por las actividades del hombre"[21].** Asimismo, la aplicación del referido principio **"tiene el potencial de permitir y promover procesos de toma de decisiones más democráticos e**

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[20] Tickner, Joel A. *"Precaution, Environmental Science, and Preventive Public Policy"*: New Solutions: A journal of environmental and occupational health policy. Vol. 13(3) 275-282, 2003. Pág. 280.
[21] Ibídem. Pág. 282.

inclusivos, en donde diferentes voces sean escuchadas y consideradas"[22].

Finalmente, debe tenerse en cuenta que la dimensión del principio de precaución **"va más allá de las problemáticas asociadas a los riesgos a corto o medio plazo, puesto que se refiere también a cuestiones a largo plazo e incluso ligadas al bienestar de las generaciones futuras"[23].** Decidir adoptar medidas estatales preventivas y regulatorias, respecto a tales riesgos, **"sin esperar a disponer de todos los conocimientos científicos necesarios, es una postura basada claramente en el principio de precaución"[24].**

1.2. El derecho a la consulta en materia ambiental. Una vez precisado lo anterior, debe tenerse en cuenta que al resolver el amparo en revisión **365/2018,** esta Segunda Sala estableció que **"el derecho de participación pública en asuntos medioambientales, se ve reflejado en diversos instrumentos internacionales relacionados con el medio ambiente y el desarrollo sostenible",** a saber; **(I)** la Declaración de Río sobre el Medio Ambiente y el Desarrollo; **(II)** el Acuerdo de Cooperación Ambiental de América del Norte[25]; **(III)** el Convenio sobre el acceso a la información, la participación del público en la toma de decisiones y el acceso a la justicia en materia de medio ambiente -Convenio de Aarhus[26]- y; **(IV)** las 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[27]-.

Y aunque no todos estos instrumentos son vinculantes, lo cierto es que **"constituyen pautas orientadoras que permiten advertir la importancia de**

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[22] Science for Enviromental Policy. "*The precautionary principle […]"* op. cit. Pág. 20
[23] Comisión Europea. "*Comunicado de la Comisión sobre el principio de precaución".* op. cit. Pág. 7.
[24] Ídem.
[25] Firmado el cuatro de septiembre de mil novecientos noventa y tres y aprobado por la Cámara de Senadores del Congreso de la Unión el veintidós de noviembre siguiente.
[26] Tratado internacional de la Comisión Económica de las Naciones Unidas para Europa firmado el veintiséis de junio de mil novecientos noventa y ocho, que entró en vigor el treinta de octubre de dos mil uno.
[27] Directrices voluntarias adoptadas por el Consejo del Programa de las Naciones Unidas para el Medio Ambiente el veintiséis de febrero de dos mil diez.

la participación pública en materia ambiental, razón por la que este Alto Tribunal no puede pasarlas por alto, en tanto constituyen criterios orientadores que permiten dar plena realización al derecho humano a un medio ambiente sano, al acceso a la información y a la participación ciudadana".

Así, la Declaración de Río sobre el Medio Ambiente y el Desarrollo procuró alcanzar acuerdos internacionales en los que se respeten los intereses de todos y se proteja la integridad del sistema ambiental y de desarrollo mundial y, para tal efecto, en su principio 10 estableció que **"[e]l mejor modo de tratar las cuestiones ambientales es con la participación de todos los ciudadanos interesados, en el nivel que corresponda. En el plano nacional, toda persona deberá tener acceso adecuado a la información sobre el medio ambiente de que dispongan las autoridades públicas, incluida la información sobre los materiales y las actividades que encierran peligro en sus comunidades, así como la oportunidad de participar en los procesos de adopción de decisiones".**

En el Acuerdo de Cooperación Ambiental de América del Norte celebrado entre el Gobierno de Canadá, de los Estados Unidos Mexicanos y de los Estados Unidos de América, se subrayó la importancia de la participación de la sociedad en la conservación, la protección y el mejoramiento del medio ambiente y tuvo por objeto reafirmar, entre otros, la Declaración de Río sobre el Medio Ambiente y el Desarrollo. En dicho instrumento se sostuvo como objetivo del acuerdo promover la transparencia y la participación de la sociedad en la elaboración de leyes, reglamentos y políticas ambientales **"y se acordó que los Estados, en la medida de lo posible, brindaran a las personas y las partes interesadas oportunidad razonable para formular observaciones sobre las medidas propuestas en materia ambiental".**

Por su parte, el Convenio de Aarhus prevé, en la parte que

interesa, la participación del público en las decisiones relativas a actividades relacionadas con la gestión de desechos, específicamente, las instalaciones para la descarga de desechos peligrosos y establece que para las diferentes fases del procedimiento de participación del público **"se preverán plazos razonables que dejen tiempo suficiente para informar al público para que se prepare y participe efectivamente en los trabajos a lo largo de todo el proceso de toma de decisiones en materia ambiental".**

Finalmente, las Directrices de Bali tuvieron como propósito proporcionar una orientación general a los Estados, principalmente países en desarrollo, sobre el fomento de un cumplimiento efectivo de los compromisos contraídos en relación con el Principio 10 de la Declaración de Río sobre el Medio Ambiente y el Desarrollo, con el fin de facilitar un amplio acceso a la información, la participación pública y el acceso a la justicia en asuntos ambientales. Las directrices 8 a la 14 **"tuvieron por objeto regular la participación pública en el proceso de adopción de decisiones relacionadas con el medio ambiente".** Dichas directrices, en la parte que interesa, establecen lo siguiente:

- Los Estados deberían garantizar **"que existan oportunidades para una participación del público efectiva y desde las primeras etapas del proceso de adopción de decisiones relacionadas con el medio ambiente".** Para ello, se debería informar a los miembros del público interesado las oportunidades que tienen de participar en una etapa inicial del proceso de adopción de decisiones.
- En la medida de lo posible, los Estados deberían realizar esfuerzos para atraer resueltamente la participación del público, de forma transparente y consultiva. Entre ellos **"se deberían incluir esfuerzos para garantizar que se da a los miembros del público interesado una oportunidad adecuada para poder expresar sus opiniones".**
- Los Estados deberían garantizar que toda la información que reviste importancia para el proceso de adopción de decisiones

relacionadas con el medio ambiente **"se ponga a disposición de los miembros del público interesado de manera objetiva, comprensible, oportuna y efectiva".**

- Los Estados deberían garantizar que **"se tomen debidamente en cuenta las observaciones formuladas por el público en el proceso de adopción de decisiones y que esas decisiones se den a conocer".**

- Los Estados deberían asegurar que cuando se da inicio a un proceso de valoración en el que se planteen cuestiones o surjan circunstancias que revistan importancia para el medio ambiente y que no se hayan considerado previamente, **"el público debería poder participar en ese proceso de examen en la medida en que las circunstancias lo permitan".**

A partir de lo anterior, esta Segunda Sala sostuvo que los instrumentos internacionales anteriores giran en torno a la idea fundamental de que **"toda persona debe tener acceso adecuado a la información medioambiental, así como la oportunidad de participar en los procesos de adopción de decisiones desde las primeras etapas, con objeto de tener una influencia real en la toma de medidas que puedan tener por objeto afectar su derecho a un medio ambiente sano".**

En suma, se concluyó que el derecho a la participación previsto en los artículos 35, fracción III, de la Constitución Política de los Estados Unidos Mexicanos; 25, inciso a) del Pacto Internacional de Derechos Civiles y Políticos[28] y 23, numeral 1, inciso a) de la Convención Americana sobre Derechos Humanos[29], **"no se restringe a participar en asuntos políticos, por ejemplo, en las elecciones a través del voto, sino que incluye la posibilidad de incidir en la discusión relativa a políticas y proyectos**

[28] Ratificado por México el veintitrés de marzo de mil novecientos ochenta y uno.
[29] Ratificada por México el tres de febrero de mil novecientos ochenta y uno.

medioambientales, especialmente, cuando éstos les afecten a los ciudadanos".

Lo anterior permite dar efectividad a la intención expresa del Constituyente Permanente al reformar el artículo 4 constitucional, en el sentido de que el derecho fundamental a un medio ambiente sano no se limita a ser una norma programática, **"sino que contara con plena eficacia legal, es decir, que se traduzca en un mandato concreto para la autoridad, consistente en garantizar a la población un medio ambiente sano para su desarrollo y bienestar, lo cual acontece, como ya se vio, *cuando se asegura la participación de la sociedad en la conservación, la protección y el mejoramiento del medio ambiente"*.**

Es así, pues la participación del público interesado **"permite efectuar un análisis más completo del posible impacto ambiental que puede ocasionar la realización de un proyecto o actividad determinada y permite analizar si afectará o no derechos humanos",** de modo que es relevante permitir, principalmente, que las personas que pudieran resultar afectadas tengan la posibilidad de presentar sus opiniones o comentarios sobre el tema que les atañe al inicio del procedimiento, pues es cuando todas las opciones y soluciones son aún posibles y pueden ejercer una influencia real.

Como se aprecia del precedente en cita, la recopilación de fuentes convencionales en la materia permite colegir que, el derecho humano a un medio ambiente sano, **impone determinadas obligaciones de procedimiento al Estado** en lo que respecta a la protección del medio ambiente. Entre esas obligaciones figuran el deber de: **(I)** evaluar el impacto ambiental y hacer pública la información relativa al medio ambiente; **(II)** facilitar la participación pública en la toma de decisiones ambientales; y **(III)** dar acceso a recursos efectivos para la tutela de los derechos al medio ambiente.

El firme cumplimiento de los deberes de procedimiento "**produce un medio ambiente más saludable, que, a su vez, contribuye a un mayor grado de cumplimiento con los derechos sustantivos, como son los derechos a la vida, a la salud, a la propiedad y a la intimidad. Lo mismo sucede en el sentido contrario"[30].** El incumplimiento de las obligaciones de procedimiento puede dar lugar a un medio ambiente degradado, que interfiere con el pleno disfrute de los demás derechos humanos.

Por ende, los órganos de derechos humanos **"han afirmado claramente que los Estados tienen la obligación de facilitar la participación pública en la toma de decisiones ambientales"[31].** Esta obligación dimana **"de los derechos de todas las personas a participar en el gobierno de su país y en la dirección de los asuntos públicos, y también es necesaria para proteger una amplia gama de derechos de los daños ambientales"[32].** De ahí que la obligación de facilitar la participación pública en la toma de decisiones ambientales **"tiene profundas raíces en las normas de derechos humanos"[33].**

No en vano, en el documento final de la Conferencia de las Naciones Unidas sobre el Desarrollo Sostenible -Conferencia "Río+20"-, los Estados reconocieron que **"las oportunidades para que las personas influyan en su vida y su futuro, participen en la adopción de decisiones y expresen sus inquietudes son fundamentales para el desarrollo sostenible"[34].** Para que la participación de la población sea eficaz, hay que suministrarle

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[30] ONU. Informe del Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, John H. Knox. 3 de febrero de 2015. Párr. 42.
[31] ONU. Informe del Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, John H. Knox. 24 de diciembre de 2012. Párr. 42.
[32] Ídem.
[33] ONU. Informe del Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, John H. Knox. 1 de febrero de 2016. Párr. 56.
[34] ONU. Informe del Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, John H. Knox. 30 de diciembre de 2013. Párr. 38.

información de manera que pueda entender y discutir la situación, incluidos los posibles efectos de una política o un proyecto propuestos, **"y deben ofrecerse oportunidades reales de que las opiniones de la población afectada sean escuchadas e influyan en la adopción de decisiones"[35].**

1.3. Interpretación de la norma reclamada. Una vez analizado el contenido y alcance del principio de precaución en materia ambiental, así como la obligación adjetiva del Estado de facilitar la participación pública en la toma de decisiones ambientales, se procede a establecer *el recto entendimiento que debe darse al artículo 51, párrafo segundo, de la Ley Federal sobre Metrología y Normalización.*

Como se ha expuesto, dicho enunciado normativo permite, a grandes rasgos, que las dependencias respectivas puedan obviar el procedimiento "ordinario" para la modificación de las normas oficiales mexicanas, siempre y cuando **"no subsistan las causas que motivaron la expedición de una Norma Oficial Mexicana".**

Al respecto, esta Segunda Sala estima oportuno establecer *la forma en que se desarrolla el procedimiento regular u ordinario de expedición o alteración de las normas oficiales mexicanas* y, una vez establecido ello, *se procederá a examinar la forma en cómo debe entenderse la operabilidad del supuesto de excepción legal para las modificaciones de dichas normas reclamado en el presente medio de control constitucional.*

En principio, debe tenerse en cuenta que, conforme a la Ley Federal sobre Metrología y Normalización, la **"norma oficial mexicana"[36]** se

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[35] ONU. Informe del Experto independiente sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible, John H. Knox. 1 de febrero de 2016. Párr. 59.

[36] "Artículo 3o.- Para los efectos de esta Ley, se entenderá por:
[…]

concibe como:

I. Una **"regulación técnica de observancia obligatoria";**

II. Expedida por las dependencias competentes;

III. Que establece reglas, especificaciones, atributos, directrices, características o prescripciones aplicables a un producto, proceso, instalación, sistema, actividad, servicio o método de producción u operación, así como aquellas relativas a terminología, simbología, embalaje, marcado o etiquetado y las que se refieran a su cumplimiento o aplicación.

Así, la **elaboración o modificación** de tales regulaciones técnicas de observancia obligatoria, corresponde primigeniamente a **"las dependencias a quienes corresponda la regulación o control del producto, servicio, método, proceso o instalación, actividad o materia a normalizarse"**[37]**.** Estas dependencias, a su vez, son *apoyadas, retroalimentadas y revisadas* por los llamados Comités Consultivos Nacionales de Normalización, mismos que se encuentran integrados **"por personal técnico de las dependencias competentes, según la materia que corresponda al comité, organizaciones de industriales, prestadores de servicios, comerciantes, productores agropecuarios, forestales o pesqueros; centros de investigación científica o tecnológica, colegios de profesionales y consumidores"**[38]**.**

XI. Norma oficial mexicana: la regulación técnica de observancia obligatoria expedida por las dependencias competentes, conforme a las finalidades establecidas en el artículo 40, que establece reglas, especificaciones, atributos, directrices, características o prescripciones aplicables a un producto, proceso, instalación, sistema, actividad, servicio o método de producción u operación, así como aquellas relativas a terminología, simbología, embalaje, marcado o etiquetado y las que se refieran a su cumplimiento o aplicación".

[37] "Artículo 43.- En la elaboración de normas oficiales mexicanas participarán, ejerciendo sus respectivas atribuciones, las dependencias a quienes corresponda la regulación o control del producto, servicio, método, proceso o instalación, actividad o materia a normalizarse".

[38] "Artículo 62.- Los comités consultivos nacionales de normalización son órganos para la elaboración de normas oficiales mexicanas y la promoción de su cumplimiento. Estarán integrados por personal técnico de las dependencias competentes, según la materia que corresponda al comité, organizaciones de industriales, prestadores de servicios, comerciantes, productores agropecuarios, forestales o pesqueros; centros de investigación científica o tecnológica, colegios de profesionales y consumidores.

En el entendido de que las dependencias competentes, en coordinación con el secretariado técnico de la Comisión Nacional de Normalización determinarán **"qué organizaciones de las mencionadas [...] deberán integrar el comité consultivo de que se trate, así como en el caso de los comités que deban constituirse para participar en actividades de normalización internacional"[39].**

De ahí que el proceso para la elaboración o modificación de las normas oficiales mexicanas, **se realiza en forma conjunta entre las dependencias a las que corresponda la regulación o control de la actividad o materia a normalizarse, y los comités consultivos nacionales de normalización respectivos.**

Ahora, el proceso de expedición y modificación de las normas oficiales mexicanas, puede resumirse bajo las siguientes etapas; **(I)** elaboración del anteproyecto; **(II)** formulación del proyecto; **(III)** publicación del proyecto y; **(IV)** finalmente, expedición de la norma oficial mexicana. Tales etapas se describen a continuación:

I. **Elaboración del anteproyecto.** En primer lugar, las dependencias encargadas de la regulación o control de la actividad o materia a normalizarse, deberán **"elaborar los anteproyectos de normas oficiales mexicanas"** y **"someterlos a los comités consultivos nacionales de normalización"[40].**

Las dependencias competentes, en coordinación con el secretariado técnico de la Comisión Nacional de Normalización determinarán qué organizaciones de las mencionadas en el párrafo anterior, deberán integrar el comité consultivo de que se trate, así como en el caso de los comités que deban constituirse para participar en actividades de normalización internacional".

[39] Ídem.

[40] "Artículo 44.- Corresponde a las dependencias elaborar los anteproyectos de normas oficiales mexicanas y someterlos a los comités consultivos nacionales de normalización.
Asimismo, los organismos nacionales de normalización podrán someter a dichos comités, como anteproyectos, las normas mexicanas que emitan.
Los comités consultivos nacionales de normalización, con base en los anteproyectos mencionados, elaborarán a su vez los proyectos de normas oficiales mexicanas, de conformidad con lo dispuesto en el presente capítulo.
Para la elaboración de normas oficiales mexicanas se deberá revisar si existen otras relacionadas, en cuyo caso se coordinarán las dependencias correspondientes para que se elabore de manera conjunta una sola

Los anteproyectos que se presenten en los comités para discusión se acompañarán de **"una manifestación de impacto regulatorio"** [41] **.** Tal manifestación debe contener una explicación sucinta de *la finalidad de la norma, de las medidas propuestas, de las alternativas consideradas y de las razones por las que fueron desechadas*, *y una comparación de dichas medidas con los antecedentes regulatorios***.** Asimismo, deberá contener una descripción general de *las ventajas y desventajas y de la factibilidad técnica de la comprobación del cumplimiento con la norma.*

Además, cuando la norma pudiera tener un amplio impacto en la economía o un efecto sustancial sobre un sector específico**, "la manifestación deberá incluir un análisis en términos monetarios del valor presente de los costos y beneficios potenciales del anteproyecto y de las**

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norma oficial mexicana por sector o materia. Además, se tomarán en consideración las normas mexicanas y las internacionales, y cuando éstas últimas no constituyan un medio eficaz o apropiado para cumplir con las finalidades establecidas en el artículo 40, la dependencia deberá comunicarlo a la Secretaría antes de que se publique el proyecto en los términos del artículo 47, fracción I.
Las personas interesadas podrán presentar a las dependencias, propuestas de normas oficiales mexicanas, las cuales harán la evaluación correspondiente y en su caso, presentarán al comité respectivo el anteproyecto de que se trate".

[41] "Artículo 45.- Los anteproyectos que se presenten en los comités para discusión se acompañarán de una manifestación de impacto regulatorio, en la forma que determine la Secretaría, que deberá contener una explicación sucinta de la finalidad de la norma, de las medidas propuestas, de las alternativas consideradas y de las razones por las que fueron desechadas, una comparación de dichas medidas con los antecedentes regulatorios, así como una descripción general de las ventajas y desventajas y de la factibilidad técnica de la comprobación del cumplimiento con la norma. Para efectos de lo dispuesto en el artículo 4A de la Ley Federal de Procedimiento Administrativo, la manifestación debe presentarse a la Secretaría en la misma fecha que al comité.
Cuando la norma pudiera tener un amplio impacto en la economía o un efecto sustancial sobre un sector específico, la manifestación deberá incluir un análisis en términos monetarios del valor presente de los costos y beneficios potenciales del anteproyecto y de las alternativas consideradas, así como una comparación con las normas internacionales. Si no se incluye dicho análisis conforme a este párrafo, el comité o la Secretaría podrán requerirlo dentro de los 15 días naturales siguientes a que se presente la manifestación al comité, en cuyo caso se interrumpirá el plazo señalado en el artículo 46, fracción I.
Cuando el análisis mencionado no sea satisfactorio a juicio del comité o de la Secretaría, éstos podrán solicitar a la dependencia que efectúe la designación de un experto, la cual deberá ser aprobada por el presidente de la Comisión Nacional de Normalización y la Secretaría. De no existir acuerdo, estos últimos nombrarán a sus respectivos expertos para que trabajen conjuntamente con el designado por la dependencia. En ambos casos, el costo de la contratación será con cargo al presupuesto de la dependencia o a los particulares interesados. Dicha solicitud podrá hacerse desde que se presente el análisis al comité y hasta 15 días naturales después de la publicación prevista en el artículo 47, fracción I. Dentro de los 60 días naturales siguientes a la contratación del o de los expertos, se deberá efectuar la revisión del análisis y entregar comentarios al comité, a partir de lo cual se computará el plazo a que se refiere el artículo 47, fracción II".

alternativas consideradas, así como una comparación con las normas internacionales"[42]. Si no se incluye dicho análisis, el comité o la Secretaría de Economía podrán requerirlo dentro de los 15 días naturales siguientes a que se presente la manifestación al comité.

Cuando el análisis mencionado no sea satisfactorio a juicio del comité o de la Secretaría de Economía, **"éstos podrán solicitar a la dependencia que efectúe la designación de un experto, la cual deberá ser aprobada por el presidente de la Comisión Nacional de Normalización y la Secretaría"**[43]**.** De no existir acuerdo, estos últimos nombrarán a sus respectivos expertos para que trabajen conjuntamente con el designado por la dependencia.

Finalmente, debe precisarse que, si bien como se ha razonado, son las dependencias encargadas de la regulación o control de la actividad o materia a normalizarse, las que intervienen en la elaboración o modificación de las referidas normas, lo cierto es que la propia ley, establece que también las personas interesadas **"podrán presentar a las dependencias, propuestas de normas oficiales mexicanas, las cuales harán la evaluación correspondiente y en su caso, presentarán al comité respectivo el anteproyecto de que se trate"**[44]**.**

II. **Formulación del proyecto**. Una vez sometido el anteproyecto ante los comités referidos, en cumplimiento a las formalidades ya referidas, éstos procederán a elaborar **"los proyectos de normas oficiales mexicanas"**[45]**.**

Para tal formulación, los comités deberán revisar si existen otras normas oficiales relacionadas, en cuyo caso se coordinarán las dependencias correspondientes para que se elabore de manera

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[42] Ídem.
[43] Ídem.
[44] Artículo 44, último párrafo.
[45] Ibídem, tercer párrafo.

conjunta una sola norma oficial mexicana por sector o materia.

Asimismo, se tomarán en consideración las normas mexicanas y las internacionales, y cuando estas últimas no constituyan un medio eficaz o apropiado para cumplir con las finalidades que persigue la normalización de la actividad o materia respectiva, la dependencia deberá comunicarlo a la Secretaría antes de que se publique el proyecto.

III. **Publicación de los proyectos y valoración de opiniones ciudadanas.** Una vez elaborado el proyecto respectivo, éste se publicará íntegramente en el Diario Oficial de la Federación a efecto de que, dentro de los siguientes 60 días naturales, **"los interesados presenten sus comentarios al comité consultivo nacional de normalización correspondiente"**[46]**.** Durante este plazo la manifestación de impacto regulatorio **"estará a disposición del público para su consulta en el comité"**[47]**.**

Al término del citado plazo, el comité consultivo nacional de normalización correspondiente **"estudiará los comentarios recibidos y, en su caso, procederá a modificar el proyecto"**[48] en un plazo que no excederá los 45 días naturales y **"se ordenará la publicación en el**

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[46] "Artículo 47.- Los proyectos de normas oficiales mexicanas se ajustarán al siguiente procedimiento:
I. Se publicarán íntegramente en el Diario Oficial de la Federación a efecto de que dentro de los siguientes 60 días naturales los interesados presenten sus comentarios al comité consultivo nacional de normalización correspondiente. Durante este plazo la manifestación a que se refiere el artículo 45 estará a disposición del público para su consulta en el comité;
II. Al término del plazo a que se refiere de la fracción anterior, el comité consultivo nacional de normalización correspondiente estudiará los comentarios recibidos y, en su caso, procederá a modificar el proyecto en un plazo que no excederá los 45 días naturales;
III. Se ordenará la publicación en el Diario Oficial de la Federación de las respuestas a los comentarios recibidos así como de las modificaciones al proyecto, cuando menos 15 días naturales antes de la publicación de la norma oficial mexicana; y
IV. Una vez aprobadas por el comité de normalización respectivo, las normas oficiales mexicanas serán expedidas por la dependencia competente y publicadas en el Diario Oficial de la Federación.
Cuando dos o más dependencias sean competentes para regular un bien, servicio, proceso, actividad o materia, deberán expedir las normas oficiales mexicanas conjuntamente. En todos los casos, el presidente del comité será el encargado de ordenar las publicaciones en el Diario Oficial de la Federación.
Lo dispuesto en este artículo no se aplicará en el caso del artículo siguiente".

[47] Ídem.

[48] Ídem.

> **Diario Oficial de la Federación de las respuestas a los comentarios recibidos así como de las modificaciones al proyecto"**, cuando menos 15 días naturales antes de la publicación de la norma oficial mexicana; y
>
> **IV. Aprobación del proyecto y expedición de la norma oficial mexicana.** Una vez aprobadas por el comité de normalización respectivo, las normas oficiales mexicanas **"serán expedidas por la dependencia competente y publicadas en el Diario Oficial de la Federación"[49].**
>
> Cuando dos o más dependencias sean competentes para regular un bien, servicio, proceso, actividad o materia, deberán expedir las normas oficiales mexicanas conjuntamente. En todos los casos, el presidente del comité será el encargado de ordenar las publicaciones en el Diario Oficial de la Federación.

Como se aprecia de lo anterior, el procedimiento para la elaboración o modificación de las normas oficiales mexicanas no es un trabajo unilateral de las dependencias públicas encargadas de la regulación o control del producto, servicio, método, proceso o instalación, actividad o materia a normalizarse.

Por el contrario, en el proceso de creación o modificación de las normas oficiales mexicanas **intervienen tanto tales dependencias, como una pluralidad de entes que integran los referidos comités nacionales de normalización** y, más importante aún, **se prevé un esquema de participación ciudadana,** según se aprecia incluso de la exposición de motivos que dio origen a la legislación en estudio:

> "Lo más novedoso de este título, es precisamente el procedimiento al que se deben sujetar dependencias de la administración pública federal para la elaboración y expedición de las normas oficiales mexicanas. **Este procedimiento tiene por objeto hacer más transparente la manera**

[49] Ídem.

> **como las autoridades administrativas formulan estas normas**, **así como permitir la participación de diferentes sectores de la sociedad en la elaboración de las mismas.**
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> Bajo este nuevo procedimiento, las autoridades administrativas tienen la obligación de evaluar previamente el impacto de las normas oficiales mexicanas que pretendan emitir, así como de evaluar los posibles mecanismos alternativos que pudieran permitir alcanzar con un mayor beneficio y menor costo sociales, los mismos objetivos que se pretendan alcanzar con la expedición de dichas normas. **Con lo anterior, se busca hacer más racional y menos discrecional el proceso normativo a través del cual las dependencias buscan proteger el interés público.**
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> De aprobarse este proyecto de Ley Federal sobre Metrología y Normalización, la elaboración de normas oficiales mexicanas se realizaría en comités consultivos nacionales de normalización, en los que además de la participación de las dependencias competentes, se contaría con la participación y apoyo de los representantes de las diversas organizaciones de productores, comerciantes y consumidores. **Para garantizar la participación de todos los sectores de la sociedad interesados en las actividades de normalización, se establece la obligación de publicar los proyectos de normas oficiales para comentario público. Esto permitirá que la ciudadanía pueda hacer llegar sus puntos de vista a las autoridades respecto a las propuestas de regulación. De esta manera, las normas oficiales mexicanas contarán con mayor legitimidad y reconocimiento social. Ello permitiría avanzar en la democratización del ejercicio de la autoridad pública, y enriquecer el actuar del gobierno federal.** Con un sistema como el propuesto, se aseguraría el cumplimiento de compromisos internacionales adquiridos por México, como es el caso de los derivados del Código de Obstáculos Técnicos al Comercio y del Acuerdo General sobre Aranceles y Comercio (GATT) que han fijado la sana práctica de incorporar procedimientos transparentes en la elaboración de regulaciones técnicas, para evitar que éstas puedan constituir indeseables barreras al comercio internacional. (…)".

Como puede apreciarse, la intención del legislador, al crear el procedimiento en estudio, *fue dar mayor transparencia a la forma en la que la autoridad administrativa crea las normas oficiales mexicanas y, de manera especial, permitir la participación ciudadana.*

En esa inteligencia, el proceso de elaboración o modificación de

las normas oficiales mexicanas **apuntala hacia la existencia de un verdadero pluralismo valorativo de carácter técnico-científico e inclusive social, en la determinación de cómo debe regularse una determinada actividad o materia en el Estado Mexicano.**

Ello, pues los procesos respectivos no sólo exigen que la dependencia respectiva realice un anteproyecto de normalización, acompañado de la manifestación de impacto regulatorio respectivo, sino que para la aprobación, formulación, elaboración del proyecto respectivo, así como la expedición de la norma oficial mexicana, **se demanda la intervención y valoración tanto de profesionales especializados en la materia, centros de investigación científica o tecnológica, así como de colegios de profesionales, que formen parte de los Comités Consultivos Nacionales de Normalización de que se trate.**

Asimismo, dentro del procedimiento se otorga la posibilidad de que **los ciudadanos,** por una parte, presenten a las dependencias, **propuestas de creación de normas oficiales mexicanas** y, por otra, que previo a la emisión o modificación de una norma oficial mexicana respectiva, **formulen opiniones y observaciones a los proyectos publicados, las cuales que deben ser tomadas en cuenta por los Comités Consultivos Nacionales de Normalización de que se trate.**

Así, se colige que la expedición y modificación de las normas oficiales mexicanas **tiene un eminente carácter dialógico y plural que, por una parte, demanda la intervención de distintas voces institucionales que integran los citados comités y, por otra, exige la participación y opinión ciudadana;** todo ello a fin de que la regulación técnica respecto al producto, proceso, instalación, sistema, actividad, servicio o método de producción u operación, **se realice de la manera más informada posible y mediante la deliberación de**

distintos puntos de vista, tanto de las autoridades, como de los gobernados, respecto a la actividad o materia específica que se pretende regular desde un aspecto técnico.

Una vez precisado lo anterior, del análisis del sistema normativo en referencia se advierte que, el referido proceso plural e interdisciplinario **se erige como una regla general en la materia,** ya que, **excepcionalmente, la ley permite que la modificación o cancelación de las normas oficiales mexicanas, se realice en forma sumaria y unilateral,** conforme lo establece el artículo 51 de la Ley Federal sobre Metrología y Normalización que, precisamente, es motivo de reclamo en el presente medio de control constitucional y que prevé lo siguiente:

> **"Artículo 51.-** Para **la modificación** de las normas oficiales mexicanas **deberá cumplirse con el procedimiento para su elaboración.**
>
> **Cuando *no subsistan las causas* que motivaron la expedición de una norma oficial mexicana, las dependencias competentes,** a iniciativa propia o a solicitud de la Comisión Nacional de Normalización, de la Secretaría o de los miembros del comité consultivo nacional de normalización correspondiente, **podrán modificar o cancelar la norma de que se trate *sin seguir el procedimiento para su elaboración.***
>
> Lo dispuesto en el párrafo anterior no es aplicable cuando se pretendan crear nuevos requisitos o procedimientos, o bien incorporar especificaciones más estrictas, en cuyo caso deberá seguirse el procedimiento para la elaboración de las normas oficiales mexicanas.
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> **[...]".**

Como se aprecia del anterior enunciado normativo, en aquellos casos en que **"no subsistan las causas que motivaron la expedición de una norma oficial mexicana",** las dependencias competentes -a iniciativa propia, o a solicitud de la Comisión Nacional de Normalización, de la Secretaría de Economía o de los miembros del comité consultivo nacional de normalización correspondiente-,

podrán modificar o cancelar la norma de que se trate **"sin seguir el procedimiento para su elaboración".**

Es precisamente lo anterior lo que lleva a la parte quejosa a considerar que tal excepción normativa resulta inconstitucional, pues a su juicio, al permitir que las normas oficiales mexicanas puedan modificarse *sumaria y unilateralmente*, **se coarta injustificadamente el derecho de los ciudadanos a participar en decisiones que afecten el medio ambiente;** máxime que, el hecho de que no subsistan las causas que motivaron la emisión de una norma oficial mexicana, no debería ser determinado unilateralmente por la autoridad administrativa; *antes bien, los gobernados debieran tener derecho de voz para manifestarse en torno a si, efectivamente, ha ocurrido tal desaparición en las causas que originaron la emisión de la norma oficial mexicana.*

Así, la interrogante jurídica que se le presenta a esta Segunda Sala es determinar si, efectivamente, el hecho de que la autoridad pueda alterar o cancelar unilateralmente una norma oficial mexicana, *sin necesidad de desahogarse el procedimiento ordinario para ello* -consecuentemente, sin darle intervención a la ciudadanía-, *vulnera injustificadamente la obligación estatal de facilitar la participación ciudadana, en temas que afecten el medio ambiente.*

Al respecto, esta Corte Constitucional estima que **el precepto reclamado no vulnera tal derecho fundamental,** pues por una *parte, no puede inadvertirse que el supuesto normativo impugnado resulta aplicable a toda materia administrativa*, de donde se deduce que *el principio de participación ciudadana debe apreciarse, primigeniamente, en ese contexto "genérico"* y, por otra, *porque en la materia ambiental, la recta interpretación de ese enunciado jurídico lo hace apegado a la aplicación y alcance "específico" de tal principio en esa materia,* conforme a las razones que enseguida se exponen.

En efecto, **por lo que hace al supuesto específico de regulación técnica en la materia ambiental,** debe tenerse en cuenta que si bien **el principio de participación ciudadana cobra una especial relevancia y fuerza jurídica en tal materia,** como ya se ha expresado en anteriores apartados de la presente ejecutoria, lo cierto es que, ello, en sí y por sí mismo, **no torna inconstitucional** al enunciado normativo reclamado en la especie, **ya que admite una interpretación que lo hace congruente tanto a tal principio, como a otras exigencias que emanan del derecho humano a un medio ambiente sano.**

Ello, pues esta Corte Constitucional estima necesario precisar que la referida hipótesis normativa que permite la modificación o cancelación, *unilateral y sumaria* de las normas oficiales mexicanas, **en forma alguna puede ser interpretada, como lo hace el quejoso, en el sentido de que resulte aplicable para aquellos casos en que resulte debatible o exista incertidumbre científica sobre la "insubsistencia" de las causas que motivaron la expedición de la norma oficial mexicana respectiva.**

En otras palabras, **en tratándose de la materia medioambiental, el segundo párrafo del artículo 51 de la Ley Federal sobre Metrología y Normalización, adquiere una connotación de rigurosa excepcionalidad,** en tanto que, para que pueda actualizarse la referida hipótesis normativa, **es indispensable que se esté frente a la existencia de hechos o circunstancias verdaderamente extraordinarias que permitan inteligir, en forma *notoria, evidente e incontrovertible,* que las causas que motivaron la emisión de la norma oficial mexicana respectiva han dejado de subsistir.**

Ello, pues **sólo ante el hecho *evidente e irrefutable* de que,**

efectivamente, han desaparecido las causas por las cuales se emitió tal norma[50], es que resulta justificable y admisible no desahogar el procedimiento ordinario para la modificación de la norma oficial mexicana respectiva, pues en tales casos, **al no existir controversia ni incertidumbre alguna de que han quedado insubsistentes tales causas,** resultaría verdaderamente *ocioso* consultar a los expertos que forman parte de los comités consultivos nacionales de normalización, así como darle participación a la ciudadanía, previo a la cancelación o modificación de la norma oficial mexicana respectiva.

Por el contrario, **ante escenarios de incertidumbre fáctica-científica,** esto es, ante la ausencia de hechos notorios, manifiestos y evidentes que den cuenta que han quedado insubsistentes las causas que motivaron la expedición de una norma oficial mexicana *que tiene como finalidad regular una determinada actividad o materia que afecte o pueda afectar el medio ambiente*, **cobrará plena aplicación el principio de precaución,** conforme al cual *se mandata una evaluación pormenorizada respecto a los potenciales riesgos o incertidumbres sobre ese estado de cosas, a fin de dilucidar si es dable o no, modificar o cancelar tal regulación normativa y en qué medida.*

Esto es, **el principio de precaución,** aplicado a las modificaciones o cancelaciones a las normas oficiales mexicanas, **exige que la determinación sobre la subsistencia del daño o riesgo de daño al ambiente, que llevaron a expedir la norma oficial mexicana**

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50 Para ilustrar o ejemplificar tal supuesto excepcional, piénsese en una norma oficial mexicana que fue expedida para regular, desde una perspectiva técnica, *la realización de determinadas actividades humanas que afecten directa o indirectamente alguna especie que se encuentra en peligro de extinción.* Si pese a los esfuerzos o medidas adoptadas por el Estado mexicano, *en forma posterior a la expedición de tal norma, se declara oficialmente extinta tal especie,* es claro que en tal supuesto, la dependencia respectiva puede cancelar esa norma oficial mexicana, en forma unilateral y sin necesidad de desahogar el procedimiento respectivo, pues a nada práctico conduciría involucrar a diversos expertos y a la ciudadanía en esa cancelación normativa, ante la presencia de hechos manifiestos y evidentes sobre la cesación de las causas que motivaron la emisión de esa regulación técnica.

respectiva, deba ser realizada de la forma más informada posible y a través de la participación plural de los integrantes de los Comités Consultivos Nacionales de Normalización de que se trate, y mediante participación ciudadana, **esto es, demanda que se lleve a cabo el procedimiento ordinario para la alteración o cancelación de tal norma.**

Es así, pues esta Segunda Sala advierte que dejar al arbitrio y, conforme a los propios límites de la erudición técnica-científica con la que cuente la dependencia correspondiente, *el decidir en forma unilateral y expedita si se modifica o cancela una norma oficial mexicana que, precisamente*, fue emitida para prevenir daños injustificados al medio ambiente, *simple y sencillamente porque "a su juicio" han quedado insubsistentes las causas que originaron tal regulación*, **acarrearía el riesgo de permitir daños serios e irreversibles al ambiente, al no valorarse debidamente la magnitud del problema en cuestión, lo cual precisamente, pretende evitarse mediante el principio de precaución ambiental.**

En efecto, la aplicación de un planteamiento basado en el principio de precaución debe empezar con una evaluación científica, **"lo más completa posible y, si fuera viable, identificando en cada fase el grado de incertidumbre científica"[51].** Por ende, para determinar si continúan siendo necesarias, para proteger el medio ambiente o la salud humana, animal o vegetal, las medidas adoptadas mediante la expedición de una norma oficial mexicana, **"debe realizarse una evaluación científica de los efectos potencialmente peligrosos basada en los datos disponibles"[52].**

Esto es, debe llevarse a cabo una evaluación de riesgos, lo cual

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[51] Comisión Europea. "*Comunicado de la Comisión sobre el principio de precaución".* Op. cit. Pág. 3.
[52] Ibídem. Pág.13.

precisa de **"datos científicos fiables y razonamiento lógico, para llegar a una conclusión que exprese la posibilidad del acontecimiento y la gravedad del impacto de un peligro sobre el medio ambiente o sobre la salud de una población dada, incluida la magnitud del posible daño, su persistencia, reversibilidad y efectos posteriores"[53].**

Cuestiones que lógicamente, **requieren y demandan el desahogo del procedimiento regular u ordinario para la modificación o cancelación de las normas oficiales mexicanas,** en el cual se permita la intervención y valoración de profesionales especializados en la materia; centros de investigación científica o tecnológica, así como de los colegios de profesionales, que formen parte de los Comités Consultivos Nacionales de Normalización de que se trate.

Asimismo, es indiscutible que en tales casos **debe permitirse la participación ciudadana** previo a la modificación o cancelación de tal norma; a fin de que los gobernados, académicos, organizaciones no gubernamentales y, el público en general, **tengan la oportunidad de poder expresar sus opiniones y que éstas sean tomadas en cuenta al momento de adoptar tal decisión, en tanto tal modificación regulatoria puede afectar su derecho humano a un medio ambiente sano.**

Máxime que, como se ha expuesto en la presente ejecutoria, la participación del público interesado **permite efectuar un análisis más completo del posible impacto ambiental que puede ocasionar la realización de un proyecto o actividad determinada y permite analizar si afectará o no derechos humanos.** Es decir, la conjunción de la participación ciudadana y la aplicación del principio de precaución,

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[53] Ibídem. Pág.14.

tiene el potencial de permitir y promover procesos de toma de decisiones más democráticos e inclusivos, en donde diferentes voces sean escuchadas y consideradas, por lo que a las plausibles afectaciones al medioambiente se refiere.

En suma, cuando el párrafo segundo del artículo 51 de la Ley Federal sobre Metrología y Normalización, señala que las dependencias competentes pueden modificar una norma oficial mexicana sin seguir el procedimiento para su elaboración, cuando no subsistan las causas que motivaron la expedición de tal normativa, **no se refiere a aquellos casos en que esa insubsistencia se encuentre sujeta a controversia, debate o, en general, exista incertidumbre científica acerca de ese hecho,** pues en tales circunstancias, tanto el principio de precaución, como el derecho humano de participación ciudadana en la toma de decisiones que puedan afectar el derecho humano a un medio ambiente sano, **demandan que se desahogue el procedimiento ordinario para la alteración o cancelación de tales regulaciones técnicas de observancia obligatoria.**

Esto es, la determinación de la insubsistencia de las causas que originaron la expedición de una norma oficial mexicana, en materia medioambiental, **no autoriza una valoración subjetiva** por parte de la dependencia encargada de la regulación o control del producto, servicio, método, proceso o instalación, actividad o materia respectiva, *en la cual, unilateralmente y conforme a su propio arbitrio o capricho, determine si han cesado o no las cuestiones por las cuales fue expedida tal regulación técnica.*

Por el contrario, esa determinación **debe ser de carácter objetivo** en el sentido de que únicamente puede derivarse del hecho de que la

referida insubsistencia causal, **comporte un eminente carácter notorio, manifiesto, evidente e incontrovertible,** de tal suerte que ante tal naturaleza fehaciente de tal insubsistencia, devenga ocioso desahogar el procedimiento regular para poder modificar o cancelar la norma oficial mexicana respectiva, *ante la presencia de evidencias irrefutables, que por ende, no requieren ser sometidas a mayores juicios o valoraciones en la materia.*

Es por ello que se insiste en que la determinación de la "insubsistencia" de las causas que motivaron la expedición de la norma oficial mexicana, **no queda al capricho o al simple arbitrio de la dependencia respectiva, sino que debe enmarcarse bajo el contexto de cuestiones evidentes, notorias e incontrovertibles.** Tales situaciones, además, por su propia naturaleza, no deben partir de un ejercicio de inferencia lógica-científica, *sino del simple hecho de que ha salido a la luz pública información tan contundente y terminal, que no admite ni requiere de la deliberación ciudadana y técnica.*

Atento a lo hasta aquí expuesto, esta Segunda Sala concluye que el segundo párrafo del artículo 51 de la Ley Federal sobre Metrología y Normalización, **así entendido, no resulta contrario al derecho humano a un medio ambiente sano;** de ahí que no asista razón a la parte quejosa.

2. Aplicación del precepto reclamado al caso concreto. Una vez precisado lo anterior, debe tenerse en cuenta que en su tercer concepto de violación, la parte quejosa aduce que el Acuerdo número **********, intitulado **"ACUERDO de la Comisión Reguladora de Energía que modifica la Norma Oficial Mexicana NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos",** resulta inconstitucional, pues *no existe una adecuación entre los motivos invocados por la Comisión Reguladora de Energía para su emisión y la hipótesis contenida en el segundo párrafo*

del artículo 51 de la Ley Federal sobre Metrología y Normalización.

A juicio de esta Segunda Sala resulta **fundado** el motivo de disenso acabado de sintetizar, por dos razones fundamentales: **(I)** la primera, porque las causas que dieron origen a la NOM en estudio **atendieron fundamentalmente a cuestiones de índole ambiental,** siendo que las razones aportadas por la Comisión responsable para modificar unilateralmente la norma -ante la "insubsistencia de las causas que le dieron origen"-, **son de diversa índole, a saber: económicas;** y **(II)** la segunda, porque **en forma alguna resulta notorio, evidente e incontrovertible, que el aumento de porcentaje de etanol en las gasolinas, no deparará riesgo alguno al medio ambiente y,** por ende, que sea dable actualizar la hipótesis excepcional prevista por el artículo 51 de la Ley Federal sobre Metrología y Normalización.

En efecto, respecto **a la primera de las razones referidas,** debe tenerse en cuenta que el treinta de octubre de dos mil quince, se publicó en el Diario Oficial de la Federación el Acuerdo ********** por el que la Comisión Reguladora de Energía expidió la Norma Oficial Mexicana de Emergencia **"NOM-EM-005-CRE-2015, Especificaciones de la calidad de los petrolíferos",** aduciéndose como razón de urgencia para su creación **la necesidad de evitar un vacío regulatorio en cuanto a las especificaciones de calidad de los petrolíferos,** según se aprecia de sus considerandos noveno y décimo, que dicen:

> **"Noveno.** Que el carácter de emergencia deriva de la necesidad de evitar que se genere un vacío regulatorio a partir de 2016 a las personas a quienes aplica la obligación que les imponen los artículos 78 y 79 de la Ley de Hidrocarburos, relativa a las especificaciones de calidad de los petrolíferos y sus métodos de prueba.
>
> **Décimo.** Que el objeto de la presente norma oficial mexicana de emergencia es establecer las especificaciones de calidad que deben

> cumplir los petrolíferos en cada etapa de la cadena de producción y suministro, con el objeto de promover el desarrollo eficiente de dichas actividades, proteger los intereses de los usuarios, propiciar una adecuada cobertura nacional, atendiendo la confiabilidad, estabilidad y seguridad en el suministro y prestación de los servicios inherentes**".**

Posteriormente, el veintinueve de abril de dos mil dieciséis, se publicó en el Diario Oficial de la Federación el acuerdo ********** por el que la Comisión Reguladora de Energía **expidió por segunda vez** consecutiva la Norma Oficial Mexicana de Emergencia **"NOM-EM-005-CRE-2015, Especificaciones de la calidad de los petrolíferos"**, en cuyo considerando sexto se indicó que continuaba la necesidad de evitar un vacío regulatorio en cuanto a las especificaciones de calidad de los petrolíferos, **a efecto de garantizar que no representen un riesgo a la salud de las personas y al medio ambiente, y que sean compatibles con las establecidas en aquellos países en los que México guarda relación comercial,** según se aprecia de la reproducción siguiente:

> **"Sexto.** Que, en tanto se cuenta con una norma oficial mexicana definitiva en la materia, esta comisión considera necesario expedir por segunda ocasión consecutiva la NOM-EM-005-CRE-2015, toda vez que subsisten las razones que motivaron su emisión y evitar un vacío regulatorio. Ello con el fin de garantizar que los petrolíferos que se comercialicen en México cuenten con especificaciones mínimas de calidad, **de tal forma que no representen un riesgo a la salud de las personas y al medio ambiente, y sean compatibles con las establecidas en aquellos países en los que México guarda relación comercia**l**".**

Y fue durante el periodo de vigencia de esta última norma oficial mexicana de emergencia que la Comisión Reguladora de Energía **dio inicio al procedimiento de creación de una norma oficial definitiva,** la cual fue publicada en el Diario Oficial de la Federación el veintinueve de agosto de dos mil dieciséis, al tenor del acuerdo ********** por el que **se expidió** la **"NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos",** con base en los considerandos siguientes:

> **"Cuarto.** Que, de acuerdo con **el artículo 40, fracciones I y XIII, de la LFMN, las normas oficiales mexicanas tendrán como finalidad, entre otras, establecer las características y/o especificaciones que deben reunir los equipos, materiales, dispositivos e** instalaciones industriales, comerciales, de servicios y domésticas para fines sanitarios, acuícolas, agrícolas, pecuarios, ecológicos, de comunicaciones, de seguridad o de calidad y particularmente cuando sean peligrosos.
>
> **Quinto.** Que todos los petrolíferos que se comercializan en México deben cumplir especificaciones de calidad, **de tal forma que no representen un riesgo a la salud de las personas, a sus bienes y al medio ambiente, y sean compatibles con las establecidas por aquellos países con los que México guarda relación comercial.**
>
> **Sexto.** Que, con el fin de promover el desarrollo eficiente de las actividades de producción, transporte, almacenamiento, distribución y expendio al público de petrolíferos y salvaguardar la prestación de dichos servicios, fomentar una sana competencia en el sector, proteger los intereses de los usuarios, propiciar una adecuada cobertura nacional y atender a la confiabilidad, estabilidad y seguridad en las actividades permisionadas, **es necesario contar con una regulación técnica de observancia obligatoria que establezca las especificaciones de calidad de dichos petrolíferos**, para lo cual la Comisión ha diseñado un marco normativo que cumple con dicho objeto".
>
> **Séptimo.** Que el objeto de la presente Norma Oficial Mexicana es establecer las especificaciones de calidad que deben cumplir los petrolíferos en cada etapa de la cadena de producción y suministro, incluyendo la importación, con el objeto de promover el desarrollo eficiente de las actividades a que hace referencia el Considerando anterior**".**

Como puede apreciarse, para crear la NOM-016-CRE-2016, la Comisión Reguladora de Energía refirió varios presupuestos, a saber:

I. Invocó como finalidades las previstas en el artículo 40 de la Ley Federal sobre Metrología y Normalización, específicamente las contenidas en sus fracciones I –que dice: "las características y/o especificaciones que deban reunir los productos y procesos cuando éstos puedan constituir un riesgo para la seguridad de las personas o dañar la salud humana, animal, vegetal, el medio ambiente general y laboral, o para la preservación de recursos naturales"–, y XIII –que dice "las características

y/o especificaciones que deben reunir los equipos, materiales, dispositivos e instalaciones industriales, comerciales, de servicios y domésticas para fines sanitarios, acuícolas, agrícolas, pecuarios, ecológicos, de comunicaciones, de seguridad o de calidad y particularmente cuando sean peligrosos"–.

II. Lo que revela que **el objetivo perseguido se vinculaba con la regulación de especificaciones petrolíferas a efecto de que no se constituyera un riesgo** para la salud humana, animal y vegetal, **así como para la preservación del medio ambiente y los recursos naturales.**

III. Precisó como razón de creación de la Norma Oficial Mexicana la necesidad de que los petrolíferos cumplan con especificaciones de calidad de forma tal que: **no representen un riesgo a la salud de las personas, a sus bienes y al medio ambiente,** y que sean compatibles con las establecidas por aquellos países con los que México guarda una relación comercial.

IV. También invocó como objetivo lograr el desarrollo eficiente de las actividades de producción, transporte, almacenamiento, distribución y expendio al público de petrolíferos y salvaguardar la prestación de dichos servicios, fomentar una sana competencia en el sector, proteger los intereses de los usuarios, propiciar una adecuada cobertura nacional y atender a la confiabilidad, estabilidad y seguridad en las actividades permisionadas.

Y, en esos términos, adquieren relevancia los puntos 4.2. y 5.1. en cuanto a las especificaciones que deben cumplir los petrolíferos, que dicen:

> **"4.2.** Las especificaciones que deben cumplir los petrolíferos considerados en la Norma son las indicadas en las Tablas 1 a 13 siguientes:

TABLA 1. ESPECIFICACIONES DE **PRESIÓN DE VAPOR** Y TEMPERATURAS DE DESTILACIÓN DE LAS GASOLINAS SEGÚN LA CLASE DE VOLATILIDAD

		Clase de volatilidad(1)			
Propiedad	**Unidad**	**AA(3)**	**A**	**B**	**C**
Presión de Vapor(2)	kPa (lb/pulg2)	54 (7.8)	62 (9.0)	69 (10.0)	79 (11.5)
Temperatura máxima de destilación: Al 10% evaporado Al 50% evaporado Al 90% evaporado Temperatura máxima de ebullición final	 ºC(4) ºC ºC ºC	 70 77 a 121 190 225	 70 77 a 121 190 225	 65 77 a 118 190 225	 60 77 a 116 185 225
Residuo de la destilación, valor máximo	% vol.	2	2	2	2

(…)".

Tabla 6. Especificaciones adicionales de gasolinas por región.
(…)
(4) **Se prohíbe el uso de etanol en la ZMVM, ZMG y ZMM. Se permite un contenido máximo de 5.8 % en volumen de etanol anhidro como oxigenante en gasolinas Regular y Premium,** en el resto del territorio nacional, en cuyo caso, por las características físico-químicas de este aditivo, debe ser mezclado durante la carga de los autotanques en las instalaciones de almacenistas y distribuidores en el punto más cercano previo al expendio al público".

Como se aprecia, a través de estas disposiciones se fijaron dos parámetros relevantes:

I. En la tabla relativa a las especificaciones **de vapor** y temperaturas de destilación de las gasolinas, **se fijaron como niveles de presión máxima 7.8, 9.0, 10.0 y 11.5 lb/pulg2** -siete punto ocho, nueve, diez y once punto cinco libras sobre pulgada cuadrada-.

II. En la tabla relativa a las especificaciones adicionales de gasolina por región, **se fijó como parámetro permitido de**

> **oxígeno adicionado hasta el 5.8% -cinco punto ocho por ciento- en volumen de etanol,** especialmente en las gasolinas Regular y Premium fuera de las zonas metropolitanas del Valle de México, Guadalajara y Monterrey.

Finalmente, el veintiséis de junio de dos mil diecisiete se publicó en el Diario Oficial de la Federación el **"Acuerdo ********** de la Comisión Reguladora de Energía que modifica la NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos"** –disposición general administrativa que constituye el acto reclamado–, con fundamento en el párrafo segundo del artículo 51 de la Ley Federal sobre Metrología y Normalización, esto es, a través de una actuación unilateral por parte de la indicada dependencia con apoyo en las consideraciones que se reproducen a continuación:

> **"Décimo. Que, al momento en que se expidió la norma, la determinación del precio de la gasolina y diésel bajo condiciones de libre mercado iniciaría a partir del 1 de enero de 2018, de acuerdo a lo dispuesto en la fracción I, inciso c) del décimo cuarto transitorio, de la Ley de Hidrocarburos vigente en ese momento.**
>
> **Décimo Primero.** Que, posterior a la entrada en vigor de la norma, la Ley de Ingresos de la Federación para el Ejercicio Fiscal de 2017 (LIF), reformó la fracción I del décimo cuarto transitorio de la Ley de Hidrocarburos vigente al momento de la expedición de la norma. Asimismo, en el décimo segundo transitorio de la LIF, se dispuso un régimen diferenciado para la entrada en vigor de la determinación de precios bajo condiciones de libre mercado en distintas zonas. Para dichos efectos, se dispuso que la Comisión Reguladora de Energía debía emitir el cronograma de flexibilización para que durante los años de 2017 y 2018 los precios al público se determinen bajo condiciones de mercado. Durante ese periodo, en las regiones del país donde los precios al público de las gasolinas y el diésel no se determinen bajo condiciones de mercado, la Secretaría de Hacienda y Crédito Público establecería los precios máximos al público de las gasolinas. De igual forma, el décimo segundo transitorio de la LIF dispuso que las modificaciones a los acuerdos o cronograma de flexibilización únicamente podrán llevarse a cabo para adelantar el momento a partir del cual los precios al público se determinarán bajo condiciones de mercado, por lo que no podrán postergarse.

> **Décimo Tercero.** Que, parte del objeto de determinar los precios de los combustibles bajo condiciones de libre mercado, obedece a la necesidad de incentivar la participación de agentes nacionales y extranjeros en la producción e importación de combustibles que permitan aumentar la oferta de dichos productos.
>
> **Décimo Cuarto. Que, las condiciones de competencia en los estados fronterizos de México con los Estados Unidos de América han cambiado y han puesto en desventaja a los expendedores de gasolinas en territorio nacional debido a que muchos consumidores optan por abastecerse en estaciones de servicio al otro lado de la frontera en virtud de que, al tener especificaciones de calidad diferentes incluyendo 10 % de etanol, su costo tiende a ser menor.** En ese sentido, las estaciones de servicio en territorio nacional no cuentan con la posibilidad de ofrecer gasolinas similares a las que se comercializan en los Estados Unidos de América ya que la Norma prohíbe que dichas gasolinas se comercialicen en México. Esta situación, además de ser una desventaja para los expendedores ya establecidos en México, representa una barrera de entrada para quienes pretenden importar a territorio nacional, las gasolinas utilizadas en los Estados Unidos de América.
>
> **Décimo Quinto.** Que, en virtud del adelanto del periodo de liberalización de precios de las gasolinas y el diésel, así como la situación que enfrentan los expendedores al público en estados fronterizos, esta comisión considera que **no subsisten las causas que motivaron la expedición de la norma oficial mexicana, por lo que se estima necesario realizar el procedimiento de modificación dispuesto el artículo 51 de la Ley Federal sobre Metrología y Normalización".**

De esta transcripción se desprende que las razones torales en las que la Comisión Reguladora de Energía **motivó el ejercicio de la atribución a que se refiere el artículo 51, párrafo segundo, de la Ley Federal sobre Metrología y Normalización** –cancelación unilateral de la norma oficial mexicana NOM-016-CRE-2016–, se refirió a que: **(I)** han **cambiado las condiciones de competencia entre los estados fronterizos mexicanos y Estados Unidos de América** porque los nacionales optan por abastecerse del otro lado de la frontera en donde el precio tiende a ser menor por la presencia del 10% (diez por ciento) de etanol; y **(II)** se adelantó la fecha de liberación de los precios de las

gasolinas y, por ende, **cambió la situación que enfrentan los expendedores e importadores de gasolina.**

De ahí que, en lo relevante para la litis de este asunto, **modificó** la observación cinco relativa a la tabla de especificaciones **de presión de vapor y temperaturas de destilación,** así como las observaciones cuatro y siete vinculadas con la tabla de **especificaciones adicionales de gasolina por región,** para quedar de la manera siguiente:

> **"4.2.** [...]
>
> **Tabla 1. Especificaciones de presión de vapor y temperaturas de destilación de las gasolinas según la clase de volatilidad.**
>
> **[…]**
>
> **OBSERVACIONES:** [...]
>
> (5) Para las gasolinas Regular y Premium cuyo contenido de etanol anhidro es de entre 9 y 10% en volumen, en las zonas Norte, Sureste, Centro y Pacífico **se permite una presión de vapor máxima de 1.0 lb/pulg2 superior a la especificada.** […]
>
> **Tabla 6. Especificaciones adicionales de gasolinas por región.**
>
> [...]
>
> **OBLIGACIONES ADICIONALES:** [...]
>
> **(4) Se prohíbe el uso de etanol en la ZMVM, ZMG y ZMM. Se permite un contenido máximo de 10 % en volumen de etanol anhidro como oxigenante en gasolinas Regular y Premium, en el resto del territorio nacional, para lo cual, podrán utilizarse aditivos inhibidores de corrosión. [...]**
>
> (7) En el caso de las gasolinas Premium con un contenido máximo de 10 % en volumen de etanol y que hayan sido diseñadas con base en el modelo de emisiones Complex de la US EPA, se permite únicamente informar el contenido de aromáticos y olefinas. […]**".**

Como puede apreciarse, en estos aspectos, la Norma Oficial Mexicana fue modificada en cuanto a lo siguiente:

I. En la tabla relativa a las especificaciones de vapor y temperaturas de destilación de las gasolinas (que fija como niveles de presión máxima 7.8, 9.0, 10.0 y 11.5 lb/pulg2 –siete

punto ocho, nueve, diez y once punto cinco libras sobre pulgada cuadrada–), **se incrementó la posibilidad de aumentar esa presión hasta en 1.0 lb/pulg2** (una libra sobre pulgada cuadrada extra).

II. En la tabla relativa a las especificaciones adicionales de gasolina por región, **se incrementó como parámetro permitido de oxígeno adicionado hasta el 10% (diez por ciento) en volumen de etanol,** especialmente en las gasolinas Regular y Premium fuera de las zonas metropolitanas del Valle de México, Guadalajara y Monterrey.

De lo hasta aquí expuesto, esta Segunda Sala sostiene que, conforme a la motivación que la propia NOM-016-CRE-2016 contiene en términos del artículo 41, fracción I, de la Ley Federal sobre Metrología y Normalización –cuyo alcance ha sido definido en el estudio de constitucionalidad de leyes efectuado en esta ejecutoria–, **la causa que le dio origen fue la necesidad de determinar las especificaciones de calidad de los petrolíferos, con la finalidad de que: (I) no representen un riesgo a la salud de las personas, a sus bienes y al medio ambiente, y; (II)** sean compatibles con las establecidas por aquellos países con los que México guarda una relación comercial.

Ello, con el objetivo último de lograr el desarrollo eficiente de las actividades de producción, transporte, almacenamiento, distribución y expendio al público de petrolíferos y salvaguardar la prestación de dichos servicios, fomentar una sana competencia en el sector, proteger los intereses de los usuarios, propiciar una adecuada cobertura nacional y atender a la confiabilidad, estabilidad y seguridad en las actividades permisionadas.

Mientras que la justificación de la expedición del acuerdo modificatorio sin agotar el procedimiento regular de modificación de la

norma oficial mexicana se refirió a que, a decir de la autoridad, **no subsisten las causas de su creación** porque**: (I)** han **cambiado las condiciones de competencia entre los estados fronterizos mexicanos y Estados Unidos de América** porque los nacionales optan por abastecerse del otro lado de la frontera en donde el precio tiende a ser menor por la presencia del 10% (diez por ciento) de etanol; y **(II)** se adelantó la fecha de liberación de los precios de las gasolinas y, por ende, **cambió la situación que enfrentan los expendedores e importadores de gasolina.**

De una confrontación de estos elementos, **se aprecia claramente que no existe una correlación que revele que han quedado insubsistentes las causas que motivaron la expedición de la NOM-016-CRE-2016,** toda vez que no se desprende que el acuerdo modificatorio encuentre justificación en la desaparición de la necesidad de determinar las especificaciones de calidad de los petrolíferos **y, menos aún, en que ya no sea imperativo evitar riesgos en la salud de las personas y en el medio ambiente, o fijar condiciones compatibles con aquellos países con los que México guarda una relación comercial.**

Al contrario, las circunstancias relatadas por la comisión responsable, **más que referirse a la desaparición de las razones que llevaron a la expedición de la NOM-016-CRE-2016, miran a revelar cambios en la situación económica y de competitividad que en su momento imperaba;** lo que, a decir de dicha autoridad, amerita la implementación de nuevas especificaciones.

Siendo que **adquiere especial relevancia la connotación ambiental de la NOM-016-CRE-2016,** que se aprecia de uno de los objetivos que persiguió, a saber, garantizar que las especificaciones de calidad de los petrolíferos no representen un riesgo para la salud de las

personas y para el medio ambiente, **sobre lo cual no resultan consistentes los razonamientos sostenidos por la comisión responsable para justificar la expedición del acuerdo modificatorio reclamado dado que, como se ha visto, la decisión se apoyó únicamente en razones de índole comercial o económico, pero nada dice sobre las cuestiones ambientales.**

Ciertamente, la fijación que la indicada norma oficial mexicana hacía respecto de las especificaciones de presión de vapor y temperaturas de destilación de las gasolinas (niveles máximos de 7.8, 9.0, 10.0 y 11.5 lb/pulg2 –siete punto ocho, nueve, diez y once punto cinco libras sobre pulgada cuadrada–), y de oxígeno adicionado hasta el 5.8% (cinco punto ocho por ciento) en volumen de etanol, especialmente en las gasolinas regular y premium fuera de las zonas metropolitanas del Valle de México, Guadalajara y Monterrey, **atendía esencialmente a razones de sustentabilidad pues, en su momento, se consideró que éstas eran las condiciones óptimas de calidad que evitaban riesgos en la salud de las personas y en el medio ambiente.**

Sin embargo, para hacer las modificaciones en estos puntos específicos en la medida en que se incrementó en 1.0 lb/pulg2 (una libra sobre pulgada cuadrada) la presión de vapor y hasta el 10% (diez por ciento) de contenido de etanol, la comisión responsable se limitó a indicar que **"las condiciones de competencia en los estados fronterizos de México con los Estados Unidos de América han cambiado y han puesto en desventaja a los expendedores de gasolinas en territorio nacional debido a que muchos consumidores optan por abastecerse en estaciones de servicio al otro lado de la frontera en virtud de que… las estaciones de servicio en territorio nacional no cuentan con la posibilidad de ofrecer gasolinas similares a las que se**

comercializan en los Estados Unidos de América ya que la norma prohíbe que dichas gasolinas se comercialicen en México"; situación que revela que **en nada se valoraron las condiciones y repercusiones ambientales que esos cambios implican, sino que se dieron razones propias de otra materia** que, desde luego, **no son aptas para poner de manifiesto que han desaparecido las razones que llevaron a la expedición de la NOM-016-CRE-2016.**

En segundo lugar, aunado a que es del todo inadmisible aportar razones de *índole económico* para justificar que han quedado insubsistentes las causas que dieron lugar a la expedición de la NOM-016-CRE-2016 -en tanto éstas son de índole ambiental-, **esta Segunda Sala considera que, en el presente caso, no se está en el supuesto de excepción a que se refiere el artículo 51 de la Ley Federal sobre Metrología y Normalización.**

Es así, pues como se razonó en anteriores apartados de la presente ejecutoria, la adecuada interpretación del citado artículo lleva a determinar que, en la materia medioambiental, para que pueda actualizarse la referida hipótesis normativa, **resulta indispensable que se esté frente a la existencia de hechos o circunstancias verdaderamente extraordinarias que permitan inteligir, en forma notoria, evidente e incontrovertible, que las causas que motivaron la emisión de la norma oficial mexicana respectiva han dejado de subsistir,** de tal suerte que, bajo tales circunstancias excepcionales**,** resulte justificado que no se desahogue el procedimiento regular para la alteración de las normas oficiales mexicanas, ya que *a ningún fin práctico conduciría consultar a la ciudadanía en tratándose de hechos irrefutables.*

En esa inteligencia, esta Segunda Sala advierte que **no se está ante el supuesto de existencia de hechos que permitan inteligir, en**

forma notoria, evidente e incontrovertible, que el empleo de etanol anhidro, como oxigenante de gasolinas, no depara riesgo alguno de daño al medio ambiente.

Por el contrario, esta Corte Constitucional se percata que la posibilidad de que se puedan incrementar los niveles máximos de porcentaje de etanol anhidro como oxigenante en gasolinas, así como el aumento de presión de vapor máxima para las gasolinas oxigenadas con dicho alcohol, **ha sido y continua siendo objeto de un importante debate y deliberación científica, por lo que hace a los riesgos que ello podría deparar en la calidad del aire, los ecosistemas, la salud humana y en general, el medio ambiente.**

En efecto, desde la génesis de emisión de la NOM modificada a través del acuerdo reclamado, se observa que el empleo de dicho alcohol, para tales funciones oxigenantes de hidrocarburos, **fue considerado por una multiplicidad de instituciones, colegios de profesionistas y expertos, como una cuestión que no sólo podría afectar la calidad del aire, sino que podría generar repercusiones altamente negativas en los ecosistemas y en la salud de la población mexicana.** En efecto, entre tales voces institucionales y ciudadanas se destacan las siguientes:

- **Centro Mexicano de Derecho Ambiental -CEMDA-.** Por **"su alto potencial en la formación de ozono, sugerimos se restrinja el uso de etanol en la mezcla de gasolinas"**[54]**.** En el estudio sobre permeabilidad de los combustibles en sistemas automotrices del "*Coordinating Research Council",* se demuestra que, **"en términos específicos de formación de ozono […] el cambio de MTBE [éter metil ter-butílico] a etanol al 6% resultaría en un incremento de 55% en la**

[54] Foja 176 del juicio de amparo indirecto **********.

formación de ozono por vehículo por día"[55].

- **Consejo Internacional de Transporte Limpio -The International Council On Clean Transportatiom-.** La producción de ozono en la Ciudad de México, así como en muchas otras ciudades en la zona árida del norte del país, está limitada por las emisiones de compuestos volátiles orgánicos -COVs-. Esto significa que **"cualquier incremento de COVs puede provocar un mayor incremento en la producción de ozono [troposférico]"[56].** Se ha demostrado **"que aún con el uso de niveles relativamente bajos de etanol en gasolinas, la evaporación de COVs en los vehículos se incrementa dramáticamente debido al aumento en la permeabilidad en el tanque y mangueras del sistema de alimentación del combustible"[57].**

- **Instituto Mexicano para la Competitividad -IMCO-.** Diversos estudios han demostrado que **"el etanol tiene impactos negativos en la calidad del aire: incrementa las emisiones de óxidos nitrosos en 14%, de hidrocarbonos (HC) en 10% y de otros precursores de ozono en 9%, en relación con los vehículos que utilizan MTBE"[58].** Además, **"sus efectos negativos [esto es, del etanol como oxigenante de gasolinas] son más pronunciados en los vehículos de mayor antigüedad (prevalecientes en México)"[59].**

- **Secretaría de Medio Ambiente y Recursos Naturales -SEMARNAT-.** El etanol en las gasolinas **"incrementa el potencial de generación de ozono troposférico y que, al rebasarse la concentración aceptable de dicho contaminante, pueden incrementar los impactos negativos en el ambiente y en la salud de la población"[60],** particularmente en las tres zonas metropolitanas (Valle de

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[55] Fojas 176 a 177 del juicio de amparo indirecto **********.
[56] Foja 184 del juicio de amparo indirecto **********.
[57] Ídem.
[58] Respuestas a los comentarios recibidos respecto del Proyecto de Norma Oficial Mexicana PROY-NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos. Publicadas en el Diario Oficial de la Federación el 12 de agosto de 2016.
[59] Ídem.
[60] Ídem.

México, Guadalajara y Monterrey), así como en la frontera norte de la República Mexicana.

- **Asociación Nacional de la Industria Química.** Solicitamos que la gasolina mezclada con etanol se restrinja en las zonas metropolitanas, **"manteniendo el límite actual de 5.8% en el resto del país, para evitar un aumento del ozono urbano y de los niveles de PM, y limitar los daños a los vehículos y la infraestructura de distribución de gasolina en el resto del país"**[61]**.**

La posible introducción del etanol como un componente de la gasolina en las zonas metropolitanas, en especial en la Ciudad de México, Guadalajara y Monterrey, **"empeoraría la crisis de calidad del aire"**[62]**.** El etanol **"es altamente corrosivo y es conocido por degradar las juntas del sistema de combustible y aumentar la permeabilidad de los tanques de plástico para gasolina"**[63]**.** Esto **"incrementaría en gran medida las emisiones fugitivas de hidrocarburos en contraste con la gasolina mezclada con MTBE**[64]**"**, actualmente en uso en las zonas metropolitanas.

- Por ejemplo, se ha demostrado **"que un 10% de etanol en las gasolinas aumenta la formación de ozono en hasta 640% en vehículos con tecnología Tier 1 y 400% en Tier 2 (emisiones por evaporación en vehículos en uso, EPA-CRC-E- 77-2b, 2010)"**[65]**.** Con un 5.8% de etanol, el máximo permitido por la NOM-016, **"se demostró que la penetración de los hidrocarburos aumentó en 60% en promedio para vehículos Tier 0 y Tier 1, comparado con gasolinas sin oxigenantes"**[66]. Por el contrario, la adición de 11% de MTBE -éter metil ter-butílico- a gasolinas sin oxigenar resultó en una disminución del 12% de las emisiones fugitivas.

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[61] Ídem.
[62] Ídem.
[63] Ídem.
[64] Ídem.
[65] Ídem.
[66] Ídem.

El aumento mínimo en la formación de ozono **"sería de más de 11,000 toneladas por año tan solo en el Valle de México. Esto correspondería a un aumento potencial del 55% en la concentración media de ozono y en la duplicación del número de IMECAs [Índice Metropolitano de la Calidad del Aire]"**[67]**.**

- **Asociación de Combustibles Eficientes de Latinoamérica.** Considerando que **"el impacto negativo del uso de etanol en las gasolinas sobre la formación de ozono ha sido ampliamente documentado"**[68] y que la actual crisis de calidad de aire en la zona metropolitana de la Ciudad de México se ha detonado, en gran parte, por altas concentraciones de ozono, se recomienda que **"la NOM-016 elimine al etanol de la categoría de oxigenantes permitidos en las zonas metropolitanas (zonas metropolitanas de la Ciudad de México, Monterrey y Guadalajara), así como de los estados bajo la jurisdicción de la Comisión Ambiental de la Megalópolis (CAME)"**[69]**.**

Como se advierte de las anteriores observaciones al proyecto de la NOM-016-CRE-2016, el empleo del etanol como oxigenante de gasolinas, **fue considerado por diversos entes, gubernamentales, como de la sociedad, como una actividad potencialmente riesgosa para el medio ambiente, en específico, para la calidad del aire, en tanto es susceptible de aumentar la cantidad de ozono troposférico.**

En esa tesitura, esta Corte Constitucional estima que, siguiendo la línea de la recta interpretación del precepto 51, párrafo segundo, de la Ley Federal sobre Metrología y Normalización, **en tratándose de la regulación técnica de emisiones antropogénicas que, científicamente han sido consideradas como dañinas o potencialmente perjudiciales para la calidad del aire, únicamente**

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[67] Ídem.
[68] Ídem.
[69] Ídem.

podría actualizarse el referido supuesto de excepción normativa cuando surja evidencia manifiesta, fehaciente e incontrovertible, en el sentido de que -contrariamente a lo que se establecía por los conocimientos científicos, estudios o pruebas con las que se contaban al momento de expedir la norma oficial mexicana respectiva-, **dicha actividad del ser humano no genera riesgo alguno de daño al medio ambiente.**

Esto es, la única manera en que sería dable modificar, *unilateral y sumariamente* la NOM-016-CRE-2016, como lo hizo en la especie la Comisión Reguladora de Energía, por lo que hace a los niveles máximos permitidos de etanol en las gasolinas, así como la presión máxima de vapor para ello -en tanto ello depara riesgos al medio ambiente-, **es que se estuviese frente a la existencia de nuevas evidencias científicas que permitiesen inteligir, en forma notoria, evidente e incontrovertible, que las causas que motivaron la emisión de la norma oficial mexicana respectiva han dejado de subsistir** -esto es, que surgiera un consenso científico que, en forma clara y unánime, determinara que el empleo de etanol, como oxigenante de gasolinas, no depara riesgo alguno al ambiente-.

Cuestión que en forma alguna acontece en la especie, pues no sólo esta Corte se percata de que **no existe un pronunciamiento terminal y unánime de la comunidad científica respecto al impacto que tiene el empleo de tal alcohol como oxigenante para hidrocarburos,** sino que, aunado a ello, se advierte que al Acuerdo reclamado, mediante el cual se modificó la NOM-016-CRE-2016, le recayeron diversos comentarios y observaciones que, **justamente, cuestionan esa modificación regulatoria, desde el punto de vista medioambiental,** los cuales se sintetizan enseguida:

- **Secretaría de Medio Ambiente y Recursos Naturales.** Expresa dudas por **"el posible impacto negativo que la oxigenación con el 10% en volumen de etanol provocaría en ciudades con problemas de ozono, derivado del incremento esperado en compuestos orgánicos volátiles por el aumento en la presión de vapor Reid"**.
- **Instituto Mexicano para la Competitividad.** El instituto se manifestó en contra del Acuerdo debido a que la CRE **"no presentó la evidencia suficiente que demuestre que la quema de gasolinas con un contenido del 10% en volumen de etanol es inocuo para la salud de los habitantes"**.
- **Centro Mexicano de Derecho Ambiental.** Estableció que existió una contradicción de procedimiento dado que para el proceso de normalización de la NOM-016-CRE-2016 se desarrolló una Manifestación de Impacto Regulatorio "MIR", **"pero para el Acuerdo Modificatorio de dicha Norma se otorgó una exención"**.

  Asimismo, indica que **"el Acuerdo es discriminatorio y violatorio de los derechos humanos en perjuicio de la población mexicana que habita en ciudades con problemas de calidad del aire por ozono",** debido a que se permite el uso de gasolina oxigenada con etanol al 10% en volumen.
- Finalmente, hace referencia a que el Acuerdo se generó pasando por alto el proceso de revisión convocado por la propia CRE, **"ya que aún no ha concluido el mismo ni se han obtenido conclusiones basadas en elementos técnico-científicos, lo cual impide solventar la decisión tomada respecto a usar gasolina oxigenada con etanol al 10% en volumen".**
- **Asociación Mexicana de la Industria Automotriz.** La Asociación expresó **"preocupación por el impacto que la gasolina con etanol al 10% en volumen podrá tener en el parque vehicular nacional, debido a que sus sistemas de control de emisiones evaporativas no fueron diseñados para atender la carga de compuestos orgánicos**

volátiles adicionales que se generarán con dicha gasolina".

Asimismo, por la imposibilidad de algunos automotores para ajustar la mezcla aire, lo cual podría incrementar la emisión de óxidos de nitrógeno y causar afectaciones en la operación del automóvil y, finalmente, **"sobre el efecto corrosivo del etanol que podría generar daños prematuros a algunos sistemas de los vehículos, ocasionando fugas y una mayor emisión de contaminantes".**

- **Petróleos Mexicanos**. Manifestó **"la existencia de una violación del procedimiento de normalización por no presentar manifestación de impacto regulatorio";** además de advertir sobre la necesidad de incorporar infraestructura específica para el transporte, almacenamiento y despacho de la gasolina con etanol al 10% en volumen, **"concluyendo que la misma tiene implicaciones ambientales y económicas".**

- **Instituto Nacional de Ecología y Cambio Climático.** El Instituto manifestó su preocupación **"por el posible incremento en la concentración de ozono en las ciudades en las que actualmente ya se tienen problemas de calidad del aire por dicho contaminante",** lo cual ocurriría por el incremento en la Presión de Vapor Reid que se autoriza a la gasolina oxigenada con 10% en volumen de etanol.

Aunado a lo anterior, esta Corte Constitucional invoca, como *hecho notorio*[70], el estudio recientemente elaborado por el **Instituto Nacional de Ecología y Cambio Climático** -organismo público

[70] Lo anterior, conforme a la tesis P./J. 74/2006 que es del tenor literal siguiente:
"HECHOS NOTORIOS. CONCEPTOS GENERAL Y JURÍDICO. Conforme al artículo 88 del Código Federal de Procedimientos Civiles los tribunales pueden invocar hechos notorios aunque no hayan sido alegados ni probados por las partes. Por hechos notorios deben entenderse, en general, aquellos que por el conocimiento humano se consideran ciertos e indiscutibles, ya sea que pertenezcan a la historia, a la ciencia, a la naturaleza, a las vicisitudes de la vida pública actual o a circunstancias comúnmente conocidas en un determinado lugar, de modo que toda persona de ese medio esté en condiciones de saberlo; y desde el punto de vista jurídico, hecho notorio es cualquier acontecimiento de dominio público conocido por todos o casi todos los miembros de un círculo social en el momento en que va a pronunciarse la decisión judicial, respecto del cual no hay duda ni discusión; de manera que al ser notorio la ley exime de su prueba, por ser del conocimiento público en el medio social donde ocurrió o donde se tramita el procedimiento".

descentralizado de la Administración Pública Federal, con personalidad jurídica, patrimonio propio y autonomía de gestión, sectorizado en la Secretaría de Medio Ambiente y Recursos Naturales[71]-, intitulado **"Evaluación de las modificaciones a la NOM-016-CRE-2016",** emitido en el 2017, del cual se destacan las siguientes consideraciones:

- A pesar de que los grupos de trabajo para la revisión de la NOM-016-CRE-2016 aún se mantienen sesionando, *a mediados del año 2017 se publicó una modificación a la misma*, la cual presenta como principal cambio, la posibilidad del uso de etanol como oxigenante en un volumen máximo del 10% para las gasolinas que se comercializan en la Región denominada Resto del País. Esta modificación **"generó controversia debido a la información contradictoria existente sobre el impacto en el medio ambiente que el uso de etanol puede provocar, principalmente en un probable incremento de ozono".**

  La modificación a la NOM-016-CRE-2016 excluyó del uso de gasolinas oxigenadas con etanol a las Zonas Metropolitanas del Valle de México, Guadalajara y Monterrey, **"pero permite el uso de estas gasolinas en ciudades que recientemente han presentado altos niveles de ozono".** Ello, pese a que el Instituto Nacional de Ecología y Cambio Climático, **"entregó [en abril y junio de 2017] a la CRE los Informes Nacionales de Calidad del Aire 2013, 2014 y 2015 en donde se muestran las ciudades que han registrado concentraciones de ozono en el aire que *exceden los valores límites establecidos en la normatividad nacional aplicable*".**

- Para el caso de los combustibles oxigenados con etanol al 10% en volumen, se utilizó el valor anual promedio **"de las gasolinas**

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[71] Ley General de Cambio Climático.
"Artículo 13. Se crea el Instituto Nacional de Ecología y Cambio Climático como un organismo público descentralizado de la administración pública federal, con personalidad jurídica, patrimonio propio y autonomía de gestión, sectorizado en la Secretaría de Medio Ambiente y Recursos Naturales, de conformidad con las disposiciones de la Ley Federal de las Entidades Paraestatales".

americanas" del tipo convencional de verano e invierno del año 2015 **"obtenido de la página de internet de la Oficina de Transporte y Calidad del Aire de la EPA [Enviromental Protection Agency]".**

Empero, las gasolinas convencionales con etanol **"incrementarían las emisiones de compuestos orgánicos volátiles"** comparativamente con las gasolinas actuales, **"condición que podría incrementar la formación de ozono"**, debido a los siguientes elementos:

- La nueva NOM establece condiciones regulatorias **"menos restrictivas a las que aplican a las gasolinas convencionales americanas",** por lo cual se podrían importar gasolinas con menor calidad.
- El parque vehicular nacional **"es distinto al parque vehicular de los EUA por lo que es de esperarse una distinta tasa de emisión para el parque vehicular nacional".**
- La mezcla de gasolinas oxigenadas con etanol y MTBE, o gasolina oxigenada con etanol y gasolina sin oxigenar, **"propicia incrementos en la PVR [Presión de Vapor Reid], lo cual provocaría mayores emisiones evaporativas".**
- Existen condiciones de temperatura y altitud **"distintas entre las ciudades mexicanas y las americanas, lo cual propicia tasas de evaporación distintas de COV´s [Compuestos orgánicos volátiles]".**

- Asimismo, en ciudades mexicanas en donde conviven gasolinas distintas en su composición, **"es común que en algún momento se mezclen las mismas en el tanque de combustible de los automotores"**. El combustible resultante de la mezcla de gasolinas -sin oxigenar con otra oxigenada con etanol, o ambas oxigenadas pero una con MTBE y otra con etanol-, **"propician una gasolina cuya composición presenta un valor de PVR mayor al promedio ponderado de las PVR y los volúmenes de cada gasolina original".**

Habida cuenta que la Agencia de Protección al Ambiente de California encontró en pruebas de emisión de 14 vehículos del año modelo 1990 a 1995, que una gasolina con 10% en volumen de etanol**, "incrementa el potencial formador de ozono en un 9% cuando se compara con gasolina que contiene 11% MTBE [Metil Ter Butil Éter] en volumen".**

- Por otra parte, un estudio desarrollado para tal Agencia sobre emisiones evaporativas por permeación, muestran que **"el uso de gasolina oxigenada por etanol en sustitución de gasolina oxigenada con MTBE (ambas gasolinas con 2% de peso en oxígeno), incrementa las emisiones evaporativas en un 65%"**, y que la reactividad específica de las emisiones de ambos combustibles no es estadísticamente distinta en promedio.

  Las gasolinas oxigenadas con etanol **"incrementan, comparativamente con gasolinas sin oxigenar u oxigenadas con MTBE, la presión de vapor y con ello las emisiones evaporativas generadas por los automotores".**

- La existencia de un mercado de gasolinas que contengan gasolinas oxigenadas con etanol, con MTBE o sin oxigenar, **"propicia un incremento en la PVR al combinarse las gasolinas en los tanques de combustible de los automóviles, situación que propiciaría mayor tasa de emisiones de compuestos orgánicos volátiles por evaporación".**

  La temperatura ambiente y la altitud tienen un impacto en la vaporización de las gasolinas, lo cual impacta en la tasa de emisión de compuestos orgánicos volátiles. **"México presenta condiciones de temperatura muy distintas a los EUA, siendo mayores en nuestro país, por lo que se esperaría una mayor emisión de compuestos orgánicos volátiles".**

- México presenta **"más de dos decenas de ciudades con problemas de calidad del aire por ozono"** y la NOM-016-CRE-2016 sólo limita el

uso de etanol como combustible *en tres de esas ciudades.*

Como se puede advertir de las anteriores consideraciones, **existen diversas opiniones y estudios que, precisamente, ponen en duda el hecho de que pueda seguirse incrementando el porcentaje de etanol como oxigenante de las gasolinas nacionales**, **ante los potenciales daños al medio ambiente que ello ocasionaría.**

Sobre todo atendiendo **a los altos niveles de ozono que ya presentan más de dos decenas de ciudades mexicanas que se encuentran fuera de las "zonas metropolitanas";** al incremento esperado en compuestos orgánicos volátiles que deriva del incremento de porcentaje de etanol en combustibles, lo cual depararía mayores emisiones evaporativas y por ende **aumentaría el potencial formador de ozono troposférico;** a la naturaleza y características del parque vehicular mexicano, en tanto **los efectos del etanol como oxigenante de gasolinas son más pronunciados en los vehículos de mayor antigüedad** -prevalecientes en México-; así como el efecto corrosivo del etanol que **podría generar daños prematuros a algunos sistemas de los vehículos, ocasionando fugas y una mayor emisión de contaminantes a la atmósfera.**

Pero, al mismo tiempo, existen estudios que expresan lo contrario, es decir, que pugnan porque la producción del etanol se basa en sustentabilidad por provenir de materias primas renovables, a saber:

- Los publicados en la página electrónica www.etanol.mx que, en lo toral, sostienen que **"La industria del etanol en México tiene la capacidad de emplear a más de 50 mil personas, desde la producción de las materias prima hasta su expendio en estaciones de servicio",** y que **"El etanol es usado en más de 35 países para cumplir con los**

compromisos mundiales de lucha contra el cambio climático"; estudios denominados: Protocolo de Evaluación para aumentar de 10% a 20% el contenido de etanol en las gasolinas en Colombia, Guía de bolsillo del etanol documento elaborado por parte de la Renewable Fuels Association de Estados Unidos (Asociación de Combustibles Renovables*),* Compendio de hechos sobre el etanol desarrollado por Growth Energy*,* MTBE: Examinando los requerimentos de oxigenación y costos de remediación: Estudio en ciencia y tecnología de implementación de políticas públicas, La Historia del MTBE: como nuestros abogados pelearon y ganaron la primera demanda en contra del MTB, Estudio de la Asociación de Combustibles Renovables sobre el uso de mezclas de etanol en automóviles clásicos*,* Estudio sobre el mito de uso indirecto de terreno para producción de materias primas para el etanol, Comentarios públicos a la NOM 016 por parte de Chevron*,* Comentarios públicos a la NOM 016 por parte de Valero*,* Comentarios públicos a la NOM 016 por parte de Asociación Mexicana de la Industria Automotriz.

- El publicado en la página electrónica https://web.extension.illinois.edu/ethanol/, que, en lo toral, refiere que el uso del etanol implica una ganancia porque produce un 67% más de energía que la que requiere el crecimiento y procesamiento del maíz para obtenerlo.

Finalmente, del análisis que se realiza del Acuerdo reclamado, se advierte que la determinación de modificar la Norma Oficial Mexicana **"NOM-016-CRE-2016, Especificaciones de calidad de los petrolíferos",** por lo que a las cuestiones ambientales se refiere, *atendió a tres consideraciones sustanciales,* a saber:

I. El oficio ********** emitido por el Instituto Mexicano del Petróleo, en el cual tal organismo **"considera técnicamente viable la introducción de gasolinas hasta con 10 % de etanol (mezcla E10) en las**

regiones consideradas 'resto del país' y no en las zonas metropolitanas críticas";

II. El oficio No. **************, a través del cual la Secretaría de Medio Ambiente y Recursos Naturales, **"manifestó no tener inconveniente en que la Comisión [Reguladora de Energía] inicie los trabajos que considere necesarios a efecto de incrementar el porcentaje de etanol en la gasolina que se distribuye en el país",** -con excepción de las Zonas Metropolitanas de Monterrey, Guadalajara, Valle de México, y en las que se presenten altos niveles de ozono-; y

III. El oficio ************** por medio del cual la Secretaría de Energía, a través de la Subsecretaría de Hidrocarburos, **"solicitó a la Comisión valorar la pertinencia de homologar las especificaciones de calidad para las regiones consideradas como 'resto del país' para contener 10% de etanol",** lo que podría llevarse a cabo mediante la modificación de la Norma.

Esto es, una decisión tan delicada y compleja, desde el punto de vista de la regulación ambiental, como lo es la decisión de alterar los porcentajes máximos de niveles de etanoles en las gasolinas, *partió de una simple apreciación* que formuló el Instituto Mexicano del Petróleo, en el sentido de que **"era técnicamente viable la introducción de gasolinas hasta con 10% de etanol",** *así como de dos "recomendaciones" o "avenencias"* de la Secretaría de Energía y la diversa de Medio Ambiente y Recursos Naturales, en el sentido de que la Comisión Reguladora de Energía, realizará los trabajos necesarios para incrementar el porcentaje de etanol en la gasolina que se distribuye en el país.

Cuestiones que, desde luego, **resultan totalmente inocuas e inadmisibles para que la referida autoridad regulatoria haya procedido a modificar en forma unilateral y expedita, la**

NOM-016-CRE-2016, pretextando la “insubsistencia” de las causas por las cuales dicha regulación técnica fue expedida.

Es así, pues atendiendo a lo ya relatado, esta Corte Constitucional estima que en el presente caso **se está frente a un ejemplo prototípico que exige que se observe y desahogue el procedimiento ordinario para la modificación de las normas oficiales mexicanas.** Ello, pues al encontrarse en duda la magnitud de daños a la calidad del aire que podría producir el empleo del etanol como oxigenante en hidrocarburos, **cobra plena aplicación el principio de precaución ambiental,** el cual *mandata una evaluación pormenorizada respecto a los potenciales riesgos o incertidumbres sobre ese estado de cosas, a fin de dilucidar si es dable o no, modificar o cancelar tal regulación normativa y en qué medida.*

Esto es, **el principio de precaución,** aplicado al supuesto de modificaciones o cancelaciones a las normas oficiales mexicanas, exige que la determinación sobre la subsistencia del daño o riesgo de daño al ambiente, que llevaron a expedir la norma oficial mexicana respectiva, **deba ser estudiada y atendida en forma plurilateral mediante los integrantes de los Comités Consultivos Nacionales de Normalización de que se trate, y mediante la participación ciudadana, esto es, demanda que se lleve a cabo el procedimiento ordinario para la alteración o cancelación de tal norma.**

De ahí que en la especie **no podía realizarse modificación alguna a la NOM-016-CRE-2016, en forma unilateral y sumaria,** como indebidamente lo hizo la Comisión Reguladora de Energía, ya que ello acarrea el riesgo de permitir daños serios e irreversibles al ambiente y a la salud de la población, **al no valorarse debidamente la magnitud del problema en cuestión, lo cual precisamente, pretende evitarse mediante el principio de precaución.**

Asimismo, es inconcuso que en el presente caso **debía permitirse la participación ciudadana, en forma previa a la modificación de tal norma oficial mexicana,** a fin de que los gobernados, académicos, organizaciones no gubernamentales y, el público en general, *tuviesen la oportunidad de poder expresar sus opiniones y que éstas sean tomadas en cuenta al momento de adoptar tal decisión que, precisamente, puede afectar su derecho humano a un medio ambiente sano.*

En efecto, es la convicción de esta Corte Constitucional que, conforme a los principios de precaución y de participación ciudadana, *no puede ser una sola voz, ni una sola valoración, la que determine la posibilidad de que, en el Estado mexicano, se modifiquen los porcentajes máximos de empleo de etanol como oxigenante de las gasolinas.*

Por el contrario, ante la necesidad de proteger tanto a la población, como a diversas especies animales y vegetales que se encuentran en nuestro territorio, *es indispensable permitir la deliberación plural entre los diversos integrantes del Comité Consultivo Nacional de Normalización de Hidrocarburos, Petrolíferos y Petroquímicos, y desde luego, dar lugar a la participación ciudadana.*

De ahí que la modificación de la NOM en cuestión, se reitera, sólo podía darse mediante el procedimiento ordinario establecido para ello, el cual demanda *la existencia de un pluralismo valorativo de carácter técnico-científico e inclusive social, para la determinación de cómo debe regularse la actividad determinada, en la especie, el uso de etanol como oxigenante para las gasolinas nacionales.*

Máxime que esta Segunda Sala advierte que **el ozono**

troposférico -O3-, cuya emisión, precisamente, puede ser potencializada por el empleo de etanol como oxigenante de los combustibles, **es uno de los gases responsables del efecto invernadero[72],** el cual a su vez, **contribuye al fenómeno denominado como calentamiento global.**

En efecto, acorde al Grupo Intergubernamental de Expertos sobre el Cambio Climático, de la Organización de las Naciones Unidas, el ozono troposférico **"es el tercer gas de invernadero más importante después del dióxido de carbono -CO2- y el metano -CH4-"[73].** Al respecto, debe tenerse en cuenta que en abril de dos mil dieciséis, el Estado mexicano **aprobó el llamado Acuerdo de París,** mismo que **fue ratificado** el veintiuno de septiembre del mismo año[74].

En dicho Acuerdo, las partes reconocieron que **"el cambio climático es un problema de toda la humanidad y que, al adoptar medidas para hacerle frente, las Partes deberían respetar, promover y tener en cuenta sus respectivas obligaciones relativas a los derechos humanos".** Así, entre otras consideraciones, los Estados parte se propusieron lograr que **"las emisiones mundiales de gases de efecto invernadero alcancen su punto máximo lo antes posible […] *y a partir de ese momento reducir rápidamente las emisiones de gases de efecto invernadero*, de conformidad con la mejor información científica disponible, para alcanzar un equilibrio entre las emisiones antropógenas por las fuentes y la absorción antropógena por los sumideros en la segunda mitad del siglo"[75].**

De ahí que cada Estado deberá preparar, comunicar y mantener

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[72] Instituto Nacional de Ecología y Cambio Climático. "Gases y compuestos de efecto invernadero". Publicado el 18 de mayo de 2018. Consultable en https://www.gob.mx/inecc/acciones-y-programas/gases-y-compuestos-de-efecto-invernadero.

[73] Reporte intitulado: "TAR Climate Change 2001: The Scientific Basis". Capítulo 4: "Atmospheric Chemistry and Greenhouse Gases". Consultable en: https://www.ipcc.ch/site/assets/uploads/2018/03/TAR-04.pdf.

[74] Tal y como se precisa en el Decreto Promulgatorio de tal Acuerdo Internacional, publicado en el Diario Oficial de la Federación el 4 de noviembre de 2016.

[75] Artículo 4.1. del referido Acuerdo.

> las sucesivas contribuciones determinadas a nivel nacional que tenga previsto efectuar. La contribución determinada a nivel nacional sucesiva de cada Estado parte representará una progresión con respecto a la contribución determinada a nivel nacional que esté vigente para esa Parte **"y reflejará la mayor ambición posible de dicha Parte, teniendo en cuenta sus responsabilidades comunes pero diferenciadas y sus capacidades respectivas, a la luz de las diferentes circunstancias nacionales"[76].**

Asimismo, conforme al precepto 4.13 del referido Acuerdo Internacional para combatir el cambio climático, las partes **"deberán rendir cuentas de sus contribuciones determinadas a nivel nacional".** Habida cuenta que, al rendir cuentas de las emisiones y la absorción antropógenas correspondientes a sus contribuciones determinadas a nivel nacional, **"las Partes deberán promover la integridad ambiental, la transparencia, la exactitud, la exhaustividad, la comparabilidad y la coherencia".**

En ese sentido, la regulación del porcentaje de etanol como oxigenante en las gasolinas, así como los niveles máximos de presión de vapor en los hidrocarburos que contengan tal compuesto orgánico volátil, **debe analizarse y ser motivo de deliberación estatal, con la mayor información científica posible, bajo el contexto más amplio de los compromisos internacionales adquiridos por el Estado mexicano para combatir el calentamiento global.**

Al respecto, debe tenerse en cuenta que el Consejo de Derechos Humanos de la Organización de las Naciones Unidas, ha establecido que **"las obligaciones y los compromisos en materia de derechos humanos pueden guiar y reforzar la formulación de políticas internacionales y nacionales**

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[76] Artículo 4.3. del referido Acuerdo.

en la esfera del cambio climático y fomentar su coherencia y legitimidad y la durabilidad de sus resultados"[77]**.** Es así, pues el cambio climático es susceptible de poner **"en peligro el disfrute de una gran variedad de derechos humanos, en particular los derechos a la vida, a la salud, a la alimentación, al agua, a una vivienda adecuada y a la libre determinación"**[78]**.**

En un sentido importante, el Acuerdo de París significa que la comunidad internacional **"reconoce que el cambio climático plantea amenazas inaceptables al pleno disfrute de los derechos humanos y que las medidas para hacerle frente deben cumplir con las obligaciones en materia de derechos humanos"** [79]**.** En ese empeño, las normas relativas a los derechos humanos *seguirán revistiendo una importancia fundamental.*

A diferencia de la mayoría de los daños ambientales que han examinado órganos de derechos humanos, **"el cambio climático es un problema verdaderamente mundial"**[80]**.** Las emisiones de gases de efecto invernadero **"en cualquier parte del planeta contribuyen al calentamiento de la tierra en todo el mundo"**[81]**.**

De ahí que el Estado tiene la obligación de adoptar y aplicar medidas tendientes para proteger contra los daños ambientales que interfieran o puedan interferir en el disfrute de los derechos humanos. Esto implica, entre otras consideraciones, que el Estado **"tiene la obligación de proteger a quienes se encuentran en su territorio de los efectos perjudiciales del cambio climático"**[82]**.**

En ese sentido, debe tenerse en cuenta que no sólo el Acuerdo

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[77] ONU. 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. 1 de febrero de 2016. A/HRC/31/52. Párr. 10.
[78] Ibídem. Párr. 10.
[79] Ibídem. Párr. 22.
[80] Ibídem. Párr. 37.
[81] Ídem.
[82] Ibídem. Párr. 68.

de París entró en vigor el cuatro de noviembre de dos mil dieciséis -y consecuentemente , las obligaciones contraídas por cada uno de los Estados parte-, sino que el Estado mexicano, desde el seis de junio de dos mil doce, **emitió la Ley General de Cambio Climático**, la cual **"[e]s reglamentaria de las disposiciones de la Constitución Política de los Estados Unidos Mexicanos en materia de protección al ambiente, desarrollo sustentable, preservación y restauración del equilibrio ecológico".**

Dicha ley reglamentaria de la Constitución Federal tiene como objeto, entre otros, **"regular las acciones para la mitigación y adaptación al cambio climático […] Reducir la vulnerabilidad de la población y los ecosistemas del país frente a los efectos adversos del cambio climático, así como crear y fortalecer las capacidades nacionales de respuesta al fenómeno";** y, conforme a las reformas de trece de julio de dos mil dieciocho, establecer **"las bases para que México contribuya al cumplimiento del Acuerdo de París"**[83]**.**

Así, en el artículo 26 de dicha Ley General de Cambio Climático, se establecen como principios de la política nacional de cambio climático, entre otros, los de:

- Corresponsabilidad entre el Estado y la sociedad en general, **"en la realización de acciones para la mitigación y adaptación a los efectos adversos del cambio climático"**;

- Precaución, esto es, cuando haya amenaza de daño grave o

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[83] "Artículo 2o. Esta Ley tiene por objeto:
[…]
III. Regular las acciones para la mitigación y adaptación al cambio climático;
IV. Reducir la vulnerabilidad de la población y los ecosistemas del país frente a los efectos adversos del cambio climático, así como crear y fortalecer las capacidades nacionales de respuesta al fenómeno;
[…]
VIII. Establecer las bases para que México contribuya al cumplimiento del Acuerdo de París, que tiene entre sus objetivos mantener el aumento de la temperatura media mundial por debajo de 2 °C, con respecto a los niveles preindustriales, y proseguir con los esfuerzos para limitar ese aumento de la temperatura a 1.5 °C, con respecto a los niveles preindustriales, reconociendo que ello reduciría considerablemente los riesgos y los efectos del cambio climático".

irreversible, **"la falta de total certidumbre científica no deberá utilizarse como razón para posponer las medidas de mitigación y adaptación para hacer frente a los efectos adversos del cambio climático";**

- Participación ciudadana, en la formulación, ejecución, monitoreo y evaluación de la Estrategia Nacional, planes y programas de mitigación y adaptación a los efectos del cambio climático.

Resultando relevante señalar que, en el artículo Segundo Transitorio de tal ley, se establece que **"el país se compromete a reducir de manera no condicionada *un veintidós por ciento sus emisiones de gases de efecto invernadero* y un cincuenta y uno por ciento sus emisiones de carbono negro al año 2030".** Este compromiso, asumido como Contribución determinada a nivel nacional, **"implica alcanzar un máximo de las emisiones nacionales al año 2026; y desacoplar las emisiones de gases de efecto invernadero del crecimiento económico, la intensidad de emisiones por unidad de producto interno bruto se reducirá en alrededor de cuarenta por ciento entre 2013 y 2030".**

Atento a lo anterior, a juicio de esta Corte Constitucional, resulta inconcuso que la valoración del plausible incremento de porcentaje máximo de etanol como oxigenante de las gasolinas, así como el aumento de presión de vapor máxima para los hidrocarburos que empleen tal alcohol para su oxigenación, **no sólo debía enmarcarse bajo los principios de precaución y participación ciudadana, sino que además debía valorarse en el contexto de las metas estatales tendientes a lograr la reducción de emisiones de gases invernadero y, consecuentemente, de los débitos estatales de combatir y mitigar el cambio climático.**

En suma, resulta inconcuso que **la modificación a la NOM-016-CRE-2016 contenida en el Acuerdo reclamado en el presente juicio de amparo resulta inconstitucional,** ya que no era permisible, bajo

ninguna forma, que la Comisión Reguladora de Energía alterara unilateralmente tal norma oficial mexicana, pretextando el segundo párrafo del precepto 51 de la Ley Federal sobre Metrología y Normalización, **pues en esta materia era indispensable que se desahogara el procedimiento ordinario de modificación de tales normas, a efecto de atender a los principios de precaución y participación ciudadana y, con base en ello, adoptar la decisión más apegada al derecho humano a un medio ambiente sano.**

Finalmente, esta Segunda Sala no desconoce que existieron fuertes motivaciones *de competencia económica* por las cuales la Comisión Reguladora de Energía decidió modificar unilateralmente la NOM-016-CRE-2016. Empero, tales cuestiones son del todo irrelevantes al momento de adoptar una decisión estatal en materia ambiental tan sensible como lo es el uso de combustibles, pues **el interés económico no puede desatender ni prescindir de las afectaciones ambientales que pueda deparar la referida actividad.**

Es decir, los intereses o valores puramente económicos que, en su caso, pueda generar el incremento del porcentaje de etanol en las gasolinas, como oxigenante, **debían ser ponderados y confrontados contra los potenciales riesgos que ello podría deparar al medio ambiente y las obligaciones estatales de reducir las emisiones de gases invernadero.**

El hecho de que **el crecimiento y desarrollo económico en el Estado mexicano deba ser sustentable,** no deriva de un paradigma o visión propia de los Ministros integrantes de esta Segunda Sala, ni siquiera de un diálogo jurisprudencial con otras cortes constitucionales, o la dogmática constitucional. Por el contrario, el establecimiento de un desarrollo de tal índole, y el adecuado equilibrio entre el crecimiento

económico y la protección al ambiente, **constituye un principio rector establecido por el propio Constituyente Permanente, a virtud de la incorporación del derecho humano a un medio ambiente sano en el artículo 4 de la Constitución Federal, así como la aprobación y ratificación de diversos instrumentos internacionales en la materia.**

En tal virtud, como fue establecido por esta Segunda Sala al resolver el amparo en revisión **378/2014,** ante la voluntad del pueblo reflejada en el texto de la Constitución General de la República, mediante la incorporación de derechos humanos que se dirijan a edificar mayores estadios de justicia social -como lo es el derecho humano a un medio ambiente sano-, no sólo es jurídicamente permisible que los órganos jurisdiccionales –que realizan un control de la constitucionalidad– vigilen que el actuar de los poderes públicos **"se ajuste a los principios y valores que la Constitución Federal establece**, **sino que es obligatorio que lleven a cabo tal función en aras de asegurar que dichos derechos públicos subjetivos *tengan una incidencia real en el Estado Mexicano*; he ahí la función contemporánea del Poder Judicial".**

Atento a lo hasta aquí expuesto, lo procedente es declarar **fundado** el concepto de violación en análisis y, consecuentemente, **otorgar el amparo y protección federal al quejoso,** conforme a los efectos que serán precisados en el siguiente considerando.

SEXTO. Decisión. En términos de las consideraciones expuestas en el presente fallo, lo procedente es **negar el amparo** a la parte quejosa contra el artículo 51, párrafo segundo, de la Ley Federal sobre Metrología y Normalización; y **conceder la protección constitucional** respecto del Acuerdo ********** **que modifica la Norma Oficial Mexicana NOM-016-CRE-2016, especificaciones de calidad de los**

petrolíferos, publicado en el Diario Oficial de la Federación el veintiséis de junio de dos mil diecisiete.

Al respecto, adquiere relevancia tener en cuenta que la parte quejosa acudió al juicio de amparo **en defensa de un interés legítimo y de carácter abstracto que, por ende, atañe a una colectividad;** de ahí que, bajo la apreciación del principio de relatividad conforme a la interpretación más favorable a la persona y en relación con el derecho humano de acceso a la justicia y el principio de supremacía constitucional, **los efectos de la presente ejecutoria de amparo deben concretarse más allá de la esfera jurídica del propio quejoso,** como una consecuencia necesaria de la declaración de inconstitucionalidad del acuerdo modificatorio reclamado.

Ciertamente, en el caso, se concluyó la existencia de violaciones a bienes jurídicos supra individuales, es decir, **que pertenecen a un grupo y que, por ende, son indivisibles, a saber: el medio ambiente;** de ahí que los efectos de la protección constitucional no pueden referirse únicamente a la parte quejosa, pues ello sería insuficiente para lograr una efectiva restitución de los derechos violados en términos del artículo 77, fracción I, en relación con el 78 de la Ley de Amparo. Sirve de apoyo la tesis LXXXIV/2018 de esta Segunda Sala de rubro: **"SENTENCIAS DE AMPARO. EL PRINCIPIO DE RELATIVIDAD ADMITE MODULACIONES CUANDO SE ACUDE AL JUICIO CON UN INTERÉS LEGÍTIMO DE NATURALEZA COLECTIVA"[84].**

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[84] Gaceta del Semanario Judicial de la Federación. Décima Época. Libro 58. Septiembre de 2018. Tomo I. Página 1217, de texto:
"Conforme al artículo 107, fracción I, de la Constitución Política de los Estados Unidos Mexicanos, es posible acceder al juicio de amparo para obtener la protección de los intereses legítimos y colectivos, que son aquellos que atañen a "un grupo, categoría o clase en conjunto". En cualquier caso, tanto el interés colectivo como el legítimo, comparten como nota distintiva su indivisibilidad, es decir, no pueden segmentarse. De ahí que, si en los intereses colectivos o legítimos la afectación trasciende a la esfera jurídica subjetiva o individual de quien

Por tanto, la referida concesión de amparo conlleva, ineludiblemente, a la concreción **de efectos generales respecto a la inconstitucionalidad del Acuerdo** ********** que modifica la Norma Oficial Mexicana **"NOM-016-CRE-2016, especificaciones de calidad de los petrolíferos",** publicado en el Diario Oficial de la Federación el veintiséis de junio de dos mil diecisiete, específicamente en lo que fue materia de la litis constitucional, a saber:

I. La observación 5 de la tabla 1 **"Especificaciones de presión de vapor y temperaturas de destilación de las gasolinas según la clase de volatilidad",** contenida en el numeral 4.2.

II. Las observaciones 4 y 7 de la tabla 6 **"Especificaciones adicionales de gasolinas por región",** contenida en el numeral 4.2; en cuanto al incremento en el parámetro de oxígeno permitido hasta 10% (diez por ciento) en volumen de etanol en las gasolinas Regular y Premium fuera de las zonas metropolitanas del Valle de México, Guadalajara y Monterrey.

Ahora bien, en tanto en la especie se trata de la regulación técnica de cuestiones que pueden afectar el ambiente, debe señalarse que **la invalidez del Acuerdo reclamado,** únicamente en las secciones u observaciones ya referidas y que fueron materia del presente juicio de amparo, **no debe entenderse como la posibilidad de que se deje un vacío regulatorio en la materia concreta de hidrocarburos.**

Por el contrario, al decretarse la inconstitucionalidad de la

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promovió un juicio de amparo, sería inadmisible suponer que por esa cuestión se niegue la procedencia del medio de control constitucional, pretextándose la violación al principio de relatividad de las sentencias. En ese sentido, el artículo 107, fracción II, párrafo primero, de la Constitución Federal, debe interpretarse de la manera más favorable a la persona, por lo cual, lejos de invocarse una concepción restringida del principio referido, será menester maximizar tanto el derecho humano de acceso a la tutela jurisdiccional efectiva, como el principio de supremacía constitucional".

modificación unilateral y sumaria de la norma oficial mexicana en comento, es inconcuso que, para los efectos relativos al porcentaje de etanol en las gasolinas, así como de las especificaciones de presión de vapor y temperaturas de destilación de las gasolinas, **debe seguirse aplicando la NOM-016-CRE-2016, especificaciones de calidad de los petrolíferos, tal y como se encontraba prevista en forma previa a las modificaciones realizadas por el Acuerdo reclamado, esto es, conforme a las especificaciones estipuladas por esa norma publicada en el Diario Oficial de la Federación el veintinueve de agosto de dos mil dieciséis.**

Sin perjuicio de lo anterior y, con el objeto de no afectar derechos de terceros y situaciones jurídicas generadas a virtud de la entrada en vigor de las disposiciones reclamadas y previstas en la Norma Oficial Mexicana **"NOM-016-CRE-2016, especificaciones de calidad de los petrolíferos",** cuya inconstitucionalidad se ha decretado en el presente juicio, esta Segunda Sala considera necesario conceder a la autoridad responsable y a las demás que resulten competentes en la materia, **un plazo de ciento ochenta días,** contados a partir del día siguiente al en que se notifique esta sentencia, dentro del cual deberán permitir, sin poder ejercer sus facultades sancionatorias, que se lleven a cabo actos relativos a la producción y comercialización de gasolinas Premium y Magna que empleen etanol como oxigenante, en volumen de hasta un 10% -diez por ciento-, así como una presión máxima de vapor en 1.0 lb/pulg2 -una libra por pulgada cuadrada-, en términos de las porciones normativas reclamadas.

Una vez finalizado tal plazo, *deberá observarse y aplicarse inmediatamente la NOM-016-CRE-2016, tal y como se encontraba*

prevista en forma previa a las modificaciones realizadas por el Acuerdo reclamado, por lo que la Comisión Reguladora de Energía debe poner fin a las importaciones y ventas del tipo de gasolinas a que se refiere el acuerdo de modificaciones reclamado.

Lo anterior sin perjuicio de que la autoridad responsable, si así lo estima conveniente, inicie el procedimiento ordinario para la modificación de la NOM referida, conforme a las reglas y formalidades establecidas en la Ley Federal sobre Metrología y Normalización, a efecto de que se discuta en forma plural, con la mayor información científica posible y mediante la participación ciudadana, así como en observancia al principio de precaución ambiental y a las obligaciones internacionales que ha contraído el Estado Mexicano para reducir sus emisiones de gas invernadero y respetar, proteger y tutelar el medio ambiente sano, si es dable aumentar los niveles máximos de etanol permitidos en las gasolinas.

Por lo expuesto y fundado, se resuelve:

PRIMERO. En la materia de la revisión competencia de esta Segunda Sala, **se revoca** la sentencia recurrida.

SEGUNDO. La Justicia de la Unión **no ampara ni protege** a ************,** en contra del acto reclamado del Congreso de la Unión y del Presidente de la República consistente en el artículo 51, párrafo segundo, de la Ley Federal sobre Metrología y Normalización.

TERCERO. La Justicia de la Unión **ampara y protege** a ************,** en contra del acto reclamado de la Comisión Reguladora de Energía consistente en el Acuerdo ********** que modifica la Norma Oficial Mexicana NOM-016-CRE-2016, especificaciones de calidad de los petrolíferos, publicado en el Diario Oficial de la Federación el veintiséis

de junio de dos mil diecisiete, para los efectos precisados en el último considerando de esta ejecutoria.

Notifíquese; con testimonio de esta resolución, vuelvan los autos a su lugar de origen y, en su oportunidad, archívese el toca como asunto concluido.

Así lo resolvió la Segunda Sala de la Suprema Corte de Justicia de la Nación, por mayoría de cuatro votos de los Ministros Alberto Pérez Dayán (ponente), Luis María Aguilar Morales, José Fernando Franco González Salas y Presidente Javier Laynez Potisek. La Ministra Yasmín Esquivel Mossa emitió su voto en contra y manifestó que formulará voto particular.

Firman los Ministros Presidente y Ponente, con la Secretaria de Acuerdos de la Segunda Sala que autoriza y da fe.

PRESIDENTE

MINISTRO JAVIER LAYNEZ POTISEK

PONENTE

MINISTRO ALBERTO PÉREZ DAYÁN

SECRETARIA DE ACUERDOS

JAZMÍN BONILLA GARCÍA

“En términos de lo dispuesto por el Pleno de la Suprema Corte de Justicia de la Nación en su sesión del veinticuatro de abril de dos mil siete, y conforme a lo previsto en los artículos 3, fracción II, 13, 14 y 18 de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental, así como en el segundo párrafo del artículo 9º del Reglamento de la Suprema Corte de Justicia de la Nación y del Consejo de la Judicatura Federal para la aplicación de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental, en esta versión pública se suprime la información considerada legalmente como reservada o confidencial que encuadra en esos supuestos normativos”.

Annex 635

Juliana v United States, No. 18-36082, Op., 17 January 2020 (9th Cir.)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamel Vergun; HAZEL V., through her Guardian Margo Van Ummerson; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a	No. 18-36082 D.C. No. 6:15-cv-01517-AA OPINION

nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; MARY B. NEUMAYR, in her capacity as Chairman of Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and the Budget; KELVIN K. DROEGEMEIR, in his official capacity as Director of the Office of Science and Technology Policy; DAN BROUILLETTE, in his official capacity as Secretary of Energy; U.S. DEPARTMENT OF THE INTERIOR; DAVID L. BERNHARDT, in his official capacity as Secretary of Interior; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; MARK T.

ESPER, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; ANDREW WHEELER, in his official capacity as Administrator of the EPA; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted June 4, 2019
Portland, Oregon

Filed January 17, 2020

Before: Mary H. Murguia and Andrew D. Hurwitz, Circuit Judges, and Josephine L. Staton,* District Judge.

Opinion by Judge Hurwitz;
Dissent by Judge Staton

* The Honorable Josephine L. Staton, United States District Judge for the Central District of California, sitting by designation.

SUMMARY**

Climate Change / Standing

The panel reversed the district court's interlocutory orders in an action brought by an environmental organization and individual plaintiffs against the federal government, alleging climate-change related injuries to the plaintiffs caused by the federal government continuing to "permit, authorize, and subsidize" fossil fuel; and remanded to the district court with instructions to dismiss for lack of Article III standing.

Some plaintiffs claimed psychological harms, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. Plaintiffs alleged violations of their constitutional rights, and sought declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."

The panel held that: the record left little basis for denying that climate change was occurring at an increasingly rapid pace; copious expert evidence established that the unprecedented rise in atmospheric carbon dioxide levels stemmed from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked; the record conclusively established that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions; and the record established that the government's

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

contribution to climate change was not simply a result of inaction.

The panel rejected the government's argument that plaintiffs' claims must proceed, if at all, under the Administrative Procedure Act ("APA"). The panel held that because the APA only allows challenges to discrete agency decisions, the plaintiffs could not effectively pursue their constitutional claims – whatever their merits – under that statute.

The panel considered the three requirements for whether plaintiffs had Article III standing to pursue their constitutional claims. First, the panel held that the district court correctly found that plaintiffs claimed concrete and particularized injuries. Second, the panel held that the district court properly found the Article III causation requirement satisfied for purposes of summary judgment because there was at least a genuine factual dispute as to whether a host of federal policies were a "substantial factor" in causing the plaintiffs' injuries. Third, the panel held that plaintiffs' claimed injuries were not redressable by an Article III court. Specifically, the panel held that it was beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches.

The panel reluctantly concluded that the plaintiffs' case must be made to the political branches or to the electorate at large.

District Judge Staton dissented, and would affirm the district court. Judge Staton wrote that plaintiffs brought suit to enforce the most basic structural principal embedded in

our system of liberty: that the Constitution does not condone the Nation's willful destruction. She would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial.

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OPINION

HURWITZ, Circuit Judge:

In the mid-1960s, a popular song warned that we were "on the eve of destruction."[1] The plaintiffs in this case have presented compelling evidence that climate change has brought that eve nearer. A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.

The plaintiffs claim that the government has violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a "climate system capable of sustaining human life." The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2." Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government.

I.

The plaintiffs are twenty-one young citizens, an environmental organization, and a "representative of future generations." Their original complaint named as defendants

[1] Barry McGuire, *Eve of Destruction*, *on* Eve of Destruction (Dunhill Records, 1965).

the President, the United States, and federal agencies (collectively, "the government"). The operative complaint accuses the government of continuing to "permit, authorize, and subsidize" fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs. Some plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. The complaint asserts violations of: (1) the plaintiffs' substantive rights under the Due Process Clause of the Fifth Amendment; (2) the plaintiffs' rights under the Fifth Amendment to equal protection of the law; (3) the plaintiffs' rights under the Ninth Amendment; and (4) the public trust doctrine. The plaintiffs seek declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."[2]

The district court denied the government's motion to dismiss, concluding that the plaintiffs had standing to sue, raised justiciable questions, and stated a claim for infringement of a Fifth Amendment due process right to a "climate system capable of sustaining human life." The court defined that right as one to be free from catastrophic climate change that "will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem." The court also concluded that the

[2] The plaintiffs also assert that section 201 of the Energy Policy Act of 1992, Pub. L. No. 102-486, § 201, 106 Stat. 2776, 2866 (codified at 15 U.S.C. § 717b(c)), which requires expedited authorization for certain natural gas imports and exports "without modification or delay," is unconstitutional on its face and as applied. The plaintiffs also challenge DOE/FE Order No. 3041, which authorizes exports of liquefied natural gas from the proposed Jordan Cove terminal in Coos Bay, Oregon.

plaintiffs had stated a viable "danger-creation due process claim" arising from the government's failure to regulate third-party emissions. Finally, the court held that the plaintiffs had stated a public trust claim grounded in the Fifth and the Ninth Amendments.

The government unsuccessfully sought a writ of mandamus. *In re United States*, 884 F.3d 830, 837–38 (9th Cir. 2018). Shortly thereafter, the Supreme Court denied the government's motion for a stay of proceedings. *United States v. U.S. Dist. Court for Dist. of Or.*, 139 S. Ct. 1 (2018). Although finding the stay request "premature," the Court noted that the "breadth of respondents' claims is striking . . . and the justiciability of those claims presents substantial grounds for difference of opinion." *Id.*

The government then moved for summary judgment and judgment on the pleadings. The district court granted summary judgment on the Ninth Amendment claim, dismissed the President as a defendant, and dismissed the equal protection claim in part.[3] But the court otherwise denied the government's motions, again holding that the plaintiffs had standing to sue and finding that they had presented sufficient evidence to survive summary judgment. The court also rejected the government's argument that the plaintiffs' exclusive remedy was under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*

The district court initially declined the government's request to certify those orders for interlocutory appeal. But, while considering a second mandamus petition from the government, we invited the district court to revisit

[3] The court found that age is not a suspect class, but allowed the equal protection claim to proceed on a fundamental rights theory.

certification, noting the Supreme Court's justiciability concerns. *United States v. U.S. Dist. Court for the Dist. of Or.*, No. 18-73014, Dkt. 3; *see In re United States*, 139 S. Ct. 452, 453 (2018) (reiterating justiciability concerns in denying a subsequent stay application from the government). The district court then reluctantly certified the orders denying the motions for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed the proceedings, while "stand[ing] by its prior rulings . . . as well as its belief that this case would be better served by further factual development at trial." *Juliana v. United States*, No. 6:15-cv-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018). We granted the government's petition for permission to appeal.

II.

The plaintiffs have compiled an extensive record, which at this stage in the litigation we take in the light most favorable to their claims. *See Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014). The record leaves little basis for denying that climate change is occurring at an increasingly rapid pace. It documents that since the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years. For hundreds of thousands of years, average carbon concentration fluctuated between 180 and 280 parts per million. Today, it is over 410 parts per million and climbing. Although carbon levels rose gradually after the last Ice Age, the most recent surge has occurred more than 100 times faster; half of that increase has come in the last forty years.

Copious expert evidence establishes that this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked. Temperatures have already risen 0.9 degrees Celsius above

pre-industrial levels and may rise more than 6 degrees Celsius by the end of the century. The hottest years on record all fall within this decade, and each year since 1997 has been hotter than the previous average. This extreme heat is melting polar ice caps and may cause sea levels to rise 15 to 30 feet by 2100. The problem is approaching "the point of no return." Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.

The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions. As early as 1965, the Johnson Administration cautioned that fossil fuel emissions threatened significant changes to climate, global temperatures, sea levels, and other stratospheric properties. In 1983, an Environmental Protection Agency ("EPA") report projected an increase of 2 degrees Celsius by 2040, warning that a "wait and see" carbon emissions policy was extremely risky. And, in the 1990s, the EPA implored the government to act before it was too late. Nonetheless, by 2014, U.S. fossil fuel emissions had climbed to 5.4 billion metric tons, up substantially from 1965. This growth shows no signs of abating. From 2008 to 2017, domestic petroleum and natural gas production increased by nearly 60%, and the country is now expanding oil and gas extraction four times faster than any other nation.

The record also establishes that the government's contribution to climate change is not simply a result of inaction. The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and

overseas projects, and leases for fuel extraction on federal land.[4]

A.

The government by and large has not disputed the factual premises of the plaintiffs' claims. But it first argues that those claims must proceed, if at all, under the APA. We reject that argument. The plaintiffs do not claim that any individual agency action exceeds statutory authorization or, taken alone, is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A), (C). Rather, they contend that the totality of various government actions contributes to the deprivation of constitutionally protected rights. Because the APA only allows challenges to discrete agency decisions, *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890–91 (1990), the plaintiffs cannot effectively pursue their constitutional claims—whatever their merits—under that statute.

The defendants argue that the APA's "comprehensive remedial scheme" for challenging the constitutionality of agency actions implicitly bars the plaintiffs' freestanding constitutional claims. But, even if some constitutional challenges to agency action must proceed through the APA, forcing all constitutional claims to follow its strictures would

[4] The programs and policies identified by the plaintiffs include: (1) the Bureau of Land Management's authorization of leases for 107 coal tracts and 95,000 oil and gas wells; (2) the Export-Import Bank's provision of $14.8 billion for overseas petroleum projects; (3) the Department of Energy's approval of over 2 million barrels of crude oil imports; (4) the Department of Agriculture's approval of timber cutting on federal land; (5) the undervaluing of royalty rates for federal leasing; (6) tax subsidies for purchasing fuel-inefficient sport-utility vehicles; (7) the "intangible drilling costs" and "percentage depletion allowance" tax code provisions, 26 U.S.C. §§ 263(c), 613; and (8) the government's use of fossil fuels to power its own buildings and vehicles.

bar plaintiffs from challenging violations of constitutional rights in the absence of a discrete agency action that caused the violation. *See Sierra Club v. Trump*, 929 F.3d 670, 694, 696 (9th Cir. 2019) (stating that plaintiffs could "bring their challenge through an equitable action to enjoin unconstitutional official conduct, or under the judicial review provisions of the [APA]"); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017) (holding "that the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's 'final agency action' limitation applies only to APA claims"). Because denying "any judicial forum for a colorable constitutional claim" presents a "serious constitutional question," Congress's intent through a statute to do so must be clear. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)); *see also Allen v. Milas*, 896 F.3d 1094, 1108 (9th Cir. 2018) ("After *Webster*, we have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims."). Nothing in the APA evinces such an intent.[5] Whatever the merits of the plaintiffs' claims, they may proceed independently of the review procedures mandated by the APA. *See Sierra Club*, 929 F.3d at 698–99 ("Any constitutional challenge that Plaintiffs may advance under the APA would exist regardless of whether they could also assert an APA claim . . . . [C]laims challenging agency

[5] The government relies upon *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 328–29 (2015), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74–76 (1996), both of which held that statutory remedial schemes implicitly barred freestanding equitable claims. Neither case, however, involved claims by the plaintiffs that the federal government was violating their constitutional rights. *See Armstrong*, 575 U.S. at 323–24 (claiming that state officials had violated a federal statute); *Seminole Tribe*, 517 U.S. at 51–52 (same).

actions—particularly constitutional claims—may exist wholly apart from the APA."); *Navajo Nation*, 876 F.3d at 1170 (explaining that certain constitutional challenges to agency action are "not grounded in the APA").

B.

The government also argues that the plaintiffs lack Article III standing to pursue their constitutional claims. To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Jewel v. NSA*, 673 F.3d 902, 908 (9th Cir. 2011). A plaintiff need only establish a genuine dispute as to these requirements to survive summary judgment. *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

1.

The district court correctly found the injury requirement met. At least some plaintiffs claim concrete and particularized injuries. Jaime B., for example, claims that she was forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (finding separation from relatives to be a concrete injury). Levi D. had to evacuate his coastal home multiple times because of flooding. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1070–71 (9th Cir. 2011) (finding diminution in home property value to be a concrete injury). These injuries are not simply "'conjectural' or 'hypothetical;'" at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do

so unless checked. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)); *cf. Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (finding no standing because plaintiffs could "only aver that any significant adverse effects of climate change 'may' occur at some point in the future").

The government argues that the plaintiffs' alleged injuries are not particularized because climate change affects everyone. But, "it does not matter how many persons have been injured" if the plaintiffs' injuries are "concrete and personal." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)); *see also Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) ("[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance.") (alteration in original) (quoting *Jewel*, 673 F.3d at 909). And, the Article III injury requirement is met if only one plaintiff has suffered concrete harm. *See Hawaii*, 138 S. Ct. at 2416; *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint. . . . For all relief sought, there must be a litigant with standing.").

2.

The district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment. Causation can be established "even if there are multiple links in the chain," *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014), as long as the chain is not "hypothetical or tenuous," *Maya*, 658 F.3d at 1070 (quoting *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002), *amended on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002)). The causal chain here is sufficiently established.

The plaintiffs' alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%. *See Massachusetts*, 549 U.S. at 524–25 (finding that emissions amounting to about 6% of the worldwide total showed cause of alleged injury "by any standard"). And, the plaintiffs' evidence shows that federal subsidies and leases have increased those emissions. About 25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government. *See* 30 U.S.C. §§ 181–196 (establishing legal framework governing the disposition of fossil fuels on federal land), § 201 (authorizing the Secretary of the Interior to lease land for coal mining).

Relying on *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1141–46 (9th Cir. 2013), the government argues that the causal chain is too attenuated because it depends in part on the independent actions of third parties. *Bellon* held that the causal chain between local agencies' failure to regulate five oil refineries and the plaintiffs' climate-change related injuries was "too tenuous to support standing" because the refineries had a "scientifically indiscernible" impact on climate change. *Id.* at 1143–44. But the plaintiffs here do not contend that their injuries were caused by a few isolated agency decisions. Rather, they blame a host of federal policies, from subsidies to drilling permits, spanning "over 50 years," and direct actions by the government. There is at least a genuine factual dispute as to whether those policies were a "substantial factor" in causing the plaintiffs' injuries. *Mendia*, 768 F.3d at 1013 (quoting *Tozzi v. U.S. Dep't of*

Health & Human Servs., 271 F.3d 301, 308 (D.C. Cir. 2001)).

3.

The more difficult question is whether the plaintiffs' claimed injuries are redressable by an Article III court. In analyzing that question, we start by stressing what the plaintiffs do and do not assert. They do not claim that the government has violated a statute or a regulation. They do not assert the denial of a procedural right. Nor do they seek damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Rather, their sole claim is that the government has deprived them of a substantive constitutional right to a "climate system capable of sustaining human life," and they seek remedial declaratory and injunctive relief.

Reasonable jurists can disagree about whether the asserted constitutional right exists. *Compare Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–53 (E.D. Pa. 2019) (finding no constitutional right), *with Juliana*, 217 F. Supp. 3d at 1248–50; *see also In re United States*, 139 S. Ct. at 453 (reiterating "that the 'striking' breadth of plaintiffs' below claims 'presents substantial grounds for difference of opinion'"). In analyzing redressability, however, we assume its existence. *See M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). But that merely begins our analysis, because "not all meritorious legal claims are redressable in federal court." *Id.* To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award. *Id.* Redress need not be guaranteed, but it must be more than "merely speculative." *Id.* (quoting *Lujan*, 504 U.S. at 561).

The plaintiffs first seek a declaration that the government is violating the Constitution. But that relief alone is not substantially likely to mitigate the plaintiffs' asserted concrete injuries. A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action. *See Clean Air Council*, 362 F. Supp. 3d at 246, 249; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."); *see also Friends of the Earth*, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

The crux of the plaintiffs' requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress, *see, e.g.*, 30 U.S.C. § 201 (authorizing the Secretary of the Interior to lease land for coal mining), but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands, *see* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

As an initial matter, we note that although the plaintiffs contended at oral argument that they challenge only affirmative activities by the government, an order simply enjoining those activities will not, according to their own experts' opinions, suffice to stop catastrophic climate change or even ameliorate their injuries.[6] The plaintiffs' experts opine that the federal government's leases and subsidies have contributed to global carbon emissions. But they do not show that even the total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth. Nor does any expert contend that elimination of the challenged pro-carbon fuels programs would by itself prevent further injury to the plaintiffs. Rather, the record shows that many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources.

Indeed, the plaintiffs' experts make plain that reducing the global consequences of climate change demands much more than cessation of the government's promotion of fossil fuels. Rather, these experts opine that such a result calls for no less than a fundamental transformation of this country's energy system, if not that of the industrialized world. One expert opines that atmospheric carbon reductions must come "largely via reforestation," and include rapid and immediate decreases in emissions from many sources. "[L]eisurely reductions of one of two percent per year," he explains, "will not suffice." Another expert has opined that although the required emissions reductions are "technically feasible," they can be achieved only through a comprehensive plan for "nearly complete decarbonization" that includes both an "unprecedently rapid build out" of renewable energy and a

[6] The operative complaint, however, also seems to challenge the government's inaction.

"sustained commitment to infrastructure transformation over decades." And, that commitment, another expert emphasizes, must include everything from energy efficient lighting to improved public transportation to hydrogen-powered aircraft.

The plaintiffs concede that their requested relief will not alone solve global climate change, but they assert that their "injuries would be to some extent ameliorated." Relying on *Massachusetts v. EPA*, the district court apparently found the redressability requirement satisfied because the requested relief would likely slow or reduce emissions. *See* 549 U.S. at 525–26. That case, however, involved a procedural right that the State of Massachusetts was allowed to assert "without meeting all the normal standards for redressability;" in that context, the Court found redressability because "there [was] some possibility that the requested relief [would] prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 517–18, 525–26 (quoting *Lujan*, 504 U.S. at 572 n.7). The plaintiffs here do not assert a procedural right, but rather a substantive due process claim.[7]

[7] The dissent reads *Massachusetts* to hold that "a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms." Diss. at 47. But *Massachusetts* "permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions," *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420 (2011), finding that as a sovereign it was "entitled to special solicitude in [the] standing analysis," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 n.10 (2015) (quoting *Massachusetts*, 549 U.S. at 520). Here, in contrast, the plaintiffs are not sovereigns, and a substantive right, not a procedural one, is at issue. *See Massachusetts*, 549 U.S. at 517–21, 525–26; *see also Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a

We are therefore skeptical that the first redressability prong is satisfied. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court. There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. *See Brown*, 902 F.3d at 1086 (finding the plaintiff's requested declaration requiring the government to issue driver cards "incompatible with democratic principles embedded in the structure of the Constitution"). These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." *Collins v. City of Harker Heights*, 503 U.S. 115, 128–29 (1992); *see Lujan*, 504 U.S. at 559–60 ("[S]eparation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

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procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

The plaintiffs argue that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best "phase out fossil fuel emissions and draw down excess atmospheric CO2." To be sure, in some circumstances, courts may order broad injunctive relief while leaving the "details of implementation" to the government's discretion. *Brown v. Plata*, 563 U.S. 493, 537–38 (2011). But, even under such a scenario, the plaintiffs' request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking. And inevitably, this kind of plan will demand action not only by the Executive, but also by Congress. Absent court intervention, the political branches might conclude—however inappropriately in the plaintiffs' view—that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate change than the plaintiffs believe is necessary. "But we cannot substitute our own assessment for the Executive's [or Legislature's] predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" *Hawaii*, 138 S. Ct. at 2421 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). And, given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades. *See Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) ("Injunctive relief could involve

extraordinary supervision by this court. . . . [and] may be inappropriate where it requires constant supervision.").[8]

As the Supreme Court recently explained, "a constitutional directive or legal standards" must guide the courts' exercise of equitable power. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). *Rucho* found partisan gerrymandering claims presented political questions beyond the reach of Article III courts. *Id.* at 2506–07. The Court did not deny extreme partisan gerrymandering can violate the Constitution. *See id.* at 2506; *id.* at 2514–15 (Kagan, J., dissenting). But, it concluded that there was no "limited and precise" standard discernible in the Constitution for redressing the asserted violation. *Id.* at 2500. The Court

[8] However belatedly, the political branches are currently debating such action. Many resolutions and plans have been introduced in Congress, ranging from discrete measures to encourage clean energy innovation to the "Green New Deal" and comprehensive proposals for taxing carbon and transitioning all sectors of the economy away from fossil fuels. *See, e.g.*, H.R. Res. 109, 116th Cong. (2019); S.J. Res. 8, 116th Cong. (2019); Enhancing Fossil Fuel Energy Carbon Technology Act, S. 1201, 116th Cong. (2019); Climate Action Now Act, H.R. 9, 116th Cong. (2019); Methane Waste Prevention Act, H.R. 2711, 116th Cong. (2019); Clean Energy Standard Act, S. 1359, 116th Cong. (2019); National Climate Bank Act, S. 2057, 116th Cong. (2019); Carbon Pollution Transparency Act, S. 1745, 116th Cong. (2019); Leading Infrastructure for Tomorrow's America Act, H.R. 2741, 116th Cong. (2019); Buy Clean Transparency Act, S. 1864, 116th Cong. (2019); Carbon Capture Modernization Act, H.R. 1796, 116th Cong. (2019); Challenges & Prizes for Climate Act, H.R. 3100, 116th Cong. (2019); Energy Innovation and Carbon Dividend Act, H.R. 763, 116th Cong. (2019); Climate Risk Disclosure Act, S. 2075, 116th Cong. (2019); Clean Energy for America Act, S. 1288, 116th Cong. (2019). The proposed legislation, consistent with the opinions of the plaintiffs' experts, envisions that tackling this global problem involves the exercise of discretion, trade-offs, international cooperation, private-sector partnerships, and other value judgments ill-suited for an Article III court.

rejected the plaintiffs' proposed standard because unlike the one-person, one-vote rule in vote dilution cases, it was not "relatively easy to administer as a matter of math." *Id.* at 2501.

Rucho reaffirmed that redressability questions implicate the separation of powers, noting that federal courts "have no commission to allocate political power and influence" without standards to guide in the exercise of such authority. *See id.* at 2506–07, 2508. Absent those standards, federal judicial power could be "unlimited in scope and duration," and would inject "the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role." *Id.* at 2507; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (noting the "separation-of-powers principles underlying" standing doctrine); *Brown*, 902 F.3d at 1087 (stating that "in the context of Article III standing, . . . federal courts must respect their 'proper—and properly limited—role . . . in a democratic society'" (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)). Because "it is axiomatic that 'the Constitution contemplates that democracy is the appropriate process for change,'" *Brown*, 902 F.3d at 1087 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015)), some questions—even those existential in nature—are the province of the political branches. The Court found in *Rucho* that a proposed standard involving a mathematical comparison to a baseline election map is too difficult for the judiciary to manage. *See* 139 S. Ct. at 2500–02. It is impossible to reach a different conclusion here.

The plaintiffs' experts opine that atmospheric carbon levels of 350 parts per million are necessary to stabilize the global climate. But, even accepting those opinions as valid,

they do not suggest how an order from this Court can achieve that level, other than by ordering the government to develop a plan. Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a plan is beguiling, it ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a "climate system capable of sustaining human life." We doubt that any such plan can be supervised or enforced by an Article III court. And, in the end, any plan is only as good as the court's power to enforce it.

C.

Our dissenting colleague quite correctly notes the gravity of the plaintiffs' evidence; we differ only as to whether an Article III court can provide their requested redress. In suggesting that we can, the dissent reframes the plaintiffs' claimed constitutional right variously as an entitlement to "the country's perpetuity," Diss. at 35–37, 39, or as one to freedom from "the amount of fossil-fuel emissions that will irreparably devastate our Nation," *id.* at 57. But if such broad constitutional rights exist, we doubt that the plaintiffs would have Article III standing to enforce them. Their alleged individual injuries do not flow from a violation of these claimed rights. Indeed, any injury from the dissolution of the Republic would be felt by all citizens equally, and thus would not constitute the kind of discrete and particularized injury necessary for Article III standing. *See Friends of the Earth*, 528 U.S. at 180–81. A suit for a violation of these reframed rights, like one for a violation of the Guarantee Clause, would also plainly be nonjusticiable. *See, e.g.*, *Rucho*, 139 S. Ct. at 2506 ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.") (citing *Pac. States*

Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149 (1912)); *Luther v. Borden*, 48 U.S. 1, 36–37, 39 (1849).

More importantly, the dissent offers no metrics for judicial determination of the level of climate change that would cause "the willful dissolution of the Republic," Diss. at 40, nor for measuring a constitutionally acceptable "perceptible reduction in the advance of climate change," *id.* at 47. Contrary to the dissent, we cannot find Article III redressability requirements satisfied simply because a court order might "postpone[] the day when remedial measures become insufficiently effective." *Id.* at 46; *see Brown*, 902 F.3d at 1083 ("If, however, a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability[.]"). Indeed, as the dissent recognizes, a guarantee against government conduct that might threaten the Union—whether from political gerrymandering, nuclear proliferation, Executive misconduct, or climate change—has traditionally been viewed by Article III courts as "not separately enforceable." *Id.* at 39. Nor has the Supreme Court recognized "the perpetuity principle" as a basis for interjecting the judicial branch into the policy-making purview of the political branches. *See id.* at 42.

Contrary to the dissent, we do not "throw up [our] hands" by concluding that the plaintiffs' claims are nonjusticiable. *Id.* at 33. Rather, we recognize that "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges. As Judge Cardozo once aptly warned, a judicial commission does not

confer the power of "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness;" rather, we are bound "to exercise a discretion informed by tradition, methodized by analogy, disciplined by system.'" Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921).[9]

The dissent correctly notes that the political branches of government have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals. But, although inaction by the Executive and Congress may affect the form of judicial relief ordered when there is Article III standing, it cannot bring otherwise nonjusticiable claims within the province of federal courts. *See Rucho*, 139 S. Ct. at 2507–08; *Gill*, 138 S. Ct. at 1929 ("'Failure of political will does not justify unconstitutional remedies.' . . . Our power as judges . . . rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." (quoting *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring))); *Brown*, 902 F.3d at 1087 ("The *absence* of a law, however, has never been held to constitute a 'substantive result' subject to judicial review[.]").

The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record

[9] Contrary to the dissent, we do not find this to be a political question, although that doctrine's factors often overlap with redressability concerns. Diss. at 51–61; *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1192 (9th Cir. 2017) ("Whether examined under the . . . the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch. Although these are distinct doctrines . . . there is significant overlap.").

for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. Diss. at 45–46, 49–50, 57–61. We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

III.

For the reasons above, we reverse the certified orders of the district court and remand this case to the district court with instructions to dismiss for lack of Article III standing.[10]

REVERSED.

STATON, District Judge, dissenting:

In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses.

[10] The plaintiffs' motion for an injunction pending appeal, Dkt. 21, is **DENIED**. Their motions for judicial notice, Dkts. 134, 149, are **GRANTED**.

Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation.

My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.

Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction. So viewed, plaintiffs' claims adhere to a judicially administrable standard. And considering plaintiffs seek no less than to forestall the Nation's demise, even a partial and temporary reprieve would constitute meaningful redress. Such relief, much like the desegregation orders and statewide prison injunctions the Supreme Court has sanctioned, would vindicate plaintiffs' constitutional rights without exceeding the Judiciary's province. For these reasons, I respectfully dissent.[1]

[1] I agree with the majority that plaintiffs need not bring their claims under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Webster v. Doe*, 486 U.S. 592, 603–04 (1988).

I.

As the majority recognizes, and the government does not contest, carbon dioxide ("CO_2") and other greenhouse gas ("GHG") emissions created by burning fossil fuels are devastating the planet. Maj. Op. at 14–15. According to one of plaintiffs' experts, the inevitable result, absent immediate action, is "an inhospitable future . . . marked by rising seas, coastal city functionality loss, mass migrations, resource wars, food shortages, heat waves, mega-storms, soil depletion and desiccation, freshwater shortage, public health system collapse, and the extinction of increasing numbers of species." Even government scientists[2] project that, given current warming trends, sea levels will rise two feet by 2050, nearly four feet by 2070, over eight feet by 2100, 18 feet by 2150, and over 31 feet by 2200. To put that in perspective, a three-foot sea level rise will make two million American homes uninhabitable; a rise of approximately 20 feet will result in the total loss of Miami, New Orleans, and other coastal cities. So, as described by plaintiffs' experts, the injuries experienced by plaintiffs are the first small wave in an oncoming tsunami—now visible on the horizon of the not-so-distant future—that will destroy the United States as we currently know it.

What sets this harm apart from all others is not just its magnitude, but its irreversibility. The devastation might look and feel somewhat different if future generations could simply pick up the pieces and restore the Nation. But plaintiffs' experts speak of a certain level of global warming as "locking in" this catastrophic damage. Put more starkly by plaintiffs' expert, Dr. Harold R. Wanless, "[a]tmospheric

[2] NOAA, Technical Rep. NOS CO-OPS 083, Global and Regional Sea Level Rise Scenarios for the United States 23 (Jan. 2017).

warming will continue for some 30 years after we stop putting more greenhouse gasses into the atmosphere. But that warmed atmosphere will continue warming the ocean for centuries, and the accumulating heat in the oceans *will persist for millennia*" (emphasis added). Indeed, another of plaintiffs' experts echoes, "[t]he fact that GHGs dissipate very slowly from the atmosphere . . . and that the costs of taking CO_2 out of the atmosphere through non-biological carbon capture and storage are very high means that *the consequences of GHG emissions should be viewed as effectively irreversible*" (emphasis added). In other words, "[g]iven the self-reinforcing nature of climate change," the tipping point may well have arrived, and we may be rapidly approaching the point of no return.

Despite countless studies over the last half century warning of the catastrophic consequences of anthropogenic greenhouse gas emissions, many of which the government conducted, the government not only failed to act but also "affirmatively promote[d] fossil fuel use in a host of ways." Maj. Op. at 15. According to plaintiffs' evidence, our nation is crumbling—at our government's own hand—into a wasteland. In short, the government has directly facilitated an existential crisis to the country's perpetuity.[3]

II.

In tossing this suit for want of standing, the majority concedes that the children and young adults who brought suit have presented enough to proceed to trial on the first two aspects of the inquiry (injury in fact and traceability). But

[3] My asteroid analogy would therefore be more accurate if I posited a scenario in which the government itself accelerated the asteroid towards the earth before shutting down our defenses.

the majority provides two-and-a-half reasons for concluding that plaintiffs' injuries are not redressable. After detailing its "skeptic[ism]" that the relief sought could "suffice to stop catastrophic climate change or even ameliorate [plaintiffs'] injuries[,]" Maj. Op. at 23–25, the majority concludes that, at any rate, a court would lack any power to award it. In the majority's view, the relief sought is too great and unsusceptible to a judicially administrable standard.

To explain why I disagree, I first step back to define the interest at issue. While standing operates as a threshold issue distinct from the merits of the claim, "it often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). And, unlike the majority, I believe the government has more than just a nebulous "moral responsibility" to preserve the Nation. Maj. Op. at 31–32.

A.

The Constitution protects the right to "life, liberty, and property, to free speech, a free press, [and] freedom of worship and assembly." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Through "reasoned judgment," the Supreme Court has recognized that the Due Process Clause, enshrined in the Fifth and Fourteenth Amendments, also safeguards certain "interests of the person so fundamental that the [government] must accord them its respect." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). These include the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), to maintain a family and rear children, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), and to pursue an occupation of one's choosing, *Schware v. Bd. of Bar Exam.*, 353 U.S. 232, 238–39 (1957). As fundamental rights, these "may not be submitted to vote; they depend on the outcome of no elections." *Lucas v. Forty-Fourth Gen. Assembly*,

377 U.S. 713, 736 (1964) (quoting *Barnette*, 319 U.S. at 638).

Some rights serve as the necessary predicate for others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections. *Cf., e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (deeming a right fundamental because its deprivation would "undermine other constitutional liberties"). For example, the right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Because it is "preservative of all rights," the Supreme Court has long regarded suffrage "as a fundamental political right." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). This holds true even though the right to vote receives imperfect express protection in the Constitution itself: While several amendments proscribe the denial or abridgement of suffrage based on certain characteristics, the Constitution does not guarantee the right to vote *ab initio*. *See* U.S. Const. amends. XV, XIX, XXIV, XXVI; *cf.* U.S. Const. art. I, § 4, cl. 1.

Much like the right to vote, the perpetuity of the Republic occupies a central role in our constitutional structure as a "guardian of all other rights," *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982). "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society . . . ." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *see also The Ku Klux Cases*, 110 U.S. 651, 657–68 (1884). And, of course, in our system, that organized society consists of the Union. Without it, all the liberties protected by the Constitution to live the good life are meaningless.

This observation is hardly novel. After securing independence, George Washington recognized that "the destiny of unborn millions" rested on the fate of the new Nation, cautioning that "whatever measures have a tendency to dissolve the Union, or contribute to violate or lessen the Sovereign Authority, ought to be considered as hostile to the Liberty and Independency of America[.]" President George Washington, Circular Letter of Farewell to the Army (June 8, 1783). Without the Republic's preservation, Washington warned, "there is a natural and necessary progression, from the extreme of anarchy to the extreme of Tyranny; and that arbitrary power is most easily established on the ruins of Liberty abused to licentiousness." *Id.*

When the Articles of the Confederation proved ill-fitting to the task of safeguarding the Union, the framers formed the Constitutional Convention with "the great object" of "preserv[ing] and perpetuat[ing]" the Union, for they believed that "the prosperity of America depended on its Union." The Federalist No. 2, at 19 (John Jay) (E. H. Scott ed., 1898); *see also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787)[4] ("It appeared to be the sincere and unanimous wish of the Convention to cherish and preserve the Union of the States."). In pressing New York to ratify the Constitution, Alexander Hamilton spoke of the gravity of the occasion: "The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the Union, the safety and welfare of the parts of which it is composed—the fate of an empire, in many respects the most interesting in the world." The Federalist No. 1, at 11 (Alexander Hamilton) (E. H. Scott ed., 1898). In light of this animating principle, it is fitting that the

[4] Available at https://founders.archives.gov/documents/Jefferson/01-12-02-0274.

Preamble declares that the Constitution is intended to secure "the Blessings of Liberty" not just for one generation, but for all future generations—our "Posterity."

The Constitution's structure reflects this perpetuity principle. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) (examining how "[v]arious textual provisions of the Constitution assume" a structural principle). In taking the Presidential Oath, the Executive must vow to "preserve, protect and defend the Constitution of the United States," U.S. Const. art. II, § 1, cl. 8, and the Take Care Clause obliges the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. Likewise, though generally not separately enforceable, Article IV, Section 4 provides that the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and . . . against domestic Violence." U.S. Const. art. IV, § 4; *see also New York v. United States*, 505 U.S. 144, 184–85 (1992).

Less than a century after the country's founding, the perpetuity principle undergirding the Constitution met its greatest challenge. Faced with the South's secession, President Lincoln reaffirmed that the Constitution did not countenance its own destruction. "[T]he Union of these States is perpetual[,]" he reasoned in his First Inaugural Address, because "[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination." President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861). In justifying this constitutional principle, Lincoln drew from history, observing that "[t]he Union is much older than the Constitution." *Id.* He reminded his fellow citizens, "one of

the declared objects for ordaining and establishing the Constitution was 'to form a *more perfect* Union.'" *Id.* (emphasis added) (quoting U.S. Const. pmbl.). While secession manifested the existential threat most apparently contemplated by the Founders—political dissolution of the Union—the underlying principle applies equally to its physical destruction.

This perpetuity principle does not amount to "a right to live in a contaminant-free, healthy environment." *Guertin v. Michigan*, 912 F.3d 907, 922 (6th Cir. 2019). To be sure, the stakes can be quite high in environmental disputes, as pollution causes tens of thousands of premature deaths each year, not to mention disability and diminished quality of life.[5] Many abhor living in a polluted environment, and some pay with their lives. But mine-run environmental concerns "involve a host of policy choices that must be made by . . . elected representatives, rather than by federal judges interpreting the basic charter of government[.]" *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992). The perpetuity principle is not an environmental right at all, and it does not task the courts with determining the optimal level of environmental regulation; rather, it prohibits only the willful dissolution of the Republic.[6]

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[5] *See, e.g.*, Andrew L. Goodkind et al., *Fine-Scale Damage Estimates of Particulate Matter Air Pollution Reveal Opportunities for Location-Specific Mitigation of Emissions*, *in* 116 Proceedings of the National Academy of Sciences 8775, 8779 (2019) (estimating that fine particulate matter caused 107,000 premature deaths in 2011).

[6] Unwilling to acknowledge that the very nature of the climate crisis places this case in a category of one, the government argues that "the Constitution does not provide judicial remedies for every social and economic ill." For support, the government cites *Lindsey v. Normet*,

That the principle is structural and implicit in our constitutional system does not render it any less enforceable. To the contrary, our Supreme Court has recognized that "[t]here are many [] constitutional doctrines that are not spelled out in the Constitution" but are nonetheless enforceable as "historically rooted principle[s] embedded in the text and structure of the Constitution." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498–99 (2019). For instance, the Constitution does not in express terms provide for judicial review, *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803); sovereign immunity (outside of the Eleventh Amendment's explicit restriction), *Alden*, 527 U.S. at 735–36; the anticommandeering doctrine, *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018); or the regimented tiers of scrutiny applicable to many constitutional rights, *see, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994). Yet these doctrines, as well as many other implicit principles, have become firmly entrenched in our constitutional landscape. And, in an otherwise justiciable case, a private litigant may seek to vindicate such structural principles, for they "protect the individual as well" as the Nation. *See Bond v. United States*, 564 U.S. 211, 222, 225–26 (2011); *INS. v. Chadha*, 462 U.S. 919, 935–36 (1983).

In *Hyatt*, for instance, the Supreme Court held that a state could not be sued in another state's courts without its consent. Although nothing in the text of the Constitution expressly forbids such suits, the Court concluded that they

405 U.S. 56, 74 (1972), which held Oregon's wrongful detainer statute governing landlord/tenant disputes constitutional. The perpetuity principle, however, cabins the right and avoids any slippery slope. While the principle's goal is to preserve the most fundamental individual rights to life, liberty, and property, it is not triggered absent an existential threat to the country arising from a "point of no return" that is, at least in part, of the government's own making.

contravened "the 'implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.'" *Hyatt*, 139 S. Ct. at 1492 (quoting *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting)). So too here.

Nor can the perpetuity principle be rejected simply because the Court has not yet had occasion to enforce it as a limitation on government conduct. Only over time, as the Nation confronts new challenges, are constitutional principles tested. For instance, courts did not recognize the anticommandeering doctrine until the 1970s because "[f]ederal commandeering of state governments [was] such a novel phenomenon." *Printz v. United States*, 521 U.S. 898, 925 (1997). And the Court did not recognize that cell-site data fell within the Fourth Amendment until 2018. In so holding, the Court rejected "a 'mechanical interpretation' of the Fourth Amendment" because "technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes[.]" *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018). Thus, it should come as no surprise that the Constitution's commitment to perpetuity only now faces judicial scrutiny, for never before has the United States confronted an existential threat that has not only gone unremedied but is actively backed by the government.

The mere fact that we have alternative means to enforce a principle, such as voting, does not diminish its constitutional stature. Americans can vindicate federalism, separation of powers, equal protection, and voting rights through the ballot box as well, but that does not mean these constitutional guarantees are not independently enforceable.

By its very nature, the Constitution "withdraw[s] certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. When fundamental rights are at stake, individuals "need not await legislative action." *Obergefell*, 135 S. Ct. at 2605.

Indeed, in this *sui generis* circumstance, waiting is not an option. Those alive today are at perhaps the singular point in history where society (1) is scientifically aware of the impending climate crisis, and (2) can avoid the point of no return. And while democracy affords citizens the right "to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times[,]" *id.* (quoting *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 312 (2014)), that process cannot override the laws of nature. Or, more colloquially, we can't shut the stable door after the horse has bolted.

As the last fifty years have made clear, telling plaintiffs that they must vindicate their right to a habitable United States through the political branches will rightfully be perceived as telling them they have no recourse. The political branches must often realize constitutional principles, but in a justiciable case or controversy, courts serve as the ultimate backstop. To this issue, I turn next.

B.

Of course, "it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). So federal courts are not free to address *every* grievance.

"Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972). Standing is "a doctrine rooted in the traditional understanding of a case or controversy," developed to "ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

A case is fit for judicial determination only if the plaintiff has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); then citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). As to the first two elements, my colleagues and I agree: Plaintiffs present adequate evidence at this pre-trial stage to show particularized, concrete injuries to legally-protected interests, and they present further evidence to raise genuine disputes as to whether those injuries—at least in substantial part—are fairly traceable to the government's conduct at issue. *See* Maj. Op. at 18–21. Because I find that plaintiffs have also established the third prong for standing, redressability, I conclude that plaintiffs' legal stake in this action suffices to invoke the adjudicative powers of the federal bench.

1.

"Redressability" concerns whether a federal court is capable of vindicating a plaintiff's legal rights. I agree with the majority that our ability to provide redress is animated by two inquiries, one of efficacy and one of power. Maj. Op. at 21 (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir.

2018)). First, as a causal matter, is a court order likely to actually remediate the plaintiffs' injury? If so, does the judiciary have the constitutional authority to levy such an order? *Id.*

Addressing the first question, my colleagues are skeptical that curtailing the government's facilitation of fossil-fuel extraction and combustion will ameliorate the plaintiffs' harms. *See* Maj. Op. at 22–25. I am not, as the nature of the injury at stake informs the effectiveness of the remedy. *See Warth*, 422 U.S. at 500.

As described above, the right at issue is not to be entirely free from any climate change. Rather, plaintiffs have a constitutional right to be free from *irreversible and catastrophic climate change*. Plaintiffs have begun to feel certain concrete manifestations of this violation, ripening their case for litigation, but such prefatory harms are just the first barbs of an *ongoing* injury flowing from an *ongoing* violation of plaintiffs' rights. The bulk of the injury is yet to come. Therefore, practical redressability is not measured by our ability to stop climate change in its tracks and immediately undo the injuries that plaintiffs suffer today—an admittedly tall order; it is instead measured by our ability to curb by some meaningful degree what the record shows to be an otherwise inevitable march to the point of no return. Hence, the injury at issue is not climate change writ large; it is climate change beyond the threshold point of no return. As we approach that threshold, the significance of every emissions reduction is magnified.

The majority portrays any relief we can offer as just a drop in the bucket. *See* Maj. Op. at 22–25. In a previous generation, perhaps that characterization would carry the day and we would hold ourselves impotent to address plaintiffs' injuries. But we are perilously close to an overflowing

bucket. These final drops matter. *A lot.* Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm. Accordingly, I conclude that the court could do something to help the plaintiffs before us.

And "something" is all that standing requires. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court explicitly held that a non-negligible reduction in emissions—there, by regulating vehicles emissions—satisfied the redressability requirement of Article III standing:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.
>
> . . . .

> . . . The risk of catastrophic harm, though remote, is nevertheless real.

Id. at 525–26 (internal citation omitted).

In other words, under Article III, a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms. Full stop. The majority dismisses this precedent because *Massachusetts v. EPA* involved a procedural harm, whereas plaintiffs here assert a purely substantive right. Maj. Op. at 24. But this difference in posture does not affect the outcome.

While the redressability requirement is relaxed in the procedural context, that does not mean (1) we must engage in a similarly relaxed analysis whenever we invoke *Massachusetts v. EPA* or (2) we cannot rely on *Massachusetts v. EPA's* substantive examination of the relationship between government action and the course of climate change. Accordingly, here, we do not consider the likelihood that plaintiffs will prevail in any newly-awarded agency procedure, nor whether granting access to that procedure will redress plaintiffs' injury. *Cf. Massachusetts v. EPA*, 549 U.S. at 517–18; *Lujan*, 504 U.S. at 572 n.7. Rather, we assume plaintiffs *will* prevail—removing the procedural link from the causal chain—and we resume our traditional analysis to determine whether the desired outcome would in fact redress plaintiffs' harms.[7] In

[7] The presence of a procedural right is more critical when determining whether the first and second elements of standing are present. This is especially true where Congress has "define[d] injuries and articulate[d] chains of causation that will give rise to a case or controversy where none existed before" by conferring procedural rights that give certain persons a "stake" in an injury that is otherwise not their own. *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580

Massachusetts v. EPA, the remaining substantive inquiry was whether reducing emissions from fossil-fuel combustion would likely ameliorate climate change-induced injuries despite the global nature of climate change (regardless of whether renewed procedures were themselves likely to mandate such lessening). The Supreme Court unambiguously answered that question in the affirmative. That holding squarely applies to the instant facts,[8] rendering the absence of a procedural right here irrelevant.[9]

(Kennedy, J., concurring)). But who seeks to vindicate an injury is irrelevant to the question of whether a court has the tools to relieve that injury.

[8] Indeed, the majority has already acknowledged as much in finding plaintiffs' injuries traceable to the government's misconduct because the traceability and redressability inquiries are largely coextensive. *See* Maj. Op. at 19–21; *see also Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (2013) ("The Supreme Court has clarified that the 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.' The two are distinct insofar as causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief.") (internal citation omitted). Here, where the requested relief is simply to stop the ongoing misconduct, the inquiries are nearly identical. *Cf. Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) ("[I]t is important to keep the inquiries separate" where "the relief requested goes well beyond the violation of law alleged."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *see also infra* Part II.B.3.

[9] Nor am I persuaded that *Massachusetts v. EPA* is distinguishable because of the relaxed standing requirements and "special solicitude" in cases brought by a state against the United States. *Massachusetts v. EPA*, 549 U.S. at 517–20. When *Massachusetts v. EPA* was decided, more than a decade ago, there was uncertainty and skepticism as to whether an individual could state a sufficiently definite climate change-induced

2.

The majority laments that it cannot step into the shoes of the political branches, *see* Maj. Op. at 32, but appears ready to yield even if those branches walk the Nation over a cliff. This deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles. Our tripartite system of government is often and aptly described as one of "checks and balances." The doctrine of standing preserves *balance* among the branches by keeping separate questions of general governance and those of specific legal entitlement. But the doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that we instruct the other branches as to the constitutional limitations on their power. Indeed, sometimes "the [judicial and governance] roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, . . . orders the alteration of an institutional organization or procedure that causes the harm." *Lewis*, 518 U.S. at 350; *cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("Proper regard for the

harm based on gradually warming air temperatures and rising seas. But the Supreme Court sidestepped such questions of the *concreteness* of the plaintiffs' injuries by finding that "[Massachusetts's] stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Id.* at 519. Here and now, the plaintiffs submit *undisputed scientific evidence* that their distinct and discrete injuries are caused by climate change brought about by emissions from fossil-fuel combustion. They need not rely on the "special solicitude," *id.* at 520, of a state to be heard. Regardless, any distinction would go to the concreteness or particularity of plaintiffs' injuries and not to the issue of redressability.

complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury."). In my view, this Court must confront and reconcile this tension before deciding that thorny questions of standing preclude review in this case. And faithful application of our history and precedents reveals that a failure to do so leads to the wrong result.

Taking the long (but essential) way around, I begin first by acknowledging explicitly what the majority does not mention: our history plainly establishes an ambient presumption of judicial review to which separation-of-powers concerns provide a rebuttal under limited circumstances. Few would contest that "[i]t is emphatically the province and duty of the judicial department" to curb acts of the political branches that contravene those fundamental tenets of American life so dear as to be constitutionalized and thus removed from political whims. *See Marbury*, 5 U.S. at 177–78. This presumptive authority entails commensurate power to grant appropriate redress, as recognized in *Marbury*, "which effectively place[s] upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1874 (2017) (Breyer, J., dissenting). That is, "there must be something 'peculiar' (*i.e.*, special) about a case that warrants 'excluding the injured party from legal redress and placing it within that class of cases which come under the description of *damnum absque injuria*—a loss without an injury.'" *Id.* (cleaned up) (quoting *Marbury*, 5 U.S. at 163–64). In sum, although it is the plaintiffs' burden to establish injury in fact, causation,

and redressability, it is the government's burden to establish why this otherwise-justiciable controversy implicates grander separation-of-powers concerns not already captured by those requirements. We do not otherwise abdicate our duty to enforce constitutional rights.

Without explicitly laying this groundwork, the majority nonetheless suggests that this case is "special"—and beyond our redress—because plaintiffs' requested relief requires (1) the messy business of evaluating competing policy considerations to steer the government away from fossil fuels and (2) the intimidating task of supervising implementation over many years, if not decades. *See* Maj. Op. at 25–27. I admit these are daunting tasks, but we are constitutionally empowered to undertake them. There is no justiciability exception for cases of great complexity and magnitude.

3.

I readily concede that courts must on occasion refrain from answering those questions that are truly reserved for the political branches, even where core constitutional precepts are implicated. This deference is known as the "political question doctrine," and its applicability is governed by a well-worn multifactor test that counsels judicial deference where there is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the

> impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195–201 (2012) (discussing and applying *Baker* factors); *Vieth v. Jubelirer*, 541 U.S. 267, 277–90 (2004) (same); *Nixon v. United States*, 506 U.S. 224, 228–38 (1993) (same); *Chadha*, 462 U.S. at 940–43 (same).[10] In some sense, these factors are frontloaded in significance. "We have characterized the first three factors as 'constitutional limitations of a court's jurisdiction' and the other three factors as 'prudential considerations.'" *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1200 (9th Cir. 2017) (quoting *Corrie*

[10] The political question doctrine was first conceived in *Marbury*. *See Marbury*, 5 U.S. at 165–66 ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."). The modern incarnation of the doctrine has existed relatively unaltered since its exposition in *Baker* in 1962. Although the majority disclaims the applicability of the political question doctrine, *see* Maj. Op. at 31, n.9, the opinion's references to the lack of discernable standards and its reliance on *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), as a basis for finding this case nonjusticiable blur any meaningful distinction between the doctrines of standing and political question.

v. Caterpillar, Inc., 503 F.3d 974, 981 (9th Cir. 2007)).[11] Moreover, "we have recognized that the first two are likely the most important." *Marshall Islands*, 865 F.3d at 1200 (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005)). Yet, we have also recognized that the inquiry is highly case-specific, the factors "often collaps[e] into one another[,]" and any one factor of sufficient weight is enough to render a case unfit for judicial determination. *See Marshall Islands*, 865 F.3d at 1200 (first alteration in original) (quoting *Alperin*, 410 F.3d at 544). Regardless of any intra-factor flexibility and flow, however, there is a clear mandate to apply the political question doctrine both shrewdly and sparingly.

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether

[11] The six *Baker* factors have been characterized as "reflect[ing] three distinct justifications for withholding judgment on the merits of a dispute." *Zivotofsky v. Clinton*, 566 U.S. at 203 (Sotomayor, J., concurring). Under the first *Baker* factor, "abstention is warranted because the court lacks authority to resolve" "issue[s] whose resolution is textually committed to a coordinate political department[.]" *Id.* Under the second and third factors, abstention is warranted in "circumstances in which a dispute calls for decisionmaking beyond courts' competence[.]" *Id.* Under the final three factors, abstention is warranted where "prudence . . . counsel[s] against a court's resolution of an issue presented." *Id.* at 204.

> some action denominated 'political' exceeds constitutional authority.

Baker, 369 U.S. at 217; *see also Corrie*, 503 F.3d at 982 ("We will not find a political question 'merely because [a] decision may have significant political overtones.'") (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478U.S. 221, 230 (1986)). Rather, when detecting the presence of a "political question," courts must make a "discriminating inquiry into the precise facts and posture of the particular case" and refrain from "resolution by any semantic cataloguing." *Baker*, 369 U.S. at 217.

Here, confronted by difficult questions on the constitutionality of *policy*, the majority creates a minefield of *politics* en route to concluding that we cannot adjudicate this suit. And the majority's map for navigating that minefield is *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), an inapposite case about gerrymandering. My colleagues conclude that climate change is too political for the judiciary to touch by likening it to the process of political representatives drawing political maps to elect other political representatives. I vehemently disagree.

The government does not address on appeal the district judge's reasoning that the first, third, fourth, fifth and sixth *Baker* factors do not apply here. Neither does the majority rely on any of these factors in its analysis. In relevant part, I find the opinion below both thorough and well-reasoned, and I adopt its conclusions. I note, however, that the absence of the first *Baker* factor—whether the Constitution textually delegates the relevant subject matter to another branch—is especially conspicuous. As the district judge described, courts invoke this factor only where the Constitution makes an unambiguous commitment of responsibility to one branch

of government. Very few cases turn on this factor, and almost all that do pertain to two areas of constitutional authority: foreign policy and legislative proceedings. *See, e.g.*, *Marshall Islands*, 865 F.3d at 1200–01 (treaty enforcement); *Corrie*, 503 F.3d at 983 (military aid); *Nixon*, 506 U.S. at 234 (impeachment proceedings); *see also Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979) ("[J]udicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause[,] . . . [which is] a paradigm example of a textually demonstrable constitutional commitment of [an] issue to a coordinate political department.") (internal quotation marks omitted); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) ("The text and structure of the Constitution grant the President the power to recognize foreign nations and governments.").

Since this matter has been under submission, the Supreme Court cordoned off an additional area from judicial review based in part on a textual commitment to another branch: partisan gerrymandering. *See Rucho*, 139 S. Ct. at 2494–96.[12] Obviously, the Constitution does not explicitly address climate change. But neither does climate change *implicitly* fall within a recognized political-question area. As the district judge described, the questions of energy

[12] *Rucho* does not turn exclusively on the first *Baker* factor and acknowledges that there are some areas of districting that courts may police, notwithstanding the Elections Clause's "assign[ment] to state legislatures the power to prescribe the 'Times, Places and Manner of holding Elections' for Members of Congress, while giving Congress the power to 'make or alter' any such regulations." *Rucho*, 139 S. Ct. at 2495. Instead, *Rucho* holds that a combination of the text (as illuminated by historical practice) and absence of clear judicial standards precludes judicial review of excessively partisan gerrymanders. *See infra* Part II.B.4.

policy at stake here may have rippling effects on foreign policy considerations, but that is not enough to wholly exempt the subject matter from our review. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1238 (D. Or. 2016) ("[U]nlike the decisions to go to war, take action to keep a particular foreign leader in power, or give aid to another country, climate change policy is not *inherently*, or even primarily, a foreign policy decision."); *see also Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

Without endorsement from the constitutional text, the majority's theory is grounded exclusively in the second *Baker* factor: a (supposed) lack of clear judicial standards for shaping relief. Relying heavily on *Rucho*, the majority contends that we cannot formulate standards (1) to determine what relief "is sufficient to remediate the claimed constitutional violation" or (2) to "supervise[] or enforce[]" such relief. Maj. Op. at 29.

The first point is a red herring. Plaintiffs submit ample evidence that there is a discernable "tipping point" at which the government's conduct turns from facilitating mere pollution to inducing an unstoppable cataclysm in violation of plaintiffs' rights. Indeed, the majority itself cites plaintiffs' evidence that "atmospheric carbon levels of 350 parts per million are necessary to stabilize the climate." *Id.* at 24. This clear line stands in stark contrast to *Rucho*, which held that—even assuming an excessively partisan gerrymander was unconstitutional—no standards exist by which to determine *when a rights violation has even occurred*. There, "[t]he central problem [wa]s not determining whether a jurisdiction has engaged in partisan gerrymandering. It [wa]s determining when political

gerrymandering has gone too far." *Rucho*, 139 S. Ct. at 2497 (internal quotation marks omitted); *see also id.* at 2498 ("[T]he question is one of degree: How to provide a standard for deciding how much partisan dominance is too much.") (internal quotation marks omitted); *id.* at 2499 ("If federal courts are to . . . adjudicat[e] partisan gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from constitutional political gerrymandering.") (internal quotation marks and citation omitted).

Here, the right at issue is fundamentally one of a discernable standard: the amount of fossil-fuel emissions that will irreparably devastate our Nation. That amount can be established by scientific evidence like that proffered by the plaintiffs. Moreover, we need not *definitively* determine that standard today. Rather, we need conclude only that plaintiffs have submitted sufficient evidence to create a genuine dispute as to whether such an amount can possibly be determined as a matter of scientific fact. Plaintiffs easily clear this bar. Of course, plaintiffs will have to carry their burden of proof to establish this fact in order to prevail at trial, but that issue is not before us. We must not get ahead of ourselves.

The procedural posture of this case also informs the question of oversight and enforcement. It appears the majority's real concerns lie not in the judiciary's ability to draw a line between lawful and unlawful conduct, but in our ability to equitably walk the government back from that line without wholly subverting the authority of our coequal branches. My colleagues take great issue with plaintiffs' request for a "plan" to reduce fossil-fuel emissions. I am not so concerned. At this stage, we need not promise plaintiffs the moon (or, more apropos, the earth in a habitable state).

For purposes of standing, we need hold only that the trial court could fashion some sort of meaningful relief should plaintiffs prevail on the merits.[13]

Nor would any such remedial "plan" necessarily require the courts to muck around in policymaking to an impermissible degree; the *scope* and *number* of policies a court would have to reform to provide relief is irrelevant to the second *Baker* factor, which asks only if there are judicially discernable standards to guide that reformation. Indeed, our history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary's commitment to requiring adherence to the Constitution. Upholding the Constitution's prohibition on cruel and unusual punishment, for example, the Court ordered the overhaul of prisons in the Nation's most populous state. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") And in its finest hour, the Court mandated the racial integration of every public school—state and federal—in the Nation, vindicating the Constitution's guarantee of equal protection under the law.[14] *See Brown v. Bd. of Educ.* (*Brown I*), 347 U.S. 483

[13] It is possible, of course, that the district court ultimately concludes that it is unable to provide meaningful redress based on the facts proved at trial, but trial has not yet occurred. Our present occasion is to decide only whether plaintiffs have raised a genuine dispute as to the judiciary's ability to provide meaningful redress under *any* subset of the facts at issue today. *See* Maj. Op. at 18 (citing *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002)).

[14] In contrast, we are haunted by the days we declined to curtail the government's approval of invidious discrimination in public life, *see Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)

(1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954). In the school desegregation cases, the Supreme Court was explicitly unconcerned with the fact that crafting relief would require individualized review of thousands of state and local policies that facilitated segregation. Rather, a unanimous Court held that the judiciary could work to dissemble segregation over time while remaining cognizant of the many public interests at stake:

> To effectuate [the plaintiffs'] interest[s] may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*]. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> . . . [T]he courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the

("[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."), and neglected to free thousands of innocents prejudicially interned by their own government without cause, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided[.]").

> earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1955).

As we are all too aware, it took decades to even partially realize *Brown*'s promise, but the slow churn of constitutional vindication did not dissuade the *Brown* Court, and it should not dissuade us here. Plaintiffs' request for a "plan" is neither novel nor judicially incognizable. Rather, consistent with our historical practices, their request is a recognition that remedying decades of institutionalized violations may take some time. Here, too, decelerating from our path toward cataclysm will undoubtedly require "elimination of a variety of obstacles." Those obstacles may be great in number, novelty, and magnitude, but there is no indication that they are devoid of discernable standards. Busing mandates, facilities allocation, and district-drawing were all "complex policy decisions" faced by post-*Brown* trial courts, *see* Maj. Op. at 25, and I have no doubt that disentangling the government from promotion of fossil fuels will take an equally deft judicial hand. Mere complexity, however, does not put the issue out of the courts' reach. Neither the government nor the majority has articulated why

the courts could not weigh scientific and prudential considerations—as we often do—to put the government on a path to constitutional compliance.

The majority also expresses concern that any remedial plan would require us to compel "the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change[.]" *Id.* at 25. Even if the operative complaint is fairly read as requesting an affirmative scheme to address *all* drivers of climate change, however caused, *see id.* at 23 n.6., such an overbroad request does not doom our ability to redress those drivers implicated by the conduct at issue here. Courts routinely grant plaintiffs less than the full gamut of requested relief, and our inability to compel legislation that addresses emissions beyond the scope of this case—such as those purely in the private sphere or within the control of foreign governments—speaks nothing to our ability to enjoin the government from exercising its discretion in violation of plaintiffs' constitutional rights.

4.

In sum, resolution of this action requires answers only to scientific questions, not political ones. And plaintiffs have put forth sufficient evidence demonstrating their entitlement to have those questions addressed at trial in a court of law.

As discussed above, the majority reaches the opposite conclusion not by marching purposefully through the *Baker* factors, which carve out a narrow set of nonjusticiable *political* cases, but instead by broadly invoking *Rucho* in a manner that would cull from our dockets any case that presents administrative issues "too difficult for the judiciary to manage." Maj. Op. at 28. That simply is not the test. Difficult questions are not necessarily political questions and, beyond reaching the wrong conclusion in this case, the

majority's application of *Rucho* threatens to eviscerate judicial review in a swath of complicated but plainly apolitical contexts.

Rucho's limitations should be apparent on the face of that opinion. *Rucho* addresses the political process itself, namely whether the metastasis of partisan politics has unconstitutionally invaded the drawing of political districts within states. Indeed, the *Rucho* opinion characterizes the issue before it as a request for the Court to reallocate political power between the major parties. *Rucho*, 139 S. Ct. at 2502, 2507, 2508. *Baker* factors aside, *Rucho* surely confronts fundamentally "political" questions in the common sense of the term. Nothing about climate change, however, is inherently political. The majority is correct that redressing climate change will require consideration of scientific, economic, energy, and other policy factors. But that endeavor does not implicate the way we elect representatives, assign governmental powers, or otherwise structure our polity.

Regardless, we do not limit our jurisdiction based on common parlance. Instead, legal and constitutional principles define the ambit of our authority. In the present case, the *Baker* factors provide the relevant guide and further distinguish *Rucho*. As noted above, *Rucho*'s holding that policing partisan gerrymandering is beyond the courts' competence rests heavily on the first *Baker* factor, *i.e.*, the textual and historical delegation of electoral-district drawing to state legislatures. The *Rucho* Court decided it could not discern mathematical standards to navigate a way out of that particular political thicket. It did not, however, hold that mathematical (or scientific) difficulties in creating appropriate standards divest jurisdiction in *any* context.

Such an expansive reading of *Rucho* would permit the "political question" exception to swallow the rule.

Global warming is certainly an imposing conundrum, but so are diversity in higher education, the intersection between prenatal life and maternal health, the role of religion in civic society, and many other social concerns. *Cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) ("[T]he line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear[.]"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (stating that *Roe v. Wade*, 410 U.S. 113 (1973), involved the "difficult question" of determining the "weight to be given [the] state interest" in light of the "strength of the woman's [privacy] interest"); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (noting that determining the constitutionality of a large cross's presence on public land was "difficult because it represents a clash of genuine and important interests"). These issues may not have been considered within the purview of the judicial branch had the Court imported wholesale *Rucho*'s "manageable standards" analysis even in the absence of *Rucho*'s inherently political underpinnings. Beyond the outcome of the instant case, I fear that the majority's holding strikes a powerful blow to our ability to hear important cases of widespread concern.

III.

To be sure, unless there is a constitutional violation, courts should allow the democratic and political processes to perform their functions. And while all would now readily agree that the 91 years between the Emancipation Proclamation and the decision in *Brown v. Board* was too long, determining when a court must step in to protect

fundamental rights is not an exact science. In this case, my colleagues say that time is "never"; I say it is now.

Were we addressing a matter of social injustice, one might sincerely lament any delay, but take solace that "the arc of the moral universe is long, but it bends towards justice."[15] The denial of an individual, constitutional right—though grievous and harmful—can be corrected in the future, even if it takes 91 years. And that possibility provides hope for future generations.

Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?

I would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial. I would therefore affirm the district court.

With respect, I dissent.

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[15] Dr. Martin Luther King, Jr., Remaining Awake Through a Great Revolution, Address at the National Cathedral, Washington, D.C. (Mar. 31, 1968). In coining this language, Dr. King was inspired by an 1853 sermon by abolitionist Theodore Parker. *See* Theodore Parker, *Of Justice and the Conscience*, *in* Ten Sermons of Religion 84–85 (Boston, Crosby, Nichols & Co. 1853).

Annex 636

Ramendra Prasad v Total (Fiji) Ltd, Decision of the Court of Appeal, 28 February 2020

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 90 OF 2018
[High Court Civil Action No. HBC 131 of 2011]

BETWEEN : RAMENDRA PRASAD

Appellant

AND : TOTAL (FIJI) LIMITED

Respondent

Coram: **Lecamwasam, JA**
Almeida Guneratne, JA
Jameel, JA

Counsel : **Mr. J. Sloan and Ms. M. Muir for the Appellant**
Mr. H. Nagin and Ms. L. Prasad for the Respondent

Date of Hearing: **06 February 2020**

Date of Judgment: **28 February 2020**

JUDGMENT

Lecamwasam, JA

[1] This is an appeal preferred by the Appellant against the judgment dated 23 August 2018 of the High Court at Suva on the following grounds of appeal:-

GROUNDS OF APPEAL

Ground 1

1. *The learned Judge erred in fact and in law by finding that the Respondent was not liable for the full leakageing from its underground tanks and pipes situated in the Appellant's land for the following reasons:-*

    (a) The learned Judge found that it was not disputed that there was a fuel leakage;

    (b) The learned Judge wrongly held that the appellant had to prove that the fuel leakage came from the underground tanks and not the connecting underground pipes thus contradicting the agreed facts set out in the minutes of pre-trial conference;

    (c) The learned Judge wrongly held that the appellant had to prove that the disturbance of the existing tanks and pipes by the Respondent's installation of the T10 tank was the sole cause of the fuel leakage and ignored and / or fail to apply the established case law principles referred to him and set out in Ambaram Narsey Properties Ltd v Khan Brothers and Lautoka City Council; Lautoka High Court Civil Action , HBC 139 of 1996L;

    (d) The learned Judge wrongly found that the Respondent could not be liable in tort and negligence because a written supply contract had expired when the respondent continued to supply fuel and deal with the appellant, a finding which was wrong because the respondent claim is in tort and negligence and the learned Judge confused the law of contract and the law of tort and negligence;

    (e) The learned Judge wrongly interpreted the intent and plain meaning of section 50 of the Environment Management Act 2005 and wrongly applied it as requiring evidence of health related problems in order to claim damages and loss and reimbursement of instruction cause;

    (f) The learned Judge ignored, excluded or failed to consider the expert evidence as to the illegal and dangerous installation of the 10,000 litres T10 tank by the

Respondent in the Appellant's land and the weight of the expert evidence regarding the result of this dangerous installation;

(g) *The learned Judge ignored and excluded the evidence of the appellant's attempt to abate the leakageing fuel and the Respondent's denial of a fuel leakage and inaction until the Ministry of Environment on behalf of the Fiji Government found a few leakages have been proved and ordered the respondent to stop supplying fuel and;*

(h) *The learned Judge wrongly ignored, excluded or failed to consider the case law presented to him which demonstrated amongst other things, the actions that should be taken by an oil company when its equipment leakages.*

Ground 2

2. *The learned Judge erred in fact and in law by finding the fuel leakage was not extensive as the witnesses testified on the weight of the expert evidence demonstrated for the following reasons:-*

(a) *The judgment wrongly held that there was a fuel leakage but not to the extent as alleged by the appellant;*

(b) *The learned Judge wrongly substitute his own supposition that fuel leakageing underground would evaporate an assumption without any evidentiary basis that contradicted the expert evidence adduced by both the appellant and the respondent and the testimony before the honorable court;*

(c) *The learned Judge's incorrect finding on his own supposition unsupported by expert evidence that fuel will evaporate led to the further errors of fact that suggest the learned Judge did not understand that the fuel leakage had occurred underground contrary to the expert evidence of both the Appellants and Respondents expert witnesses;*

(d) *The learned Judge wrongly found without evidentiary basis that the amount of the leakage represented only a very small portion of the total capacity of the underground fuel tanks and made incorrect and unsupported factual findings in*

relation to the extent of the fuel leakage and its timing, contrary to the testimony of the witnesses and expert witnesses;

(e) *The learned Judge failed to take into account or understand the timings of the fuel leakage and the expert evidence relating to its probable start date and end date and the effect of the respondent's inaction during that time and;*

(f) *The learned Judge excluded and/or misunderstood the expert evidence from both the appellants and respondents expert witnesses and the oral testimony before him that demonstrated the extent of the contamination of the appellant's land (2000 times higher) between 2006 and 2009 and that 60% of the pollution would remain immobile in the Appellant's land.*

Ground 3

3. *The learned Judge erred in fact and in law by ignoring the expert evidence relating to the damage to the Appellant's land and business and contamination caused by the fuel leakage from the underground tanks and/or pipes and the respondent's subsequent conduct for the following reasons:*

(a) *The learned Judge ignored or failed to understand the testimony of all the expert witnesses regarding the extend of the fuel leakage and contamination of the land;*

(b) *The learned Judge ignored the testimony of the expert witnesses as to an oil company's appropriate response to fuel leakages;*

(c) *The leaned Judge ignored, without proper reasons, the testimony of the Appellant regarding his future plans for the land and the decrease in his business and the cost and safety concerns of storing the Respondent's abandoned underground fuel tanks on the Appellant's land;*

(d) *The learned Judge ignored the testimony of the Appellant regarding the health and other hazards that have been caused by the Respondent refusing to remove its equipment that it has abandoned on the Appellant's land and the Respondent's failure to comply with the consent order from the Magistrate's court; and*

(e) *The learned Judge wrongly interpreted the expert report on the level of contamination and cost of remediation as applying to areas outside the appellant's land.*

Ground 4

4. *The learned Judge erred in awarding costs to the Respondent when the learned Judge based his judgment on matters other than those pleaded by the Respondent which alleged only that the appellant had fabricated the fuel leakage.*

Ground 5

5. *The learned Judge erred in law in awarding costs to the Respondent when the Respondent had not brought any evidence before the Court to support its counter claim which was effectively abandoned at the hearing of this matter without any consequences in costs.*

Ground 6

6. *Such other and further grounds of appeal as may arise or become apparent from the record of the High Court of the recorded transcript. .*

[2] At the pre-trial conference the parties admitted the following facts:

1. *The plaintiff is the registered proprietor of the property (land and building) comprised in CT 29781 (the land) and of the business known as "Farmers Freeway Service Station" (the service station). The service station was registered in April 1998 and commenced business operations in or around June 1998.*
2. *The land on which the service station is situated, is on Princess Road in Sawani at the base of Colo-i-Suva mountain rangers along the Sawani river basin, close to Nausori town in the South East of the Island of Viti Levu.*
3. *The defendant is a limited liablity company having its registered office at 10 Rona Street, Walu Bay, Suva and is engaged in the importation, supply and retail of petroleum products including fuels, oils and lubricants.*
4. *The defendant was incorporated in Fiji on 23 November 1979 as Shell Fiji Limited and had his name changed to Total (Fiji) Limited on 3 November 2006.*
5. *At all material times the defendant supplied the plaintiff with its fuel products for sale to the plaintiff's customers in the Service Station business pursuant to*

fuel supply contract dated 12 November 1997 ("the Agreement"), the key of which were:

a. *The defendant would be the exclusive supplier of petroleum or fuel products to the plaintiff;*
b. *The defendant would provide to the plaintiff equipment for the storage and supply of fuel and petroleum products on the land;*
c. *The equipment provided by the defendant and listed in the fuel supply agreement would remain the property of the defendant at all times.*

6. *Around the end of 1997 and beginning of 1998 and pursuant to the agreement the defendant installed the following equipment on the land:*

    a. 4 underground fuel tanks
    b. 5 fuel dispenser units
    c. Shell light
    d. All the support equipment needed for the operation of the Service Station including the pipes to transfer fuel from the tanks to the fuel pumps ("the defendant's equipment").

7. *Pursuant to the agreement each time the plaintiff purchased fuel from the defendant, the defendant would deliver fuel to the plaintiff via the defendant's fuel tankers and the defendant would then fill the four underground fuel tanks with the volume of the fuel ordered by the plaintiff. The volume of the four underground fuel tanks was distributed to the fuel pumps connected to the fuel tanks through pipes installed by the defendant.*
8. *The obligation for servicing and maintaining the fuel tanks, the pipes and the fuel dispensers rested with the defendant and at all material times the defendant undertook these servicing and maintenance tasks.*
9. *In or around September 2007 the defendant agreed to locate and install a new fuel storage tank on the land and in or about September 2007, the defendant and/or its agents installed on the land at the Service Station an additional underground fuel tank with the capacity of 10,000 liters ("T10 Tank") for the purpose of storing diesel fuel.*

10. *After the installation of the T10 Tank by the defendant the Service Station had a total of 5 underground fuel tanks installed on the land by the defendant.*
11. *The plaintiff terminated its business dealings with the defendant on or around 10 June 2009.*
12. *The defendant's equipment remained on the land after the termination of the fuel supply agreement by the plaintiff as the plaintiff did not allow the defendant to remove the same and claimed storage charges from the defendant before the equipment could be removed.*
13. *On 14 November 2009 the defendant instituted proceedings in the Suva Magistrate's Court against the plaintiff for removal of the defendant's equipment without payment of storage costs claimed by the plaintiff.*
14. *On 31 January 2010, by consent of the plaintiff and the defendant, all of the defendant's equipment except the underground fuel tanks were removed by the defendant.*
15. *On 29 September 2010, the following orders were made by the Suva Magistrate's Court:*
    (a) That Defendant was to remove its fuel tanks from the Service Station within one month of the order being made;
    (b) The plaintiff's experts were at liberty to conduct necessary tests on the fuel leakage during the removal of the fuel tanks by the defendant; and
    (c) The defendant was to pay the plaintiff legal costs in the sum of FJD1000.00.
16. *The defendant has appealed the orders of the Suva Magistrate's Court made on 29 September and the appeal has remained unheard to date.*
17. *The plaintiff commenced the within proceedings in the Suva High Court on 6 May 2011 by way of a writ of summons.*

[3] In the background of the evidence and the light of the grounds of appeal urged, I shall now proceed to ascertain the judgment of the High Court bears scrutiny.

[4] I begin by summarizing the findings made by the learned Judge viz:

a) There was a fuel leakage but it was of a negligible quantity.
b) It was the Appellant's burden to prove that the leakage was from the underground fuel tank and not from the underground fuel pipes.
c) For the plaintiff/appellant to successfully maintain his claim he must establish by evidence that allowing the underground tanks to remain, caused, health-related problems and if so, the extent of the damages (therefore implying that, there was no such evidence)
d) On the aspect of the 'evaporation' I shall refer to later, if necessary, in my final determination.
e) *"According to the findings of the various reports the installation of the T10 tank has not been done properly. As a result, the position of the tanks could have shifted slightly. However, there is no evidence that the installation of the T10 tank caused damage to the other tank which resulted in extreme damage…"* (finding of the learned Judge at paragraph [33] of his judgment).
f) *"The allegation of the plaintiff is that the cause for the damage is the negligence of the defendant (paragraph [35] of the learned Judge's judgment)... Therefore the plaintiff cannot make any claim against the defendant based on negligence"* (paragraph [36] of the judgment of the High Court).

[5] I now proceed to analyze the correctness or otherwise of the impugned judgment in the light of the submissions made by the respective Counsel (both oral and written) in the light of the aforesaid findings made by the learned Judge. It was in the background of these admitted facts that the learned judge found that the Appellant had failed to prove that the leakage occurred from the pipe.

[6] The Appellant contended that the leakage was caused by the careless installation of the 'T10' tank.

[7] On behalf of the Respondent, its Vice President (Sales and Marketing) testified that after receiving the complaint they took steps to fix the leakage, and there was a slight seepage of fuel from pipelines. He denied that the leakage was from the tanks.

[8] As per item 8 of the agreed facts, the tanks and pipes both belong to the Respondent. Therefore, it is irrelevant whether it was the tanks or the pipe that leakage as the installation and maintenance of the tanks, pipes and all the related equipment was the property and responsibility of the Respondent.

[9] The learned judge found that the Appellant had produced detailed and extensive evidence, to establish that there was a fuel leakage as alleged by him.

[10] The learned judge said as follows:

> *[29] From the above it appears that the plaintiff has tendered extensive evidence in his attempt to establish that there was a fuel leakage as alleged by him. It is not disputed that that there was a fuel leakage. As I have stated earlier the position of the defendant is that the fuel leakage was in the pipes which was later fixed. As per the investigations of the Department of environment fuel leakage occurred when the tank was full. When there was lot of sales as claimed by the plaintiff the fuel tanks could not have been full all the time. Therefore, the leakage could not have been extensive.*
>
> *[30] For the plaintiff to collect 60 to 80 liters of fuel the leakage must be extensive. There is no evidence that the fuel storage tanks were re-filled every day. The plaintiff does not have any evidence to show that the leakage was not from the pipes or not only when the tanks are full. The burden is on the plaintiff to establish that the leakage was not from the pipes but from the tanks.*

[11] These findings of the learned judge are challenged by the Appellant on the basis that they are contrary to the admitted facts.

[12] In paragraph [30] of the judgment the learned judge says that the for the plaintiff to have collected 60 to 80 liters of fuel (per day) the leakage must "be extensive" However, he concluded that there is no evidence that the fuel storage tanks were re-filled every day, and that the plaintiff does not have any evidence to show that the leakage was not from the pipes ,or not only when the tanks are full, and that the burden is on the plaintiff to establish that the leakage was not from the pipes but from the tanks.

[13] In my view, this conclusion did not reflect the evidence, and it imposed an unfair burden on the Appellant. How could the Appellant establish with certainty whether the leakage was from the tanks or the pipes, when even the expert evidence was not certain of where the leakage was coming from. They attempted to repair the pipes several times. In this background, I do not think there was any basis for the learned trial judge to place such a burden on the Appellant, and conclude there was no negligence on the part of the Respondent.

[14] The Respondent's evidence was that their examination revealed that the leakage was from the pipeline joint. Upon discovery, it was repaired at the Respondent's cost. The Respondent later carried out a detailed accounting check by comparing the quantity received by the appellant as against the quantity sold. Its investigations revealed that the value of the stock was less than $120.00, which the Respondent said was a 'negligible percentage' of the overall output from the tanks, and was within the tolerance limit. The Respondent's position is that the Appellant refused to accept that the leakage was 'negligible'.

[15] In my view, this is not a tenable position in the light of the expert scientific evidence. Pollution of the environment is a regulated matter and the provisions of the Environment Management Act 2005 regulate the activities of the parties in this case.

[16] The following definitions contained in the Environment Management Act 2005 are relevant to the determination of the appeal.

> *"land" includes messuages, tenements or hereditaments, corporeal and incorporeal, buildings and other fixtures, paths, passageways, watercourses, easements, plantations, gardens, mines, minerals and quarries, the foreshore and seabed or anything resting on the seabed;*
>
> *"pollutant" means dredged spoil, solid or liquid waste, industrial, municipal or agricultural waste, incinerator residue, sewage, sewage sludge, garbage, chemical waste, hazardous waste, biological material, radioactive materials, wrecked or discarded equipment, oil or any oil residue and exhaust gases or other similar matter; (*emphasis added*)* .
>
> *"pollution incident" means the introduction, either directly or indirectly, of a waste or pollutant into the environment, which results in 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 water, air or soil, reduction of amenities or the creation of a nuisance;*
>
> *"protecting the environment" means the establishment of measures to ensure the protection of human health, safety, property, legitimate uses of the environment, species of flora and fauna, ecosystems, aesthetic properties and cultural resources, or preventing nuisance or risk of harm to any such value, on a sustainable basis;*

[17] The definitions in the Act indicate the extensive meanings given to environmental pollution, so as to capture within the reach of the Act a wide variety of activities and persons.

[18] Section 50 of the Act is a reflection of the "polluter pays principle", and is meant to act as a deterrent and ensure all-round concern for the human life, as well as the environment.

[19] In paragraph [33] the learned judge said that according to the findings of the various reports tendered by the parties, the installation of the T10 tank had not been done properly, and as a result the position of the tanks could have shifted slightly. Despite this, the learned judge concluded that there was no evidence that the installation of the T10 Tank caused damage to the other tanks which resulted in extensive leakage of unleaded and premix fuel. In his view, without evidence of the source of the leakage, the court was unable to ascertain the quantity of the leakage. But, the installation of the tanks was the sole responsibility of the Respondent, and the learned Judge's findings was not correct.

[20] I find that in determining whether the Respondent was negligent or not, it was not necessary for the court to know the exact source of the leakage, because it could have been only from the Respondent's tanks, because there were no tanks owned by anyone else which had been stored underground in the Appellant's land.

[21] The learned judge rejected the Respondent's evidence showing the amounts of fuel leakage. He found that it would not have been possible for the plaintiff to collect as much as 10,000 liters within a period of few months considering the fact that part of the fuel leakage would certainly have been absorbed to the soil and another portion of it would have *'evaporated'*. The Appellant challenges this finding. In any event the leakage is recognized as a *'pollution incident'* under the Act. Therefore, this finding was not correct.

[22] Section 50 of the Act states:

> *50.-(1) A person who has <u>suffered loss which includes</u> contracting health-related problems as a result of any pollution incident may institute a civil claim for damages in a court, which may include a claim for-*

(a) economic loss resulting from the pollution incident or from activities undertaken to prevent, mitigate, manage, clean up or remedy any pollution incident;

(b) loss of earnings arising from damage to any natural resource;

(c) loss to or of any natural environment or resource;

(d) costs incurred in any inspection, audit or investigation undertaken to determine the nature of any pollution incident or to investigate remediation options.

(2) A claim under this section may be set off against any compensation paid under section 47(2). [Emphasis Added].

[23] In the light of this strict statutory provisions, which prescribe serious punishment for offences committed under the Act, a court must take cognizance of the pollution incident so that the language and the spirit of the protections given under the Act, are effective.

[24] It is clear even from the Respondent's written and oral submissions that the Respondent acknowledged that there was a leakage and it had to be monitored. In fact, in paragraph 2.4 of the Appellants written submissions, it states that the Respondent used to send its team practically on a daily basis.

[25] In November 2008, the Environmental Department directed the Appellant to suspend supplying fuel. The Respondent submits that it was due to this order, that it was prevented from supplying fuel to the Appellant, and that it is "not responsible" for the losses of the Appellant. I am of the view that this is an untenable contention. The leakage occurred from property belonging to the Respondent, although it took place on the Appellant's land. If the leakage was negligible, as concluded by the learned judge, it is unlikely that the Department of Environment would have directed the Appellant to stop supplies.

[26] The learned Judge found that the fuel leakage was negligible and that the Appellant had not proved that it was from the tanks.

[27] If so, I asked myself the question as to what difference that could make whether it was from the underground fuel tank or the underground fuel pipes.

[28] Then, there arises the issue that the installation of the T10 tank had not been done properly (though there was no evidence of extreme damage).

[29] Then came the final crunch on the High Court judgment which I have re-capped in paragraph [2] (g) of my judgment.

[30] It is clear from the foregoing analysis on the basis of the learned judge's own findings that there was negligence on the part of the Respondent, his concern being shifted to the question of damages claimed in consequence flowing therefrom.

[31] Accordingly, I have no hesitation in saying that negligence on the part of the Respondent had been established. In that regard, I hold that the learned Judge had erred and misdirected and/or non-directed himself on the law, and the attendant principles impacting thereon.

[32] On the application of the legal principles to the very findings made by the learned Judge I wish to say this:-

(a) There was no "*causa causam*" involved but "*causa sine qua non*" which had led to the damage complained by the Appellant.

(b) The appellant did rely on the court's ruling in the **Abraham Narsey's** case which I found to be in favour of the Appellant as submitted by Mr. Sloan. However, I went further in tracing the principles of negligence in tort beginning with **Donahue v Stevenson** [1932] UKHL 100, (the seminal ruling of the House of Lords as per Lord Atkin) going upto **Re Polemis & Furness, Withy & Co Ltd** [1921] 3 KB 560 (CA),ruling in the **The Wagon Mound no 1** [1961] AC 388 (House of Lords).

(c) On a reading of those decisions, I have reached the conclusion that there was negligence on the part of the Respondent for which reason I reverse the judgment of the High Court.

[33] In the result while I feel no constraint in saying that, the learned judge having gone wrong on the question of negligence, his focus being on the "extent of damage" for the reasons I have adduced above, in so far as the assessment of damages is concerned, I remit that matter to "the Master".

[34] The Appellant claimed several reliefs in the court below. As I have decided to remit this matter of assessment of damages to the Master, I will deal with some aspects of the reliefs in this judgment. The reliefs claimed were:

> *"a. Damages for contamination of land (July 2008 to January 2009) – FJD $468,675.00;*
>
> *b. Damages for continued contamination of land February 2009 to date) FJD 1,500,000.00;*
>
> *c. Economic losses to the plaintiff resulting from the pollution incident including loss of business and reduction in trading capabilities – in accordance with section 50 of the Environment Management Act – (December 2008 to July 2009 – FJD 950,000.00;*
>
> *d. Storage costs for the storage of the defendant's equipment on the land from June 2009 to date – FJD 281,977.88 at the date of this action and continuing;*
>
> *e. Damage for nuisance incurred due to the defendant's refusal to remove its underground fuel tanks from the land – in accordance with section 50 of the Environment Management Act – FJD 250,000.00;*
>
> *f. Costs of the plaintiff's travel to and from Australia to deal with the contamination incident – FJD 10,000.00;*
>
> *g. Exemplary and punitive damages for reckless conduct in addition to the damages set out above;*
>
> *h. Costs of engaging experts and preparation of reports and associated expenses relating to the contamination – in accordance with the Environment Management Act – FJD 29,000.00;*

i. $1000.00 costs ordered by the Magistrate's Court following the consent of the defendant's solicitor to the orders made by the Magistrate's Court on 29th September, 2009;

j. The continuing legal costs of the plaintiff in respect of Suva Magistrate's Court Civil Action No. 342 of 2009 and its appeal on an indemnity basis;

k. Special damages;

l. General damages;

m. Interests on the above claims; and

n. Costs of this action on indemnity basis

[35] In regard to prayers a and b, since I have found that the Respondent was negligent, and it was this that caused the contamination of the Appellant's property, the Appellant is entitled to damages on this basis. The measure of damages will be considered by the learned Master.

[36] In respect of economic losses suffered by the Appellant, the learned Master will consider the matter in accordance with section 50 of the Environment Management Act.

[37] In paragraphs [39] and [40] of the judgment the learned says that when the Appellant discovered the leakage, in order to minimize the damage and to prevent any further leakage, he should have closed down the two tanks in which the fuel was leakageing, immediately informed the Respondent, and then claimed damages for loss of sales in the event the Respondent failed to repair the leakage. This finding reveals that the learned trial judge did have in mind that the Appellant would or could have suffered economic loss if sales had to be stopped. In fact, after the government directed the Appellant to stop sales during a specific period, the Appellant says he suffered loss. Accounts were produced in court. At the time fuel leakage was detected, the FSA agreement between the parties had expired. However, even at that time, the tanks continued to be owned by the Respondent.

[38] In respect of storage costs for the storage of the defendant's equipment on the land from June 2009 to date, and for Damages for nuisance incurred due to the defendant's refusal to

remove its underground fuel tanks from the land. In view of the above admission at the pre-trial conference, it is the Plaintiff who had not allowed the defendant to remove the equipment (due to reasons best known to him). As this is a contested matter before the Magistrate's Court which is in appeal, I do not wish to make any observations in that regard. Therefore I decline to make any award under this head.

[39] Even in terms of clause 5 of the agreement, although the onus was on the Appellant to be responsible for the storage of the products sold by him, in accordance with the relevant laws and regulations at the time, the tanks, pipes and related equipment continued to be owned by the Respondent.

[40] In regard to the claim for exemplary and punitive damages for reckless conduct in addition to the damages set out above; this court sees no basis to award costs under this head, despite the finding of negligence on the part of the Respondent, due to the conduct that ensued between the parties.

[41] In regard to costs of engaging experts and preparation of reports and associated expenses relating to the contamination, in accordance with the Environment Management Act, the learned Master is entitled to consider reasonable costs under this head.

[42] In regard to damages for nuisance incurred due to the defendant's refusal to remove its underground fuel tanks from the land, it is pertinent to advert to the agreed facts of the minutes of the pre-trial conference wherein at paragraph 12 it is recorded thus:-

> *"The defendant's equipment remained on the land after the termination of the fuel supply agreement by the plaintiff as the plaintiff did not allow the defendant to remove the same and claimed storage charges from the defendant before the equipment could be removed"*.

[43] Although the Plaintiff says that he was getting medical treatment in Australia and had to travel back to Fiji especially because of the alleged fuel leakage, he has not proved this as special damages by the production of an air ticket or any other medical grounds to the satisfaction of court and therefore the learned High Court Judge had not erred in respect of the cost of the Plaintiff's travel.

[44] This court is mindful of the principles usually followed when it is faced with the task of overturning the trial judge's finding on the facts.

Conclusion

[45] Accordingly, I order as follows:-

i) That the appeal be allowed and the judgment of the High Court is set aside;
ii) The Registrar is directed to send this matter to the Master for determining the quantum of damages due to the Appellant;
iii) The Respondent is to pay to the Appellant a sum of $5,000.00, as costs in the court below and the sum of $10,000.00 in this court within 28 days of this Judgment.

Almeida Guneratne, JA

[46] I agree with the reasoning, conclusion and the proposed orders contained in Lecamwasam, JA's judgment.

Jameel, JA

[47] I agree with the conclusions and orders proposed by Lecamwasam JA.

The Orders of the Court are:

1. *The Appeal is allowed and the judgment of the High Court dated 23 August 2018, is set aside.*
2. *The Registrar is directed to send this matter to the Master for determining the quantum of damages due to the Appellant as directed by this court.*
3. *The Respondent is ordered to pay to the Appellant a sum of $5000.00 as costs in the court below and $10,000.00 as costs in this court within 28 days from the date of this judgment.*

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Hon. Justice S. Lecamwasam
Justice of Appeal

COURT OF APPEAL FIJI

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Hon. Justice Almeida Guneratne
Justice of Appeal

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Hon. Justice F. Jameel
Justice of Appeal

Annex 637

Petropulos & Another v Dias [2020] ZASCA 53

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1055/2018

In the matter between:

MARINA PETROPULOS **FIRST APPELLANT**

NIK MOROFF & ASSOCIATES CC **SECOND APPELLANT**

and

ARTUR FERNANDO PERREIRA DIAS **RESPONDENT**

Neutral citation: *Petropulos & Another v Dias* (Case no 1055/2018) [2020] ZASCA 53 (21 May 2020)

Coram: PONNAN, SALDULKER, VAN DER MERWE, MAKGOKA AND MOKGOHLOA JJA

Heard: 3 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 21st day of May 2020.

Summary: Neighbour law – duty of lateral support – owed to land and buildings on it – English principle of lateral support, although influential, not part of our law – strict liability – available in principle for breach of lateral support.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Bozalek J sitting as court of first instance): judgment reported *sub nom Dias v Petropulos and Another* [2018] ZAWCHC 93; 2018 (6) SA 149 (WCC); [2018] 4 All SA 153 (WCC).

The appeal is dismissed with costs, such costs to be paid by the appellants jointly and severally, the one paying the other to be absolved.

JUDGMENT

Makgoka JA (Ponnan, Saldulker, Van Der Merwe, and Mokgohloa JJA concurring)

[1] This appeal concerns the nature, scope and ambit of the duty of lateral support owed in respect of contiguous properties. The court a quo, the Western Cape Division of the High Court, Cape Town (Bozalek J), concluded that the duty of lateral support is owed not only in respect of land but also buildings constructed on the land, save where such land has been 'unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land.' The appeal is with leave of the court a quo.

[2] The facts are comprehensively set out in the judgment of the court a quo, which has been reported *sub nom Dias v Petropulos and Another* [2018] ZAWCHC 93; 2018 (6) SA 149 WCC; [2018] 4 All SA 153 (WCC). Briefly stated, the facts are: The first appellant, Ms Petropulos, the respondent, Mr Dias, and Mr Dawid Venter (Mr Venter), Mr Kenneth Wentzel (Mr Wentzel) and Mr Peter Babrow (Mr Babrow), owned adjoining properties in Camps Bay, Cape Town, on a steeply sloping mountainside. The land on which the properties are situated, is bound by Theresa Avenue, on the upper end of the mountain, and Barbara Road, on the lower end. The respondent's property is situated in Theresa Avenue. It shares a boundary with the properties of the

first appellant and Mr Venter, both of which are situated downhill in Barbara Road. At the relevant time, being March to August 2008, all of the properties, except for the first appellant's, which was still an undeveloped erf, had houses built on them. The respondent's house had been completed in 1994.

[3] During March 2008 the first appellant and Mr Venter each undertook excavations on their respective properties, near the respective boundaries with the respondent's property. The excavation on the first appellant's property was in preparation for the building of a house, while Mr Venter was preparing to build an additional garage. The building works on Mr Venter's property were uneventful, and were completed in April 2008. The excavation on the first appellant's property, on the other hand, involved fairly substantial excavations to produce three tiers, and for a lift shaft. To provide lateral support, the three levels were each secured by a retaining wall. Mr Naumann, the first appellant's husband, an experienced builder, undertook the building works on the property.

[4] From May 2008, problems became evident on the respondent's property. A dip appeared in the garden; furrows appeared in the garden between the respondent's property and the first appellant's; the respondent's terra-force wall, and the ground under it, collapsed during the course of the construction of the top retaining wall. Between 23 July and 1 August 2008, there was a major movement in the underlying ground. The entire slope on which respondent's property is situated, subsided. The respondent's property moved laterally and downwards towards the excavation on the first appellant's property, resulting in extensive structural damage to the property. Cracks appeared in the walls, tiles, floor slabs, the boundary wall as well as the driveway adjacent to Theresa Road. The pool rail detached from the house and a hairline crack appeared in it. There were problems on Mr Venter's property, too. The property subsided and cracks appeared thereon. On 23 July 2008 Mr Venter, because of safety concerns, was forced to abandon the property.

[5] The respondent attributed the damage to his property to the excavations undertaken by the first appellant and Mr Venter on their respective properties. He instituted a claim for damages against both, based on strict liability, for breach of the

duty to provide lateral support. It was alleged, among others, that the slope mobilised through the mechanism of 'a shallow slip circle with uplift at the toe, resulting in vertical upward bulging of the ground surface between Barbara Road and the structures facing onto it; and lateral movement towards Barbara Road.' This allegation became the focal point of the first appellant's case during the trial, as will be clear later. The first appellant and Mr Venter each defended the action and denied liability. The first appellant also joined the second appellant, Nik Moroff & Associates, the project engineer for the works on her property, as a third party to the proceedings.

[6] Before the trial commenced, an order was made, by a different judge, to adjudicate the following issues separately in terms of Rule 33(4) of the Uniform Rules of Court:

(a) Whether a common law duty to provide lateral support to the respondent's property was owed by each of the first appellant and Mr Venter properties;
(b) Whether the excavations carried out on each of the above properties in May or June 2008 breached this duty to provide lateral support;
(c) If so, whether as a result of the respondent's property being so deprived of such lateral support by such excavations the scree slope on which respondent's property was situated mobilised and subsided in June 2008.

[7] The trial commenced before the court a quo on 21 November 2016. During the course of the trial, Mr Venter reached an agreement with the respondent and ceased participation in the action, hence he takes no part in this appeal. On 30 July 2018 the court a quo delivered its judgment. It declared that: the first appellant and Mr Venter owed the respondent a duty to provide lateral support to his property; the excavations undertaken on their respective properties breached that duty, as a result of which the slope on which the respondent's property is situated, mobilised and subsided. No substantive order was made against the second appellant, except that it was ordered to pay the respondent's costs, jointly and severally with the first appellant.

[8] In this court, it was contended on behalf of the appellants that: First, the first appellant did not owe a duty to provide lateral support to the respondent's property, inasmuch as the latter's property was no longer in its natural state. Second, that the

excavations on the first appellant's property did not breach the duty to provide lateral support. Third, that the excavation on the first appellant's property was not linked sufficiently closely to the harm suffered by the respondent for legal liability to ensue (causation). And, fourth, that on the facts of this case, it is inconceivable that the first appellant should be held liable to the respond in the absence of a finding of fault. Each of these contentions will be considered in turn.

Is the duty of support owed only in respect of land in its natural state?

[9] In answering this question, the learned judge undertook an extensive analysis of the various authorities. This included *East London Municipality v South African Railways and Harbours* 1951 (4) SA 466 (E). There, it was held that our law of lateral support was the same as English law, in terms of which the right is confined to land in its natural state and does not extend to constructions such as buildings on it.

[10] The court a quo also considered the decision of this court in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* [2006] ZASCA 118; 2007 (2) SA 363 (SCA); [2007] 2 All SA 567 (SCA). The court a quo declined to follow *East London Municipality*, and concluded (at para 59)[1] that in our law, the duty of lateral support is owed to neighbouring or contiguous pieces of land as well as the buildings on it. However, at para 60,[2] the court expressed the following caveat to that general principle:

'However, too broad a formulation of the right or duty of lateral support could lead to conceptual and equitable difficulties, particularly where the contiguous parcels of land are situated on a slope. Where a property has been unduly or unreasonably loaded through the erection of disproportionately large or heavy structures, it would seem unfair in my view that a neighbouring piece of land should attract an equivalently onerous duty of lateral support'.

Later, at (para 63)[3] the learned judge summarised the position as follows:

'In the result, I consider that the appropriate approach is to hold that a duty of lateral support extends not only to land but also to buildings, save where such land has been unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land'.

[1] Para 152 in the original text.
[2] Para 153 in the original text.
[3] Para 156 in the original text.

[11] The appellants submitted that the court a quo was wrong by not concluding that the duty of lateral support in our law is similar to English law, in terms of which the duty is owed to land only in its natural state, and does not extend to artificial structures such as the buildings on it. Further, in English law, support for buildings can only be obtained by means of a servitude, which is obtainable by a user of a building after at least 20 years or by agreement. This principle of English law was enunciated more than a century ago in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 and is best expressed in the oft-quoted passage of Lord Penzance's speech at 804:

'[I]t is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away and allow his neighbour's house, if supported by it, to fall in ruins to the ground.'

[12] It is necessary to examine the development of our own law in this regard. The duty of lateral support owed to an adjacent landowner corresponds with the neighbour's entitlement to such support. This means that the right to lateral support is reciprocal between neighbouring landowners. That principle was first accepted into South African law as a principle of neighbour law in *London and SA Exploration Co v Rouliot* (1890-1891) 8 SC 74. There it was held (at 93) that the right of lateral support is a 'well established natural right', incidental to the ownership of the property and not servitudal in nature. *Rouliot* was followed, albeit on different grounds, in *Johannesburg Board of Executors and Trust Company Limited v Victoria Building Company Limited* (1894) 1 OR 43.

[13] However, the application of the principle to situations where land has been improved with buildings or structures on it, and where excavation causes subsidence and damage to buildings, has given rise to two contrasting views. Van der Walt[4] explains the divergent underlying philosophies thus:

'Milton argues that the right of lateral support is explained in terms of two theories. According to the one theory, the right of lateral support is a servitude arising from the natural situation of land (as opposed to servitudes created by grant or prescription). According to this theory, the right would be restricted to the land in its natural state and would not apply to buildings on the land. Furthermore, any infringement of the right would arise from the mere withdrawal of lateral

[4] AJ van der Walt *The Law of Neighbours* (2010) at 96 para 3 2 1.

support and not only from damage caused by such withdrawal, with the implication that prospective damages could be awarded. The second theory explains the right of lateral support as a natural right of property that is based on the principle *sic utere tuo alienum non laedas* and protected by nuisance law. Seen in this way, the right pertains to mutual respect for normal use of land and there is no reason why it should not apply to buildings as well. Furthermore, liability for infringements of the right would arise from actual damage and not simply from withdrawal of the support, and consequently prospective damages could not be claimed. Liability would be strict.'

As I have shown, *Rouliot* grounded the introduction of these principles in our law on the second basis.

[14] In *Victoria* and in *Phillips v South African Independent Order of Mechanics and Fidelity Benefit Lodge and Brice* 1916 CPD 61 it was held that Roman and Roman-Dutch law recognised a right of lateral support for land and buildings. Consequently the defendants were held liable for the collapsing of buildings caused by the excavation of land on the boundary between two tenements. See also *Demont v Akals' Investments (Pty) Ltd and Another* 1955 (2) SA 312 (N), where Selke J (at 316B-E) said:

'An owner of land is normally entitled to expect and to require from land contiguous to his own such lateral support as would suffice to maintain his land in a condition of stability if it were in its natural state. A landowner can, of course, alter the condition of his land, for example by excavating or building on it, but he cannot normally, by the mere fact of doing that, acquire greater or different rights to lateral support. His basic rights … remain the same whatever he may choose to do with his land. They are rights ancillary to his ownership, and they are enjoyed reciprocally by him and by all owners of contiguous land; and, while they exist unimpaired, any infringement of them by the withdrawal or disturbance of lateral support furnishes him with a cause of action'.

[15] However, a different path was followed in *Douglas Colliery Ltd v Bothma and Another* 1947 (3) SA 602 (T) and in *East London Municipality.*[5] Those cases relied heavily on English law and consequently concluded that lateral support is owed only

[5] *East London Municipality* was uncritically followed in *Gordon v Durban City Council* 1955 (1) SA 634 (N) and in *John Newmark & Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (N).

to land in its natural state, and not to artificial structures on it. *Douglas* concerned mining law. Neser J held (at 612) that there is no natural right of support for that which is artificially constructed on land. The learned judge relied on a passage in Halsbury *Laws of England* (Hailsham ed, vol 22 under the title *Mines*) in which the following is stated at para 1341:

'There is no natural right of support for that which is artificially constructed on land: such a right cannot exist *ex jure naturae* for the thing itself did not so exist. Therefore any right to the support of such an artificial burden must in each case be acquired by grant, or by some means equivalent in law to a grant. Thus it may be acquired by express grant, or implied grant, or by prescription, or it may be created by statute.'

[16] In *East London Municipality*, a landowner had granted to the municipality and the public in general a public road over his property. The municipality laid high tension electric cables along the road. The defendant, in carrying out his quarrying operations, removed the lateral support and caused a subsidence. Reynolds J held that in regard to artificial constructions on land our law was the same as English law. Accordingly he concluded, in line with English authorities, that the right of lateral support extends only to land in its natural state and not to constructions such as buildings on it.

[17] Reynolds J (at 482H-484E) expressly declined to follow *Victoria* on the basis that the Roman law authorities relied on by Morice J in *Victoria* were no authority for the conclusion that lateral support was owed not only to neighbouring land but also to buildings on it. The learned judge then referred to Halsbury Laws of England (Hailsham ed (vol 11, para 640) in which the following is said:

'The mere fact, however, that there are buildings on his land does not preclude an owner from his right against a neighbour or subjacent owner who acts in such a manner as to deprive the land of support, so long as the presence of the buildings does not materially affect the question, or their additional weight did not cause the subsidence which followed the withdrawal of the support.'

[18] Over 50 years after the decision in *East London Municipality*, this court in *Anglo Operations* had to consider whether the principle of neighbour law should be extended to govern the relationship between mineral rights holders and owners of the same land. It was held that the principle should be restricted to the right of lateral support as

between neighbouring landowners, and that the relationship between the landowner and the holder of mineral rights in the same land is regulated by the principle of servitude. In the course of its judgment, the court considered the effect of *Rouliot,* in respect of which it was pointed out (in para 8) that the gravamen of the decision was that 'a rule, similar in content to the English rule of lateral support, which provides landowners, as an intrinsic element of their ownership, with the right of adjacent support of their land, should be incorporated into our law'. The court took the view that the origin of the principle was unimportant.

[19] After dealing with the conceptual differences between English law and our law, Brand JA cautioned (at para 17) with reference to *Rouliot*:

'Equally erroneous, in my view, is the statement that De Villiers CJ decided to incorporate the English doctrine of lateral and subjacent support, with all its ramifications, into our law. On the contrary, I agree with the statement by the Court a quo (at 366B) that what had happened in *Rouliot* was that:

"De Villiers CJ and Smith J simply introduced, as Judge-made law, a rule which they regarded as common to all civilised systems of law because, as they perceived it, a lacuna existed. The Judges did not concern themselves with the exact pedigree of the rule. . . . The rule was introduced because it was regarded as just and equitable."'

[20] It would thus seem that one of the 'ramifications' of the English doctrine of lateral support, which Brand JA cautioned against, is the slavish adoption of the restriction of lateral support being owed to neighbouring land only, and not extending the duty to buildings constructed thereon. This is surely understandable. English law on this aspect is rigid, and results in anomalies, as demonstrated in the passage from *Dalton*. Therefore, the significance of *Anglo Operations* is two-fold. First, it affirmed *Rouliot* as the correct statement of our law on lateral support. Second, it qualified *Rouliot*, and brought the principle of lateral support within the sphere of our neighbour law.

[21] In our neighbour law, fairness and equity are important considerations. As Hoexter JA explained in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 114G those considerations are the basis of the law between neighbours. Furthermore, in our constitutional context, the principle of lateral support must find expression in the

constitutional value of Ubuntu, which 'carries in it the ideas of humaneness, social justice and fairness'.[6] The English law principle of lateral support in all its rigidity may well be inimical to all these.

[22] It is significant that in at least one common law jurisdiction, Singapore, this principle has been jettisoned. In *Xpress Print Pte Ltd v Monocrafts Pte Ltd and Another* [2000] SGCA 37; [2000] 3 SLR 545, the appellant and the first respondent were neighbouring landowners. As a result of excavation work done by the first respondent on his land for the purposes of construction, the building on the appellant's land suffered massive damage. The appellant sued for, among others, wrongful interference of support, which was dismissed by the trial judge on the basis of English law as set out in para 11 above.

[23] On appeal to it, the Court of Appeal of Singapore held that the right of support enjoyed by a neighbouring landowner extended beyond the land in its natural state to the buildings erected thereon. In arriving at this conclusion, the court took the view that the right of support must have its roots in 'the principles of reciprocity and mutual respect for each other's property (at para 43). With regard to English law, the court observed (at paras 33 and 37):

'English law on the subject of the right of support … contains a number of curious propositions. If my neighbour's land is in its natural state, I may not remove the soil on my land without providing alternative support for his land; but if my neighbour expends money and effort in building a bungalow on his land, then I may excavate with impunity, even though his bungalow may crumble to the ground. Yet, my liberty to ignore the support required by his house is not perpetual, but lasts only for 20 years, at which time any indolence in pursuing my right to remove my soil is transformed into a positive right of support in respect of his dwelling. . . .

Perhaps only lawyers can understand and appreciate how a simple issue such as this, through the process of law, comes to be governed by a mass of convoluted and irreconcilable rules; surely only the bravest among them would attempt to explain it to the average citizen. For our part, we fail to see any legal principle capable of supporting the distinctions drawn by the cases. Further, we are of the view that the proposition that a landowner may excavate his land with impunity, sending his neighbour`s building and everything in it crashing to the ground, is

[6] Per Madala J in *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC) para 236.

a proposition inimical to a society which respects each citizen`s property rights, and we cannot assent to it'.

[24] These remarks are apposite, and accord with the principles of our own neighbour law. So viewed, and in the light of this court's exposition in *Anglo Operations*, it is clear that the courts in *Douglas* and *East London Municipality* erred. It follows that those decisions are not to be taken as correctly reflecting the position of our law. The court a quo was accordingly correct in holding that the duty of lateral support was not limited to land in its natural state, but extends to buildings on the land.

[25] However, as stated earlier, the court a quo articulated an exception to that general principle. The court said that a duty of lateral support extends not only to land but also to buildings, save where such land has been 'unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land'. What exactly the court a quo intended to convey by the quoted expression is unclear. The exception is not without practical difficulties. A typical example is that of a landowner who builds his or her home in full compliance with town planning and building regulations and in accordance with architectural plans. In terms of the exception, such an owner bears the onus to prove that the building had not 'unduly or unreasonably loaded' the land, or that it is not 'disproportionately large' or 'a heavy structure'. That is untenable.

[26] Furthermore, the philosophical foundation of the exception seems, with respect, doubtful. The learned judge relied heavily on the views of Professor Milton for the conclusion that the English principle of lateral support is not part of our law. The learned judge, said:

'Professor Milton argues that the exception whereby the English law does not apply to all artificial erections on land "so long as the presence of the buildings does not materially affect the question, or the additional weight did not cause the subsidence which followed the withdrawal of support" was doubtfully of any real value.'

However, in the same article, the learned author stated:

'It is an inevitable tendency of modern life for more and more people to gravitate to cities. As a result larger buildings must be erected to accommodate them and provide employment. The larger the buildings, the greater the pressure on the soil and the less the duty of lateral support

owed by neighbouring land. This, it is submitted, is an illogical and unrealistic approach and, on principle, it should not be preserved'.[7]

[27] The approach of the court a quo therefore appears incongruous. Furthermore, it unwittingly introduces a feature of the English principle of lateral support, referred to in *East London Municipality*, as set out in para 17 above. This is the very principle which the court a quo had correctly declined to follow. It follows that the exception the court a quo sought to introduce cannot be supported. As I demonstrate later in the judgment, there are sufficient safeguards in our law to meet the concerns sought to be addressed by this exception.

Did the excavations on the first appellant's property breach the duty of lateral support owed to the respondent?

[28] Seven witnesses testified on behalf of the respondent, two for the first appellant. The second appellant did not call any witnesses. For purposes of this appeal, only the evidence of the two geo-technical experts, Dr McStay and Dr Day is relevant. The reason for this is that it is no longer in dispute that the respondent's property was damaged by the slope failure in July and August 2008. Both appellants have, in their respective heads of argument in this court, conceded that aspect. Implicit in this, is the acceptance that there was no prior damage or structural defects on the respondent's property before the slope failure. That issue is one in respect of which the respondent, his wife, Mr Wentzel, Mr Babrow and Mr Naumann all testified. The other witness was Ms Valentia Papanicolaou, whose evidence related to the measurements of the ground movement from the end of July. Nothing turns on her evidence in the appeal.

[29] About the geo-technical experts, Dr McStay, for the respondent, is an engineering and environmental geologist, and a director in charge of a geo-sciences unit of an international engineering consultancy firm. Dr Day is a practising specialist geo-technical engineering consultant and an adjunct professor of geo-technical engineering at the University of Stellenbosch.

[7] Quoted in para 144 of the judgment of the court a quo (Footnote omitted.)

[30] The court a quo gave a commendably detailed exposition of their evidence. I would therefore focus on what I consider the salient features of their respective opinions. It was common cause between them that there was a slope failure which caused ground movement on the affected properties. However, they differed on the cause and mechanism of the slope failure. I find it convenient to commence with Dr Day's evidence.

[31] The defining theme of Dr Day's evidence was his distinction between mechanisms of slope failure – one as a result of the removal of lateral support, and the other, slope instability. He went on to explain how each of them manifested. In respect of lateral support failure, the primary cause of both ground movement and failure is a reduction in the lateral (horizontal) pressure exerted on the face of the excavation. Here, the ground movement is confined to the area of excavation. Regarding the failure due to slope instability, Dr Day explained that it is normally characterised by a rotational or translational movement on the ground above the failure surface. In the event of a rotational failure, a scarp may develop at the top of the failing mass and bulging may occur at the toe. Unlike in the failure caused by lateral support, here the area of slope instability is generally not confined to a particular property, but may pervade a general area.

[32] Applying these suppositions to this case, Dr Day testified that the failure was caused by the removal of the weight of material from the toe of an already compromised slope, the mechanism of which is a deep seated circular slip failure. On this mechanism, according to Dr Day, the failure would not be through the removal of lateral support, but attributable to the general instability of the hillslope, which, in turn, was caused by a multiplicity of historical factors, including the earlier excavations and loading of the affected properties when houses were built thereon, starting from the early 1980s.

[33] According to Dr Day, the movement of the slope was triggered by a combination of the excavation at the toe of the slope on the properties of the first appellant and Mr Venter, and the added weight at the top of the slope on the properties of the respondent and Mr Babrow**.** He explained further that the excavation at the toe of the

slope had two effects. Firstly, it reduced the weight of the soil at the toe. Secondly, it reduced the shearing resistance of the soil over the part of the failure plane, below the excavated area. When that happened, given the already compromised slope, according to him, the excavation resulted in slope failure.

[34] In line with his mechanism distinction theory, Dr Day went on to explain that if the ground movement was only as a result of the removal of lateral support, it would have been confined to the area immediately above the retaining wall, ie it would have a localised effect. As there was no sign of ground failure in the area immediately above the retaining walls, Dr Day postulated that the ground movement was caused by general instability of the slope rather than the removal of lateral support. This, as stated earlier, was one of the ways in which failure due to slope instability manifested itself, ie it generally pervades a general area, rather than confinement to a particular property. Dr Day also thought it significant that when the slope mobilised, neither the excavation itself nor the retaining walls built by Mr Naumann failed, but continued to support the face of the excavation. This included the portion of the respondent's land that fell inside the failure zone. According to Dr Day, this further supported his view that the lateral support afforded to the respondent's property had not been compromised.

[35] I turn now to the evidence of Dr McStay. The essence of his evidence was that the deep-seated movement, which occurred under the properties of the first appellant and the respondent, was a slope failure triggered by the removal of lateral support due to the excavation on the first appellant's property. According to him, the mechanism of the failure was a progressive one, ie a series of smaller slip planes immediately above the face of the excavation. In Dr McStay's opinion, both his 'progressive' failure and Dr Day's deep- seated circular slip failure theories resulted from the removal of lateral support because the mechanism in each case was the same, namely the excavation on the first appellant's property, which was the main triggering mechanism for the slope instability. Thus, explained Dr McStay, it was largely irrelevant whether there was a series of small progressive failures or the existence of a deep slip circle.

[36] Dr McStay further testified that the respondent's house itself did not appear to have undergone extreme lateral movement but rather relatively small scale vertical settlement. This suggested that the original foundation of the house was largely below the active slip circle causing the lateral movement. According to him, there was a vertical down movement rather than just uplift, as suggested by Dr Day. To support this view, he had regard to the crack in the paving between the respondent's garage and Theresa Avenue, which movement straddled two properties. Dr McStay also explained why the excavations on the first appellant's property stood for some time before they affected the respondent's property. According to him, this was not unusual, as a slope failure normally occurred over a period of time, and not immediately, especially on a deep-seated circle such as the one in the present case.

[37] That summarises the evidence of the two experts. To consider their competing contentions, one has to bear in mind, the objective facts. Key among those is that the respondent's property was damaged when it moved laterally and downwards towards the excavation on the first appellant's property. This happened because lateral support, previously provided by the first appellant's property to the respondent's property, had been removed. Given these considerations, the exact mechanism which caused the removal of lateral support is unimportant. The distinction by Dr Day in this regard is artificial, has neither a factual nor legal basis, and is not borne out by the objective facts. It was rightly rejected by the court a quo.

[38] A further string to the first appellant's bow was this: as the respondent's property was contiguously situated on a slope with other properties, the weight of the first appellant and Mr Venter's properties was meant to support the entire slope, and not only the respondent's property. Accordingly, so went the argument, following the slope mobilisation and damage to his property, the respondent does not, as a matter of law, have a cause of action for breach of lateral support. The court a quo rejected this submission as follows (at para 111):[8]

'[O]ne reason is the inherent illogicality of the proposition that if an excavation is of such large proportions that it causes not simply a localised subsidence or failure but also one which undermines an entire slope comprising multiple properties, then the owner of a contiguous

[8] Para 207 in the original text.

property cannot sustain an action based on a breach of the duty of lateral support. To accept this reasoning would mean that a landowner whose excavation or breach causes far-reaching damage affecting a number of properties escapes liability whilst land owners, the consequences of whose breach are much more modest, are saddled with strict liability'.
I cannot fault this reasoning.

[39] What is more, it became necessary for Mr Naumann to implement remedial measures to arrest further slope failure, including having experts install anchors and to reinstate the lateral support previously provided by the ground excavated from the first appellant's property. It is common cause that the bulk of these measures were implemented on the first appellant's property, where the major excavation took place. The significance of this, as correctly pointed out by counsel for the respondent, is that if the lateral movement of the respondent's property was caused by the excavations on the first appellant's property, it is on that property that the remedial measures had to be implemented. And it was common cause that these remedial measures in fact arrested the movement of the slope.

[40] Counsel for the appellants made much of the averment in the respondent's particulars of claim that the slope mobilised through the mechanism of 'a shallow slip circle with uplift at the toe' which had resulted in vertical upward bulging of the ground surface at the bottom of the first appellant and Mr Venter's properties. It was suggested that there was evidence of such uplift and bulging. This, according to the first appellant, was fatal to the respondent's case because the pleaded mechanism fitted in with the opinion of Dr Day that the slope mobilisation occurred when an uplift took place at the toe of the excavation and the slip circle, thus excluding the removal of lateral support.

[41] There is no merit in this contention. In *Gijzen v Verrinder* 1965 (1) SA 806 (D) at 810D-F, it was pointed out that, in most instances, the complaint of a plaintiff suing for deprivation of lateral support arises from a subsidence that was caused by the removal of such support. Nevertheless, such a subsidence (ie one *caused* by the removal of lateral support) is not required for a successful plaintiff action. By way of analogy, I conclude that is not required for a plaintiff in an action based on the removal

of lateral support to plead a particular mechanism through which such removal of lateral support manifests.

[42] The respondent's averment as to the mechanism of the slope failure was thus totally superfluous. Even in its absence, the thrust of his claim was clear: as a result of the excavation on the first appellant's property, lateral support owed to his property was removed; the slope mobilised in the process of which extensive damage was caused to his property. It is therefore patently opportunistic for the appellants to seek to tie the respondent to a superfluous averment in his particulars of claim.

[43] In any event, the two mechanisms were fully explored during the trial and it became clear that they overlapped; and that, in essence, as the court a quo correctly observed, they were variations of the same mechanism. The position is analogous to the converse situation, where an issue not pleaded is fully traversed during the trial. As explained in *Van Mentz v Provident Assurance Corporation of Africa Ltd* 1961 (1) SA 115 (A) at 122:

'In a case where it is clear that the appellate tribunal has all the material before it on which to form an opinion upon the real issue emerging during the course of the trial it will be proper to treat the issues as enlarged (*Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (AD) at 433), where this can be done without prejudice to the party against whom the enlargement is to be used (*Robinson v Randfontein Estates, GM Co Ltd*, 1925 AD 173 at 198).'

See also *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 44H-45C).

[44] In the final analysis, the court a quo was faced with conflicting evidence of a very technical nature. Where this is the case, the resolution of the dispute 'must depend on an analysis of the cogency of the underlying reasoning which led the experts to their conflicting opinions' (*Buthelezi v Ndaba* [2013] ZASCA 72; 2013 (5) SA 437 (SCA) para 14). The court a quo preferred Dr McStay's evidence to that of Dr Day, and observed as follows (paras 127-128):[9]

[9] Paras 222-223 in the original text.

'The opinions which he [Dr McStay] expressed were rational and backed by consistent reasons. What came through in his reports and evidence was a practical and common sense approach which demonstrated his wide experience in the field…
As far as Dr Day is concerned there is no doubting his expertise as a geo-technical civil engineer and his evidence was very helpful in understanding the geological aspects of what took place on the site from March 2008 until the remedial measures were completed. Although I do not doubt Dr Day's sincerity or his professional integrity, I gained the distinct impression that he became overly wedded to his client's case, including the notion that the geological event was not a failure of lateral support. Dr Day's unwillingness to accept that the Dias dwelling was in excellent condition prior to 2008, based on speculative or weak evidence indicating the contrary, suggested that he fell into the trap of approaching some of the issues in the matter in a less than balanced manner'.

[45] Having carefully considered the totality of the evidence of the two experts, the court a quo cannot be faulted for preferring that of Dr McStay. Of the two experts, it is Dr McStay's evidence which provided the most reasoned and cogent explanation for what had happened. His evidence closely matches the objective facts. It follows that the respondent succeeded in establishing that the slope mobilisation had resulted from a breach of the duty to provide lateral support due to the excavation on the first appellant's property. Given the objective facts in this case, it would indeed defy all logic for a court to hold that the excavations by the first appellant did not destabilise the respondent's property and thus breached the duty to provide lateral support to it.

Causation

[46] I turn now to causation. As explained in *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-35D, there are two distinct questions in the causation enquiry. The first is a factual one and relates to the question whether the relevant conduct caused or materially contributed to the harm giving rise to the claim. If it did not, then no legal liability can arise. If it did, then the second question becomes relevant, namely whether the conduct is linked to the harm sufficiently closely or directly for legal liability to ensue, or stated differently, whether the harm is too remote from the conduct.

[47] The *causa sine qua non* (the 'but for' test) is ordinarily applied to determine factual causation. The central theme of the first appellant's case was that the slope

mobilisation was a result of a multiplicity of factors, of which the excavation on her property was but one. In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431; [2002] 3 All SA 741 (SCA) (para 25) it was explained:

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics.'

And in *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA):

'The legal mind enquires: What is more likely? The issue is one of persuasion, which is ill-reflected in formulaic quantification … Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences.[10]

The test set out in *Van Duivenboden* and *Gore* received the imprimatur of the Constitutional Court in *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC) para 47.

[48] Applying the above test to the facts of this case, it must be asked whether, but for the excavation, the slope would have mobilised. In this regard, the excavation was extensive, involving the removal of 5413m³ of earth, 57 blasting shots as well as the removal of many large boulders. The lift shaft excavation was 13m in length, 5.5m in width and 9.5m deep. It was excavated up to about 6m from the respondent's property and done without any bracing or support. It involved blasting at least one large boulder and many others which needed to be broken and removed. In these circumstances, it is hard not to accept Dr McStay's opinion that there was a clear nexus between the excavation and the slope failure.

[49] There must be a logical explanation as to why, after standing unaffected for 16 years, the respondent's property mobilised shortly after the major excavation on the first appellant's property in 2008 and why the movement ceased when the remedial measures were effected. During his testimony, Dr Day utilised a model to demonstrate

[10] *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA) para 33 (Citations omitted.)

the slip circle failure. After a demonstration with reference to four blocks, the court a quo pointed out that in terms of the model he used, a necessary condition of the slip circle was the removal of an excavation block, to which proposition Dr Day agreed. He explained the role of excavation as follows:

'It was a contributing element. There is no doubt about it. It's no coincidence that this failure occurred when excavation was formed. So the formation of the excavation contributed to the instability of the slope, that is correct. But it contributed to the instability of the slope as opposed to a lateral support failure'.

[50] It is also common cause that the excavation on Mr Venter's property stopped in April 2008. In answer to a direct question during cross-examination as to what event, thereafter, could have caused the distress on the entire hill slope, Dr Day was constrained to concede that 'the major event was the removal of ground which then set the process of slope instability in motion ….' After suggesting that the rainfall was a contributing factor, he conceded that the excavation was 'a necessary condition' for the failure. The following excerpt from the evidence of Dr Day's cross-examination is illustrative of the centrality of the excavation to the slope failure and eventually the damage to the respondent's property:

'MR BEY: So Dr, it is not clear that but for the Naumann [first appellant] excavation the land on the Dias [respondent] property behind the [Mr] Venter property would not have failed? --- M'Lord, if the excavations had not been formed we wouldn't be here today'.

I take that as a yes--- Yes'

[51] The appellants emphasised that the role of the other factors such as the innate instability of the slope, the excavation on Mr Venter's property, and the winter rainfalls, should not be discounted. Of course they should not. But, as shown above, given the nature and extent thereof, the excavation was central to the slope mobilisation. As pointed out in *Van Duivenboden* para 25 the respondent was not required to establish the causal link between the excavation and the damage to his property with certainty. All that was expected from him was to establish that the excavation was probably the cause of the damage to his property.

[52] In *Regal*, Ogilvie Thompson JA (at 116A-C) referred with approval to the *American Restatement of the Law of Torts*, vol IV at 277, where, dealing with factual causation, the learned authors say:

'In some cases the physical condition is not, of itself, harmful, but becomes so upon the intervention of some other force – the act of another person, or force of nature. In such cases the liability of the person whose activity created the physical condition depends upon the determination that his activity was a substantial factor in causing the harm, and that the intervening force was not a superseding cause.'

[53] Applying these tests to the facts of the present case, the excavation on the first appellant's property must be regarded as a 'substantial factor' or a proximate cause of the slope mobilisation. In the circumstances, it is safe to conclude that but for the excavation on the first appellant's property, the slip circle failure would most probably not have occurred. I thus find a direct and probable chain of causation between the excavation and the slope mobilisation which caused damage to the respondent's property. Factual causation was accordingly established.

[54] With regard to legal causation, the court a quo expressed doubt whether it was necessary to enquire into legal causation, since liability was strict in the present case and 'the question of reasonable foreseeability does not arise'. With respect, the court a quo overlooked the fact that there has to be a measure by which it is determined whether the conduct that factually caused the harm suffered, is too remote from the harm. The test provided by the law for this part of the enquiry is a flexible one, in which reasonable foreseeability is but only one factor, among several. Other factors include directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonableness, fairness and justice, as explained in *S v Mokgethi and Others* 1990 (1) SA 32 (A); [1990] 1 All SA 320 (A) at 40I-41D . It could well be that in a particular case, such as the present, one or more or all of reasonable foreseeability, directness, or the absence or presence of a *novus actus interveniens*, play a subsidiary role, or no role at all. But it is difficult to imagine a case where legal policy, reasonableness, fairness and justice would play no role at all.

[55] Viewed in this light, legal causation is necessary, irrespective of whether liability is strict or not. As explained by the Constitutional Court in *Mashongwa*:[11]

'No legal system permits liability without bounds. It is universally accepted that a way must be found to impose limitations on the wrongdoer's liability. The imputation of liability to the wrongdoer depends on whether the harmful conduct is too remotely connected to the harm caused or closely connected to it. When proximity has been established, then liability ought to be imputed to the wrongdoer provided policy considerations based on the norms and values of our Constitution and justice also point to the reasonableness of imputing liability to the defendant.'

[56] In *International Shipping Co (Pty) v Bentley (Pty) Ltd* 1990 (1) SA 680 (A) at 700H-J Corbett CJ neatly summed up the position with regard to legal causation as follows:

'[D]emonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".'

[57] In determining the presence of legal causation, the question is whether, having regard to the considerations alluded to, the harm is too remote from the conduct or whether, it is fair, reasonable and just that the first appellant be burdened with liability. In my view, the question should be answered against the first appellant.

No fault liability

[58] As stated already, none of the affected properties were in their natural state. They had all been developed for the building of houses. It was submitted on behalf of the appellants that for that reason, our law does not permit a claim under strict liability for breach of the duty of lateral support. The respondent's claim, it was submitted, should have been brought as an Aquilian action, so that negligence and wrongfulness

[11] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) para 68. (Citations omitted.)

on the part of the first appellant could be established. In their heads of argument, counsel submitted:

'The imposition of strict liability can only be justified in principle where prospect of direct harm is so obvious that there can be no question of a lack of foreseeability and where there is clear and obvious single cause. By contrast, where potential for harm, as in this instance where mechanism of failure is more complicated, or obscure, and hence not readily foreseeable, or involves more than one cause, including a contribution by the claimant, and the conduct may be neither negligent nor unlawful, the entire blame for the earth movement should not be visited on one neighbour by virtue of a rule of strict liability.'

[59] Broadly stated, every landowner has a right to the lateral support and where subsidence or other destabilisation occurs, as a result of excavations on an adjacent property, the owner of the adjacent property will be liable in an action for damages irrespective of whether she was negligent or not. That is not to suggest that an adjacent property owner is not entitled to excavate. His or her entitlement to do so, is limited by the duty not to withdraw the lateral support which is afforded to the adjacent property. The right is reciprocal. Neither culpa nor dolus is a requirement for liability for damage caused by the withdrawal of lateral support. Of course, if an aggrieved property owner can prove that he or she suffered pecuniary loss through dolus or culpa, she can likewise sue in delict by virtue of the lex Aquilia.

[60] It is now settled that liability in subsidence cases is strict. *In D&D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D) it was explained (at 253H-I) that:

'In subsidence cases it is unnecessary to prove an unlawful act or negligence; the cause of action is simply damage following upon deprivation of lateral support. The action lies only against the owner of the adjoining property, and each successive subsidence gives rise to a fresh cause of action'.

See also *Gijzen* at 811E.

[61] Prof JC van Der Walt[12] offers the following justification for strict liability:

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[12] JC van Der Walt 'Strict liability in the South African law of delict' (1968) 1 *CILSA* at 63.

'Liability based on risk is usually created - either by legislation or by the courts - in cases where a particular activity normally entails an extra· ordinary increase in the risk of harm to the community. Fleming states it thus: "Certain types of activity which involve extraordinary risks to others, either in the seriousness of the harm threatened or, more often, in its high degree of probability, are charged with responsibility for ensuing harm, even if the most diligent care has been exercised to obviate its occurrence. In these situations, it is widely felt that he for whose benefit the risk is created should bear the loss unavoidably entailed rather than the random victim."
…The most common defences at the disposal of a defendant in cases of strict liability are "act of God" (vis maior) and fault on the part of the injured party.'

[62] There is sufficient safeguard in our law to meet the appellants' concerns, in the form of legal causation, which, inter alia, rests on policy considerations. The elastic approach to legal causation adopted by this court in *Mokgethi* is 'sensitive to public policy considerations and aims to keep liability within the bounds of reasonableness, fairness, and justice'. (See *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC) para 19, referring to *Mokgethi* at 40I-41D).

[63] Also, a cause of action based on strict liability in cases such as this, serves to ensure that those who suffer damage are not non-suited because of the absence of fault or because of their inability to prove the presence of fault. As is evident in this case, the respondent simply did not know exactly what was happening on the first appellant's property, other than that his property was damaged. Importantly, there is no attack on the strict liability action as being contra bonos mores, or unconstitutional. There are therefore no policy considerations for our law to, *a priori*, set itself against an action based on strict liability for breach of lateral support, as cases always turn on their own facts.

[64] In sum, the answer to counsel's submission is, first, that culpa or dolus is not required for liability because the right of support is a natural right of ownership. Second, there are sufficient safeguards and flexibility in our law so as to ensure that one is not unjustifiably punished at the expense of others. Third, liability without fault here is usually restricted to damage to life, limb and property. On the facts the court a quo correctly held that the first appellant is liable to the respondent. Although there is

no unanimity among scholars on a theoretical justification for strict liability, the authors of *Neethling-Potgieter-Visser Law of Delict*[13] observe:

'[w]here a person's activities create a considerable increase in the risk or danger of causing damage, that is, an increased potential for harm, there is sufficient justification for holding him liable for damage even in the absence of fault . . . Van der Walt, however, points out that the question whether or not the potential of risk has been increased enough, will depend largely on the legal convictions of the community, as reflected in legislation or case law. This theory [the risk or danger theory] provides a satisfactory explanation for most of the instances of strict liability which are recognised in our law.

Nonetheless, a satisfactory and universally accepted scientific basis for every instance of liability without fault has not yet been found, and will probably never be found. A flexible approach is therefore necessary so that each specific case may be valued on its own merits and judged accordingly.'

[65] It remains to sum up the position of our law on the right of lateral support owed between contiguous properties. First, it is a natural right incidental to the ownership of the property and not servitudal in nature, as enunciated in *Rouliot*. Second, it is a principle of neighbour law as explained in *Anglo Operations*, which rests on justice and fairness, as articulated in *Regal.* Lastly, it is owed to land not only in its natural state, but extends to buildings upon it. Although influential in the acceptance of the right of lateral support into our law, English law was not slavishly implanted into our law.

[66] Before I conclude, something needs to be said about the manner in which this litigation has been conducted. The order of separation followed on an application by the appellants, which was opposed by the respondent. The costs of that application were reserved. The trial of the separated issues was lengthy, taking place over a total of 27 days. In this court, the record spans 4248 pages, which includes the court a quo's judgment 129 pages. It is thus disquieting that despite this circuitous journey, in terms of the separation order, the judgment of this court would not result in a final determination of the dispute between the parties. It was with this in mind that it was enquired of counsel during the hearing of the appeal whether the parties would be prepared to accept the order of this court as a final word on the liability dispute between

[13] J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 7ed (2014) 379-80.

the parties. Counsel for the parties accepted that this judgment will finally dispose of all the disputes between the parties, as far as liability is concerned.

[67] It is regrettable that this court has, once again, to express disquiet on how rule 33(4) is often not properly considered.[14] As it was stated in *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3:

'Rule 33(4) of the Uniform Rules ─ which entitles a Court to try issues separately in appropriate circumstances ─ is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order ─ and, in all cases, it must be so satisfied before it does so ─ it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.'

See also *ABSA Bank Ltd v Bernert* [2010] ZASCA 36; 2011 (3) SA 74 (SCA) para 21.

[68] In *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks and Another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA), this court cautioned against piece-meal litigation:

'Piece-meal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition it might well be desirable to have that issue decided first.

This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one

[14] See, for example, *Firstrand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6; 2018 (5) SA 300 (SCA) paras 9-10; *Feedpro Animal Nutrition (Pty) Ltd v Nienaber NO and Another* [2016] ZASCA 32 para 15; *Cilliers NO and Others v Ellis and Another* [2017] ZASCA 13 paras 12-14; and *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* [2017] ZASCA 95 para 6.

hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.'[15]

[69] It is by no means clear that these principles informed the decision to separate issues in this matter. In my view, the issues raised in the separated order are inextricably linked to the rest of the issues in the pleadings. They could conveniently have been ventilated in one hearing. This should have been clear to the parties and the judge who granted the separation order.

[70] In all the circumstances the appeal has to fail. The following order is made:
The appeal is dismissed with costs, such costs to be paid by the appellants jointly and severally, the one paying the other to be absolved.

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T M Makgoka

Judge of Appeal

[15] *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks and Another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA) paras 89-90. (Citations omitted.)

APPEARANCES:

For Appellants:	M Seale SC (with him M Steenkamp) Instructed by: Mellows & De Swardt Attorneys, Cape Town Symington & De Kok Attorneys, Bloemfontein
For Respondent:	RWF MacWilliamson SC Instructed by: Smith Tabata Buchanan Boyes, Cape Town Honey Attorneys, Bloemfontein

Annex 638

Notre Affaire à Tous and Others v France, *Tribunal Administratif de Paris*
N°1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021

TRIBUNAL ADMINISTRATIF
DE PARIS

N°1904967, 1904968, 1904972, 1904976/4-1

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ASSOCIATION OXFAM FRANCE
ASSOCIATION NOTRE AFFAIRE À TOUS
FONDATION POUR LA NATURE ET L'HOMME
ASSOCIATION GREENPEACE FRANCE

_____

Mme Anne Baratin
Rapporteur

_____

Mme Amélie Fort-Besnard
Rapporteur public

_____

Audience du 14 janvier 2021
Lecture du 3 février 2021

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44-008
60-01-02-02
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RÉPUBLIQUE FRANÇAISE

AU NOM DU PEUPLE FRANÇAIS

Le tribunal administratif

(4ème section – 1ère chambre)

Vu la procédure suivante :

I. Par une requête et un mémoire complémentaire, enregistrés sous le n° 1904967 les 14 mars 2019 et 20 mai 2019, l'association Oxfam France, représentée par sa directrice générale, Mme Cécile Duflot, représentée par Me Alimi, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de 1 euro en réparation du préjudice moral subi ;

2°) de condamner l'État à lui verser la somme symbolique de 1 euro au titre du préjudice écologique ;

3°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de :

- prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet

de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ;

- prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, la loi n° 2015-992 du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ;

- prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique ;

- prendre les mesures nécessaires aux fins d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique ;

4°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

L'association soutient que :

- l'État est soumis à une obligation générale de lutter contre le changement climatique, qui trouve son fondement, d'une part, dans la garantie du droit de chacun à vivre dans un environnement équilibré et respectueux de la santé, reconnu par l'article 1er de la Charte de l'environnement, à valeur constitutionnelle, d'autre part dans l'obligation de vigilance environnementale qui s'impose à lui en vertu des articles 1er et 2 de la même Charte et qui s'applique, eu égard aux engagements internationaux de la France, notamment la Convention-cadre des Nations Unies sur les changements climatiques (CCNUCC) de 1992 et l'accord de Paris adopté le 12 décembre 2015, à la lutte contre le changement climatique, enfin, dans le contenu même de la notion de vigilance, qui doit être rapprochée du devoir de prévention des atteintes à l'environnement et du principe de précaution, consacrés par les articles 3 et 5 de la Charte, ainsi que du devoir de diligence défini par le droit international ;

- l'État a une obligation, au regard des principes de droit à la vie et de droit au respect de la vie privée et familiale garantis par les articles 2 et 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, qui supposent la protection de l'environnement, de lutter contre le changement climatique dont les conséquences menacent de près de 9,75 millions de personnes en France ;

- un principe général du droit de chacun de vivre dans un système climatique soutenable, exigence préalable à la promotion du développement durable et à la jouissance des

droits de l'homme pour les générations actuelles et futures, s'impose aux États ; ce principe, bien que non encore explicitement reconnu par l'État français, résulte tant de l'état général du droit, international et interne, que des exigences de la conscience juridique du temps et de l'État de droit ;

- l'État a méconnu cette obligation générale de lutte contre le changement climatique, d'une part, en s'abstenant, jusqu'en 2005, d'adopter les mesures permettant d'éliminer ou, à tout le moins, de limiter les dangers et les risques liés au changement climatique, alors que ce changement climatique, son origine anthropique et ses conséquences délétères sont connus depuis plusieurs décennies et ont été établis scientifiquement par les travaux du GIEC dès 1990, et depuis 2005, en s'abstenant de mettre en place les mesures de suivi nécessaires à la satisfaction de ses obligations, , d'autre part en se fixant des objectifs qui ne permettent pas de maintenir l'augmentation de la température moyenne globale de l'atmosphère en-dessous de 1,5°C, alors même que la France a accepté, en tant que pays développé, une « *responsabilité commune mais différenciée* », se traduisant par un engagement nécessairement plus important que celui des pays en développement, enfin, en adoptant, par le biais de ses autorités administratives, des mesures qui se révèlent, en tout état de cause, insuffisantes pour assurer l'application du cadre législatif et réglementaire destiné à lutter contre le changement climatique, comme en témoignent notamment les retards de versement des aides à la conversion ou l'insuffisance des investissements favorables au climat ;

- cette méconnaissance est constitutive d'une faute de nature à engager la responsabilité de l'État ;

- l'État est également soumis à des obligations spécifiques en matière de lutte contre le changement climatique, fixées par les conventions internationales, le droit de l'Union européenne et le droit interne, et qui portent respectivement sur la réduction des émissions de gaz à effet de serre, la réduction de la consommation énergétique, le développement des énergies renouvelables, l'adoption de mesures sectorielles et la mise en œuvre de mesures d'évaluation et de suivi ;

- en matière de réduction des émissions de gaz à effet de serre, les objectifs adoptés par l'Union européenne, dans la décision n°406/2009/CE et dans le règlement 2018/842/UE, sont insuffisants au regard des engagements internationaux de l'Union visant à limiter le réchauffement planétaire nettement en dessous de 2°C par rapport aux niveaux préindustriels ; il en est de même des objectifs des « contributions déterminées au niveau national » ;

- les émissions de gaz à effet de serre de la France dépassent de 4% les plafonds annuels fixés par le décret sur la stratégie nationale bas-carbone (SNBC) pour la période 2015-2018, ce qui représente un coût de 3 à 4 milliards d'euros ; dans le secteur des transports, l'objectif 2017 a été dépassé de 10,6 % et l'objectif fixé par la loi Grenelle I, visant à ramener les émissions du secteur des transports à leur niveau de 1990 en 2020, ne pourra manifestement pas être atteint ; dans le secteur du bâtiment, l'objectif 2017 a été dépassé de 22,7 % ; dans le secteur agricole, l'objectif 2017 a été dépassé de 3,2 % ; la méconnaissance des objectifs généraux et sectoriels que la France s'est fixés révèle une méconnaissance, par l'État, d'une part, des obligations mises à sa charge en matière de réduction des émissions de gaz à effet de serre par le droit de l'Union européenne et le droit interne – et, notamment, la loi Grenelle I, la loi sur la transition énergétique pour la croissance verte (LTECV) et le décret SNBC – et, d'autre part, de son obligation générale de lutte contre le changement climatique ;

- en matière d'amélioration de l'efficacité énergétique, la France a méconnu son obligation générale de lutte contre le changement climatique ainsi que ses obligations résultant notamment de la directive 2012/27/UE et du décret du 27 octobre 2016 relatif à la

programmation pluriannuelle de l'énergie ; l'atteinte des objectifs fixés par ce décret nécessiterait de multiplier par 4 le rythme annuel d'amélioration de l'efficacité énergétique dans les secteurs finaux, alors que la consommation des énergies primaires fossiles augmente depuis 2014 ;

- les objectifs fixés quant à la part des énergies renouvelables dans la consommation énergétique globale sont méconnus, en violation de la Directive 2009/28/CE, de l'article L. 100-4 du code de l'énergie, et du décret PPE du 27 octobre 2016, ce qui caractérise également une méconnaissance de l'obligation générale de lutte contre le changement climatique ;

- dans le secteur des transports, le pouvoir réglementaire n'a pas pris, ou a pris tardivement, les mesures nécessaires pour atteindre les objectifs fixés par la loi Grenelle et la SNBC I, s'agissant d'une part du report modal des frets routiers et aériens vers le fret ferroviaire, d'autre part des objectifs de consommation et d'émission de gaz à effet de serre par les véhicules particuliers ainsi que de leur entretien ; ainsi, d'une part, la part du transport ferroviaire dans le fret est passée de 25% à 10% de 2001 à 2017 et les investissements publics dans les infrastructures ferroviaires ont diminué, d'autre part, les émissions moyennes de CO2 par kilomètre du parc de véhicules ont augmenté, la consommation moyenne des véhicules particuliers n'a que très faiblement baissé et les dispositifs adoptés en vue de favoriser le renouvellement du parc automobile vers des véhicules bas carbone se sont avérés insuffisants ;

- dans le secteur du bâtiment, les objectifs de réduction de la consommation énergétique de 38 % en 2020 et de rénovation de 500 000 bâtiments par an ne sont pas atteints ; aucun dispositif de suivi n'a été mis en place, non plus que l'observatoire national de la rénovation énergétique (prévu par le plan de rénovation énergétique des bâtiments publié en avril 2018) et le service public de la performance énergétique de l'habitat prévu par la loi TECV ; s'agissant de l'obligation de réaliser des travaux d'amélioration des performances énergétiques dans les bâtiments à usage tertiaire ou dans lesquels s'exerce une activité de service public, le décret prévu par l'article L. 111-10-3 du Code de la construction et de l'habitation pour définir la nature et les modalités de cette obligation n'a été adopté que sept ans après l'entrée en vigueur de la loi Grenelle II ayant instauré ladite obligation, et a été annulé par le Conseil d'État en 2018, ce qui fait que ces dispositions réglementaires n'ont toujours pas été prises ; enfin, s'agissant des audits énergétiques des bâtiments des grandes entreprises, le décret du 24 novembre 2014 relatif aux modalités d'application de ces audits, pris en application de la loi du 16 juillet 2013, a limité leur périmètre pour les grandes entreprises à 80 % du montant des factures énergétiques, ce qui ne permet pas de dresser une image fiable de la performance énergétique globale et de recenser les possibilités d'amélioration les plus significatives ;

- dans le secteur de l'agriculture, l'objectif de cultiver 20% de la surface agricole utile en agriculture biologique en 2020 est méconnu dès lors que seule une proportion de 6,5% de cette surface était cultivé en mode biologique en 2017, de même que les objectifs de réduction de l'utilisation des engrais azotés, dont les ventes ont augmenté sur la période 2014-2016, et de développement des légumineuses, dont les surfaces n'ont augmenté que récemment et à un rythme trop lent ; les importants retards de paiements des aides à l'agriculture biologique et des mesures agroenvironnementales et climatiques ne permettent pas de poursuivre efficacement l'objectif assigné, en méconnaissance de l'article 31 de la loi Grenelle 1 ;

- en matière d'évaluation et de suivi, d'une part, le pouvoir réglementaire n'a pris qu'en mai 2017 le décret prévu par l'article L. 222-1 B du code de l'environnement, issu de la LTECV du 17 août 2015, en vue de définir les principes et modalités de calcul des émissions de gaz à effet de serre des projets publics, et celui-ci ne s'applique qu'aux décisions de financement des projets publics prises à compter du 1er octobre 2017, ce qui retarde de plus de deux ans la mise

en œuvre du dispositif prévu par le code, sans qu'aucune difficulté technique identifiée ne puisse justifier un tel délai ; l'obligation d'évaluation des projets publics est à cet égard à la fois tardive et insuffisante ; d'autre part, l'État a manqué à son obligation d'établir des bilans de ses émissions de gaz à effet de serre pour l'ensemble de ses compétences, de ses activités et de son patrimoine, et n'a pas davantage respecté son obligation de mettre à jour, tous les trois ans, les bilans établis puisque seuls 18 bilans, imprécis et non mis à jour, ont été publiés ; il a ainsi méconnu les articles L. 229-25 et R. 229-47 du code de l'environnement ;

- en matière d'adaptation au changement climatique, d'une part, en mettant 12 ans à adopter la première Stratégie nationale d'adaptation, les autorités administratives – et, notamment, le ministre de l'environnement – ont méconnu les obligations mises à la charge de l'État, résultant notamment de la CCNUCC, ainsi que leur obligation générale de lutte contre le changement climatique ; d'autre part, en tardant à adopter les plans nationaux d'adaptation au changement climatique (PNACC), lesquels s'avèrent insuffisants, l'État a méconnu ses obligations résultant de la CCNUCC, du droit de l'Union européenne – et, notamment, du Règlement (UE) n° 525/2013 – et de l'article 42 de la loi Grenelle I, ainsi que son obligation générale de lutte contre le changement climatique, et commis une faute de nature à engager sa responsabilité ; enfin, seuls 12 à 14 des 750 établissements publics de coopération intercommunale tenus d'adopter un plan climat-air-énergie territorial avant le 31 décembre 2016, en application de l'article L. 229-26 du code de l'environnement, ont, à ce jour, adopté un tel Plan, ce qui caractérise une faute des préfets et donc de l'État, qui ne les a pas enjoint à adopter de tels plans ;

- l'ensemble de ces illégalités sont constitutives de fautes de nature à engager la responsabilité de l'État ;

- le lien de causalité entre ces fautes et l'aggravation du changement climatique est établi : dans les domaines de la protection de l'environnement et de la santé en particulier, la responsabilité de l'État peut être engagée dès lors que le comportement de l'administration est l'une des causes déterminantes du dommage ; en l'espèce, l'État français, informé et conscient de l'insuffisance des mesures qu'il a adoptées pour atteindre ses objectifs climatiques, a commis des manquements dans la mise en œuvre de ses obligations, fautes qui contribuent directement à l'impossibilité d'enrayer le changement climatique et à son aggravation ; par conséquent, ses fautes et carences sont à l'origine directe de l'aggravation du dommage environnemental lié au changement climatique, dommage à l'origine directe des préjudices invoqués ;

- son préjudice moral est établi au regard de son objet statutaire, qui est notamment de « *développer et soutenir des activités de lutte contre la pauvreté et ses causes structurelles, et de promouvoir la défense des droits fondamentaux dans le monde* », par la mise en œuvre, *« directement ou en partenariat, de programmes et actions ayant notamment pour effet de favoriser un accès durable et de qualité à l'alimentation et aux services essentiels (santé, éducation, eau,…) pour le plus grand nombre, contribuer à un partage plus équitable des ressources naturelles, permettre aux populations les plus défavorisées – et en particulier les femmes – de préserver et d'exercer leurs droits fondamentaux (…)* » et des actions qu'elle mène ; en effet, d'une part elle conduit des missions de plaidoyer auprès des instances politiques afin d'obtenir des changements en matière de politique climatique, d'autre part elle organise de nombreuses campagnes de sensibilisation et de mobilisation de la société civile aux enjeux de la lutte contre le changement climatique, comme des colloques, des conférences, des expositions ou d'autres événements, des interventions dans les écoles, la publication de tribunes ou communiqués de presse, ainsi que des actions sur les réseaux sociaux ; en outre elle finance des travaux de recherches relatifs au changement climatique afin de disposer de données propres et actualisées, enfin elle apporte son soutien aux pays du Sud en les aidant à mettre en œuvre les

mesures nécessaires pour s'adapter au changement climatique et en atténuer les effets ; elle a ainsi consacré à ces actions, depuis le début 2009, près de 2 millions d'euros ; or l'aggravation du changement climatique ou, à tout le moins, l'impossibilité d'y remédier, imputable aux fautes de l'État, porte atteinte aux intérêts collectifs qu'elle défend, en ce que cette aggravation constitue un obstacle à la concrétisation de son objet social, qui est la protection de l'environnement ; par conséquent, le dommage environnemental caractérisé par un surplus d'émissions de GES, est constitutif d'un préjudice moral, dont elle est fondée à solliciter la réparation ;

- le préjudice écologique, introduit dans le code civil par la loi n° 2016-1087 et défini comme « une atteinte non négligeable aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement », peut être reconnu par le juge administratif ; en l'espèce, les manquements commis sont à l'origine d'un dommage environnemental caractérisé par l'aggravation du changement climatique ou, à tout le moins, l'impossibilité d'y remédier ; ce dommage porte une atteinte aux fonctions écologiques de l'atmosphère, atteinte constitutive d'un préjudice écologique actuel car les fautes relevées sont à l'origine d'un premier surplus d'émissions de gaz à effet de serre depuis 1990, date du premier rapport du GIEC, et d'un second surplus depuis 2015 par rapport aux budgets carbone défini par le décret SNBC, et d'un préjudice futur certain car les gaz à effet de serre anthropiques ont une durée de vie de 12 à 120 ans dans l'atmosphère, ce qui implique que l'arrêt immédiat des émissions n'empêcherait pas la température globale d'augmenter pendant encore plusieurs décennies ;

- l'injonction demandée a pour but de mettre un terme au dommage et d'en prévenir l'aggravation, comme l'y autorise la jurisprudence du Conseil d'État.

Par un mémoire en défense, enregistré le 23 juin 2020, la ministre de la transition écologique et solidaire conclut au rejet de la requête.

Elle soutient que :

- l'association requérante ne peut pas se prévaloir de l'Accord de Paris, dont les stipulations ne produisent aucun effet envers les particuliers ; qu'en tout état de cause les objectifs définis aux articles 2 et 7 ont été respectés ;

- aucune méconnaissance de la convention européenne des droits de l'homme ne peut être reprochée à la France, qui respecte les objectifs de protection des populations qu'elle s'est fixés ;

- en ce qui concerne l'objectif de réduction de 17% des gaz à effet de serre, les engagements de la France sont plus contraignants que les objectifs de l'Union européenne et ont été partiellement atteints, avec une réduction de 13,8% en 2018 par rapport à 2005 ; que les objectifs 2020 seront atteints ;

- en ce qui concerne l'objectif d'augmentation des énergies renouvelables, celui-ci est indépendant de celle des gaz à effet de serre et le délai imparti n'est pas expiré ;

- en ce qui concerne l'objectif d'amélioration de l'efficacité énergétique, la réponse est la même, et de nombreux dispositifs ont été mis en place ;

- la méconnaissance de la Charte de l'environnement est inopérante en l'absence de question prioritaire de constitutionnalité et ne crée pas d'obligation de lutte contre le changement climatique ;

- le principe général du droit, qui n'a pas été dégagé par la jurisprudence administrative, ne peut lui être opposé ;

- le non-respect des budgets carbone n'est pas une violation du code de l'environnement et d'importants dispositifs ont été mis en place, notamment la loi énergie climat de novembre 2019, qui fixe une série d'objectifs sur la réduction des gaz à effet de serre, les énergies renouvelables, la rénovation des passoires thermiques, la création du Haut conseil pour le climat, le budget vert (rapport annuel sur les incidences environnementales du projet de loi de finance), la loi d'orientation des mobilités de décembre 2019, qui impose la décarbonation complète des transports terrestres, le développement des véhicules électriques, le verdissement des flottes de véhicules publics, le plan vélo, le forfait mobilités durables, la loi contre le gaspillage et sur l'économie circulaire de février 2020, qui porte sur la réduction de production de déchets, le recyclage, et la SNBC révisée et la nouvelle programmation pluriannuelle d'avril 2020 ;

- les requérantes n'établissent pas de lien de causalité entre les fautes alléguées et le préjudice invoqué dès lors que la France est responsable de 1% des émissions mondiales de gaz à effet de serre, liées à cinq secteurs dont les transports, le secteur tertiaire, l'agriculture et l'industrie manufacturière surtout, que les collectivités territoriales jouent un rôle essentiel et qu'en matière industrielle, un rôle structurant est joué par le système européen d'échange des quotas d'émissions ; que L'État ne doit pas restreindre excessivement les libertés individuelles ;

- l'existence d'un préjudice moral n'est pas démontrée ;

- le préjudice écologique n'est pas applicable devant la juridiction administrative ;

- certaines injonctions demandées sont du domaine de la loi : le juge administratif ne peut pas demander au premier ministre de soumettre un projet de loi au Parlement.

Par un mémoire en réplique, enregistré le 3 septembre 2020, l'association Oxfam France conclut aux mêmes fins par les mêmes moyens.

Elle soutient en outre que :

- l'Accord de Paris était invoqué seulement au soutien d'une argumentation plus large sur les engagements internationaux de la France ;

- l'objectif d'augmentation des énergies renouvelables est l'un des principaux leviers pour réduire les gaz à effet de serre, or le retard accumulé ne permettra pas d'atteindre l'objectif contraignant de 23% en 2020 ;

- l'objectif d'amélioration de l'efficacité énergétique, qui est également l'un des principaux leviers de la lutte contre les gaz à effet de serre, ne sera pas atteint en 2020, comme l'État le reconnaît lui-même (nouvelle PPE, décret 2020-456 et Rapport de la France 2020 en application de la directive 2012/27/UE du 25 octobre 2012 relative à l'efficacité énergétique) ; cette méconnaissance traduit l'insuffisance des mesures adoptées en la matière au regard de ses obligations, prévues tant par le droit interne que par le droit de l'Union européenne, et est constitutive d'une faute de nature à engager la responsabilité de l'État ;

- la convention européenne des droits de l'homme pose une exigence de protection effective par les États, notamment par des mesures préventives ; en l'espèce, la carence est établie car les risques et la gravité pour la santé sont connus depuis longtemps mais sous-estimés et le cadre juridique est inefficace dès lors que, s'agissant des mesures d'atténuation du risque climatique, les trajectoires de réduction des gaz à effet de serre sont constamment dépassées, comme l'a relevé le Haut Conseil pour le climat dans son rapport annuel pour 2020, et les politiques et moyens en matière d'adaptation du changement climatique insuffisants, notamment en raison du sous-investissement financier ;

- aucune violation directe des articles 1 et 2 de la Charte n'a été invoquée (mais elle ne peut être exclue) et il est faux de dire que l'application de la Charte ne crée pas d'obligation générale de lutte contre le changement climatique, comme le montre la décision du conseil constitutionnel 2019-823 QPC ; le Conseil d'État a jugé en matière de pollution de l'air qu'il ne suffit pas que les autorités de l'État élaborent des plans, mais que ces plans doivent être effectifs, sans se borner à fixer des objectifs non assortis d'actions concrètes ;

- sur le respect des obligations résultant du droit interne :

- les nouvelles lois dont se prévaut l'État traduisent le manque d'ambition de la France en matière de réduction d'émissions de GES, de rénovation des bâtiments et de développement des énergies renouvelables, ou mettent en lumière les carences du pouvoir règlementaire ;

- la loi du 3 août 2009 peut être invoquée pour prévenir une illégalité future si les actes administratifs compromettent la réalisation des objectifs, sans qu'importe le fait que le délai pour la réduction des gaz à effet de serre ne soit pas expiré ;

- les plafonds d'émissions fixés par les budgets carbone ont été dépassés pour la période 2015-2018 et cette tendance s'est confirmée pour 2019, comme l'a constaté le Haut Conseil pour le climat dans son rapport 2020 ; or ces plafonds ont une portée contraignante, aucune dérogation n'est prévue, seulement une révision à chaque échéance de 4 ans ;

- la requérante établit la réalité de son préjudice moral notamment par son investissement financier important dans la campagne « Energie Climat ».

Par des mémoires en intervention enregistrés le 20 avril 2020 et le 5 janvier 2021, soit postérieurement à la clôture de l'instruction, l'association Initiatives pour le climat et l'énergie, représentée par Me Gendreau, demande au tribunal de faire droit aux « conclusions de l'État ».

Par un mémoire en intervention, enregistré le 22 juin 2020, la Fondation Abbé Pierre, représentée par son président, M. Laurent Desmard, représenté par Me Daoud, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de **1** euro en réparation du préjudice moral subi ;

2°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de :

- prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ;

- prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, la loi n° 2015-992 du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ;

- prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique ;

- prendre les mesures nécessaires aux fins d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique ;

3°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

Elle soutient que :

- la convention européenne des droits de l'homme impose des obligations aux États, notamment en matière de risques environnementaux pesant sur les habitations et domiciles des individus, contre lesquels les États ont l'obligation de prendre des mesures concrètes visant à protéger le droit à une protection du domicile et des biens contre les risques environnementaux graves, qu'il s'agisse de risques établis ou potentiels ;

- il existe un principe général du droit de chacun de vivre dans un système climatique soutenable, qui résulte tant de l'état général du droit que des exigences de la conscience juridique du temps ;

- le Pacte international des droits économiques, sociaux et culturels instaure un droit à un logement convenable, donc protégé des risques environnementaux, et fait naître une obligation positive des États de prendre des mesures appropriées pour assurer la mise en œuvre de ce droit ;

- l'État méconnaît ses obligations en matière d'évaluation et de suivi de sa politique d'amélioration de l'efficacité énergétique, en l'absence de définitions relatives à la nature des rénovations énergétique et à la précarité énergétique ;

- l'objectif d'accès à l'énergie pour tous, notamment par le chèque énergie, augmente nécessairement les consommations dès lors qu'il n'est pas articulé avec l'obligation de réduction des gaz à effet de serre et d'atténuation du changement climatique en général ;

- la mise en œuvre des mesures spécifiques de rénovation énergétique des logements est insuffisante et ne permettra pas d'atteindre les objectifs fixés ;

- l'État méconnaît ses obligations d'atténuation et d'adaptation au regard du décret décence, qui méconnait les articles 3 et 5 de la loi sur la transition écologique et la croissance verte et n'édicte aucun niveau de performance énergétique, en violation avec les objectifs de la SNBC ;

- les fautes et carences spécifiques de l'État en matière de lutte contre le changement climatique sont, à tout le moins, à l'origine de l'aggravation du changement climatique et de l'impossibilité d'y remédier, c'est-à-dire à l'origine directe de l'aggravation du dommage environnemental lié au changement climatique ;

- le préjudice moral de l'association requérante est établi au regard des actions menées par celle-ci, qui consistent en des actions de soutien financier contre la précarité énergétique, des actions de conseil et d'accompagnement aux acteurs locaux, des travaux d'enquête, d'expertises et de recherches afin de faire du logement une priorité nationale, des actions de sensibilisation des citoyens au mal-logement à travers des campagnes d'information nationales et d'interpellation des pouvoirs publics à travers des actions « coup de poing » pour dénoncer les situations de logement inacceptable ou le manque d'ambition politique de certaines mesures publiques.

Par un mémoire en intervention enregistré le 20 juillet 2020, la Fédération nationale d'agriculture biologique, représentée par son président, M. Guillaume Riou, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de **1** euro en réparation du préjudice moral subi ;

2°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment de prendre les mesures nécessaires permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre du secteur agricole et mobilisant des moyens suffisants pour favoriser les pratiques agricoles conformes aux objectifs climatiques ;

3°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du Code de justice administrative.

Elle soutient que :

- selon le 5e rapport d'évaluation du GIEC, le réchauffement climatique et les événements qui lui sont liés ont un impact négatif déjà sensible sur l'agriculture, y compris l'agriculture biologique, et sur la sécurité alimentaire ; les politiques liées à l'agriculture

occupent un rôle fondamental dans la politique environnementale, l'agriculture biologique étant reconnue comme contribuant aux objectifs d'atténuation et d'adaptation au changement climatique car moins émettrice de gaz à effet de serre ; le Plan climat français souhaite ainsi «mobiliser l'agriculture pour lutter contre le changement climatique » et la SNBC pour le secteur agricole « s'appuie d'abord sur la poursuite et l'amplification des actions liées au projet agro-écologique et à l'agriculture de précision, afin de renforcer des systèmes moins émetteurs de gaz à effet de serre directement ou indirectement » et cite expressément l'agriculture biologique comme solution ;

- son intervention est recevable dès lors que les problématiques environnementales sont intrinsèquement liées aux problématiques de l'agriculture, qui figurent en tête des intérêts défendus par la Fédération selon ses statuts ; ainsi, la violation par l'État de ses obligations en matière de lutte contre le changement climatique porte atteinte aux intérêts collectifs défendus par la Fédération, qui s'implique activement dans la lutte contre le changement climatique ;

- l'État a manqué à son obligation de favoriser la production et la structuration de la filière biologique, compromettant ainsi par son action l'atteinte de l'objectif de 20 % de surfaces certifiées bio en 2020, fixé par la loi Grenelle I ; en effet, la décision du gouvernement de limiter le transfert du premier au deuxième pilier de la politique agricole commune, consacré à l'aide à la conversion à l'agriculture biologique, à 4,2 % a eu pour effet de diminuer le financement des aides à l'agriculture biologique, dans le but de préserver les financements des aides non-conditionnées à des changements de pratiques agricoles ; les retards de paiements des aides de la PAC sont la conséquence d'une négligence de l'État quant à la complexité des tâches administratives qui lui incombaient, ainsi que d'une mauvaise organisation de la chaîne de paiement de ces aides ; l'État a ainsi complexifié l'accès aux aides à l'agriculture biologique, et mis en difficulté financière des producteurs qui s'engageaient dans une démarche à même de répondre aux enjeux climatiques ;

- cette violation par l'État de ses obligations spécifiques en matière de lutte contre le changement climatique en lien avec l'agriculture participe ainsi à la violation de son obligation générale de lutte contre le changement climatique résultant de la Charte de l'environnement et de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et engage sa responsabilité ;

- le lien de causalité entre les fautes de l'État et l'aggravation du changement climatique a été établi par la Requérante, aux conclusions de laquelle se joint la Fédération intervenante ;

- cette aggravation du changement climatique est à son tour à l'origine directe des préjudices invoqués par la Fédération intervenante ; en effet, si l'État avait pris toutes les mesures nécessaires au regard de ses obligations générales et spécifiques en matière de lutte contre le changement climatique et de développement de l'agriculture biologique, certains projets de la Fédération auraient pu être menés à bien et obtenir des résultats tout à fait différents ; à ce titre, elle est fondée à solliciter l'octroi d'une indemnité d'un montant d'1 euro au titre de son préjudice moral ;

- les injonctions sollicitées sont de nature à mettre un terme à ce préjudice.

Par courrier du 11 juin 2020, les parties ont été informées, en application des dispositions de l'article R. 611-7 du code de justice administrative, de ce que le jugement était susceptible d'être fondé sur un moyen relevé d'office, tiré de l'irrecevabilité des conclusions de la requête tendant à la réparation du préjudice écologique dès lors, d'une part, que l'association Oxfam France n'est pas agréée pour la protection de l'environnement et, d'autre part, qu'elle n'a pas pour objet la protection de la nature et la défense de l'environnement.

Par un mémoire enregistré le 25 juin 2020, l'association Oxfam France a répondu au moyen d'ordre public.

Par une ordonnance du 7 septembre 2020, la clôture de l'instruction a été fixée au 9 octobre 2020 à 12h00.

Par courriers du 29 octobre 2020, adressés en application de l'article R. 613-1-1 du code de justice administrative, le ministre de la transition écologique, le ministre de l'économie, des finances et de la relance, le ministre de l'intérieur, le ministre des solidarités et de la santé, le ministre de l'agriculture et de l'alimentation, le ministre de l'Europe et des affaires étrangères et le ministre de la cohésion des territoires et des relations avec les collectivités territoriales ont été invités à produire leurs observations, dans le délai d'un mois, sur les demandes d'injonction faites par l'association requérante, en tant qu'elles entrent dans leurs attributions respectives.

Des mémoires présentés par la ministre de la transition écologique et le ministre de l'agriculture, enregistrés le 8 janvier 2021, n'ont pas été communiqués.

II. Par une requête et deux mémoires, enregistrés sous le n° 1904968 les 14 mars 2019, 20 mai 2019 et 4 septembre 2020, l'association Notre Affaire À Tous, représentée par sa présidente, Mme Clotilde Bato, représentée par Me Daoud, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de 1 euro en réparation du préjudice moral subi ;

2°) de condamner l'État à lui verser la somme symbolique de 1 euro au titre du préjudice écologique ;

3°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de :

- prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ;

- prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, la loi n° 2015-992 du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009

relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ;

- prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique ;

- prendre les mesures nécessaires aux fins d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique ;

4°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

Elle soulève les mêmes moyens que ceux développés à l'appui de la requête n° 1904967 et soutient en outre que son préjudice moral est établi au regard de son objet statutaire, qui est notamment de « promouvoir la justice climatique en proposant un plaidoyer qui vise à renforcer la législation environnementale et les droits de la nature » et des actions qu'elle mène, d'une part pour lutter contre le changement climatique et protéger les victimes climatiques, notamment par l'interpellation des pouvoirs publics, des campagnes d'action sur la transition écologique ou des plaidoyers auprès des instances politiques, d'autre part pour faire œuvre pédagogiques sur la lutte climatique et la protection des victimes climatiques, par la constitution d'un « Mouvement climat », des campagnes de sensibilisation de la société civile ou des actions de promotion de nouveaux outils de droit pour défendre le système climatique et la planète ; or l'aggravation du changement climatique ou, à tout le moins, l'impossibilité d'y remédier, imputable aux fautes de l'État, porte atteinte aux intérêts collectifs qu'elle défend, en ce que cette aggravation constitue un obstacle à la concrétisation de son objet social, qui est la protection de l'environnement ; par conséquent, le dommage environnemental caractérisé par un surplus d'émissions de GES, est constitutif d'un préjudice moral, dont elle est fondée à solliciter la réparation.

Par un mémoire en défense, enregistré le 23 juin 2020, la ministre de la transition écologique et solidaire conclut au rejet de la requête.

Elle soutient qu'aucun des moyens invoqués par la requérante n'est fondé.

Par des mémoires en intervention enregistrés les 20 avril 2020 et 5 janvier 2021, soit postérieurement à la clôture de l'instruction, l'association Initiatives pour le climat et l'énergie, représentée par Me Gendreau, demande au tribunal de faire droit aux « conclusions de l'État ».

Par un mémoire en intervention, enregistré le 22 juin 2020, la Fondation Abbé Pierre, représentée par son président, M. Laurent Desmard, représenté par Me Daoud, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de **1** euro en réparation du préjudice moral subi ;

2°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de :

- prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ;

- prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, la loi n° 2015-992 du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du Parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ;

- prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique ;

- prendre les mesures nécessaires aux fins d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique ;

3°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

Elle soulève les mêmes moyens que ceux développés dans son intervention à l'appui de la requête n° 1904967.

Par un mémoire en intervention enregistré le 20 juillet 2020, la Fédération nationale d'agriculture biologique, représentée par son président, M. Guillaume Riou, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de **1** euro en réparation du préjudice moral subi ;

2°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière

de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment de prendre les mesures nécessaires permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre du secteur agricole et mobilisant des moyens suffisants pour favoriser les pratiques agricoles conformes aux objectifs climatiques ;

3°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

Elle soulève les mêmes moyens que ceux développés à l'appui de la requête n° 1904967.

Par courrier du 11 juin 2020, les parties ont été informées, en application des dispositions de l'article R. 611-7 du code de justice administrative, de ce que le jugement était susceptible d'être fondé sur un moyen relevé d'office, tiré de l'irrecevabilité des conclusions de la requête tendant à la réparation du préjudice écologique dès lors, d'une part, que l'association Notre affaire à tous n'est pas agréée pour la protection de l'environnement et, d'autre part, qu'elle n'est pas créée depuis cinq ans à la date d'introduction de la requête.

Par un mémoire enregistré le 25 juin 2020, l'association Notre Affaire À Tous a répondu au moyen d'ordre public.

Par une ordonnance du 7 septembre 2020, la clôture de l'instruction a été fixée au 9 octobre 2020 à 12h00.

Par courriers du 29 octobre 2020, adressés en application de l'article R. 613-1-1 du code de justice administrative, le ministre de la transition écologique, le ministre de l'économie, des finances et de la relance, le ministre de l'intérieur, le ministre des solidarités et de la santé, le ministre de l'agriculture et de l'alimentation, le ministre de l'Europe et des affaires étrangères et le ministre de la cohésion des territoires et des relations avec les collectivités territoriales ont été invités à produire leurs observations, dans le délai d'un mois, sur les demandes d'injonction faites par l'association requérante, en tant qu'elles entrent dans leurs attributions respectives.

Des mémoires présentés par la ministre de la transition écologique et le ministre de l'agriculture, enregistrés le 8 janvier 2021, n'ont pas été communiqués.

III. Par une requête et deux mémoires, enregistrés sous le n° 1904972 les 14 mars 2019, 20 mai 2019 et 3 septembre 2020, la Fondation pour la Nature et l'Homme, représentée par son directeur général, M. Alain Grandjean, représenté par Me Baldon, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de 1 euro en réparation du préjudice moral subi ;

2°) de condamner l'État à lui verser la somme symbolique de 1 euro au titre du préjudice écologique ;

3°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière

de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de :

- prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ;

- prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, la loi n° 2015-992 du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ;

- prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique ;

- prendre les mesures nécessaires aux fins d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique ;

4°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

Elle soulève les mêmes moyens que ceux développés à l'appui de la requête n° 1904967 et soutient en outre que son préjudice moral est établi au regard de son objet statutaire, qui est notamment de « contribuer à une métamorphose de nos sociétés par le changement des comportements individuels et collectifs », dans le but d' « assurer la préservation du patrimoine naturel commun, le partage équitable des ressources, la solidarité et le respect de la diversité sous toutes ses formes », et des actions qu'elle mène, comme l'organisation de colloques, d'expositions ou d'autres manifestations, l'édition de supports d'information et de communication, ou la conduite d'actions de terrain et d'actions de plaidoyers, destinées à favoriser la prise de conscience des citoyens et des autorités publiques ; or l'aggravation du changement climatique ou, à tout le moins, l'impossibilité d'y remédier, imputable aux fautes de l'État, porte atteinte aux intérêts collectifs qu'elle défend, en ce que cette aggravation constitue un obstacle à la concrétisation de son objet social, qui est la protection de l'environnement ; par

conséquent, le dommage environnemental caractérisé par un surplus d'émissions de GES, est constitutif d'un préjudice moral, dont elle est fondée à solliciter la réparation.

Par un mémoire en défense, enregistré le 23 juin 2020, la ministre de la transition écologique et solidaire conclut au rejet de la requête.

Elle soutient qu'aucun des moyens invoqués par la requérante n'est fondé.

Par des mémoires en intervention enregistrés le 20 avril 2020 et le 5 janvier 2021, soit postérieurement à la clôture de l'instruction, l'association Initiatives pour le climat et l'énergie, représentée par Me Gendreau, demande au tribunal de faire droit aux « conclusions de l'État ».

Par un mémoire en intervention, enregistré le 22 juin 2020, la Fondation Abbé Pierre, représentée par son président, M. Laurent Desmard, représenté par Me Daoud, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de **1** euro en réparation du préjudice moral subi ;

2°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de :

- prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ;

- prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, la loi n° 2015-992 du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ;

- prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique ;

- prendre les mesures nécessaires aux fins d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique ;

3°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

Elle soulève les mêmes moyens que ceux développés dans son intervention à l'appui de la requête n° 1904967.

Par un mémoire en intervention enregistré le 20 juillet 2020, la Fédération nationale d'agriculture biologique, représentée par son président, M. Guillaume Riou, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de **1** euro en réparation du préjudice moral subi ;

2°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment de prendre les mesures nécessaires permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre du secteur agricole et mobilisant des moyens suffisants pour favoriser les pratiques agricoles conformes aux objectifs climatiques ;

3°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du Code de justice administrative.

Elle soulève les mêmes moyens que ceux développés à l'appui de la requête n° 1904967.

Par une ordonnance du 7 septembre 2020, la clôture de l'instruction a été fixée au 9 octobre 2020 à 12h00.

Par courriers du 29 octobre 2020, adressés en application de l'article R. 613-1-1 du code de justice administrative, le ministre de la transition écologique, le ministre de l'économie, des finances et de la relance, le ministre de l'intérieur, le ministre des solidarités et de la santé, le ministre de l'agriculture et de l'alimentation, le ministre de l'Europe et des affaires étrangères et le ministre de la cohésion des territoires et des relations avec les collectivités territoriales ont été invités à produire leurs observations, dans le délai d'un mois, sur les demandes d'injonction faites par l'association requérante, en tant qu'elles entrent dans leurs attributions respectives.

Des mémoires présentés par la ministre de la transition écologique et le ministre de l'agriculture, enregistrés le 8 janvier 2021, n'ont pas été communiqués.

IV. Par une requête et deux mémoires, enregistrés sous le n° 1904976 les 14 mars 2019, 20 mai 2019 et 3 septembre 2020, l'association Greenpeace France, représentée par son directeur exécutif, M. Jean-François Julliard, représenté par Me Capdebos, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de 1 euro en réparation du préjudice moral subi ;

2°) de condamner l'État à lui verser la somme symbolique de 1 euro au titre du préjudice écologique ;

3°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de :

- prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ;

- prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, la loi n° 2015-992 du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ;

- prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique ;

- prendre les mesures nécessaires aux fins d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique ;

4°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

Elle soulève les mêmes moyens que ceux développés à l'appui de la requête n° 1904967 et soutient en outre que son préjudice moral est établi au regard de son objet statutaire, qui est notamment « *la promotion des énergies renouvelables et des économies d'énergie, la lutte contre les pollutions et nuisances portant atteinte aux équilibres fondamentaux des océans, du sol, du sous-sol, de l'air, de l'eau, de la biosphère, du climat, des sites et paysages, l'action pour la défense des intérêts des consommateurs, des usagers et des contribuables dans les domaines de l'environnement, de la santé, de l'alimentation, de l'énergie, de la gestion des déchets, de l'urbanisme, de la publicité et du cadre de vie* » et des actions qu'elle mène, notamment des actions de sensibilisation du grand public, des travaux de recherches scientifiques, des actions de désobéissance civile, des recours juridiques à l'encontre de textes fragilisant la protection de l'environnement et de projets industriels impactant le changement climatique, des colloques, des publications de supports d'information et de communication et des actions de plaidoyers, destinées à favoriser la prise de conscience des citoyens et des autorités publiques ; or l'aggravation du changement climatique ou, à tout le moins, l'impossibilité d'y remédier, imputable aux fautes de l'État, porte atteinte aux intérêts collectifs qu'elle défend, en ce que cette aggravation constitue un obstacle à la concrétisation de son objet social, qui est la protection de l'environnement ; par conséquent, le dommage environnemental caractérisé par un surplus d'émissions de GES, est constitutif d'un préjudice moral, dont elle est fondée à solliciter la réparation.

Par des mémoires en intervention enregistrés les 20 avril 2020 et 5 janvier 2021, soit postérieurement à la clôture de l'instruction, l'association Initiatives pour le climat et l'énergie, représentée par Me Gendreau, demande au tribunal de faire droit aux « conclusions de l'État ».

Par un mémoire en intervention, enregistré le 15 juin 2020, l'association France Nature Environnement, représentée par Me Le Briero, demande au tribunal :

1°) de juger que la carence fautive de la France à respecter la valeur limite annuelle fixée pour le dioxyde d'azote a conduit à un préjudice écologique certain aggravant les effets du changement climatique par l'émission d'un surplus de dioxydes d'azote aggravant l'acidification et l'eutrophisation des milieux contribuant pour partie à diminuer la capacité d'absorption de dioxyde de carbone des écosystèmes forestiers et marins, l'émission d'un surplus de dioxydes d'azote précurseurs reconnus de l'ozone, aggravant pour partie ainsi la formation d'ozone, gaz à effet de serre reconnu, la formation d'un surplus d'ozone endommageant les écosystèmes forestiers, diminuant ainsi pour partie leur capacité d'absorption de dioxyde de carbone ;

2°) d'enjoindre à l'État de prendre toutes mesures utiles et nécessaires dans le délai le plus court afin d'assurer le respect de la valeur limite annuelle pour le dioxyde d'azote (NO2) dans les douze agglomérations et zones de qualité de l'air françaises en dépassement systématique et persistant : Marseille, Toulon, Paris, Auvergne-Clermont-Ferrand, Montpellier, Toulouse Midi-Pyrénées, zone urbaine régionale Reims Champagne-Ardenne, Grenoble Rhône-Alpes, Strasbourg, Lyon Rhône-Alpes, Vallée de l'Arve Rhône-Alpes et Nice.

Elle soutient que :

- son intervention est recevable dès lors, notamment, que son intérêt à agir est suffisant ; en effet, l'association a pour objet, aux termes de ses statuts, « la protection de la nature et de l'environnement », la « conservation et la restauration des espaces, ressources, milieux et habitats naturels, terrestres et marins, les espèces animales et végétales, la diversité et les équilibres fondamentaux de la biosphère, l'eau, l'air, le sol, le sous-sol, les sites et paysages, le cadre de vie » et la « lutte contre les pollutions et nuisances », elle est reconnue d'utilité publique

et agréée au titre de l'article L. 141-1 du Code de l'environnement et développe depuis 2015 des activités en matière de protection de l'environnement et spécifiquement pour la transition écologique et contre le changement climatique ;

- la lutte contre la pollution atmosphérique participe directement de la lutte contre le changement climatique ; or la France dépasse de manière systématique et persistante la valeur limite annuelle pour le dioxyde d'azote, fixée par les directives, elles-mêmes transposées dans le code de l'environnement ; cette carence a contribué à une atteinte non négligeable aux éléments des écosystèmes, à leurs fonctions mais aussi aux bénéfices collectifs tirés par l'homme de l'environnement, notamment par une acidification des milieux terrestres, atteignant de manière non négligeable des éléments de l'écosystème forestier pouvant entrainer leur dépérissement, portant ainsi préjudice à leur fonction de captation du carbone, par une acidification des milieux aquatiques pouvant à terme mettre en cause de nombreuses espèces et par là l'ensemble de la chaine alimentaire et de surcroit réduit la capacité de puits de carbone des océans et mers ;

- par sa carence fautive à respecter la valeur limite fixée, dans le but d'éviter, de prévenir ou de réduire les effets nocifs sur la santé humaine et/ou l'environnement, des dioxydes d'azote, l'État français a manifestement méconnu son obligation générale de lutte contre le changement climatique telle qu'elle découle des dispositions de la Charte de l'environnement ; cette carence est à l'origine directe et certaine des préjudices invoqués.

Par un mémoire en intervention, enregistré le 22 juin 2020, la Fondation Abbé Pierre, représentée par son président, M. Laurent Desmard, représenté par Me Daoud, demande au tribunal :

1°) de condamner l'État à lui verser la somme symbolique de **1** euro en réparation du préjudice moral subi ;

2°) d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de :

- prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ;

- prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, la loi n° 2015-992 du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du

23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ;

- prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique ;

- prendre les mesures nécessaires aux fins d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique ;

3°) de mettre à la charge de l'État la somme de 3 000 euros en application des dispositions de l'article L. 761-1 du code de justice administrative.

Elle soulève les mêmes moyens que ceux développés dans son intervention à l'appui de la requête n° 1904967.

Par des mémoires en intervention enregistrés les 8 octobre 2020 et 13 janvier 2021, l'Association nationale de protection des eaux et des rivières (ANPER-TOS), représentée par Me Le Briero, demande au tribunal :

1°) de juger que l'État français est responsable d'une inaction à préserver la ressource aquatique et la biodiversité aquatique contre les effets du changement climatique ;

2°) d'enjoindre à l'État de prendre toutes mesures utiles et nécessaires en vue de préserver la ressource aquatique et la biodiversité aquatique contre les effets du changement climatique.

Elle soutient que :

- son intervention est recevable dès lors, notamment, que son intérêt à agir est suffisant ; en effet, l'association a pour objet, aux termes de ses statuts, de contribuer à la protection de l'eau et de la biodiversité des milieux aquatiques et de leurs habitats, de lutter contre toute forme de pollution et de protéger la ressource en eau, elle est reconnue d'utilité publique et agréée au titre de l'article L. 141-1 du Code de l'environnement ;

- l'État, d'une part, s'abstient d'agir suffisamment sur la modification des pratiques agricoles en vue d'atténuer les impacts des changements climatiques, comme en témoignent l'absence de réduction des autorisations de prélèvement d'origine agricole, le choix de l'État de développer les retenues collinaires et de substitution pour l'irrigation agricole, sans modifier les pratiques culturales et la disparition continue des zones humides par l'effet de l'inaction étatique face aux changements climatiques, d'autre part, met en œuvre une insuffisante préservation des cours d'eau et plans d'eau face aux impacts des changements climatiques ; enfin, il néglige de suivre les recommandations de ses propres services qui permettraient une gestion équilibrée, démocratique et durable de la ressource en eau face aux enjeux posés par le réchauffement climatique.

Par une ordonnance du 7 septembre 2020, la clôture de l'instruction a été fixée au 9 octobre 2020 à 12h00.

Par courriers du 29 octobre 2020, adressés en application de l'article R. 613-1-1 du code de justice administrative, le ministre de la transition écologique, le ministre de l'économie, des finances et de la relance, le ministre de l'intérieur, le ministre des solidarités et de la santé, le ministre de l'agriculture et de l'alimentation, le ministre de l'Europe et des affaires étrangères et le ministre de la cohésion des territoires et des relations avec les collectivités territoriales ont été invités à produire leurs observations, dans le délai d'un mois, sur les demandes d'injonction faites par l'association requérante, en tant qu'elles entrent dans leurs attributions respectives.

Des mémoires présentés par la ministre de la transition écologique et le ministre de l'agriculture, enregistrés le 8 janvier 2021, n'ont pas été communiqués.

Vu les autres pièces du dossier ;

Vu :

- la Constitution et son Préambule ;
- la convention cadre des Nations Unies sur les changements climatiques du 9 mai 1992 et son protocole signé à Kyoto le 11 décembre 1997 ;
- l'accord de Paris, adopté le 12 décembre 2015 ;
- la décision 94/69/CE du Conseil du 15 décembre 1993 ;
- la décision 406/2009/CE du Parlement Européen et du Conseil du 23 avril 2009 ;
- la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 ;
- la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 ;
- le règlement (UE) 2018/842 du Parlement européen et du Conseil du 30 mai 2018 ;
- le code civil ;
- le code de l'énergie ;
- le code de l'environnement ;
- la loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement (1), dite loi Grenelle 1 ;
- la loi n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte ;
- la loi n° 2019-1147 du 8 novembre 2019 relative à l'énergie et au climat ;
- le décret n° 2015-1491 du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone ;
- le décret n° 2016-1442 du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie ;
- le décret n° 2019-439 du 14 mai 2019 relatif au Haut Conseil pour le climat ;
- le décret n° 2020-456 du 21 avril 2020 relatif à la programmation pluriannuelle de l'énergie ;
- le décret n° 2020-457 du 21 avril 2020 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone ;
- le code de justice administrative ;

Après avoir entendu en audience publique :

- le rapport de Mme Anne Baratin, premier conseiller ;
- les conclusions de Mme Amélie Fort-Besnard, rapporteur public ;
- les observations de Me Alimi et Me Kouzmine, avocats de l'association Oxfam France, de Me Daoud et Me Partouche, avocats de l'association Notre Affaire A Tous, de Me Baldon, avocat de la Fondation pour la nature et l'homme, de Me Capdebos, avocat de l'association Greeenpeace France, de Me Daoud, avocat de la Fondation Abbé Pierre, de Me Le Briero, avocat de l'association France Nature Environnement ;
- et les observations de Mmes Bretonneau et Risler, représentant la ministre de la transition écologique, et de M. Maillard, représentant l'association Initiatives pour le climat et l'énergie.

Des notes en délibéré ont été enregistrées le 18 janvier 2021 pour la Fondation Abbé Pierre, l'association Notre Affaire À Tous, l'association France Nature Environnement et l'Association nationale pour la protection des eaux et des rivières.

Considérant ce qui suit :

1. Les requêtes susvisées n°s 1904967, 1904968, 1904972 et 1904976, présentées pour l'association Oxfam France, l'association Notre Affaire À Tous, la Fondation pour la Nature et l'Homme et l'association Greenpeace France, ont le même objet et ont fait l'objet d'une instruction commune. Il y a lieu de les joindre pour statuer par un seul jugement.

Sur les conclusions indemnitaires :

2. Par un courrier du 17 décembre 2018, les associations Oxfam France, Notre Affaire À Tous et Greenpeace France et la Fondation pour la Nature et l'Homme ont demandé au Premier ministre, au ministre de la transition écologique et solidaire, au ministre des solidarités et de la santé, au ministre de l'agriculture et de l'alimentation, au ministre de la cohésion des territoires et des relations avec les collectivités territoriales, au ministre des transports, au ministre de l'économie et des finances, au ministre de l'action et des comptes publics, au ministre de l'Europe et des affaires étrangères, au ministre de l'intérieur et au ministre des outremers, d'une part, de réparer les préjudices moral et écologique résultant des carences de l'État en matière de lutte contre le changement climatique, d'autre part, de mettre sans délai un terme à l'ensemble de ces carences qui, à défaut, continuent d'engager sa responsabilité, c'est-à-dire de prendre toute mesures utile permettant de stabiliser, sur l'ensemble du territoire national, les concentrations de gaz à effet de serre dans l'atmosphère à un niveau qui permette de contenir l'élévation de la température moyenne de la planète à 1,5° C par rapport aux niveaux préindustriels, en combinaison avec des objectifs appropriés pour les pays développés et les pays en développement, de prendre toute mesure utile à l'adaptation du territoire national, et particulièrement des zones vulnérables, aux effets du changement climatique, de cesser toute contribution directe ou indirecte de l'État français au changement climatique, de mettre en en œuvre toutes les mesures permettant d'atteindre les objectifs fixés a minima en matière de réduction des émissions de gaz à effet de serre sur l'ensemble du territoire national, de développement des énergies renouvelables et d'augmentation de l'efficacité énergique. Cette demande ayant été rejetée par un courrier du 15 février 2019, les quatre associations précitées demandent au tribunal, d'une part, de condamner l'État à les indemniser du préjudice moral

qu'elles estiment subir et du préjudice écologique à hauteur de 1 euro symbolique pour chacun d'eux, d'autre part, d'enjoindre au Premier ministre et aux ministres compétents de mettre un terme à l'ensemble des manquements de l'État à ses obligations – générales et spécifiques – en matière de lutte contre le changement climatique ou d'en pallier les effets, de faire cesser le préjudice écologique, et notamment, dans le délai le plus court possible, de prendre les mesures nécessaires aux fins de réduire les émissions de gaz à effet de serre dans l'atmosphère – à due proportion par rapport aux émissions mondiales, et compte tenu de la responsabilité particulière acceptée par les pays développés – à un niveau compatible avec l'objectif de contenir l'élévation de la température moyenne de la planète en-dessous du seuil de 1,5° C par rapport aux niveaux préindustriels, en tenant compte du surplus de gaz à effet de serre émis par la France depuis 1990 et des efforts supplémentaires que le respect de cet objectif implique ; de prendre à tout le moins toutes les mesures permettant d'atteindre les objectifs de la France en matière de réduction des émissions de gaz à effet de serre, de développement des énergies renouvelables et d'augmentation de l'efficacité énergétique, fixés par la loi du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement, la loi du 12 juillet 2010 portant engagement national pour l'environnement, la loi du 17 août 2015 sur la transition énergétique pour une croissance verte, le décret du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone, le décret du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie, la décision n°406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative au partage de l'effort, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables, la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, le règlement (UE) 2018/842 du parlement européen et du conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 et la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables ; de prendre les mesures nécessaires à l'adaptation du territoire national aux effets du changement climatique et d'assurer la protection de la vie et de la santé des citoyens contre les risques liés au changement climatique.

<u>Sur les interventions</u> :

3. Aux termes de l'article R. 632-1 du code de justice administrative : « *L'intervention est formée par mémoire distinct. (…) / Le président de la formation de jugement ou le président de la chambre chargée de l'instruction ordonne, s'il y a lieu, que ce mémoire en intervention soit communiqué aux parties et fixe le délai imparti à celles-ci pour y répondre. / Néanmoins, le jugement de l'affaire principale qui est instruite ne peut être retardé par une intervention.* ».

4. En premier lieu, l'association France Nature Environnement, qui a notamment pour objet de lutter contre les atteintes anthropiques à l'environnement dont l'une des manifestations réside dans la contribution au phénomène du changement climatique, justifie d'un intérêt suffisant à intervenir au soutien de la requête n° 1904976 présentée par l'association Greenpeace France. Ainsi, son intervention est recevable.

5. En deuxième lieu, une intervention ne peut être admise que si son auteur s'associe soit aux conclusions du requérant, soit à celles du défendeur. Ainsi, est irrecevable une intervention qui présente des conclusions distinctes de celles de l'un ou de l'autre. Par suite, les interventions de la Fondation Abbé Pierre et de la Fédération nationale de l'agriculture

biologique, qui demandent la réparation de leur préjudice moral à hauteur de 1 euro chacune et ne demandent pas la réparation du préjudice écologique, ne sont pas recevables.

6. En troisième lieu, une intervention non motivée n'est pas recevable. Par suite, l'Association Initiatives pour le climat et l'énergie, dont l'intervention au soutien de l'État ne comporte l'énoncé d'aucun moyen et qui, en outre, n'a présenté une intervention motivée que postérieurement à la clôture de l'instruction, n'est pas recevable à intervenir dans les présentes instances.

7. En dernier lieu, en vertu de l'article 10 des statuts de l'association nationale pour la protection des eaux et rivières, le président « *a qualité pour ester en justice au nom de l'association. Son intervention n'est donc pas recevable. Dans ce cas, le président ne peut être remplacé que par un mandataire agissant en vertu d'une procuration spéciale signée par lui ou, en cas d'empêchement, d'un vice-président ou du secrétaire général* ».

8. En l'absence de procuration spéciale donnée à son mandataire par le président de l'association nationale pour la protection des eaux et rivières, seul compétent pour représenter l'association en vertu des dispositions statutaires précitées, Me Le Briero n'avait pas qualité pour présenter devant le tribunal, au nom de l'association, une intervention au soutien des conclusions de l'association Greenpeace France. Dès lors, l'intervention en son nom est irrecevable.

Sur le préjudice écologique :

9. Pour demander la condamnation de l'État à leur verser la somme symbolique d'un euro et le prononcé d'une injonction à l'encontre du Premier ministre et des ministres compétents d'adopter toutes les mesures nécessaires pour mettre fin au dommage lié aux surplus d'émissions de gaz à effet de serre et prévenir l'aggravation de ce dommage, les associations requérantes soutiennent que l'État est responsable, par ses carences dans la lutte contre le changement climatique, d'un préjudice écologique.

En ce qui concerne la recevabilité de l'action en réparation du préjudice écologique :

10. Aux termes de l'article 1246 du code civil : « *Toute personne responsable d'un préjudice écologique est tenue de le réparer.* ». En vertu de l'article 1247 du même code, le préjudice écologique consiste en une atteinte non négligeable aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement. L'article 1248 de ce code dispose que : « *L'action en réparation du préjudice écologique est ouverte à toute personne ayant qualité et intérêt à agir, telle que l'Etat, l'Office français de la biodiversité, les collectivités territoriales et leurs groupements dont le territoire est concerné, ainsi que les établissements publics et les associations agréées ou créées depuis au moins cinq ans à la date d'introduction de l'instance qui ont pour objet la protection de la nature et la défense de l'environnement.* ». Enfin, aux termes de l'article L. 142-1 du code de l'environnement : « *Toute association ayant pour objet la protection de la nature et de l'environnement peut engager des instances devant les juridictions administratives pour tout grief se rapportant à celle-ci. (...)* ».

11. Il résulte de l'ensemble de ces dispositions que les associations, agréées ou non, qui ont pour objet statutaire la protection de la nature et la défense de l'environnement ont qualité

pour introduire devant la juridiction administrative un recours tendant à la réparation du préjudice écologique.

12. En premier lieu, il résulte de l'instruction que l'association Oxfam France a pour objet, selon l'article 2 de ses statuts, de « *développer et soutenir des activités de lutte contre la pauvreté et ses causes structurelles et de promouvoir la défense des droits fondamentaux dans le monde* », en mettant en œuvre des « *actions ayant notamment pour effet de (...) contribuer à un partage plus équitable des ressources naturelles* ». À cet effet, elle mène notamment des actions de plaidoyer auprès des instances politiques afin d'obtenir des changements en matière de politique climatique, organise des campagnes de sensibilisation de la société civile aux enjeux de la lutte contre le changement climatique, finance des travaux de recherches relatifs au changement climatique et apporte son soutien aux pays du Sud en les aidant à mettre en œuvre les mesures nécessaires pour s'adapter au changement climatique et en atténuer les effets. Créée en 1988, elle est également membre du conseil d'administration de l'association Réseau Action pour le Climat, fédération d'associations de lutte contre le changement climatique. Ainsi, eu égard à son objet et à ses actions en faveur de la lutte contre le dérèglement climatique, cette association est recevable à présenter des conclusions en réparation du préjudice écologique.

13. En deuxième lieu, l'association Notre Affaire À Tous, créée en 2015, a notamment pour objet, selon l'article 2 de ses statuts, d'« *organiser, de financer ou de soutenir toutes actions (...) ayant pour objet de protéger le vivant, l'environnement, le climat, les générations présentes et futures et la faune et la flore* » et de « *promouvoir la nécessité des êtres humains, des gouvernements et des Etats d'agir pour une meilleure protection de l'environnement* ». À cet effet, elle initie et soutient des actions juridiques, collabore à des publications scientifiques et à des rapports sur des questions de justice climatique et participe à l'organisation de colloques. Ainsi, eu égard à son objet et à ses actions menées en faveur de la sensibilisation à la lutte contre le changement climatique, cette association est recevable à présenter des conclusions en réparation du préjudice écologique.

14. En troisième lieu, la Fondation pour la Nature et l'Homme, créée en 1990 et reconnue d'utilité publique par décret du 1er août 1996, a pour objet, selon l'article 1er de ses statuts, de « *contribuer à une métamorphose de nos société par le changement des comportements individuels et collectifs* », dans le but d'« *assurer la préservation du patrimoine naturel commun, le partage équitable des ressources, la solidarité et le respect de la diversité sous toutes ses formes* ». À cet effet, elle mène des actions, telles que l'organisation de colloques, d'expositions ou d'autres manifestations, l'édition de supports d'information et de communication, ou la conduite d'actions de terrain et d'actions de plaidoyers, destinées à favoriser la prise de conscience des citoyens et des autorités publiques face à l'urgence climatique. Eu égard à son objet, à l'ancienneté de son engagement et à la multiplicité des actions menées en faveur de la protection de l'environnement, cette association est recevable à présenter des conclusions en réparation du préjudice écologique.

15. En dernier lieu, l'association Greenpeace France, créée en 1977 et agréée par arrêté ministériel du 28 septembre 1994 au titre de l'article L. 252-1 du code rural, devenu L. 141-1 du code de l'environnement, a pour objet, selon l'article 1er de ses statuts, « *la promotion des énergies renouvelables et des économies d'énergie, la lutte contre les pollutions et nuisances portant atteinte aux équilibres fondamentaux des océans, du sol, du sous-sol, de l'air, de l'eau, de la biosphère, du climat, des sites et paysages, l'action pour la défense des intérêts des consommateurs, des usagers et des contribuables dans les domaines de l'environnement, de la santé, de l'alimentation, de l'énergie (...)* ». À cet effet, elle mène notamment des actions de

sensibilisation du grand public, des travaux de recherches scientifiques, des actions de désobéissance civile, des recours juridiques à l'encontre de textes fragilisant la protection de l'environnement et de projets industriels impactant le changement climatique, des colloques, des publications de supports d'information et de communication et des actions de plaidoyers, destinées à favoriser la prise de conscience des citoyens et des autorités publiques. Eu égard à son objet, à l'ancienneté de son engagement et à la multiplicité des actions menées en faveur de la protection de l'environnement, cette association est recevable à présenter des conclusions en réparation du préjudice écologique.

En ce qui concerne l'existence d'un préjudice écologique :

16. Il résulte de l'instruction, et notamment des derniers rapports spéciaux publiés par le Groupe d'experts intergouvernemental sur l'évolution du climat (GIEC), auxquels la France participe activement, dont elle contribue au financement à hauteur de 15 %, et aux conclusions desquels elle adhère, que l'augmentation constante de la température globale moyenne de la Terre, qui a atteint aujourd'hui 1°C par rapport à l'époque préindustrielle, est due principalement aux émissions de gaz à effet de serre d'origine anthropique. Cette augmentation, responsable d'une modification de l'atmosphère et de ses fonctions écologiques, a déjà provoqué notamment l'accélération de la fonte des glaces continentales et du pergélisol et le réchauffement des océans, qui ont pour conséquence l'élévation du niveau de la mer, qui est en voie d'accélération. Ce dernier phénomène se combine avec l'augmentation, en fréquence et en gravité, des phénomènes climatiques extrêmes, l'acidification des océans et l'atteinte des écosystèmes, qui ont des conséquences graves et irréversibles sur les activités humaines telles que la pêche et les cultures, ainsi que sur les ressources en eau, et entraînent des risques croissants d'insécurité alimentaire et de dégradation des ressources en eau, de la santé humaine et de la croissance économique. Il résulte également de ces rapports que ce réchauffement global atteindra 1,5°C entre 2030 et 2052 si les émissions anthropiques de gaz à effet de serre continuent d'augmenter au rythme actuel et qu'il persistera pendant plusieurs siècles, même si ces émissions diminuent, en raison de la persistance dans l'atmosphère des gaz à effet de serre, et qu'un réchauffement de 2°C plutôt qu'1,5°C augmenterait gravement ces différents phénomènes et leurs conséquences. Il résulte encore de ces travaux que chaque demi-degré de réchauffement global supplémentaire renforce très significativement les risques associés, en particulier pour les écosystèmes et les populations les plus vulnérables, et qu'une limitation de ce réchauffement à 1,5°C nécessite de réduire, d'ici à 2030, les émissions de gaz à effet de serre de 45 % par rapport à 2010 et d'atteindre la neutralité carbone au plus tard en 2050. Enfin, il résulte des travaux de l'Observatoire national sur les effets du réchauffement climatique, organisme rattaché au ministère de la transition écologique et chargé notamment de décrire, par un certain nombre d'indicateurs, l'état du climat et ses impacts sur l'ensemble du territoire national, qu'en France, l'augmentation de la température moyenne, qui s'élève pour la décennie 2000-2009, à 1,14°C par rapport à la période 1960-1990, provoque notamment l'accélération de la perte de masse des glaciers, en particulier depuis 2003, l'aggravation de l'érosion côtière, qui affecte un quart des côtes françaises, et des risques de submersion, fait peser de graves menaces sur la biodiversité des glaciers et du littoral, entraîne l'augmentation des phénomènes climatiques extrêmes, tels que les canicules, les sécheresses, les incendies de forêts, les précipitations extrêmes, les inondations et les ouragans, risques auxquels sont exposés de manière forte 62 % de la population française, et contribue à l'augmentation de la pollution à l'ozone et à l'expansion des insectes vecteurs d'agents infectieux tels que ceux de la dengue ou du chikungunya. Au regard de l'ensemble de ces éléments, le préjudice écologique invoqué par les associations requérantes doit être regardé comme établi.

En ce qui concerne les carences fautives et le lien de causalité :

17. Pour rechercher la responsabilité de l'État au titre du préjudice écologique, les associations requérantes soutiennent qu'il a contribué à l'aggravation de celui-ci, en méconnaissance de son obligation générale de lutte contre le changement climatique, d'une part, en n'adoptant pas, par le biais de ses autorités administratives, les mesures suffisantes pour assurer l'application du cadre législatif et réglementaire qu'il s'est fixé pour lutter contre le changement climatique, d'autre part, en se dotant d'objectifs en matière de réduction des émissions de gaz à effet de serre qui ne permettent pas de limiter l'élévation de la température moyenne globale de l'atmosphère à 1,5°C.

S'agissant de l'obligation générale de lutte contre le changement climatique :

18. D'une part, l'article 2 de la convention-cadre des Nations Unies sur les changements climatiques (CCNUCC) du 9 mai 1992 stipule que : *« L'objectif ultime de la présente Convention et de tous instruments juridiques connexes que la Conférence des Parties pourrait adopter est de stabiliser, conformément aux dispositions pertinentes de la Convention, les concentrations de gaz à effet de serre dans l'atmosphère à un niveau qui empêche toute perturbation anthropique dangereuse du système climatique (...). »*. À cet égard, le paragraphe 1 de l'article 3 de la convention prévoit notamment que : *« Il incombe aux Parties de préserver le système climatique dans l'intérêt des générations présentes et futures, sur la base de l'équité et en fonction de leurs responsabilités communes mais différenciées et de leurs capacités respectives. Il appartient, en conséquence, aux pays développés parties d'être à l'avant-garde de la lutte contre les changements climatiques et leurs effets néfastes. »* Par ailleurs, aux termes de l'article 2 de l'accord de Paris du 12 décembre 2015, conclu dans le cadre de la conférence des parties mentionnée à l'article 7 de la convention : *« 1. Le présent Accord, en contribuant à la mise en œuvre de la Convention, notamment de son objectif, vise à renforcer la riposte mondiale à la menace des changements climatiques, dans le contexte du développement durable et de la lutte contre la pauvreté, notamment en : / a) Contenant l'élévation de la température moyenne de la planète nettement en dessous de 2° C par rapport aux niveaux préindustriels et en poursuivant l'action menée pour limiter l'élévation de la température à 1,5° C par rapport aux niveaux préindustriels, étant entendu que cela réduirait sensiblement les risques et les effets des changements climatiques; (...). / 2. Le présent Accord sera appliqué conformément à l'équité et au principe des responsabilités communes mais différenciées et des capacités respectives, eu égard aux différentes situations nationales. »* Aux termes du paragraphe 1 de l'article 4 de cet accord : *« En vue d'atteindre l'objectif de température à long terme énoncé à l'article 2, les Parties cherchent à parvenir au plafonnement mondial des émissions de gaz à effet de serre dans les meilleurs délais, étant entendu que le plafonnement prendra davantage de temps pour les pays en développement Parties, et à opérer des réductions rapidement par la suite conformément aux meilleures données scientifiques disponibles de façon à parvenir à un équilibre entre les émissions anthropiques par les sources et les absorptions anthropiques par les puits de gaz à effet de serre au cours de la deuxième moitié du siècle, sur la base de l'équité, et dans le contexte du développement durable et de la lutte contre la pauvreté. »* Aux termes du paragraphe 2 du même article : *« Chaque partie communique et actualise les contributions déterminées au niveau national successives qu'elle prévoit de réaliser. Les Parties prennent des mesures internes pour l'atténuation en vue de réaliser les objectifs desdites contributions. »*.

19. D'autre part, par la décision 94/69/CE du 15 décembre 1993 concernant la conclusion de la CCNUCC, le Conseil a approuvé la convention au nom de la Communauté européenne, devenue l'Union européenne. Notamment aux fins de mise en œuvre des stipulations précitées, l'Union européenne a adopté un premier « Paquet Énergie Climat 2020 », composé en particulier de la décision n° 406/2009/CE du 23 avril 2009 relative à l'effort à fournir par les États membres pour réduire leurs émissions de gaz à effet de serre afin de respecter les engagements de la Communauté en matière de réduction de ces émissions jusqu'en 2020. Par la suite, l'Union européenne, qui a adhéré à l'accord de Paris, a notifié à la Conférence des États parties à la CCNUCC, en application des stipulations de l'article 4 de cet accord, une « contribution déterminée au niveau national » (CDN) pour l'Union et ses États membres correspondant à une réduction minimum de 40 % des émissions de gaz à effet de serre en 2030 par rapport à leur niveau de 1990. Elle a alors adopté un second « Paquet Énergie Climat » reposant notamment sur le règlement (UE) 2018/842 du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030 contribuant à l'action pour le climat afin de respecter les engagements pris dans le cadre de l'accord de Paris.

20. Enfin, aux termes de l'article 3 de la Charte de l'environnement, qui a valeur constitutionnelle : « *Toute personne doit, dans les conditions définies par la loi, prévenir les atteintes qu'elle est susceptible de porter à l'environnement ou, à défaut, en limiter les conséquences* ». Les dispositions de l'article L. 100-4 du code de l'énergie, dans leur rédaction issue de la loi du 8 novembre 2019 relative à l'énergie et au climat, précisent que : *« I. - Pour répondre à l'urgence écologique et climatique, la politique énergétique nationale a pour objectifs : /1° De réduire les émissions de gaz à effet de serre de 40 % entre 1990 et 2030 et d'atteindre la neutralité carbone à l'horizon 2050 en divisant les émissions de gaz à effet de serre par un facteur supérieur à six entre 1990 et 2050. La trajectoire est précisée dans les budgets carbone mentionnés à l'article L. 222-1 A du code de l'environnement. (...) »*. En vue d'atteindre cet objectif de réduction des émissions de gaz à effet de serre, l'article L. 222-1 B du code de l'environnement prévoit que : « *I. – La stratégie nationale de développement à faible intensité de carbone, dénommée " stratégie bas-carbone ", fixée par décret, définit la marche à suivre pour conduire la politique d'atténuation des émissions de gaz à effet de serre dans des conditions soutenables sur le plan économique à moyen et long termes afin d'atteindre les objectifs définis par la loi prévue à l'article L. 100-1 A du code de l'énergie. (...)* ».

21. Il résulte de ces stipulations et dispositions que l'État français, qui a reconnu l'existence d'une « urgence » à lutter contre le dérèglement climatique en cours, a également reconnu sa capacité à agir effectivement sur ce phénomène pour en limiter les causes et en atténuer les conséquences néfastes. À cet effet, il a choisi de souscrire à des engagements internationaux et, à l'échelle nationale, d'exercer son pouvoir de réglementation, notamment en menant une politique publique de réduction des émissions de gaz à effet de serre émis depuis le territoire national, par laquelle il s'est engagé à atteindre, à des échéances précises et successives, un certain nombre d'objectifs dans ce domaine.

S'agissant de l'action insuffisante de l'État au regard des objectifs qu'il s'est fixés :

22. Les associations requérantes soutiennent que l'État est responsable de l'aggravation du préjudice écologique résultant des émissions à effet de serre constaté ci-dessus à hauteur de l'insuffisance de son action pour atteindre les objectifs qu'il s'est lui-même fixés en matière d'amélioration de l'efficacité énergétique, d'augmentation de la part des énergies produites à partir de sources renouvelables et de réduction des émissions de gaz à effet de serre.

Concernant l'amélioration de l'efficacité énergétique :

23. Le préambule de la décision du Parlement européen et du Conseil du 23 avril 2009 indique que : « *(...) Le Conseil européen de mars 2007 a décidé que la Communauté prend de manière indépendante l'engagement ferme de réduire d'ici à 2020 ses émissions de gaz à effet de serre d'au moins 20 % par rapport à 1990. / L'amélioration de l'efficacité énergétique constitue un élément essentiel pour les États membres afin de satisfaire aux exigences énoncées dans la présente décision* ». En vertu de l'article L. 100-1 du code de l'énergie, la politique énergétique *« (...) 4° préserve la santé humaine et l'environnement, en particulier en luttant contre l'aggravation de l'effet de serre (...)* ». Aux termes de l'article L. 100-1 du même code : « *Pour atteindre les objectifs définis à l'article L. 100-1, l'Etat (...) veille, en particulier, à : / 1° Maîtriser la demande d'énergie et favoriser l'efficacité et la sobriété énergétiques (...)* ». À cet effet, aux termes de l'article L. 100-2 de ce code : « *l'État (...) veille, en particulier à : / 1° maîtriser la demande d'énergie et favoriser l'efficacité et la sobriété énergétiques (...)* » et aux termes de l'article L. 100-4 de ce code : « « *I. - Pour répondre à l'urgence écologique et climatique, la politique énergétique nationale a pour objectifs : / (...) 2° De réduire la consommation énergétique finale de 50 % en 2050 par rapport à la référence 2012, en visant les objectifs intermédiaires d'environ 7 % en 2023 et de 20 % en 2030* ». Dans ce cadre, l'article 2 du décret du 27 octobre 2016 relatif à la programmation pluriannuelle de l'énergie dispose que : *« I. - Les objectifs de réduction de la consommation d'énergie primaire fossile par rapport à 2012 sont les suivants : / - pour le gaz naturel : - 8,4 % en 2018 et - 15,8 % en 2023 ; / - pour le pétrole : - 15,6 % en 2018 et - 23,4 % en 2023 ; / - pour le charbon : - 27,6 % en 2018 et - 37 % en 2023. / II. - L'objectif de réduction de la consommation finale d'énergie par rapport à 2012 est de – 7 % en 2018 et de - 12,6 % en 2023*. », ce dernier objectif ayant été révisé par le décret du 21 avril 2020 pour être ramené à – 7,5 % en 2023.

24. Il résulte de l'instruction, et notamment d'une étude de l'Institut du développement durable et de relations internationales, citant les données établies par le service des données et des études statistiques du ministère de la transition écologique, que la consommation finale d'énergie a diminué de 1,7 % entre 2012 et 2017, soit une baisse largement inférieure au rythme requis pour respecter l'objectif fixé pour 2018, qui nécessiterait de multiplier par quatre le rythme annuel d'amélioration de l'efficacité énergétique dans les secteurs finaux. En outre, les rapports de la France d'avril 2019 et juin 2020, transmis en application de la directive 2012/27/UE du Parlement et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique, précisent que cette consommation est en baisse de 0,4 % entre 2017 et 2018 et indiquent que « l'atteinte des objectifs pour 2020 nécessite une montée en puissance rapide des mesures engagées ou nouvelles ». Enfin, le projet de la nouvelle programmation pluriannuelle de l'énergie relève que « le rythme actuel est insuffisant pour atteindre l'objectif à 2020 de la directive efficacité énergétique. Le scénario de référence indique que l'objectif pour 2020 ne serait atteint qu'en 2026 ».

25. Toutefois, s'il résulte ainsi de l'instruction que les objectifs que s'est fixés l'État en matière d'amélioration de l'efficacité énergétique n'ont pas été respectés et que cette carence a contribué à ce que l'objectif de réduction des émissions de gaz à effet de serre examiné ci-dessous ne soit pas atteint, l'écart ainsi constaté entre les objectifs et les réalisations, dès lors que l'amélioration de l'efficacité énergétique n'est qu'une des politiques sectorielles mobilisables en ce domaine, ne peut être regardé comme ayant contribué directement à l'aggravation du

préjudice écologique dont les associations requérantes demandent réparation. Par suite, leurs conclusions sur ce point ne peuvent qu'être écartées.

Concernant l'augmentation de la part des énergies renouvelables dans la consommation finale brute d'énergie :

26. En ce domaine, la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 indique, dans son premier considérant, que : « *la maîtrise de la consommation énergétique européenne et l'augmentation de l'utilisation de l'énergie produite à partir de sources renouvelables constituent, avec les économies d'énergie et une efficacité énergétique accrue, des éléments importants du paquet de mesures requises afin de réduire les émissions de gaz à effet de serre et de se conformer à la CCNUCC,… en vue d'une diminution des émissions des gaz à effet de serre au-delà de 2012* » et impose aux États membres, dans son article 3, de fixer des objectifs contraignants globaux concernant la part d'énergie produit à partir de sources renouvelables. À cet effet, aux termes de l'article L. 100-4 du code de l'énergie : « *I. - Pour répondre à l'urgence écologique et climatique, la politique énergétique nationale a pour objectifs : / (…) 4° De porter la part des énergies renouvelables à 23 % de la consommation finale brute d'énergie en 2020 et à 32 % en 2030 (…)* », ce dernier objectif ayant été porté à 33 % par la loi du 8 novembre 2019 relative à l'énergie et au climat.

27. Il résulte de l'instruction, et notamment des données d'Eurostat, direction générale de la Commission européenne chargée de l'information statistique à l'échelle communautaire, qu'en France, la part des énergies renouvelables dans la consommation finale brute d'énergie était, en 2018, de 16,6 %, en augmentation de 0,9% par rapport à 2016.

28. Toutefois, s'il résulte ainsi de l'instruction que les objectifs que s'est fixés l'État n'ont pas davantage été atteints, l'écart ainsi constaté entre les objectifs et les réalisations, dès lors que la politique en ce domaine n'est elle-même qu'une des politiques sectorielles mobilisables, ne peut être regardé comme ayant contribué directement à l'aggravation du préjudice écologique dont les associations requérantes demandent réparation. Par suite, leurs conclusions sur ce point ne peuvent également qu'être écartées.

Concernant l'objectif de réduction des émissions de gaz à effet de serre :

29. En ce domaine, d'une part, l'annexe II de la décision n° 406/2009/CE du 23 avril 2009 relative à l'effort à fournir par les États membres pour réduire leurs émissions de gaz à effet de serre afin de respecter les engagements de la Communauté en matière de réduction de ces émissions jusqu'en 2020, a fixé à la France, pour 2020, une limite d'émission de gaz à effet de serre de – 14 % par rapport aux niveaux d'émission de 2005. L'annexe I du règlement (UE) 2018/842 du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les États membres de 2021 à 2030, prévu par son article 4, fixe pour chaque État membre le niveau de cette contribution minimale et a assigné à la France une obligation de réduction des émissions de gaz à effet de serre de – 37 % en 2030 par rapport à leur niveau de 2005. D'autre part, les dispositions de l'article L. 100-4 du code de l'énergie, dans leur rédaction issue de la loi du 8 novembre 2019 relative à l'énergie et au climat, précisent que : *« I. - Pour répondre à l'urgence écologique et climatique, la politique énergétique nationale a pour objectifs : / 1° De réduire les émissions de gaz à effet de serre de 40 % entre 1990 et 2030 et d'atteindre la neutralité carbone à l'horizon 2050 en divisant les émissions de gaz à effet de serre par un facteur supérieur à six entre 1990 et 2050. La trajectoire est précisée dans les budgets carbone mentionnés à l'article L. 222-1 A du code de l'environnement. Pour*

l'application du présent 1°, la neutralité carbone est entendue comme un équilibre, sur le territoire national, entre les émissions anthropiques par les sources et les absorptions anthropiques par les puits de gaz à effet de serre, tel que mentionné à l'article 4 de l'accord de Paris ratifié le 5 octobre 2016. La comptabilisation de ces émissions et absorptions est réalisée selon les mêmes modalités que celles applicables aux inventaires nationaux de gaz à effet de serre notifiés à la Commission européenne et dans le cadre de la convention-cadre des Nations unies sur les changements climatiques, sans tenir compte des crédits internationaux de compensation carbone ; / (...) ». En vue d'atteindre cet objectif de réduction des émissions de gaz à effet de serre, l'article L. 222-1 A du code de l'environnement prévoit que : *« Pour la période 2015-2018, puis pour chaque période consécutive de cinq ans, un plafond national des émissions de gaz à effet de serre dénommé " budget carbone " est fixé par décret. »* et l'article L. 222-1 B du même code, dans sa rédaction issue de la loi du 8 novembre 2019 précitée, notamment que : *« I. – La stratégie nationale de développement à faible intensité de carbone, dénommée " stratégie bas-carbone ", fixée par décret, définit la marche à suivre pour conduire la politique d'atténuation des émissions de gaz à effet de serre dans des conditions soutenables sur le plan économique à moyen et long termes (...) / II. – Le décret fixant la stratégie bas-carbone répartit le budget carbone de chacune des périodes mentionnées à l'article L. 222-1 A par grands secteurs, notamment ceux pour lesquels la France a pris des engagements européens ou internationaux, par secteur d'activité ainsi que par catégorie de gaz à effet de serre. La répartition par période prend en compte l'effet cumulatif des émissions considérées au regard des caractéristiques de chaque type de gaz, notamment de la durée de son séjour dans la haute atmosphère. (...) / Il répartit également les budgets carbone en tranches indicatives d'émissions annuelles. / III. – L'Etat, les collectivités territoriales et leurs établissements publics respectifs prennent en compte la stratégie bas-carbone dans leurs documents de planification et de programmation qui ont des incidences significatives sur les émissions de gaz à effet de serre. / Dans le cadre de la stratégie bas-carbone, le niveau de soutien financier des projets publics intègre, systématiquement et parmi d'autres critères, le critère de contribution à la réduction des émissions de gaz à effet de serre. Les principes et modalités de calcul des émissions de gaz à effet de serre des projets publics sont définis par décret. »* Aux termes de l'article D. 222-1-A du code de l'environnement dans sa rédaction issue du décret du 18 novembre 2015 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone : *« I. – Les émissions de gaz à effet de serre comptabilisées au titre des budgets carbone fixés en application de l'article L. 222 1 A sont celles que la France notifie à la Commission européenne et dans le cadre de la convention-cadre des Nations unies sur les changements climatiques. / (...) »* Aux termes de l'article D. 222-1-B du même code : *« I. – Le respect des budgets carbone est évalué sur la base des inventaires annuels transmis à la Commission européenne ou dans le cadre de la convention-cadre des Nations unies sur les changements climatiques les plus à jour. »* Enfin, en vertu de l'article 2 de ce décret du 18 novembre 2015 : *« Les budgets carbone des périodes 2015-2018, 2019-2023 et 2024-2028 sont fixés respectivement à 442, 399 et 358 Mt de CO2eq par an, à comparer à des émissions annuelles en 1990, 2005 et 2013 de, respectivement, 551, 556 et 492 Mt de CO2eq.*», ces derniers objectifs ayant été révisés par le décret du 21 avril 2020 relatif aux budgets carbone nationaux et à la stratégie nationale bas-carbone pour être ramenés à 422 Mt de CO2eq par an pour la période 2019-2023 et 359 pour 2024-2028. Il résulte de l'ensemble de ce qui précède qu'à hauteur des engagements qu'il s'est fixés et du calendrier qu'il a arrêté, l'État a reconnu qu'il était en mesure d'agir directement sur les émissions de gaz à effet de serre.

30. À cet égard, il résulte de l'instruction, notamment des rapports annuels publiés en juin 2019 et juillet 2020 par le Haut Conseil pour le climat, organe indépendant créé par décret du 14 mai 2019 afin d'émettre des avis et recommandations sur la mise en œuvre des politiques

et mesures publiques pour réduire les émissions de gaz à effet de serre de la France, et des données collectées par le Centre interprofessionnel technique d'études de la pollution atmosphérique (CITEPA), opérateur de l'État qui réalise, chaque année, pour le compte du ministère de la transition écologique, l'inventaire des émissions dans l'air de gaz à effet de serre de la France, qu'en ce qui concerne la réduction de ces émissions, au terme de la période 2015-2018, la France a substantiellement dépassé, de 3,5 %, le premier budget carbone qu'elle s'était assignée, soit environ 61 Mt CO_2eq par an, réalisant une baisse moyenne de ses émissions de 1,1 % par an alors que le budget fixé imposait une réduction de l'ordre de 1,9 % par an, l'ensemble des secteurs d'activité affichant un dépassement de leurs objectifs pour cette même année, mais plus particulièrement ceux des transports, de l'agriculture, du bâtiment et de l'industrie, qui représentent plus de 85 % des émissions. Pour l'année 2019, la diminution des émissions s'est élevée à 0,9 % par rapport à 2018, alors que le deuxième budget carbone, fixé pour la période 2019-2023, prévoit une diminution de 1,5 % par an. A cet égard, dans ses deux rapports annuels, le Haut Conseil pour le climat a relevé que « *les actions de la France ne sont pas encore à la hauteur des enjeux et des objectifs qu'elle s'est donnés* » et a constaté l'absence de baisse substantielle dans tous les secteurs concernés. Par suite, l'État doit être regardé comme ayant méconnu le premier budget carbone et n'a pas ainsi réalisé les actions qu'il avait lui-même reconnues comme étant susceptibles de réduire les émissions de gaz à effet de serre.

31. En outre, la circonstance que l'État pourrait atteindre les objectifs de réduction des émissions de gaz à effet de serre de 40 % en 2030 par rapport à leur niveau de 1990 et de neutralité carbone à l'horizon 2050 n'est pas de nature à l'exonérer de sa responsabilité dès lors que le non-respect de la trajectoire qu'il s'est fixée pour atteindre ces objectifs engendre des émissions supplémentaires de gaz à effet de serre, qui se cumuleront avec les précédentes et produiront des effets pendant toute la durée de vie de ces gaz dans l'atmosphère, soit environ 100 ans, aggravant ainsi le préjudice écologique invoqué.

S'agissant de l'insuffisance des objectifs pour limiter le réchauffement à 1,5° C :

32. Si les associations requérantes soutiennent en outre que la France, tout comme les autres États parties à la CCNUCC, a pris des engagements insuffisants en matière de réduction des émissions de gaz à effet de serre pour atteindre l'objectif de limitation de l'élévation de la température mondiale à 1,5° C par rapport aux niveaux préindustriels, il résulte de l'instruction que la France, ainsi qu'il a été dit, s'est engagée, aux termes de l'article L. 100-4 du code de l'énergie, à réduire ses émissions de gaz à effet de serre de 40 % entre 1990 et 2030 et à atteindre la neutralité carbone à l'horizon 2050 en divisant les émissions de gaz à effet de serre par un facteur supérieur à six entre 1990 et 2050, ce qui constitue un objectif plus ambitieux que celui qui lui a été fixé par l'Union européenne. Par conséquent, à supposer même que les engagements pris par l'ensemble des États parties seraient insuffisants, les associations requérantes n'établissent pas que ces derniers seraient, par leur insuffisance, directement à l'origine du préjudice écologique invoqué.

S'agissant de l'insuffisance des mesures d'évaluation et de suivi et des mesures d'adaptation :

33. Il résulte de l'instruction que l'insuffisance de ces mesures, à la supposer établie, ne peut être regardée comme ayant directement causé le préjudice écologique dont les associations requérantes demandent la réparation.

34. Il résulte de tout ce qui précède que les associations requérantes sont fondées à soutenir qu'à hauteur des engagements qu'il avait pris et qu'il n'a pas respectés dans le cadre du premier budget carbone, l'État doit être regardé comme responsable, au sens des dispositions précitées de l'article 1246 du code civil, d'une partie du préjudice écologique constaté au point 16. Pour le surplus, leurs conclusions doivent être rejetées.

En ce qui concerne la réparation du préjudice écologique :

S'agissant de la demande de réparation en argent :

35. Aux termes de l'article 1249 du code civil : « *La réparation du préjudice écologique s'effectue par priorité en nature. / En cas d'impossibilité de droit ou de fait ou d'insuffisance des mesures de réparation, le juge condamne le responsable à verser des dommages et intérêts, affectés à la réparation de l'environnement, au demandeur ou, si celui-ci ne peut prendre les mesures utiles à cette fin, à l'État. / L'évaluation du préjudice tient compte, le cas échéant, des mesures de réparation déjà intervenues, en particulier dans le cadre de la mise en œuvre du titre VI du livre Ier du code de l'environnement.* ».

36. Il résulte de ces dispositions que la réparation du préjudice écologique, qui est un préjudice non personnel, s'effectue par priorité en nature et que ce n'est qu'en cas d'impossibilité ou d'insuffisance des mesures de réparation que le juge condamne la personne responsable à verser des dommages et intérêts au demandeur, ceux-ci étant affectés à la réparation de l'environnement.

37. En l'espèce, d'une part, les associations requérantes ne démontrent pas que l'État serait dans l'impossibilité de réparer en nature le préjudice écologique dont le présent jugement le reconnaît responsable, d'autre part, la demande de versement d'un euro symbolique en réparation du préjudice écologique est sans lien avec l'importance de celui-ci. Il s'ensuit que cette demande ne peut qu'être rejetée.

S'agissant de la demande de réparation en nature et des demandes d'injonction qui l'accompagnent :

38. D'une part, aux termes de l'article L. 911-1 du code de justice administrative : « *Lorsque sa décision implique nécessairement qu'une personne morale de droit public ou un organisme de droit privé chargé de la gestion d'un service public prenne une mesure d'exécution dans un sens déterminé, la juridiction, saisie de conclusions en ce sens, prescrit, par la même décision, cette mesure assortie, le cas échéant, d'un délai d'exécution. (...)* ». D'autre part, lorsque le juge administratif statue sur un recours indemnitaire tendant à la réparation d'un préjudice imputable à un comportement fautif d'une personne publique et qu'il constate que ce comportement et ce préjudice perdurent à la date à laquelle il se prononce, il peut, en vertu de ses pouvoirs de pleine juridiction et lorsqu'il est saisi de conclusions en ce sens, enjoindre à la personne publique en cause de mettre fin à ce comportement ou d'en pallier les effets.

39. Ainsi qu'il a été dit ci-dessus, l'État ne peut être regardé comme responsable du préjudice écologique invoqué par les associations requérantes qu'autant que le non-respect du premier budget carbone a contribué à l'aggravation des émissions de gaz à effet de serre. Par suite, les injonctions demandées par les associations requérantes ne sont recevables qu'en tant qu'elles tendent à la réparation du préjudice ainsi constaté ou à prévenir, pour l'avenir, son aggravation. L'état de l'instruction ne permet pas au tribunal de déterminer avec précision les

mesures qui doivent être ordonnées à l'État à cette fin. En conséquence, il y a lieu d'ordonner, avant-dire droit, un supplément d'instruction afin de communiquer à l'ensemble des parties les observations non communiquées des ministres compétents, qui avaient été sollicitées par le tribunal le 29 octobre 2020 dans le délai d'un mois, et n'ont été transmises à celui-ci que le 8 janvier 2021. Il y a lieu de fixer pour ce faire un délai de deux mois à compter de la notification du présent jugement.

Sur le préjudice moral :

Sur l'existence d'un préjudice moral :

40. Les dispositions de l'article L. 142-1 du code de l'environnement citées au point 10 ne dispensent pas l'association qui sollicite la réparation d'un préjudice, notamment moral, causé par les conséquences dommageables d'une carence fautive de l'autorité administrative de démontrer l'existence d'un préjudice direct et certain résultant, pour elle, de la faute commise par l'Etat.

41. En l'espèce, compte tenu des carences fautives de l'État à mettre en œuvre des politiques publiques lui permettant d'atteindre les objectifs de réduction des émissions de gaz à effet de serre qu'il s'est fixés, les associations requérantes peuvent prétendre à la réparation par l'État de ces carences fautives sous réserve de démontrer l'existence d'un préjudice, direct et certain en résultant pour elles.

Sur la réparation du préjudice :

En ce qui concerne l'association Oxfam France :

42. L'association Oxfam France, dont l'objet statutaire a été décrit au point 12, mène de longue date des actions en vue notamment d'aider les territoires à s'adapter aux effets du changement climatique et à en atténuer les effets, en tant que ces effets portent atteinte aux fonctions des écosystèmes essentielles pour le développement des sociétés humaines. Dès lors, les carences fautives de l'État dans le respect de ses engagements en matière de lutte contre le changement climatique ont porté atteinte aux intérêts collectifs qu'elle défend. Par suite, il y a lieu de condamner l'État à payer à l'association Oxfam France la somme d'un euro symbolique qu'elle demande au titre de la réparation de ce préjudice.

En ce qui concerne l'association Notre Affaire À Tous :

43. L'association Notre Affaire À Tous, dont l'objet statutaire a été décrit au point 13, mène des actions variées d'information du public et de sensibilisation à la lutte contre le changement climatique, et soutient ou conduit des actions juridiques et contentieuses en faveur de collectivités ou de particuliers victimes d'atteintes à l'environnement. Dès lors, les carences fautives de l'État dans le respect de ses engagements en matière de lutte contre le changement climatique ont porté atteinte aux intérêts collectifs qu'elle défend. Par suite, il y a lieu de condamner l'État à payer à l'association Notre Affaire À Tous requérante la somme d'un euro symbolique qu'elle demande au titre de la réparation de ce préjudice.

En ce qui concerne la Fondation pour la Nature et l'Homme :

44. La Fondation pour la Nature et l'Homme, dont l'objet statutaire a été décrit au point 14, s'investit de longue date dans des actions nombreuses et concrètes dans le domaine de l'éducation à l'environnement et de la protection de la biodiversité. En outre, elle a été désignée, par arrêté du 18 mars 2013 pour prendre part au débat sur l'environnement se déroulant dans le cadre des instances consultatives nationales et ayant vocation à examiner les politiques d'environnement et de développement durable visées à l'article L. 141-3 du code de l'environnement. Dès lors, les carences fautives de l'État dans le respect de ses engagements en matière de lutte contre le changement climatique ont porté atteinte aux intérêts collectifs qu'elle défend. Par suite, il y a lieu de condamner l'État à payer à la Fondation pour la Nature et l'Homme requérante la somme d'un euro symbolique qu'elle demande au titre de la réparation de ce préjudice.

En ce qui concerne l'association Greenpeace France :

45. L'association Greenpeace France, dont l'objet statutaire a été décrit au point 15, mène depuis 1977 de très nombreuses actions tendant à contribuer à la réduction du réchauffement climatique et à limiter son augmentation, notamment par l'analyse des politiques énergétiques et climatiques nationales, l'émission de propositions de scénarios de transition énergétique, la conduite de campagnes et de plaidoyers en faveur de nouveaux modèles de consommation durable et de l'abandon des énergies fossiles ou de l'arrêt de la déforestation importée. Dès lors, les carences fautives de l'État dans le respect de ses engagements en matière de lutte contre le changement climatique ont porté atteinte aux intérêts collectifs qu'elle défend. Par suite, il y a lieu de condamner l'État à payer à l'association Greenpeace France requérante la somme d'un euro symbolique qu'elle demande au titre de la réparation de ce préjudice.

D E C I D E :

Article 1er : L'intervention de l'association France Nature Environnement est admise.

Article 2 : Les interventions de la Fondation Abbé Pierre, de la Fédération nationale de l'agriculture biologique, de l'Association Initiatives pour le climat et l'énergie et de l'Association nationale pour la protection des eaux et rivières ne sont pas admises.

Article 3 : L'État versera à l'association Oxfam France, l'association Notre Affaire À Tous, la Fondation pour la Nature et l'Homme et l'association Greenpeace France la somme d'un euro chacune en réparation de leur préjudice moral.

Article 4 : Il est ordonné, avant de statuer sur les conclusions des quatre requêtes tendant à ce que le tribunal enjoigne à l'État, afin de faire cesser pour l'avenir l'aggravation du préjudice écologique constaté, de prendre toutes les mesures permettant d'atteindre les objectifs que la France s'est fixés en matière de réduction des émissions de gaz à effet de serre, un supplément d'instruction afin de soumettre les observations non communiquées des ministres compétents à l'ensemble des parties, dans un délai de deux mois à compter de la notification du présent jugement.

Article 5 : Les conclusions des quatre requêtes tendant au versement d'un euro symbolique en réparation du préjudice écologique sont rejetées.

Article 6 : Tous droits et moyens des parties sur lesquels il n'est pas expressément statué par le présent jugement sont réservés jusqu'en fin d'instance.

Article 7 : Le présent jugement sera notifié à l'association Oxfam France, l'association Notre Affaire À Tous, la Fondation pour la Nature et l'Homme, l'association Greenpeace France, l'association France Nature Environnement, la Fondation Abbé Pierre, la Fédération nationale de l'agriculture biologique, l'Association Initiatives pour le climat et l'énergie, l'Association nationale pour la protection des eaux et rivières, le secrétaire général du gouvernement, la ministre de la transition écologique, le ministre de l'économie, des finances et de la relance, le ministre de l'intérieur, le ministre des solidarités et de la santé, le ministre de l'agriculture et de l'alimentation, le ministre de l'Europe et des affaires étrangères et le ministre de la cohésion des territoires et des relations avec les collectivités territoriales.

Délibéré après l'audience du 14 janvier 2021, à laquelle siégeaient :

M. Duchon-Doris, président,
Mme Baratin, premier conseiller,
M. Perrot, conseiller.

Lu en audience publique le 3 février 2021.

Le rapporteur, Le président,

A. BARATIN J.-C. DUCHON-DORIS

La greffière,

L. THOMAS

La République mande et ordonne au secrétaire général du gouvernement, à la ministre de la transition écologique, au ministre de l'économie, des finances et de la relance, au ministre de l'intérieur, au ministre des solidarités et de la santé, au ministre de l'agriculture et de l'alimentation, au ministre de l'Europe et des affaires étrangères et au ministre de la cohésion des territoires et des relations avec les collectivités territoriales, chacun en ce qui le concerne et à tous huissiers de justice à ce requis en ce qui concerne les voies de droit commun, contre les parties privées, de pourvoir à l'exécution de la présente décision.

Annex 639

D. G. Khan Cement Company v Government of Punjab, Judgment of the Supreme Court of Pakistan of 15 April 2021

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Syed Mansoor Ali Shah

C.P.1290-L/2019
(Against the Order of Lahore High Court, Lahore dated 31.01.2019, passed in W.P. No. 5898/2019)

D. G. Khan Cement Company Ltd.

.....Petitioner(s)

Versus

Government of Punjab through its Chief Secretary, Lahore, etc.

.....Respondent(s)

For the petitioner(s): Mr. Salman Aslam Butt, ASC.

For the respondent(s): Ms. Aliya Ejaz, Asstt. A.G.
Dr. Khurram Shahzad, D.G. EPA.
M. Nawaz Manik, Director Law, EPA.
M. Younas Zahid, Dy. Director.
Fawad Ali, Dy. Director, EPA (Chakwal).
Kashid Sajjan, Asstt. Legal, EPA.
Rizwan Saqib Bajwa, Manager GTS.

Research Assistance: Hasan Riaz, Civil Judge-cum-Research Officer at SCRC.[1]

Date of hearing: 11.02.2021

JUDGEMENT

Syed Mansoor Ali Shah, J.- The case stems from Notification dated 08.03.2018 **("Notification")** issued by the Industries, Commerce and Investment Department, Government of the Punjab **("Government")**, under sections 3 and 11 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 **("Ordinance")**, introducing amendments in Notification dated 17.09.2002 to the effect that establishment of new cement plants, and enlargement and expansion of existing cement plants shall not be allowed in the "Negative Area" falling within the Districts Chakwal and Khushab.

2. The petitioner owns and runs a cement manufacturing plant in Kahoon Valley in the Salt Range at Khairpur, District Chakwal and feels wronged of the Notification for the reasons, viz.

[1] Supreme Court Research Centre, SCP, Islamabad.

(i) the Provincial Government and its line Department lacked jurisdiction to issue the Notification and only Local Government under the Punjab Local Government Act, 2013 **("Act")** could exercise jurisdiction over matters relating to zoning and classification of land, land use, environment control, water sources and ecological balances; (ii) the respondents without a detailed scientific study about underground water levels acted with undue haste in issuing the Notification; (iii) the petitioner was not given the opportunity of hearing under section 3 of the Ordinance read with Articles 4, 9, 10A, 18 and 25 of the Constitution of the Islamic Republic of Pakistan **("Constitution")**; (iv) the petitioner's right to freedom of trade, business and profession under Article 18 of the Constitution was infringed; and (v) the actions of the respondents unreasonably discriminated between the petitioner and other cement manufacturers similarly placed on the basis of materials and information that could not be termed as reasonable or intelligible differentia thereby violating Article 25 of the Constitution.

3. We consider in this case if the Government's decision of issuing the Notification lacks statutory authority or if factual grounding of the Notification compromises its legal validity.

Legality of declaring an area as a "Negative Area" under the Ordinance

4. We first turn to the question whether the Provincial Government can declare an area to be a "Negative Area" under the Ordinance. "Negative Area" under the Notification is where no new cement plant can be set up and no enlargement or enhancement of an existing cement plant can be allowed. The preamble to the Ordinance provides for *organized and planned growth of industries* in the Province. Organized and planned industrial growth is unquestionably in the public interest and is effectively regulated through section 3 of the Ordinance. No person can establish an industrial undertaking or enlarge any existing industrial undertaking except with the prior permission of the Provincial Government. Generally, such permission can be granted or refused only after extending an opportunity to the applicant to show

cause against it. The discretion of the Government to permit the setting up or enlargement of an industrial undertaking under section 3 is structured according to the conditions spelled out in section 3(b) of the Ordinance. Section 3(a) deals with the permission for establishing or enlarging an industrial undertaking in an area as a greenfield project, which is being examined by the Government for the first time. However, section 3(b) refers to the area where the Government has already satisfied itself on the basis of the information available to it and after making such inquiry as to whether the industrial undertaking to be established or enlarged is *prejudicial to national interest*, or *injurious to health* of the residents of the local area in which the industrial undertaking is proposed to be set up or enlarged, or is a *source of nuisance* for the residents of the local area in which the industrial undertaking is proposed to be set up or enlarged and may declare such an area to be either *positive or negative area* or zone as the case maybe. "Planning" is a comprehensive, coordinated and continuing process that involves identification of future goals, development of plans to achieve those goals, and devising of mechanism to give effect to those plans with a view to promoting the common good of the society.[2] Zoning of the Province into positive and negative areas is a means towards achieving organized and planned industrial growth without impinging on the social, environmental, ecological, civic and economic interests of the locals. Zoning divides land into distinct geographical areas and imposes restrictions with respect to use of land in each area. These regulatory controls allow or disallow use of land in a particular geographical zone. Therefore, any application requesting permission to establish or enlarge an industrial undertaking under section 3 of the Ordinance in an area that is already marked as a zone (negative or positive) is decided accordingly. The organization and planning under the Ordinance is, therefore, in effect, actualized on the basis of the parameters mentioned under section 3(b) of the Ordinance.

5. Further, the socioeconomic concerns critical for organized and planned development existing in the year 1963[3]

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[2] Craig Anthony (Tony) Arnold, 'Planning Milagros: Environmental Justice and Land Use Regulation' (1998) 76 Denv. U.L. Rev. 1, 90.
[3] Year of the Ordinance.

have since multiplied and become more complex as the population has swelled from approximately 48 million in 1963 to more than 217 million in 2019.[4] Organized and planned growth in the world today would undoubtedly mean "sustainable development[5]" and the terms *prejudicial to national interest*, *injurious to health* and *source of nuisance* would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice, etc. The authority to regulate land use, introduce zones or negative or positive areas, has been recognized as the police power of the state, asserted for public welfare.[6] The legislative policy of organized and planned growth, under the Ordinance, also synchronizes well with our constitutional values, set out in the preamble of the Constitution, as well as the Fundamental Rights and the Principles of Policy, in particular, the right to life and dignity,[7] promotion of social and economic well-being of the people[8] and safeguarding the legitimate interest of backward and depressed classes[9].

6. We deem it necessary to observe that zoning of areas into positive and negative is *not absolute*. The ban under the Notification is not etched in stone but may be lifted if the Government is of the view that the valley, in this specific case, stands recharged with water and nature has become resilient to allow sustainable development. Organization and planning of future growth cannot be frozen in time and is never intended to be static. Zoning allows the flexibility needed to respond to change. The choices that govern a particular territorial zoning may not hold good indefinitely. Land use patterns change giving rise to opportunities to revise earlier standards as zoning measures are introduced in public interest.[10]

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[4] Source: World Bank.
[5] development that meets the needs of the present generation without compromising the ability of future generations to meet their needs.
[6] *Euclid v Ambler Realty Co.* 272 U.S. 365, 387.
[7] The Constitution of the Islamic Republic of Pakistan 1973, arts 9 and 14.
[8] ibid, art 38.
[9] Ibid, art 37(a).
[10] Daniel R. Mandelker, 'Spot Zoning: New Ideas for an Old Problem' (2016) 48 Urb. Law. 737.

The value of zoning lies in the flexibility by which it is administered to react to new social and economic situations.[11] We, therefore, hold that zoning of areas for the purposes of the Ordinance is not absolute but is subject to change provided such change is necessitated by new circumstances. Hence, the prohibition under the Notification not to establish or enlarge an industrial undertaking in a negative area is not absolute.

7. Insofar as the objection of the petitioner that the mandate of zoning of land belongs to the local government is concerned, suffice it to say that the matter involved a trans-district issue which could be dealt with by the Provincial Government exercising the authority conferred by the Ordinance. Even so, the functions of the local government could not mean to trump the executive authority of the Provincial Government.[12] The Ordinance is a special law compared to the Act and therefore takes preference. Furthermore, under section 4 of the Act, local governments have to function within the provincial framework and are to faithfully observe the federal and provincial laws. And in the performance of their functions, the local governments shall not impede or prejudice the exercise of the executive authority of the Provincial Government. Even otherwise, nothing has been brought on the record that shows that the concerned districts have taken a contrary position or are aggrieved of the Notification.

8. Also, the petitioner claimed that its right to freedom of trade, business and profession guaranteed under Article 18 of the Constitution was infringed and the actions of the respondents unreasonably discriminated between the petitioner and other cement manufacturers. We are, however, of the view that the rights granted under Article 18 of the Constitution are "subject to such qualifications" that have been "prescribed by law". The Ordinance forbids the setting up of any industrial undertaking except by the prior written permission of the Government. Placing an embargo on establishment and expansion of cement plants in the Negative Area to provide for organized and planned growth of industries in the Province in line with the objectives of the Ordinance does not

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[11] Keith H. Hirokawa, 'Making Sense of a "Misunderstanding of the Planning Process" ' (2012) 44 Urb. Law. 295.
[12] *LDA v Imrana Tiwana* 2015 SCMR 1739.

offend Article 18 of the Constitution.[13] Moving on, the decision to impose a ban on the establishment and expansion of cement plants was not taken to benefit or punish anyone but to ensure the organized and planned growth of industry in the Province in view of the findings of a multidisciplinary study (discussed later) which provided reasonable basis for zoning of project area without violating Article 25 of the Constitution.[14]

Factual foundation of the "Negative Area"

9. The next question is whether the Notification was issued in public interest in line with the objectives of the Ordinance or not. In 2016, the Secretary, Mines and Minerals Department informed the Provincial Government that existing cement plants in the Salt Range were causing ecological harm to the area. In this backdrop, the Government decided to inquire into the matter and solicit expert advice. A study was commissioned for determining the suitability of the project area for cement plants comprising Districts of Chakwal, Jhelum, Khushab and Mianwali of Punjab. M/s. NESPAK and M/s. Sogreah **("Consultants")** were engaged for the purpose. The project team included foreign experts such as Cement Plant Expert, Environmental Chemist and Geologist having experience of working in a range of countries in different regions of the world.[15] The methodology of the study reflects that following determinants were identified to be the criteria for suggesting proposals concerning delineation of the negative and positive zones for the establishment of new and expansion of existing cement plants:

i. sufficiency of cement raw materials;
ii. sustainable water resources;
iii. environmental conditions of the project area;
iv. socio-economic conditions;
v. transportation infrastructure; and
vi. agriculture, forest, restricted and sensitive sites.

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[13] *Tariq Khan Mazari v Government of Punjab* PLD 2016 SC 778.
[14] ibid.
[15] They were joined by Pakistani experts from NESPAK including Quality Assurance Expert, Project Manager, Geological Advisor, Chief Geologist, Water Resource Expert, Groundwater Engineer, GIS Expert, Transportation Expert, Traffic Engineer, Environmental Expert, Ecological Expert and Sociology Expert.

The Consultants undertook a fairly comprehensive exercise covering a range of factors likely to be impacted by the establishment or expansion of cement plants in the project area. They verified deposits, determined their quality and estimated their resource potential to decide the issue of sufficiency of cement raw materials; carried out water resource study by examining ground and surface water resources; and studied air emissions, ambient noise, and ground, surface and waste water. They also conducted surveys to examine socioeconomic conditions of the area and made estimation of the existing traffic volume through manual classified count surveys, capacity analysis of existing road network, estimation of generated traffic due to new facilities and traffic projections based on relevant socioeconomic indicators and past data. Technical audit of existing cement plants was conducted. Forest, agricultural and wildlife reserve areas/sanctuaries were taken into consideration. Field visits were conducted and ecological features of the area were studied. A meeting of the Consultants with the representatives of the cement plants and the Government officials was also held.

10. The Consultants found that groundwater table had gone down at an average of 64 feet at various locations, shallow wells (open/dug wells) had been found dried up and, therefore, further installation of new cement plants/expansion of existing cement plants could cause further depletion of groundwater resulting in greater problems for the local people and especially for agriculture. They were of the view that four valleys i.e. Kahoon, Vinhaar, Pail and Padhrar having important scenic and touristic value needed to be protected. Additionally, these valleys contain forest areas, settlements and agriculture lands. It is underlined that total population of the area was recorded as 4.8 million in 2017 and around 1,23,753 in the Negative Area alone. The study showed that any new cement plant or expansion of any existing cement plant would require new road infrastructure or improvement in the capacity of the existing road infrastructure. A negative zone covering an area of 979 sq km (11% of the total area) with an embargo on establishment of new and expansion of existing cement plants was thus delineated out of a total of 8,872

sq km. It was also proposed that demarcation of negative zones be reviewed after every ten years on the basis of technical assessment.

11. The Provincial Cabinet in view of the said recommendations of the Consultants took a number of decisions including declaration of "Negative Area" comprising 979 sq km of land in the Salt Range out of a total area of 8,872 sq km where establishment of new and expansion of existing cement plants was completely banned. It is underlined that the Positive Area adjoins the Negative Area and can be accessed by the petitioner for future development subject to the regulatory approvals under the law. It was also decided that the existing cement plants falling within the Negative Area would be allowed to operate only if they were fully compliant with all legal, technical and environmental standards prescribed by the Government and after a final approval was given by the Government to this effect. The Notification was thus issued and establishment of new and expansion of existing cement plants was banned in the Negative Area. The Government concluded that permitting the establishment of new and expansion of existing cement plants would be prejudicial to public interest.

12. It is hardly a secret that water situation in the project area is far from satisfactory. In November 2017, this Court had taken notice of the reports of drying up of the fabled Katas Raj Temple Pond. Cement companies situated in the vicinity of the pond were found pumping huge quantities of water free of charge and without having any regard for the environmental impact of such unbridled extraction on the aquifer as well as surrounding areas.[16] This Court in *Katas Raj* case had observed that the issue of scarcity of water in the area was becoming acute adversely affecting the environment and lives of the people living nearby.[17] The cement companies were directed to switch to alternative sources of water and bring their dependence on groundwater to zero within six months.[18] The cement plants, subsequently, claimed to have brought the use of groundwater to zero though the feeding channels of Katas Raj Temple Pond could not become functional

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[16] *In the Matter of Drying Out of the Shri Katas Raj Temple Pond* HRC No. 25598-G of 2017, Order dated 08.05.2018.
[17] ibid.
[18] ibid.

and, therefore, the Director General **("DG")**, Environmental Protection Agency **("EPA")** Punjab was directed to constitute a "Team of Experts" from all concerned departments for technical survey of the area to discover the reasons behind the issue.[19] The "Interim Report" dated 11.06.2020 submitted by the DG, EPA Punjab did not convey a satisfactory picture: "14 % (of groundwater in the valley) is abstracted by cement industry"; "Katas Raj Temple' (*sic*) pond is located downhill whereas the Bestway Cement Factory was installed at *(sic)* uphill 03 km away from the pond, thus the latter intervention may influence the groundwater flow path recharging holy pond"; and "over abstraction appears so far to be the main cause of drying out of pond." Here, we are reminded of the Consultants' recommendation that use of existing tube wells within the boundary of existing cement plants, even after shifting to alternative sustainable water sources, must be monitored to ensure that cement plants are not abstracting groundwater.

13. The Assistant Director (Environment) Chakwal during the pendency of this case carried out site inspection of the petitioner's cement plant on 09.02.2021. His report reveals that there are also other issues besides water. He reported that blasting and quarrying of raw materials caused dust pollution in the locality causing environmental damage; quarrying also threatened the local ecology of biodiversity rich area of Kallar Kahar; deforestation and erosion resulted from quarrying; heavy transport and machinery used for transporting raw material affected the locals of the area negatively; quarrying sites deteriorated the aesthetic appeal of the area; and air emissions from the cement industry was a cause of air pollution in the area.

14. The only objection raised by the petitioner to the report of the Consultants relates to the finding about underground water levels. However, the petitioner loses sight of the fact that sustainability of water resources was not the sole factor leading to designation of the Negative Area. Rather, the Consultants carried out a multidisciplinary study of the project area to determine suitability of land for establishment and expansion of cement plants. Fixated on the issue of groundwater levels, the petitioner

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[19] CMA No. 82 of 2019 in HRC No. 25598-G of 2017, Order dated 06.11.2019.

engaged private consultants "to prepare a factual report on the status of ground water in and around the plant area." Without going into the qualification of the consultants hired by the petitioner and the scope of the inquiry undertaken by them, we believe, it is not our job to referee battles among experts.[20] The Government has discretion to rely on reasonable opinions of its own qualified experts in case of conflicting specialist views.[21] Another aspect is the integration of science in planning and regulation. The courts while reviewing scientific and technical determinations generally exhibit deference to institutional competence because of the specialized nature of the subject matter.[22] There is a risk that the courts will unravel layers of careful scientific work as a result of their combined ignorance and judicial second-guessing while reviewing science-based regulatory decisions.[23] However, scientific complexity does not provide excuse to evade judicial scrutiny as it needs to be ensured that Government does not transgress its mandate or does not mangle scientific results to produce certain outcomes.[24] Judicial oversight of specialized administrative decision-making is necessary to obviate the possibility of capture and incompetence.[25] Accordingly, we keep ourselves restricted to the rationality of the Government's decision.[26]

15. It was vehemently argued by the learned counsel for the petitioner, that the petitioner company proposes to expand the existing cement plant by installing a new "zero water" technology cement plant. However, there is no evidence brought on the record to establish the claim that the new cement plant technology is 'zero-water' or even the fact that the petitioner is currently manufacturing cement without any use of water. Even the

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[20] *Mississippi v EPA* 744 F.3d 1334, 1348.
[21] *Marsh v Oregon Natural Resources Council* 490 U.S. 360, 378.
[22] Emily Hammond Meazell, 'Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science' (2011) 109 Mich. L. Rev. 733, 734.
[23] Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Science Challenges for Law and Policy: Rethinking Judicial Review of Expert Agencies' (2015) 93 Tex. L. Rev. 1681, 1682.
[24] Laura Anzie Nelson, 'Delineating Deference To Agency Science: Doctrine or Political Ideology?' (2010) 40 Envtl. L. 1057, 1068.
[25] Eduardo Jordao and Susan Rose-Ackerman, 'Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review' (2014) 66 Admin. L. Rev. 1, 68.
[26] *Mississippi* (n 18) 1348.

consultants engaged by the petitioner did not say that cement plants could be run without using water. On the contrary, according to the position taken by the petitioner and confirmed by the DG, EPA, Punjab, the petitioner is currently using six rainwater harvesting ponds and two water tanks to save water for use in the cement plant. This act of building storage tanks and ponds shows that water is essential for the running of the cement plant, not to mention that development of the ponds and storage tanks further restricts the recharge and replenishment rate of the aquifer which is to sustain the local habitat including nature, population, subsistence agriculture and help in regaining water supply levels for Katas Raj Temple Pond. We also notice that building such ponds and storage tanks (a water management project) required an Initial Environmental Examination (IEE)/Environment Impact Assessment (EIA), which does not appear to have been done, casting doubts on legal sustainability of these ponds and storage tanks in the Negative Area. Recourse to alternative source of water by the petitioner company clearly establishes that use of water is an indispensible requirement for running a cement plant. Additionally, the petitioner claimed that it was not given the opportunity of hearing before the issuance of the Notification. We, however, see that the Consultants had arranged a Stakeholders Consultation Meeting with cement companies. Three officials of the petitioner participated in the said meeting and their names and signatures are visible in the report. Besides, we need to look beyond limestone, clay and other minerals to appreciate the value of the stretch of land, called the Salt Range, whose charm has captivated pilgrims, travelers and emperors since olden days. The picturesque region rich in biodiversity, and historical and sociocultural heritage is a national asset of timeless magnificence.

Precautionary Principle, *In Dubio Pro Natura* & Environmental Legal Personhood

16. The facts of the case brought before us through various technical reports of the Government and its consultants (referred to above) show that there are serious threats to environment in the Negative Area, especially to the underground water aquifer that needs to be first recharged before any

sustainable development in the area can take place. Negative area in other words means an environmentally fragile area, which is a vulnerable natural habitat and needs care and protection, till it recovers, if at all. Enlargement of an existing cement plant in a negative area attracts the well-established principle of international environmental law called the *Precautionary Principle,* reflected in Principle 10 of the Rio Declaration, 1992. The principle provides; "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Another emerging environmental principle declared as Principle 5 of the IUCN World Declaration on the Environmental Rule of Law (2016) is *in dubio pro natura* i.e. "in cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom." In the facts of the case, the Provincial Government was obliged to take a precautionary approach and act in-line with the principle of *in dubio pro natura*, till, inter alia, a detailed hydrogeological study assessing the potential of groundwater resources for industrial purposes of the project area is carried out. This approach is also constitutionally compliant as the courts are to protect the fundamental rights of the public and in this case right to life, sustainability and dignity of the community surrounding the project remains paramount till such time that the Government is of the view that the project has no adverse environmental effects. Also, the environment needs to be protected in its own right. There is more to protecting nature than a human centered rights regime. We see elements of personhood have now been ascribed to nature by legislatures and courts around the world.[27] The approach of personifying the environment

[27] Legislatures in Ecuador, New Zealand, Australia and Uganda; Courts in Colombia (Constitutional Court, Sentencia T-622/16), India (*Mohd. Salim v Uttarakhand* 2017 (2) RCR (Civil) 636) and Bangladesh (*Human Rights and Peace for Bangladesh v Bangladesh* (2019) W.P. No. 13989 of 2016 (HCD)); and local governing bodies in the US have granted legal personhood to nature or natural objects.

in order to protect and preserve nature and its objects is one of the latest evolutions in environmental law.[28] Man and his environment each need to compromise for the better of both and this peaceful co-existence requires that the law treats environmental objects as holders of legal rights.[29]

Water Justice

17. According to our National Climate Change Policy, 2012 water resources are inextricably linked with climate; this is why the projected climate change has such serious implications for Pakistan's water resources. Freshwater resources in Pakistan are based on snow and glacier-melt and monsoon rains, both highly sensitive to climate change. This will further exacerbate the already difficult situation of a water-stressed country facing demand increases due to population growth and increasing economic activity. To address the impact of climate change on water resources and to enhance water security, the Government of Pakistan has proposed Integrated Water Resource Management to provide regulatory frameworks, water licensing, slow action dams, artificial recharge especially for threatened aquifers, adoption of integrated water resource management concepts, and ensuring rational ground water exploitation by avoiding excessive pumping. Agriculture is central to human survival and is probably the human enterprise most vulnerable to climate change. The hydrological cycle is similarly likely to be influenced by global warming, necessitating the agriculture and livestock sectors, particularly in rain-fed areas, to adapt to climate change. The World Water Forum, laying down the concept of water justice, declared[30] that the State should exercise stewardship over all water

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[28] Alexandre Lillo, 'Is Water Simply a Flow? Exploring an Alternative Mindset for Recognizing Water as a Legal Person' (2018) 19 Vt. J. Envtl. L. 164, 165.

[29] Christopher D. Stone, 'Should Trees Have Standing? - Toward Legal Rights for Natural Objects' (1972) 45 S. Cal. L. Rev. 450, 481 & 501.

[30] The Declaration was presented at the Conference of Judges and Prosecutors on Water Justice at the 8th World Water Forum in Brasília (Brazil) from 18-23 March 2018. This declaration reflects and encapsulates the discussions and the views held by participants of the High-Level Preparatory Meetings held in Rio de Janeiro (Brazil) on 8 December 2017 and the Conference of Judges and Prosecutors on Water Justice from 19-21 March 2018. It does not represent a formally negotiated outcome and does not necessarily reflect the views of any individual, institution, State, or country represented at the Forum, or their institutional positions on all issues, or the views of any judge or member of the Global Judicial Institute on the Environment or the WCEL Steering Committee.

resources, and protect them, in conjunction with their associated ecological functions, for the benefit of current and future generations, and the Earth community of life.[31] Because of the close interlinkages between land and water and the ecological functions of water resources, any person with a right or interest to use water resources or land has a duty to maintain the ecological functions and integrity of water resources and related ecosystems.[32] The precautionary principle should be applied in the resolution of water-related disputes. Notwithstanding scientific uncertainty or complexity regarding the existence or extent of risks of serious or irreversible harm to water, human health or the environment, judges should uphold or order the taking of the necessary protective measures having regard to the best available scientific evidence.[33] Consistent with the principle *in dubio pro natura*, in case of uncertainty, water and environmental controversies before the courts should be resolved, and the applicable laws interpreted, in a way most likely to protect and conserve water resources and related ecosystems.[34] In adjudicating water and water-related cases, judges should be mindful of the essential and inseparable connection that water has with the environment and land uses, and should avoid adjudicating those cases in isolation or as merely a sectoral matter concerning only water.[35] Water justice requires appreciation that there are no easy, simple or singular solutions to the water crisis, and that water problems cannot be resolved through technical solutions alone but require broader recognition that they are inherently ecological, political and social issues simultaneously.[36]

Climate Change & Climate Justice

18. The fragility of the Negative Area also needs to be examined in the larger context of climate change. The environmental issues initially brought to our courts were local geographical issues, be it air pollution, urban planning, water

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[31] Principle 1 – Water as a Public Interest Good.
[32] Principle 2 – Water Justice, Land Use, and the Ecological Function of Property.
[33] Principle 5 – Water Justice and Precaution.
[34] Principle 6 – *In Dubio Pro Aqua.*
[35] Principle 9 – Water Justice and Environmental Integration.
[36] Farhana Sultana, 'Water justice: why it matters and how to achieve it' (2018) 43 Water International 483. <https://doi.org/10.1080/02508060.2018.1458272>.

scarcity, deforestation or noise pollution. But now climate change has a bearing on these issues.[37] One of the serious climate change threats to Pakistan is the rising temperatures resulting in enhanced heat and water-stressed conditions, particularly in arid and semi-arid regions, leading to reduced agricultural productivity.[38] Notably, the Salt Range has an arid climate characterized by lack of water.[39] According to our National Climate Change Policy, 2012 for Pakistan to continue on a development path, the more immediate and pressing task is to prepare itself for adaptation to climate change. The country is bearing huge socioeconomic costs of environmental degradation, it is globally ranked in the top ten countries most affected by climate change in the past 20 years and has lost 0.53 percent per unit GDP, suffered economic losses worth US$ 3792.52 million and witnessed 152 extreme weather events from 1999 to 2018.[40] Only by devising and implementing appropriate adaptation measures will it be possible to ensure water, food and energy security for the country. The goal of the Policy is to ensure that climate change is mainstreamed in the economically and socially vulnerable sectors of the economy and to steer Pakistan towards climate resilient development. The Notification, in the current facts of the case, is a climate resilient measure and in step with the National Climate Change Policy and the Constitution.

19. Another important dimension of climate change is *intergenerational justice* and the need for *climate democracy.* The tragedy is that tomorrow's generations aren't here to challenge this pillaging of their inheritance. The great silent majority of future generations is rendered powerless and needs a voice. This Court should be mindful that its decisions also adjudicate upon the rights of the future generations of this country. It is important to question ourselves; how will the future generations look back on us and what

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[37] We have moved from Environmental Justice, which was largely localized and limited to our own ecosystems and biodiversity, to Climate Justice, which is planetary and beyond the scope of national jurisdiction, in a journey starting with *Shehla Zia* (PLD 1994 SC 693) through *Imrana Tiwana* (PLD 2015 Lahore 522) to *Asghar Leghari* (PLD 2018 Lahore 255).
[38] National Climate Change Policy, 2012.
[39] 'Salt Range, Mountains, Pakistan' <https://www.britannica.com/place/Salt-Range>.
[40] Pakistan Economic Survey (2019-20), ch 16, p. 305.

legacy we leave for them?[41] This Court and the Courts around the globe have a role to play in reducing the effects of climate change for our generation and for the generations to come. Through our pen and jurisprudential fiat, we need to decolonize our future generations from the wrath of climate change, by upholding climate justice at all times. Democracy, anywhere in the world is pillared on the *rule of law*, which substantially means rights based rule of law rather than rule based; which guarantees fundamental values of morality, justice, and human rights, with a proper balance between these and other needs of the society.[42] Post climate change, democracies have to be redesigned and restructured to become more climate resilient and the fundamental principle of *rule of law* has to recognize the urgent need to combat climate change. Robust democracies need to be *climate democracies* in order to save the world and our further generations from being colonized at the hands of climate change. The premabular constitutional value of *democracy* under our Constitution is in effect *climate democracy*, if we wish to actualize our Constitution and the fundamental rights guaranteed under the Constitution for ourselves and our future generations. Janine Benyus[43] suggests we learn from nature's 3.8 billion years of evolution. How is it that other species have learned to survive and thrive for 10,000 generations or more? Well, it's by taking care of the place that would take care of their offspring, by living within the ecosystem in which they are embedded, by knowing not to foul the nest. We must restore and repair and care for the planetary home that will take care of our offspring. For our children, and our children's children, and all those yet to come, we must love our rivers and mountains and reconnect with the long and life-giving cycles of nature.[44] To us there is no conflict between environmental protection and development because our answer would be sustainable development. Sustainable development means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs[45] and it is in step with our constitutional values of social and economic justice.

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[41] Roman Krznaric, *The Good Ancestor* (2020 Penguin/Random House).
[42] Aharon Barak, *The Judge in a Democracy*.
[43] Biomimicry Designer.
[44] 'How to be a good ancester' <https://www.ted.com/talks/roman_krznaric_how_to_be_a_good_ancestor/transcript?language=en>.
[45] The Pakistan Environmental Protection Act 1997, s 2 (xlii).

20. As a result, all contentions raised by the petitioner are rejected. We hold that the Notification dated 08.03.2018 is in accordance with the provisions of the Ordinance and negative area can be planned and designed banning industrial activity within its bounds. The Petitioner company is not allowed to enlarge or enhance the capacity of its existing cement plant till such time that the Negative Area subsists. In these circumstances, we uphold the Notification. The High Court has rightly refrained from interfering into the matter. Consequently, the leave is refused and the petition is dismissed.

Judge

Announced
Islamabad,
15th April, 2021. Judge

Judge

Approved for reporting
Iqbal

Annex 640

Commune de Grande-Synthe v the Republic of France, Judgment of the Conseil d'État of 1 July 2021, No 427301

CONSEIL D'ETAT PD
statuant
au contentieux

N° 427301 **REPUBLIQUE FRANÇAISE**

_____

AU NOM DU PEUPLE FRANÇAIS

COMMUNE DE GRANDE-SYNTHE
et autre

_____

Mme Airelle Niepce
Rapporteure

Le Conseil d'Etat statuant au contentieux
(Section du contentieux, 6ème et 5ème chambres réunies)

_____

M. Stéphane Hoynck
Rapporteur public

Sur le rapport de la 6ème chambre
de la Section du contentieux

_____

Séance du 11 juin 2021
Décision du 1er juillet 2021

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Vu la procédure suivante :

La commune de Grande-Synthe et M. C… B… ont demandé au Conseil d'Etat :

1°) d'annuler pour excès de pouvoir les décisions implicites de rejet résultant du silence gardé par le Président de la République, le Premier ministre et le ministre d'Etat, ministre de la transition écologique et solidaire, sur leurs demandes tendant, d'une part, à ce que soient prises toutes mesures utiles permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national de manière à respecter *a minima* les engagements consentis par la France au niveau international et national, d'autre part, à ce que soient mises en œuvre des mesures immédiates d'adaptation au changement climatique, et enfin, à ce que soient prises toutes dispositions d'initiatives législatives et réglementaires afin de « rendre obligatoire la priorité climatique » et interdire toutes mesures susceptibles d'augmenter les émissions de gaz à effet de serre ;

2°) d'enjoindre au Premier ministre et au ministre d'Etat, ministre de la transition écologique et solidaire, de prendre les mesures et dispositions susvisées dans un délai maximum de six mois ;

3°) à titre subsidiaire, de transmettre à la Cour de justice de l'Union européenne plusieurs questions préjudicielles portant sur l'interprétation des stipulations des articles 2, 3, et 4

de l'accord de Paris, des dispositions de l'article 3 de la décision n° 406/2009/CE du Parlement européen et du Conseil du 23 avril 2009 relative à l'effort à fournir par les États membres pour réduire leurs émissions de gaz à effet de serre afin de respecter les engagements de la Communauté en matière de réduction de ces émissions jusqu'en 2020, des dispositions combinées du a) du paragraphe 1er de l'article 2 de l'accord de Paris et de la décision n° 406/2009/CE du 23 avril 2009 précitée et des dispositions des directives 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 relative à l'efficacité énergétique et 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables.

Par une décision n° 427301 du 19 novembre 2020, le Conseil d'Etat, statuant au contentieux, a :

- rejeté les conclusions de cette requête dirigées contre le refus implicite de prendre toute mesure d'initiative législative tendant à « rendre obligatoire la priorité climatique » comme portées devant une juridiction incompétente pour en connaître ;

- rejeté les conclusions de cette requête, présentées au titre de l'article L. 761-1 du code de justice administrative, en tant qu'elles concernent M. B… ;

- admis les interventions de la Ville de Paris, de la ville de Grenoble, des associations Oxfam France, Greenpeace France et Notre Affaire A Tous et de la Fondation pour la Nature et l'Homme dans la limite de la recevabilité de la requête de la commune de Grande-Synthe ;

- rejeté les conclusions de cette requête tendant à l'annulation pour excès de pouvoir des refus implicites de prendre toute mesure d'initiative réglementaire tendant à « rendre obligatoire la priorité climatique » et de mettre en œuvre des mesures d'adaptation immédiate au changement climatique ;

- et, avant de statuer sur le surplus des conclusions de cette requête, ordonné un supplément d'instruction tendant à la production par les parties des éléments mentionnés au point 16 de cette décision.

Par quatre nouveaux mémoires, enregistrés les 18 février, 19 mars, 27 avril et 31 mai 2021, la commune de Grande-Synthe maintient le surplus de ses conclusions et demande qu'une somme de 8 000 euros soit mise à la charge de l'Etat au titre des dispositions de l'article L. 761-1 du code de justice administrative.

……

Vu les autres pièces du dossier, y compris celles visées par la décision du Conseil d'Etat du 19 novembre 2020 ;

Vu :

- la Constitution et son Préambule ;

- la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ;

- la convention cadre des Nations Unies sur les changements climatiques du 9 mai 1992 et son protocole signé à Kyoto le 11 décembre 1997 ;

- l'accord de Paris, adopté le 12 décembre 2015 ;

- la décision 94/69/CE du Conseil du 15 décembre 1993 ;
- la décision 406/2009/CE du Parlement Européen et du Conseil du 23 avril 2009 ;
- la directive 2009/28/CE du Parlement européen et du Conseil du 23 avril 2009 ;
- la directive 2012/27/UE du Parlement européen et du Conseil du 25 octobre 2012 ;
- le règlement (UE) 2018/842 du Parlement européen et du Conseil du 30 mai 2018 ;
- le code de l'énergie ;
- le code de l'environnement ;
- la loi n° 2009-967 du 3 août 2009 ;
- la loi n° 2015-992 du 17 août 2015 ;
- la loi n° 2019-1147 du 8 novembre 2019 ;
- le décret n° 2015-1491 du 18 novembre 2015 ;
- le décret n° 2019-439 du 14 mai 2019 ;
- le décret n° 2020-457 du 21 avril 2020 ;
- le code de justice administrative ;

Après avoir entendu en séance publique :

- le rapport de Mme Airelle Niepce, maître des requêtes,

- les conclusions de M. Stéphane Hoynck, rapporteur public ;

La parole ayant été donnée, après les conclusions, à la SCP Foussard, Froger, avocat de la commune de Grande-Synthe et autres, à la SCP Nicolaÿ, de Lanouvelle, Hannotin, avocat de l'association Oxfam France et autres ;

Vu la note en délibéré, enregistrée le 11 juin 2021, présentée par la ministre de la transition écologique ;

Considérant ce qui suit :

1. Par trois courriers du 19 novembre 2018, la commune de Grande-Synthe (Nord), représentée par son maire en exercice, M. B…, agissant également en son nom personnel en sa qualité de maire et de citoyen, a demandé respectivement au Président de la République, au Premier ministre et au ministre d'Etat, ministre de la transition écologique et solidaire, d'une part, de prendre toutes mesures utiles permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national de manière à respecter les obligations consenties par la France voire à aller au-delà, d'autre part, de prendre toutes dispositions d'initiatives législative ou réglementaire pour « rendre obligatoire la priorité climatique » et pour interdire toutes mesures susceptibles d'augmenter les émissions de gaz à effet de serre, et, enfin, de mettre en œuvre des mesures immédiates d'adaptation au changement climatique. Il a été accusé

réception de ces demandes les 20 et 21 novembre 2018. La commune de Grande-Synthe et M. B… ont demandé l'annulation pour excès de pouvoir des décisions de refus implicite nées du silence gardé pendant plus de deux mois sur ces demandes.

2. Par une décision n° 427301 du 19 novembre 2020, le Conseil d'Etat, statuant au contentieux, a rejeté les conclusions de cette requête dirigées contre le refus implicite de prendre toutes mesures d'initiative législative tendant à « rendre obligatoire la priorité climatique » comme portées devant une juridiction incompétente pour en connaître, a rejeté les conclusions présentées au titre de l'article L. 761-1 du code de justice administrative, en tant qu'elles concernent M. B…, admis les interventions de la Ville de Paris, de la ville de Grenoble, des associations Oxfam France, Greenpeace France et Notre Affaire A Tous et de la Fondation pour la Nature et l'Homme dans la limite de la recevabilité de la requête de la commune de Grande-Synthe, rejeté les conclusions de la requête tendant à l'annulation pour excès de pouvoir des refus implicites de prendre toutes mesures d'initiative réglementaire tendant à « rendre obligatoire la priorité climatique » et de mettre en œuvre des mesures d'adaptation immédiate au changement climatique et, enfin, avant de statuer sur le surplus des conclusions, ordonné un supplément d'instruction tendant à la production par les parties de tous éléments permettant d'établir la compatibilité du refus attaqué avec la trajectoire de réduction des émissions de gaz à effet de serre telle qu'elle résulte du décret du 21 avril 2020 relatif aux budgets carbone nationaux et à la stratégie nationale bas carbone (SNBC) permettant d'atteindre les objectifs de réduction du niveau des émissions de gaz à effet de serre produites en France de - 40 % en 2030 par rapport à leur niveau 1990, fixé par l'article L. 100-4 du code de l'énergie, et de - 37 % en 2030 par rapport à leur niveau de 2005, fixé par l'annexe I du règlement (UE) 2018/842 du 30 mai 2018.

Sur les conclusions dirigées contre le refus implicite de prendre toute mesure utile permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national :

3. En premier lieu, si la commune soutient que le décret du 21 avril 2020 précité est illégal en tant qu'il a relevé les plafonds d'émissions de gaz à effet de serre des 2ème et 3ème budgets carbone, il est constant que l'illégalité d'un acte administratif, qu'il soit ou non réglementaire, ne peut être utilement invoquée à l'appui de conclusions dirigées contre une décision administrative que si cette dernière a été prise pour son application ou s'il en constitue la base légale. Le refus implicite attaqué ne constituant pas une mesure prise pour l'application du décret du 21 avril 2020 et ce dernier n'en constituant pas davantage la base légale, la commune requérante ne peut, par suite, utilement invoquer l'illégalité de ce décret au soutien de ses conclusions aux fins d'annulation.

4. En deuxième lieu, il ressort des éléments et documents produits en réponse au supplément d'instruction ordonné par la décision du 19 novembre 2020 précitée, en particulier des données provisoires collectées par le Centre interprofessionnel technique d'études de la pollution atmosphérique (CITEPA), que les émissions de gaz à effet de serre nationales se sont élevées à environ 441 Mt CO2 eq. en 2019, dernières données consolidées disponibles versées au dossier par les parties. Si, ainsi que le souligne la ministre, ce niveau d'émissions de gaz à effet de serre permet de regarder la France comme un des pays industrialisés les plus sobres en la matière, les émissions de CO2 par habitant étant estimées, en 2018, à 5 t. CO2/hab. pour la France comparé à 6,9 t. CO2/hab. à l'échelle de l'Union européenne, à 8,1 t. CO2/hab. s'agissant de la Chine et à 16,1 t. CO2/hab. pour les Etats-Unis, et si, ainsi qu'elle le souligne

également, le niveau d'émissions en 2019 correspond au plafond indicatif annuel du 2ème budget carbone tel qu'il résulte du décret du 21 avril 2020, fixé à 443 Mt CO2 eq., et à une diminution de l'ordre de 0,9 % par rapport à 2018, cette réduction apparaît toutefois limitée alors que le 1er budget carbone (2015-2018) visait une diminution de l'ordre 1,9 % par an et que le 3ème budget carbone (2024-2028) prévoit, selon la SNBC révisée par le décret, une réduction de 3 % en moyenne par an, dès 2025. Par ailleurs, si, ainsi que le fait valoir également la ministre, les données provisoires pour l'année 2020 mettent en évidence une baisse sensible du niveau des émissions pour cette année, autour de 401 Mt CO2 eq., il ressort des pièces du dossier que cette baisse est intervenue dans le contexte des mesures de gestion de la crise sanitaire causée par la pandémie de Covid-19 prises depuis mars 2020, qui ont conduit à une forte réduction du niveau d'activité et, par voie de conséquence, du niveau des émissions de gaz à effet de serre. Dans ce contexte, cette réduction pour l'année 2020, pour significative qu'elle soit, apparait néanmoins, ainsi que l'a relevé le Haut conseil pour le climat (HCC) dans son avis portant sur le projet de loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets de février 2021, comme « transitoire » et « sujette à des rebonds », et ne peut, en conséquence, être regardée comme suffisant à établir une évolution des émissions de gaz à effet de serre respectant la trajectoire fixée pour atteindre les objectifs de 2030.

5. En troisième lieu, il ressort également des pièces du dossier que si le 2ème budget carbone, tel qu'il est issu de la révision de la SNBC par le décret du 21 avril 2020 précité, se borne à prévoir une diminution des émissions de gaz à effet de serre de l'ordre de 6 % sur la période de cinq ans concernée (2019-2023), une diminution de l'ordre de 12 % est prévue sur la période de cinq ans suivante (2024-2028), correspondant au 3ème budget carbone, afin d'atteindre les objectifs de réduction rappelés au point 2. Dans ce contexte, ainsi que le font valoir la requérante et les intervenantes, il ressort également des pièces du dossier, notamment de plusieurs rapports et avis publiés entre 2019 et 2021 par la formation d'autorité environnementale du Conseil général de l'environnement et du développement durable (CGEDD), par le Conseil économique, social et environnemental (CESE) et par le HCC, que cette nouvelle trajectoire de diminution des émissions de gaz à effet de serre implique l'adoption de mesures supplémentaires à court terme pour être en mesure d'obtenir l'accélération de la réduction des émissions de gaz à effet de serre visée à partir de 2023. Dès son avis d'avril 2019 portant sur le nouveau projet de SNBC pour 2019-2023, le CESE avait ainsi émis des doutes quant à la capacité de cette SNBC, et de la programmation pluriannuelle de l'énergie également prévue à l'article L. 100-4 du code de l'énergie, à établir les conditions préalables indispensables pour que cette accélération de la diminution des émissions programmée après 2023 puisse être regardée comme crédible. Dans son rapport annuel publié en juillet 2020, le HCC a, pour sa part, relevé que la réduction des émissions de gaz à effet de serre continuait à être trop lente et, en tout cas, insuffisante pour permettre d'atteindre les plafonds fixés par les budgets carbone en cours et futurs. Il en va ainsi d'ailleurs, à plus forte raison, dans la perspective du prochain relèvement de l'objectif de réduction des émissions à l'échelle de l'Union européenne à l'horizon 2030 de 40 % à 55 % par rapport à leur niveau de 1990, qui a fait l'objet d'un accord entre le Parlement européen et le Conseil en avril 2021 et qui vient d'être formellement adopté par ces deux institutions. Ce constat de la nécessité d'une accentuation des efforts pour atteindre les objectifs fixés en 2030 et de l'impossibilité, en l'état des mesures adoptées à ce jour, d'y parvenir n'est pas sérieusement contesté par la ministre de la transition écologique, qui, dans les mémoires produits dans le cadre du supplément d'instruction ordonné le 19 novembre dernier, met en avant les différentes mesures prévues par le projet de loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, déposé en février dernier et actuellement en cours de discussion au Parlement, ainsi que par les mesures réglementaires qui devraient être prises, le moment venu, pour son application, afin de soutenir qu'elles permettront, au total, avec

les mesures déjà en vigueur, d'atteindre une diminution des émissions de l'ordre de 38 % en 2030, admettant ainsi que, sur la base des seules mesures déjà en vigueur, les objectifs de diminution des émissions de gaz à effet de serre fixés pour 2030 ne pourraient pas être atteints.

6. Il résulte de ce qui précède que faute qu'aient été prises, à la date de la présente décision, les mesures supplémentaires nécessaires pour infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national, le refus opposé à la requérante par le pouvoir réglementaire est incompatible avec la trajectoire de réduction de ces émissions fixée par le décret du 21 avril 2020 précité pour atteindre les objectifs de réduction fixés par l'article L. 100-4 du code de l'énergie et par l'annexe I du règlement (UE) 2018/842 du 30 mai 2018. Par suite, et sans qu'il soit besoin d'examiner les autres moyens de la requête, la commune de Grande-Synthe est fondée à en demander l'annulation.

Sur les conclusions à fin d'injonction :

7. L'annulation du refus implicite de prendre des mesures supplémentaires permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national afin d'assurer sa compatibilité avec les objectifs de réduction de ces émissions tels que fixés à l'article L. 100-4 du code de l'énergie et à l'annexe I du règlement (UE) 2018/842 du 30 mai 2018 implique nécessairement l'édiction de telles mesures. Par suite, il y a lieu pour le Conseil d'Etat d'ordonner cette édiction avant le 31 mars 2022.

Sur les conclusions présentées au titre des dispositions de l'article L. 761-1 du code de justice administrative :

8. Dans les circonstances de l'espèce, il y a lieu de mettre à la charge de l'Etat la somme de 5 000 euros à verser à la commune de Grande-Synthe, au titre des dispositions de l'article L. 761-1 du code de justice administrative.

D E C I D E :

Article 1er : Le refus implicite de prendre toutes mesures utiles permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national afin d'assurer sa compatibilité avec les objectifs de réduction des émissions de gaz à effet de serre fixés à l'article L. 100-4 du code de l'énergie et à l'annexe I du règlement (UE) 2018/842 du 30 mai 2018 est annulé.

Article 2 : Il est enjoint au Premier ministre de prendre toutes mesures utiles permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national afin d'assurer sa compatibilité avec les objectifs de réduction des émissions de gaz à effet de serre fixés à l'article L. 100-4 du code de l'énergie et à l'annexe I du règlement (UE) 2018/842 du 30 mai 2018 avant le 31 mars 2022.

Article 3 : L'Etat versera à la commune de Grande-Synthe une somme de 5 000 euros au titre de l'article L. 761-1 du code de justice administrative.

Article 4 : Le surplus des conclusions de la requête et des interventions est rejeté.

Article 5 : La présente décision sera notifiée à la commune de Grande-Synthe, première requérante dénommée, à la Ville de Paris, la ville de Grenoble, aux associations Oxfam France, Greenpeace France et Notre Affaire à Tous et à la Fondation pour la Nature et l'Homme, au Président de la République, au Premier ministre et à la ministre de la transition écologique.

Copie en sera adressée à la présidente de la section du rapport et des études.

Annex 641

Mejillones Tourist Service Association and others with the Environmental Evaluation Service (SEA) of Antofagasta, Judgment of the Supreme Court of Chile of 19 April 2022 (Spanish original and English translation of pages 15, 19-20)

Translated Extract of '*Mejillones Tourist Service Association and others v. Environmental Evaluation Service (SEA) of Antofagasta*, Judgment of the Supreme Court of Chile, 19 April 2022'

[. . .]

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[. . .]

In addition, and as stated when analysing the text of the provision of Article 25 quinquies of the updated Law No. 19,300, in the message of the law that amended it, it was established that one of the elements considered in structuring the amendments made was precisely the need to adequately address climate change and its effects on the various components of our environment.

[. . .]

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[. . .]

The exclusion of any of the aspects generates an eventual affectation of the right to live in an environment free of contamination, since its non-consideration may allow harmful effects to be produced in the environment due to the lack of such review, thus generating a concrete threat to the right consecrated and protected by article 19.8 of the Constitution.

It should be remembered at this point that article 20 contemplates as cases that enable intervention by means of this precautionary action the deprivation, disturbance or threat to the right, in this case, it is evident that the degree of affectation denounced is configured at least in its degree of threat, to the right to live in an environment free of contamination, reason for which the action will have to be accepted as will be disposed in the resolution.

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In view of these considerations, and also in view of the provisions of Articles 19 and 20 of the Political Constitution of the Republic and the Agreed Order of the Supreme Court on the Processing and Judgment of the Appeal for the Protection of Constitutional Guarantees, the appealed judgment issued by the Court of Appeals of Antofagasta is revoked and, in its place, the action is accepted, and the Environmental Assessment Service of the Region of Antofagasta must incorporate in the context of the extraordinary review ordered in accordance with the provisions of Article 25 quinquies of Law No. 19,300: (i) the variation in the terrestrial environment due to the regulatory change in the atmosphere component; (ii) the variation in the marine environment due to modification of the seawater quality

component with respect to the variation in pH, water temperature; (iii) the variation in the marine environment due to the modification of the subtidal communities component, in relation to the composition, abundance, biomass and availability of the benthic macrofauna, and (iv) the significant variation in the subtidal sediments component, linked to its granulometric composition and the depth of the seabed, as indicated in the ninth reason.

[. . .]

Santiago, diecinueve de abril de dos mil veintidós.

Vistos:

Se reproducen la parte expositiva y los motivos primero a tercero, séptimo y octavo de la sentencia en alzada, eliminándose los restantes.

Y se tiene además presente:

Primero: Que, en autos han recurrido de protección don Marcos Emilfork Orthusteguy, abogado, en representación de los señores Saba Ester Galindo Gacitúa, Manuel Jesús Carvajal Donoso, estudiante, Nicolás Gerónimo Bribbo Amas, por sí mismo y en representación de la Asociación de Prestadores Turísticos de Mejillones, y de Claudio Andrés Rojas Cavieres, por sí mismo y en representación de Axe Tim Baue, todos domiciliados en la comuna de Mejillones, Región de Antofagasta, todos operadores turísticos de la zona de Mejillones, en contra del Servicio de Evaluación Ambiental de la Región de Antofagasta.

El acto que recurren es la Resolución Exenta N° 0223 de fecha 11 de junio de 2021, que resolvió rechazar el recurso de reposición interpuesto en contra de la Resolución Exenta N° 0173 de la Comisión de Evaluación Ambiental de fecha 11 de mayo de 2021, que dio inicio al proceso de revisión excepcional de la resolución de calificación ambiental N° 290/2007 de fecha 7 septiembre de 2007, que calificó como favorable el estudio de

impacto ambiental del proyecto "Central Termoeléctrica Angamos".

La resolución recurrida confirma la decisión de restringir el proceso excepcional de revisión de la resolución de Calificación Ambiental del proyecto señalado, a las variables (i) calidad del Agua; variación sustantiva del Oxígeno Disuelto; (ii) calidad del agua: variación sustantiva del Cloro Libre Residual y (iii) fauna acuática; variación sustantiva de comunidades submareales, en circunstancias que a juicio de los recurrentes debió igualmente incorporar aquellas relativas a (i) la variación en el ambiente terrestre por el cambio normativo en el componente atmósfera; (ii) la variación significativa en el ambiente terrestre por cambio en la normativa aplicable en el componente atmósfera; (iii) la variación en el ambiente marino por modificación del componente calidad de agua de mar con respecto a la variación en el pH, la temperatura del agua; (iv) la variación en el ambiente marino por modificación del componente comunidades submareales, en relación a la composición, abundancia, biomasa y disponibilidad de la macrofauna bentónica, y (v) la variación significativa en el componente sedimentos submareales, vinculado a su composición granulométrica y la profundidad del fondo marino, siendo dicha exclusión a su juicio antojadiza, por lo que el referido acto deviene

en arbitrario e ilegal y conculcatorio de los derechos fundamentales garantidos en los numerales 1,2,8,23 y 24 del artículo 19 de la Constitución Política de la República.

Segundo: Que, por resolución de fecha trece de agosto de dos mil veintiuno, se tuvo como tercero independiente a Empresa Eléctrica Angamos S.p.A., titular del proyecto.

Tercero: Que la recurrida y el tercero independiente sostienen en sus respectivas presentaciones rolantes a fojas 10 y 12, que el recurso ha de ser rechazado, esgrimiendo para ello en síntesis los siguientes argumentos.

En el caso del Servicio de Evaluación Ambiental de la Región de Antofagasta, en primer lugar, se sostiene que la acción deducida no es la vía idónea para impugnar actos administrativos de carácter ambiental, por ser su contenido de conocimiento técnico discrecional y, asimismo, por no ser los derechos reclamados de naturaleza jurídica indubitada, postulando que lo correcto sería que la materia sea conocida en un procedimiento de lato conocimiento por instituciones técnicas especializas y creadas para tales efectos. En cuanto al fondo, sostiene que no existe una acción u omisión ilegal, y que el acto recurrido no tiene naturaleza jurídica de ser un acto administrativo que

otorgue derecho a las partes. Además, señala que no existe necesidad de cautela urgente, considerando la naturaleza jurídica de la resolución recurrida, toda vez que, no existe en el acto administrativo un peligro concreto o al menos, uno inminente, desvirtuando la concurrencia de vulneraciones a las garantías que se solicitan proteger.

De su parte el tercero independiente Empresa Eléctrica Angamos SPA., instando por el rechazo de la acción constitucional, plantea en primer lugar, la falta de legitimación pasiva, pues el Director Regional del Servicio de Evaluación Ambiental, no cuenta con la representación judicial del mismo, ni con la representación de la Comisión de Evaluación Ambiental de Antofagasta. En segundo lugar, sostienen que los recurrentes no cuentan con la legitimación activa para accionar, al no acreditar la afectación directa por las variables que motivan al recurso, puesto que, el acto recurrido es un mero trámite que no provoca un estado de indefensión y es incapaz de generar vulneración a garantía constitucional alguna, a la vez que el recurso incoado adolece de la urgencia necesaria, toda vez que la materia ya se encuentra en conocimiento de la autoridad administrativa competente, estando ya sometidas al imperio del derecho, hechos que por cierto, no son avalados por probanza alguna. Por otra parte, indica que

los hechos alegados, no revisten el carácter de indubitados para ser considerados como una ilegalidad; agrega que el recurso de protección no es la vía idónea para discutir las supuestas ilegalidades denunciadas y que en virtud de la Ley N° 20.600 corresponde al conocimiento de los tribunales ambientales.

En cuanto al fondo de la acción, sostiene para solicitar el rechazo los argumentos contenidos en el motivo de la sentencia que se ha dado por reproducido, no existiendo a su juicio argumentos que hagan meritorio el acogimiento de la acción deducida según se detalla en el motivo 3° de la sentencia que se ha dado por reproducido, solicitando el rechazo del recurso interpuesto.

Cuarto: Que, en relación a las cuestiones de forma propuestas, deberá estarse a lo señalado en los motivos séptimo y octavo de la sentencia, los que se dan por reproducidos, y a virtud de los cuales se rechazan las alegaciones de falta de legitimación pasiva y activa de las partes, por las consideraciones allí señaladas.

En relación con la ausencia de necesidad de cautela o peligro inminente que genere el acto, alegación que se propone como una cuestión formal, lo cierto es que más bien dice relación con el fondo de la acción propuesta, por lo que será analizada en dicho contexto.

Quinto: Que, en cuanto al fondo de la cuestión debatida, y para los efectos del análisis, se habrá de

analizar primeramente lo dispuesto en el artículo 25 quinquies que estatuye: "*La Resolución de Calificación Ambiental podrá ser revisada, excepcionalmente, de oficio o a petición del titular o del directamente afectado, cuando ejecutándose el proyecto, las variables evaluadas y contempladas en el plan de seguimiento sobre las cuales fueron establecidas las condiciones o medidas, hayan variado sustantivamente en relación a lo proyectado o no se hayan verificado, todo ello con el objeto de adoptar las medidas necesarias para corregir dichas situaciones.*

Con tal finalidad se deberá instruir un procedimiento administrativo, que se inicie con la notificación al titular de la concurrencia de los requisitos y considere la audiencia del interesado, la solicitud de informe a los organismos sectoriales que participaron de la evaluación y la información pública del proceso, de conformidad a lo señalado en la ley Nº 19.880.

El acto administrativo que realice la revisión podrá ser reclamado de conformidad a lo señalado en el artículo 20."

De la lectura de la disposición transcrita se puede concluir que el proceso de revisión de la Resolución de Calificación Ambiental de un proyecto, es uno de carácter excepcional, que puede ser activada de oficio, a petición del titular o del directamente afectado.

Las circunstancias que habilitan el inicio de este proceso excepcional surgen en el período de ejecución del proyecto, ya calificado favorablemente desde un punto de vista ambiental, y solo respecto de las variables evaluadas y contempladas en el plan de seguimiento, sobre las cuales fueron establecidas las condiciones o medidas dispuestas en dicha resolución y que "1°*hayan variado sustantivamente en relación a lo proyectado" o "2° no se hayan verificado".*

Tenemos así, que el referido proceso solo puede decretarse respecto de variables evaluadas y contempladas en el plan de seguimiento, o, en relación con medidas dispuestas en dicha resolución, y abre incluso la posibilidad de incluir variables no señaladas cuando no ha existido medición previa, o que la misma no se hayan verificado; todo lo anterior con el fin de adoptar medidas correctivas de situaciones no previstas al momento de otorgarse la autorización ambiental respectiva, circunstancia que por lo demás tiene plena coincidencia con el carácter esencialmente modificable y evolutivo de las variables ambientales, en consonancia con el objetivo preventivo de evitar daños ambientales y propender a su conservación, que mantiene la legislación ambiental.

Dicha disposición fue incorporada a la Ley N° 19.300, mediante la modificación efectuada por la Ley N°

20.417, que establece la institucionalidad ambiental, con una estructura orgánica, primero a sugerencia de la Comisión de Medio Ambiente de la Cámara de Diputados y en su texto final con las sucesivas revisiones que se efectuaron del mismo en el Congreso Nacional.

En el Mensaje de dicha ley, en relación con el desempeño ambiental y los desafíos que enfrentamos, se sostuvo por el ejecutivo que "*Los nuevos desafíos a los que el mundo se verá enfrentado en los próximos años, muchos de los cuales ya están presentes entre nosotros, son el cambio climático, la pérdida de biodiversidad, la escasez de agua, la contaminación y la calidad de vida en las ciudades. No actuar hoy, tendrá efectos significativos en nuestro desarrollo económico futuro, pero además en la calidad de vida de nuestros habitantes. Por otra parte, nuestras cifras sostenidas de crecimiento pueden verse afectadas en el futuro si no abordamos el desafío de la sustentabilidad. Un crecimiento no sustentable trae ventajas de corto plazo, pero afecta la estabilidad del bienestar de las personas y sus familias en el largo plazo. Los cambios que tenga el medio ambiente pueden producir efectos importantes en los recursos naturales, al igual que en los activos financieros, materiales y humanos. De este modo, no existe nadie en nuestro país que pueda sentirse al margen legítimamente de lo que suceda con nuestros activos*

ambientales, pues todos, cualquiera sea nuestro nivel de ingreso, dependemos de ellos. Asimismo, somos todos responsables de su protección. (Mensaje del proyecto de ley N° 20417. MENSAJE DE S.E. LA PRESIDENTA DE LA REPÚBLICA CON EL QUE INICIA UN PROYECTO DE LEY QUE CREA EL MINISTERIO, EL SERVICIO DE EVALUACIÓN AMBIENTAL Y LA SUPERINTENDENCIA DEL MEDIO AMBIENTE.)

Sexto: En la especie, quienes han requerido el inicio del proceso son operadores turísticos, ubicados dentro del área de influencia del proyecto denominado "Termoeléctrica Angamos", situado en las cercanías de la península de Mejillones, y tal como ha quedado asentado se encuentran directa y potencialmente afectados por el proyecto y sus externalidades, al encontrarse dentro del área de influencia del mismo.

En relación con las variables cuya revisión se solicita, la petición de inicio del proceso de revisión deja en claro que la Resolución N° 290/2007, no contiene un Plan de Seguimiento, no obstante lo cual el considerando 6, redirige la materia al Informe Consolidado de Evaluación, (ICE) que entrega una reseña de las medidas de monitoreo adoptadas, y de las variables ambientales que son objeto de la misma, incluyéndose las referidas al ambiente terrestre y marino.

Séptimo: Que, en este punto, resulta relevante para el análisis consignar las características del proyecto de

Central Termoeléctrica Angamos". El mismo fue presentado al Sistema de Evaluación Ambiental el 23 de octubre de 2013, y corresponde a un proyecto generador de energía eléctrica, con una potencia bruta de 600 MW, que se inyectan al sistema interconectado del Norte Grande a través de líneas de trasmisión por definir, no señaladas en el proyecto inicial. La Central funciona con carbón y petróleo como alternativa con 4 unidades generadoras de 150 MW cada una, que luego se modificó a 2 unidades de 280 MW, proyecto que fue aprobado por la Corema por resolución N° 25/2008.Este proyecto contempla captación de aguas marinas para el desarrollo del proceso productivo así como la descarga de la misma al mar.

Así las cosas, de la naturaleza misma del proyecto aparece que éste puede tener un impacto significativo en la variable cambio climático que se solicitó incluir en le revisión, precisamente por cuanto no fue ésta consignada de modo expreso en la resolución que calificó ambientalmente el proyecto.

Octavo: Que, la solicitud de inicio del proceso extraordinario de revisión del artículo 25 quinquies de autos, peticiona que dentro de las variables que sean objeto de revisión se contemplen: "6*.6.1. Variación Significativa en el Ambiente Terrestre por Cambio en la Normativa Aplicable en el Componente Atmósfera: en consideración a la ratificación la Convención Marco de*

las Naciones Unidas para el Cambio Climático (CMNUCC), mediante Decreto Supremo N° 123, de fecha 31 de enero de 1995, de la Secretaría General de la Presidencia, y la ratificación del Acuerdo de Paris por medio del Decreto Supremo N'30, de fecha 13 de febrero de 2017, del Ministerio de Relaciones Exteriores, se establece como meta a largo plazo la neutralidad de carbono a nivel nacional para el año 2050, la cual consiste en absorber tanto dióxido de carbono (CO2) como el que genera. De esta manera, para alcanzar dicha meta se requiere el retiro progresivo y programado de las centrales termoeléctricas en base a carbón, entre las cuales se encuentra la Central Termoeléctrica Angamos, dentro de la segunda fase de descarbonización programada por el actual gobierno. No obstante, en consideración a que durante el programa de descarbonización se estima que operarán sucesivos gobiernos y directorios en todas las compañías involucradas, los Solicitantes indican que no existen certezas de que este efectivamente se lleve a cabo, de manera que, el único mecanismo se ajuste de las emisiones de CO2 de la central es a través del SETA y, en concreto, la revisión de la Resolución de Calificación Ambiental, ello en atención a los nuevos compromisos internacionales adquiridos por el Estado chileno y la labor preventiva de protección ambiental que ejerce el Servicio de Evaluación Ambiental.6.6.2. Variación Significativa en el Ambiente

Marino por Modificación en el Componente Calidad de Agua de Mar: por a) Modificación del punto de captación y de descarga del emisario mediante una DIA paralela: y la b) Alteración de la ubicación del punto control de monitoreo: Según informan los Solicitantes, el punto de monitoreo de control (denominado en la línea de base del SED-6 Proyecto) se encuentra a 6,03 km de los demás puntos de muestreo, debido a variaciones en diversos elementos de las variables contempladas en el plan de seguimiento del Proyecto, a saber:… 6.6.2.1. Variación en el pH; 6.6.2.2. Variación en la temperatura del agua; 6.6.2.3. Oxígeno disuelto y 6.6.2.4. Cloro residual.

6.6.3. Variación Significativa en el Ambiente Marino por Modificación en el Componente Comunidades Submareales: En consideración a lo anterior, los solicitantes señalan las siguientes modificaciones de variables contempladas en el plan de seguimiento del Proyecto: 6.6.3.1. Composición, abundancia y biomasa de la macrofauna bentónica en las estaciones en el tiempo: en conformidad a la información contenida en la línea de base, así como, en los monitoreos del año 2018 se presencia una disminución considerable para la especie Alia unfasciata (sin: Mitrella unftciata), para el grupo taxonómico Anthozoos (con 405 individuos, y una biomasa de 1.050, según consta en la línea de base, mientras que este grupo estuvo totalmente ausente en el muestreo de

2018 y la especie Nassarius gayi, con 355 individuos y una biomasa de 25,2, mientras que en el año 2018 se registró un máximo de ocho individuos y una biomasa de 1,73. De esta forma, en conformidad a la información presentada, existe una disminución en el tiempo en la abundancia y la biomasa de la macrofauna bentónica. 6.6.3.2. Variación sustantiva en las comunidades de macrofauna bentónica: de la comparación entre la información presentada en la línea de base y el monitoreo realizado en el año 2018, se desprende la pérdida de, al menos, 14 de las 56 especies originales y el reemplazo de las especies originales, lo que ha generado un incremento en la diversidad de poliquetos, en desmedro de la diversidad de los demás grupos taxonómicos.

6.6.4. <u>Variación Sustantiva en el Componente de Sedimentos Submareales:</u> los solicitantes indican las siguientes modificaciones de variables contempladas en el plan de seguimiento del Proyecto: 6.6.4.1. Sedimentos Submareales: conforme a lo indicado en la Línea Base de Medio Marino del Proyecto, se presentan que los fondos predominantes en el área de estudio *y sus alrededores oscilan entre arena mediana y arena muy fina, con algunas estaciones con predominio de arenas finas.*

6.6.4.2. Disminución sustantiva de la profundidad del fondo marino en la bahía de Mejillones."

Noveno: Que la resolución que dio inicio al proceso de revisión extraordinaria contemplado en el artículo 25 quinquies, acogió la solicitud respecto de las variables (i) Calidad del agua: variación sustantiva del Oxígeno Disuelto; (ii) Calidad del agua: variación sustantiva del Cloro Libre Residual; y, (iii) Fauna acuática: variación sustantiva de comunidades submareales, excluyendo los restantes.

Para fundar dicha exclusión la resolución sostiene respecto de:

a) la variación en el ambiente terrestre por el cambio normativo en el componente atmósfera; no procede la aplicación de la revisión de la RCA N°290/2007, en consideración a que, dicho procedimiento administrativo se encuentra acotado a la revisión de variables evaluadas y contempladas en el plan de seguimiento sobre las cuales fueron establecidas las condiciones o medidas establecidas en el marco de la evaluación de impacto ambiental del Proyecto y no a situaciones posteriores comprometidas por agentes externos al procedimiento de evaluación ambiental, como es el caso del programa de "Descarbonización de la Matriz energética".

Lo cierto es que como ya se asentó de la lectura de la disposición que hace procedente tal revisión, uno de los supuestos habilitantes es precisamente que la variable no haya sido contemplada en el plan de

seguimiento, y por lo demás y tal como lo sostiene el recurrente, los compromisos adquiridos por el país en relación con la rebaja de emisiones contaminantes a la atmósfera en el contexto de tratados internacionales, permite sostener que tal exclusión no aparece justificada y de contrario aparece como antojadiza y arbitraria desde que resulta evidente que la actividad desarrollada por el proyecto tiene en sí misma el poder de modificar dicho componente ambiental de un modo negativo y que si bien no fue contemplado en el inicio del proyecto, lo cierto es que precisamente debido a dicha circunstancia se hace necesaria su revisión por este medio extraordinario

Por lo demás, y tal como se consignó al analizar el texto de la disposición del artículo 25 quinquies de la Ley N° 19.300 actualizada, en el mensaje de la ley que la modificó, se estableció como uno de los elementos que se consideraron para estructurar las modificaciones realizadas, está precisamente la necesidad de afrontar de modo adecuado el cambio climático y sus efectos en los distintos componentes de nuestro medio ambiente.

b) la variación en el ambiente marino por modificación del componente calidad de agua de mar con respecto a la variación en el pH, y la temperatura del agua; se sostiene que las variaciones en estos componentes, determinadas en relación a aquéllas establecidas en la línea de base del proyecto, se

encuentran "*dentro de los rangos contemplados, por lo que, no constituye una variación en los términos contemplados en el artículo 25 quinquies de la Ley N°19.300*", esto es, no considera que dichas variaciones sean significativas, sin embargo a la luz de los antecedentes allegados por los actores, tal aserto aparece precisamente discutido y, en aras a la concretización del principio preventivo en materia ambiental, aparece razonable efectuar la revisión propuesta, desde que la afectación de los componentes señalados puede generar efectos nocivos en el área de influencia del proyecto, que corresponde a un área de surgencia de vida marina, cuya biodiversidad debe ser protegida en aras de su conservación para generaciones futuras.

c) la variación en el ambiente marino por modificación del componente comunidades submareales, en relación a la composición, abundancia, biomasa y disponibilidad de la macrofauna bentónica, en este punto los argumentos de la resolución aparecen como contradictorios desde que en el primer párrafo del punto 9.4 se señala que "*En virtud de lo anterior, cabe señalar que el impacto identificado como "Alteración del hábitat marino de fauna intermareal y submareal" para la fase de construcción, se calificó durante la etapa de evaluación ambiental como negativo, medio bajo, de manera que, es*

posible visualizar que la variable difiere o no se verifica conforme a los monitoreos realizados, en cantidades cercanas o similares a aquellas presentadas en la línea de base.

Por lo tanto, es posible concluir que se cumple con el requisito estipulado en el artículo 25 quinquies de la Ley N°19.300, dado que se presenta la disminución de las especies en el tiempo, la cual, no se encuentra conforme a lo evaluado, de manera que, se encuentra generando un aumento significativo en la extensión, magnitud o duración de los impactos ambientales, de forma que, es necesario revisar la variable evaluada, pero igualmente se acoge la solicitud solo respecto de "iii) *Fauna acuática: variación sustantiva de comunidades submareales*", resultando evidente de contrario que la constatación de disminución de especies, trae aparejada igualmente una afectación y modificación de la biomasa, por lo que la exclusión de dicho aspecto aparece antojadiza a la luz de las propias conclusiones de la autoridad técnica sectorial.

d) la variación significativa en el componente sedimentos submareales, vinculado a su composición granulométrica y la profundidad del fondo marino, ello atendiendo a que las variaciones estarían dentro de los rangos señalados en la línea de base de proyecto no excediendo el 50% cuestión que como se señaló en el punto

b) no aparece concluyente debiendo procederse como se indicó en dicho literal, permitiendo la revisión de la variable.

Décimo: Que, del análisis efectuado, aparece que la resolución recurrida, no se encuentra debidamente justificada y, en consecuencia, debe ser considerada arbitraria e ilegal, desde que al ceder los fundamentos que la sostiene, ésta aparece desprovista de razonamiento que justifique la decisión que contiene.

Undécimo: Que, así calificada la resolución que se recurre, habrá de ahora analizarse si la misma tiene la entidad necesaria para conculcar en modalidad de amenaza perturbación o privación de alguna de las garantías que se estiman conculcadas.

Sobre el particular, la recurrida ha sostenido que el acto por no ser un acto terminal, sino un acto administrativo dentro de un proceso reglado, no tendría la virtud de generar esa consecuencias jurídicas, sin embargo, el artículo 25 quinquies que fuera analizado, establece un régimen recursivo en relación a este procedimiento que solo contempla la posibilidad de ejercer una acción de reclamación respecto del acto administrativo de revisión, esto es, el acto final que se pronuncie sobre las conclusiones a que se arriba en el proceso extraordinario de revisión, en conclusión aquella resolución que da la apertura del proceso, y que

corresponde a la cuestionada, no tiene consagrado recurso a su respecto y produce el efecto cierto de establecer aquellos aspectos que serán objeto de la misma revisión. En tal sentido, resulta claro que al determinar los aspectos que serán materia de revisión, genera dicha resolución una situación jurídica que define el marco en el que se debe producir dicha revisión, limitándola solo a aquellos aspectos.

La exclusión de alguno de los aspectos, de contrario, genera una eventual afectación del derecho a vivir en un medio ambiente libre de contaminación, desde que su no consideración puede permitir que efectos nocivos se produzcan en el medio ambiente por la falta de dicha revisión, generando así una amenazada concreta al derecho consagrado y protegido por la acción deducida en el numeral 8 del artículo 19 de la Constitución Política de la República.

Hay que recordar en este punto, que el artículo 20 contempla como supuestos que habilitan la intervención por la vía de la presente acción cautelar la privación, perturbación o amenaza del derecho, en la especie, resulta evidente que el grado de afectación que se denuncia se configura al menos en su grado de amenaza, al derecho a vivir en un medio ambiente libre de contaminación, motivo por el cual la acción habrá de ser acogida como se dispondrá en lo resolutivo.

Por estas consideraciones y visto, además, lo dispuesto en los artículos 19 y 20 de la Constitución Política de la República y Auto Acordado de la Excma. Corte Suprema sobre Tramitación y Fallo del Recurso de Protección de Garantías Constitucionales, **se revoca** la sentencia apelada de fecha treinta y uno de agosto de dos mil veintiuno, dictada por la Corte de Apelaciones de Antofagasta y, en su lugar se dispone que **se acoge** la acción deducida, debiendo el Servicio de Evaluación Ambiental de la Región de Antofagasta incorporar en el contexto de la revisión extraordinaria dispuesta de conformidad con lo dispuesto en el artículo 25 quinquies de la Ley N°19.300: (i) la variación en el ambiente terrestre por el cambio normativo en el componente atmósfera; (ii) la variación en el ambiente marino por modificación del componente calidad de agua de mar con respecto a la variación en el pH, la temperatura del agua; (iii) la variación en el ambiente marino por modificación del componente comunidades submareales, en relación a la composición, abundancia, biomasa y disponibilidad de la macrofauna bentónica, y (iv) la variación significativa en el componente sedimentos submareales, vinculado a su composición granulométrica y la profundidad del fondo marino, conforme se indicó en el motivo noveno.

Regístrese, y devuélvase.

Redacción a cargo del Ministro Sr. Muñoz.

Rol N° 71.628-2021.

Pronunciado por la Tercera Sala de esta Corte Suprema integrada por los Ministros (as) Sr. Sergio Muñoz G., Sra. Ángela Vivanco M., Sra. Adelita Ravanales A., y por los Abogados Integrantes Sr. Héctor Humeres N. y Sr. Pedro Águila Y. No firma, no obstante haber concurrido al acuerdo de la causa, el Abogado Integrante Sr. Humeres por no encontrarse disponible su dispositivo electrónico de firma.

SERGIO MANUEL MUÑOZ GAJARDO
MINISTRO
Fecha: 19/04/2022 20:36:42

ANGELA FRANCISCA VIVANCO MARTINEZ
MINISTRA
Fecha: 19/04/2022 20:36:43

ADELITA INES RAVANALES ARRIAGADA
MINISTRA
Fecha: 19/04/2022 20:36:43

PEDRO HERNAN AGUILA YAÑEZ
ABOGADO INTEGRANTE
Fecha: 19/04/2022 20:36:44

Pronunciado por la Tercera Sala de la Corte Suprema integrada por los Ministros (as) Sergio Manuel Muñoz G., Angela Vivanco M., Adelita Inés Ravanales A. y Abogado Integrante Pedro Aguila Y. Santiago, diecinueve de abril de dos mil veintidós.

En Santiago, a diecinueve de abril de dos mil veintidós, se incluyó en el Estado Diario la resolución precedente.

Annex 642

PSB et al. v Brazil (on Climate Fund), Federal Supreme Court of Brazil, ADPF 708, 1 July 2022 (Portuguese original and English machine translation of paragraph 36)

Translated Extract of '*PSB et al. v Brazil (on Climate Fund)*, Federal Supreme Court of Brazil, ADPF 708, 1 July 2022'

[. . .]

36. On these grounds, in respect for the constitutional right to a healthy environment (CF, art. 225), for the country's duty to comply with internationally assumed rights and commitments (CF, art. 5, §2) and in observance of the principle of separation of powers, which governs the "expenses that constitute constitutional and legal obligations" (CF, art. 2 c/c art. 9, §2, LC 101/2000), I grant the action to: (i) recognise the omission of the Federal Government, due to the failure to fully allocate the resources of the Climate Fund for 2019; (ii) order the Federal Government to refrain from failing to operate the Climate Fund or from allocating its resources; and (iii) prohibit the contingency of the revenues forming part of the Fund.

[. . .]

Ementa: Direito constitucional ambiental. Arguição de Descumprimento de Preceito Fundamental. Fundo Clima. Não destinação dos recursos voltados à mitigação das mudanças climáticas. Inconstitucionalidade. Violação a compromissos internacionais.

1. Trata-se de arguição de descumprimento de preceito fundamental por meio da qual se alega que a União manteve o Fundo Nacional sobre Mudança do Clima (Fundo Clima) inoperante durante os anos de 2019 e 2020, deixando de destinar vultosos recursos para o enfrentamento das mudanças climáticas. Pede-se: (i) a retomada do funcionamento do Fundo; (ii) a decretação do dever da União de alocação de tais recursos e a determinação de que se abstenha de novas omissões; e (iii) a vedação ao contingenciamento de tais valores, com base no direito constitucional ao meio ambiente saudável.

2. Os documentos juntados aos autos comprovam a efetiva omissão da União, durante os anos de 2019 e 2020. Demonstram que a não alocação dos recursos constituiu uma decisão deliberada do Executivo, até que fosse possível alterar a constituição do Comitê Gestor do Fundo, de modo a controlar as informações e decisões pertinentes à alocação de seus recursos. A medida se insere em quadro mais amplo de sistêmica supressão ou enfraquecimento de colegiados da Administração Pública e/ou de redução da participação da sociedade civil em seu âmbito, com vistas à sua captura. Tais providências já foram consideradas inconstitucionais pelo STF em reiteradas decisões. Nesse sentido: ADI 6121, Rel. Min. Marco Aurélio (referente à extinção de múltiplos órgãos colegiados); ADPF 622, Rel. Min. Roberto Barroso (sobre alteração do funcionamento do Conselho Nacional da Criança e do Adolescente – CONANDA); ADPF 623 MC, Rel. Min. Rosa Weber (sobre a mesma problemática no Conselho Nacional de Meio Ambiente – CONAMA); ADPF 651, Rel. Min.

Cármen Lúcia (pertinente ao Conselho Deliberativo do Fundo Nacional do Meio Ambiente - FMNA).

3. O funcionamento do Fundo Clima foi retomado às pressas pelo Executivo, após a propositura da presente ação, liberando-se: (i) a integralidade dos recursos reembolsáveis para o BNDES; e (ii) parte dos recursos não reembolsáveis, para o Projeto Lixão Zero, do governo de Rondônia. Parcela remanescente dos recursos não reembolsáveis foi mantida retida, por contingenciamento alegadamente determinado pelo Ministério da Economia.

4. Dever constitucional, supralegal e legal da União e dos representantes eleitos, de proteger o meio ambiente e de combater as mudanças climáticas. A questão, portanto, tem natureza jurídica vinculante, não se tratando de livre escolha política. Determinação de que se abstenham de omissões na operacionalização do Fundo Clima e na destinação dos seus recursos. Inteligência dos arts. 225 e 5º, § 2º, da Constituição Federal (CF).

5. Vedação ao contingenciamento dos valores do Fundo Clima, em razão: (i) do grave contexto em que se encontra a situação ambiental brasileira, que guarda estrita relação de dependência com o núcleo essencial de múltiplos direitos fundamentais; (ii) de tais valores se vincularem a despesa objeto de deliberação do Legislativo, voltada ao cumprimento de obrigação constitucional e legal, com destinação específica. Inteligência do art. 2º, da CF e do art. 9º, § 2º, da Lei de Responsabilidade Fiscal - LC 101/2000 (LRF). Precedente: ADPF 347 MC, Rel. Min. Marco Aurélio.

6. Pedido julgado procedente para: (i) reconhecer a omissão da União, em razão da não alocação integral dos recursos do Fundo Clima referentes a 2019; (ii) determinar à União que se abstenha de se omitir em

fazer funcionar o Fundo Clima ou em destinar seus recursos; e (iii) vedar o contingenciamento das receitas que integram o Fundo.

7. Tese: " *O Poder Executivo tem o dever constitucional de fazer funcionar e alocar anualmente os recursos do Fundo Clima, para fins de mitigação das mudanças climáticas, estando vedado seu contingenciamento, em razão do dever constitucional de tutela ao meio ambiente (CF, art. 225), de direitos e compromissos internacionais assumidos pelo Brasil (CF, art. 5º, § 2º), bem como do princípio constitucional da separação dos poderes (CF, art. 2º c /c art. 9º, § 2º, LRF).*"

Voto :

O Relator Ministro LUÍS ROBERTO BARROSO:

1. Trata-se de ação direta ajuizada pelo Partido Socialista Brasileiro – PSB, pelo Partido Socialismo e Liberdade – PSOL, pelo Partido dos Trabalhadores – PT e pelo Rede Sustentabilidade, admitida como arguição de descumprimento de preceito fundamental. Por meio dela, invocam-se ações e omissões da União, que, na prática, ensejariam o não funcionamento do Fundo Nacional sobre Mudança do Clima (Fundo Clima), e a não aplicação de seus vultosos recursos para a adoção de medidas de mitigação às mudanças climáticas, em violação ao direito a um meio ambiente saudável (CF, art. 225), bem como de compromissos internacionais de que o Brasil é parte (CF, art. 5º, par. 2º).

I. Preliminares

2. Rejeito as preliminares invocadas pela União. Não se trata, tal como alegado pela Presidência, de ação por meio da qual se investe contra meros atos que regulamentam o funcionamento do Fundo Clima. Ao contrário, questionam-se ações e sobretudo **omissões (portanto, a ausência de atos)** que ensejaram o não funcionamento do Fundo, com a indevida retenção e não aplicação de seus recursos em 2019 e ao menos parte de 2020. Não há tampouco violação reflexa, tal como alegado pela AGU. O exame das ações

e omissões da União na matéria não demanda seu cotejo com a lei. Ao contrário, o exame se dá à luz do direito constitucional à tutela do meio ambiente, à sua preservação para presentes e futuras gerações, assim como à proteção e restauração de processos ecológicos essenciais (CF, art. 225, *caput* e parágrafos).

3. Não procede tampouco o argumento de que estaria ausente, no caso, o requisito de subsidiariedade aplicável à ADPF, ao fundamento de que as mesmas ações e omissões poderiam ser discutidas por meio de ações coletivas. A toda evidência, o problema só será adequadamente solucionado por meio de ação direta de que resulte uma decisão com efeitos vinculantes e gerais para o Poder Judiciário e para a Administração Pública. Não há dúvida, portanto, quanto ao cabimento da ação ou quanto à presença do referido requisito.

II. Mérito

4. No mérito, os requerentes pedem a retomada do funcionamento do Fundo Clima, com a aprovação do Plano Anual de Aplicação de Recursos – PAAR, a continuidade da captação de recursos e sua efetiva alocação. Pedem, ainda, que se determine à União que assegure o funcionamento do Fundo Clima enquanto ele existir, abstendo-se de paralisá-lo novamente, e dando destinação a seus recursos; bem como se vede o contingenciamento de seus recursos, a fim de evitar que, por medida transversa (alegada necessidade de atender a normas de responsabilidade fiscal), o governo opte justamente por contingenciar as verbas destinadas ao combate às mudanças climáticas e, portanto, à proteção ao meio ambiente.

5. Antes, contudo, de adentrar o mérito propriamente, é importante tecer algumas considerações sobre o contexto em que o presente caso se desenvolve e sobre as implicações do presente debate.

1. O contexto:

1.1. O que são mudanças climáticas

6. A questão ambiental é uma das questões definidoras do nosso tempo. É no seu âmbito que se situam dois temas conexos, com imenso impacto sobre as nossas vidas e das futuras gerações: a mudança climática e o aquecimento global. O *aquecimento global* está associado ao "efeito estufa". A energia solar alcança a atmosfera da Terra e é refletida de volta para o espaço. Parte dessa energia, no entanto, fica retida na atmosfera pelos chamados gases de efeito estufa, dos quais o mais importante é o dióxido de carbono. Esse é um fenômeno natural e necessário para manter a Terra em temperatura compatível com a vida humana.

7. Sucede que fatos da vida moderna, como, sobretudo, a queima de combustíveis fósseis (carvão, petróleo, gás natural), mas também a agricultura, a pecuária e o desmatamento têm aumentado excessivamente a emissão de gases de efeitos estufa e a consequente retenção de calor, provocando o aquecimento do planeta e relevantes *mudanças climáticas* . As consequências são sentidas em diferentes partes do mundo. Entre elas podem ser apontados: o aumento da temperatura global, o aquecimento dos oceanos, o derretimento das calotas polares (*ice sheets*), a retração das geleiras (*glacial retreat*), a perda da cobertura de neve no Hemisfério Norte, a elevação do nível do mar, a perda na extensão e espessura do gelo do Mar Ártico, a extinção de espécies em proporções alarmantes e o número crescente de situações climáticas extremas (como furacões, enchentes e ondas de calor). O conjunto de tais alterações pode colocar em risco a sobrevivência do homem na Terra **[1]** .

8. A solução do problema depende do esforço de todos e cada um dos países e passa por repensar o modo de produção e consumo consolidado até aqui, de forma a incorporar o conceito de "desenvolvimento sustentável": aquele que "atende às necessidades do presente, sem comprometer a possibilidade de as gerações futuras atenderem a suas próprias necessidades". O desenvolvimento sustentável depende de uma redução geral de gases de efeito estufa (GEEs) por todos os atores envolvidos, entre outras medidas.

1.2. Compromissos transnacionais assumidos pelo Brasil

9. Em virtude disso, idealizou-se um regime jurídico transnacional para o enfrentamento das mudanças climáticas, assentado sobre três pilares: (i) a

Convenção Quadro , que entrou em vigor em 1994, foi ratificada por 197 países e estabeleceu princípios abrangentes, obrigações de caráter geral e processos de negociação a serem detalhados em conferências posteriores entres as partes; (ii) o *Protocolo de Kyoto* , que entrou em vigor em 1997 , conta atualmente com a ratificação de 192 países e instituiu metas específicas de redução da emissão de gases de efeito estufa para 36 países industrializados e a União Europeia. Os países em desenvolvimento ficaram de fora dessa obrigação específica; (iii) o *Acordo de Paris* , que entrou em vigor em 2016 e conta com a adesão de 185 países. Diferentemente do Protocolo de Kyoto, em lugar de fixar limites vinculantes de emissão, previu que cada país apresentaria, voluntariamente, sua "contribuição nacionalmente determinada". O acordo não distingue entre os papeis de países desenvolvidos e em desenvolvimento.

10. Em 2009, o Brasil assumiu o compromisso climático voluntário de, até 2020, reduzir a emissão de GEEs entre 36,1% e 38,9%, em relação às emissões projetadas para o período. Embora o referido documento tenha constituído mera declaração política, sem caráter vinculante, a meta anunciada foi positivada no art. 12 da Lei nº 12.187/2009 **[2]** , diploma que instituiu a Política Nacional sobre Mudança do Clima (PNMC) **[3]** .

11. Tal previsão foi repetida no art. 19, § 1º, I, do Decreto nº 9.578/2018 e equivalia ao compromisso de redução da taxa anual de desmatamento para um patamar máximo de 3.925 Km2 até 2020. Isso porque, no caso do Brasil, a alteração de uso do solo e o desmatamento estão entre as principais atividades responsáveis pela emissão de GEEs. Por ocasião da ratificação e internalização do Acordo de Paris, o Brasil se comprometeu igualmente a reduzir a emissão de GEEs em 37%, com relação ao nível de 2005, até o ano de 2025, e em 43% até o ano de 2030 **[4]** .

1.3. Grave retrocesso em matéria ambiental

12. Entre os anos de 2004 e 2012, o Brasil aperfeiçoou políticas públicas de proteção ao meio ambiente e experimentou considerável êxito na redução do desmatamento. A despeito disso, a partir de 2013, as taxas anuais de desmatamento voltaram a subir progressivamente. Nessa linha, em 2018, o desmatamento foi de 7.536 km2, representando um aumento de 65% em relação ao ano de 2012. Portanto, o quadro relacionado ao combate às mudanças climáticas no país, antes do atual governo, já era preocupante.

13. Ocorre que, a partir de 2019 (mesmo ano de paralisação do Fundo Clima), o desmatamento sofreu aumento ainda maior em comparação com o ocorrido na década anterior. O índice anual de desmatamento na Amazônia Legal retornou para os patamares de 2006/2007, ampliando-se de forma relevante inclusive em áreas protegidas, como terras indígenas e unidades de conservação. A situação caracteriza um grande retrocesso em um quadro que já era crítico **[5]** .

14. Nessa linha, em 2019, o desflorestamento por corte raso foi de 10.129 km2, um aumento de 34% em relação ao ano anterior, em que o índice já estava alto por conta da tendência de subida havida entre 2013 e 2018. Em 2020, essa taxa foi de 10.851 km2, quase três vezes a meta prevista nos Decretos nº 7.309/2010 e 9.578/2018, que deveria ter sido cumprida nesse ano. Em 2021, o desmatamento aumentou mais 22% e alcançou uma área de 13.235 km2, a maior em 15 anos , representando aumento de 76% no desmatamento anual em relação a 2018, e de quase 190% em relação a 2012. Para o ano de 2022, a ferramenta de inteligência artificial PrevisIA, prevê desmatamento na Amazônia Legal da ordem de 15.391 km2, o que representaria um aumento de 16% em relação a 2021.

15. **Portanto, os resultados objetivamente apurados indicam que o país caminha, em verdade, no sentido contrário aos compromissos assumidos e à mitigação das mudanças climáticas, e que a situação se agravou substancialmente nos últimos anos. Esse é o preocupante e persistente quadro em que se encontra o enfrentamento às mudanças climáticas no Brasil, que coloca em risco a vida, a saúde e a segurança alimentar da sua população, assim como a economia no futuro.**

2. A questão ambiental como questão constitucional

(CF, art. 225)

16. Ao contrário do que alegam a Presidência da República e a Advocacia-Geral da União, a questão pertinente às mudanças climáticas constitui matéria constitucional. Nessa linha, o art. 225, *caput* e parágrafos, da Constituição estabelece, de forma expressa, o direito ao meio ambiente ecologicamente equilibrado, impondo ao Poder Público o poder-dever de defendê-lo, preservá-lo e restaurá-lo, para presentes e futuras gerações.

Portanto, a tutela ambiental não se insere em juízo político, de conveniência e oportunidade, do Chefe do Executivo. Trata-se de obrigação a cujo cumprimento está vinculado.

17. Na mesma linha, a Constituição reconhece o caráter supralegal dos tratados internacionais sobre direitos humanos de que o Brasil faz parte, nos termos do seu art. 5º, § 2º. E não há dúvida de que a matéria ambiental se enquadra na hipótese. Como bem lembrado pela representante do PNUMA no Brasil, durante a audiência pública: "Não existem direitos humanos em um planeta morto ou doente" (p. 171). Tratados sobre direito ambiental constituem espécie do gênero tratados de direitos humanos e desfrutam, por essa razão, de status supranacional. Assim, não há uma opção juridicamente válida no sentido de simplesmente omitir-se no combate às mudanças climáticas.

18. Além disso, os dados objetivos trazidos acima evidenciam uma situação de colapso nas políticas públicas de combate às mudanças climáticas, sem dúvida alguma agravada pela omissão do Executivo atual. Em contextos como esse, é papel das supremas cortes e dos tribunais constitucionais atuar no sentido de impedir o retrocesso. O princípio da vedação do retrocesso é especialmente proeminente quando se cuide de proteção ambiental. E ele é violado quando se diminui o nível de proteção do meio ambiente por meio da inação ou se suprimem políticas públicas relevantes sem a devida substituição por outras igualmente adequadas.

3. Ações e omissões da União relacionadas ao Fundo Clima

19. No que respeita especificamente ao Fundo Clima, trata-se do principal instrumento federal voltado ao custeio do combate às mudanças climáticas e ao cumprimento das metas de redução de emissão de gases de efeito estufa. De acordo com a Lei 12.114/2009, que o regulou, ele deve ter seus recursos destinados às atividades indicadas no art. 5º, §4º, da Lei 12.114 /2009, a saber:

> I - educação, capacitação, treinamento e mobilização na área de mudanças climáticas;
>
> II - Ciência do Clima, Análise de Impactos e Vulnerabilidade;
>
> III - adaptação da sociedade e dos ecossistemas aos impactos das mudanças climáticas;

IV - projetos de redução de emissões de gases de efeito estufa - GEE;

V - projetos de redução de emissões de carbono pelo desmatamento e degradação florestal, com prioridade a áreas naturais ameaçadas de destruição e relevantes para estratégias de conservação da biodiversidade;

VI - desenvolvimento e difusão de tecnologia para a mitigação de emissões de gases do efeito estufa;

VII - formulação de políticas públicas para solução dos problemas relacionados à emissão e mitigação de emissões de GEE;

VIII - pesquisa e criação de sistemas e metodologias de projeto e inventários que contribuam para a redução das emissões líquidas de gases de efeito estufa e para a redução das emissões de desmatamento e alteração de uso do solo;

IX - desenvolvimento de produtos e serviços que contribuam para a dinâmica de conservação ambiental e estabilização da concentração de gases de efeito estufa;

X - apoio às cadeias produtivas sustentáveis;

XI - pagamentos por serviços ambientais às comunidades e aos indivíduos cujas atividades comprovadamente contribuam para a estocagem de carbono, atrelada a outros serviços ambientais;

XII - sistemas agroflorestais que contribuam para redução de desmatamento e absorção de carbono por sumidouros e para geração de renda;

XIII - recuperação de áreas degradadas e restauração florestal, priorizando áreas de Reserva Legal e Áreas de Preservação Permanente e as áreas prioritárias para a geração e garantia da qualidade dos serviços ambientais.

20. A Lei 12.114/2009 estabelece, ainda, que o fundo é gerido por um Comitê Gestor (art. 4º) e que tais recursos são aplicáveis por meio de: (i) apoio financeiro **reembolsável** , mediante concessão de empréstimo, por intermédio do agente operador, no caso, o BNDES (art. 5º, I, c/c art. 7º); e/ou (ii) apoio financeiro, **não reembolsável** , referente a projetos de mitigação da mudança do clima, aprovados pelo Comitê Gestor, conforme diretrizes previamente estabelecidas pelo Comitê.

21. Ocorre que, a despeito da sua importância, e como relatado na inicial, **o Fundo Clima realmente permaneceu inoperante durante todo o ano de 2019 e parte do ano de 2020** . Segundo "Avaliação da Política Nacional sobre Mudança do Clima", da Comissão de Meio Ambiente do Senado Federal, tal inoperância se deveu à falta de nomeação do Comitê

Gestor do Fundo **porque o Executivo pretendia, antes de dar destinação aos recursos, alterar a sua composição** . Segundo o mesmo documento: a "nova composição do Comitê privilegia a representação e a participação do setor privado **em detrimento da participação da sociedade civil organizada** , ao contrário da antiga composição".

22. A providência não é estranha ao STF e se insere no mesmo contexto de extinção e/ou alteração de múltiplos órgãos colegiados da Administração Pública, por meio das quais se pretendeu suprimir ou reduzir a participação da sociedade civil e de *experts* em tais órgãos e assegurar o controle do governo sobre as decisões e as informações pertinentes ao setor. De modo geral, tais medidas foram declaradas inconstitucionais pelo Supremo Tribunal Federal, tendo-se assinalado que geravam risco de captura de tais órgãos e violavam o direito à participação da cidadania e das organizações da sociedade civil em temas de relevante interesse público. Entendeu-se, ainda, que as mudanças comprometiam o dever de transparência e *accountability* da Administração Pública e de representantes eleitos e, por conseguinte, o próprio princípio democrático. Nesse sentido: Precedentes: ADI 6121, Rel. Min. Marco Aurélio (referente à extinção de múltiplos órgãos colegiados da Administração federal); ADPF 622, Rel. Min. Roberto Barroso (pertinente ao Conselho Nacional da Criança e do Adolescente – CONANDA); ADPF 623 MC, Rel. Min. Rosa Weber, monocrática (relacionada ao Conselho Nacional de Meio Ambiente – CONAMA); ADPF 651, Rel. Min. Cármen Lúcia (pertinente ao Conselho Deliberativo do Fundo Nacional do Meio Ambiente).

23. De fato, o Decreto 10.143, de 28.11.2019, alterou as regras de composição do Fundo Clima. E a Portaria MMA nº 113, de 16.03.2020, do Ministério do Meio Ambiente, nomeou os novos integrantes do Conselho. Constata-se, portanto, que **o Fundo esteve inoperante, por decisão deliberada da União em mantê-lo inoperante** .

24. A alegação, invocada pelo então Ministro do Meio Ambiente, de que o não funcionamento ocorreu porque se esperava o novo marco normativo de saneamento não procede. Em primeiro lugar, os recursos do Fundo não se destinam a saneamento nem exclusivamente, nem majoritariamente, como se infere do dispositivo transcrito acima (art. 5º, §4º, da Lei 12.114 /2009). Existem outras muitas atividades às quais seus recursos poderiam ser destinados, que inclusive emitem mais GEEs do que a atividade de saneamento e, portanto, seriam mais efetivas na mitigação das mudanças

climáticas. **Além disso, o PAAR de 2020 e 2021, posteriormente aprovado, não se limitou à alocação dos recursos paralisados para saneamento, direcionando-os a <u>todas</u> as linhas disponíveis para financiamento no BNDES, o que demonstra que a mora anterior não decorreu da espera pela aprovação do marco do saneamento.** Veja-se a redação do PAAR:

> *Diretrizes Bienais e Prioridades*
>
> Os espaços urbanos brasileiros têm demandado políticas públicas na área ambiental. Ao longo dos anos, o investimento público insuficiente em saneamento, melhoria da qualidade do ar, gestão de resíduos sólidos, entre outros temas, tem gerado passivos ambientais locais com elevado custo a sustentabilidade do meio ambiente, afetando até mesmo a saúde das famílias mais vulneráveis. O direcionamento dos recursos para o atendimento dessa necessidade tem repercussão positiva na população em geral, inclusive em sua relação com a cidade e o meio ambiente.
>
> *Prioridades para Aplicação*
>
> As áreas prioritárias para investimento dos recursos do FNMC são todas as aplicações voltadas a melhoria da qualidade de vida da população, com ênfase para a qualidade ambiental urbana em todo o Brasil, relacionadas em alguma medida com a mitigação da mudança do clima e a adaptação aos seus efeitos.
>
> • **Recursos não reembolsáveis** : as temáticas e as regiões prioritárias de aplicação serão determinadas no âmbito da escolha dos projetos apresentados pelo MMA para aprovação do Comitê Gestor, **com ênfase para a agenda de qualidade ambiental urbana, inclusive a gestão de resíduos sólidos e o encerramento de lixões** .
>
> • **Recursos reembolsáveis** : **são elegíveis para financiamento todas as linhas do Fundo Clima existentes no BNDES, a saber: mobilidade urbana, cidades sustentáveis e mudanca do clima, máquinas e equipamentos eficientes, energias renováveis, resíduos sólidos, carvão vegetal, florestas nativas, gestão e serviços de carbono, além de projetos inovadores em todos os subprogramas** . (Grifou-se)

25. O que fica evidente, a partir da análise dos autos, é que a alocação dos recursos se deu às pressas, após a propositura da ação e possivelmente em razão dela.

26. Segundo informações apresentadas nos autos, os recursos reembolsáveis foram todos destinados pelo PAAR de 2020 e 2021 ao BNDES, e direcionados prioritariamente ao meio ambiente urbano (e não

para o combate ao desmatamento e alteração do uso do solo no meio rural). Quanto aos recursos não reembolsáveis, foram integralmente alocados a projeto de destinação de resíduos sólidos do governo de Rondônia – projeto Lixão Zero. Ainda de acordo com informações do Ministério do Meio Ambiente, ficou retida **a importância de " R$ 212.772 que estavam bloqueados pelo Ministério da Economia, em função do atendimento das metas fiscais"** .

4. Dever de destinação dos recursos por parte da União

(CF, Arts. 2º e 225 c/c art. 9º, § 2º, da LRF)

27. O contexto narrado acima, a gravidade da situação ambiental brasileira, a aversão à temática reiteradamente manifestada pela União, o histórico de desestruturação de órgãos colegiados integrantes da Administração Pública e de não alocação de recursos para a proteção ambiental corroboram, ainda, a necessidade de que este Supremo Tribunal Federal atenda ao pedido dos requerentes de determinação de que o Executivo tem o dever – e não a livre escolha – de dar funcionamento ao Fundo Clima e de alocar seus recursos para seus fins. Nesse sentido, é procedente o pedido de que deixe de se omitir em tal operacionalização nos exercícios subsequentes.

28. É igualmente procedente o pedido de vedação ao contingenciamento dos recursos do Fundo. Isso porque as obrigações legais de destinação específica de recursos de fundos contam com a apreciação e deliberação não apenas do Executivo, mas igualmente do Legislativo. Trata-se, portanto, de escolha alocativa produzida com base em ato complexo, que se sujeita ao princípio da separação dos Poderes. O Executivo não pode simplesmente ignorar as destinações determinadas pelo Legislativo, a seu livre critério, sob pena de violação ao princípio da separação dos Poderes (CF, art. 2º). Em razão da particularidade de tais despesas com destinação específica, o art. 9º, § 2º, da Lei Complementar 101/2000 (Lei de Responsabilidade Fiscal) previu: **" Não serão objeto de limitação as despesas que constituam obrigações constitucionais e legais do ente"** .

29. Na mesma linha, a doutrina observa que a Lei de Responsabilidade Fiscal foi aprovada, entre outros objetivos, com o propósito de limitar a

discricionariedade do Executivo no contingenciamento de valores, a fim de assegurar o efetivo cumprimento de despesas obrigatórias. Confira-se:

> A **LRF e a LDO especificam quais as despesas de caráter obrigatório e por isso mesmo prioritárias** . Considerando que a LDO tem origem em uma proposta do Executivo e é obrigatoriamente **examinada e aprovada pelo Congresso Nacional, integrado por representantes do povo, legitimamente eleitos, não há como questionar a classificação das despesas quanto à prioridade de sua realização** , pois tais prioridades devem refletir o interesse maior do povo brasileiro, o interesse público. (Rubens Luiz Murga da Silva, Da despesa na Administração Pública Federal, R. CEJ, Brasília, n. 26, p. 69-78, jul./set 2004, grifou-se).

30. Essa é justamente a hipótese dos autos. A alocação de recursos do Fundo Clima concretiza o dever constitucional de tutela e restauração do meio ambiente (e dos direitos fundamentais que lhes são interdependentes). Suas receitas são vinculadas por lei a determinadas atividades. Por essa razão, tais recursos não podem ser contingenciados, nos termos da Lei de Responsabilidade Fiscal. Trata-se, inclusive, de entendimento com amparo em precedente do Pleno do STF, proferido nos autos da ADPF 347, Rel. Min. Marco Aurélio, em que se concluiu pela impossibilidade de contingenciamento dos recursos do Fundo Penitenciário Nacional (FUNPEN), com base nos mesmos argumentos. Confira-se o voto do relator quanto ao ponto:

> Como assevera o professor Eduardo Bastos de Mendonça, "políticas públicas são definidas concretamente na lei orçamentária, em função das possibilidades financeiras do Estado", de forma que "a retenção de verbas tende a produzir, na melhor das hipóteses, programas menos abrangentes". **Segundo o autor, a medida mostra-se ainda mais problemática tendo em conta "que os cortes têm atingido programas relacionados a áreas em que, para além de qualquer dúvida, a atuação do Estado tem sido insatisfatória ou insuficiente"** , como é o caso do sistema penitenciário nacional (MENDONÇA, Eduardo Bastos Furtado de. A Constitucionalização das Finanças Públicas no Brasil. Rio de Janeiro: Renovar, 2010, p. 97-98).

> Os valores não utilizados deixam de custear não somente reformas dos presídios ou a construção de novos, mas também projetos de ressocialização que, inclusive, poderiam reduzir o tempo no cárcere. **No mais, é de todo duvidosa a possibilidade de limitar despesas dessa natureza ante o disposto no § 2º do artigo 9º da Lei Complementar nº 101, de 2000:**
>
> Art. 9º. Se verificado, ao final de um bimestre, que a realização da receita poderá não comportar o cumprimento das metas de resultado primário ou nominal estabelecidas no Anexo de Metas Fiscais, os Poderes e o Ministério Público promoverão, por ato próprio e nos montantes necessários, nos trinta dias subseqüentes, limitação de empenho e movimentação financeira, segundo os critérios fixados pela lei de diretrizes orçamentárias. [..]
>
> § 2º. Não serão objeto de limitação as despesas que constituam obrigações constitucionais e legais do ente, inclusive aquelas destinadas ao pagamento do serviço da dívida, e as ressalvadas pela lei de diretrizes orçamentárias.
>
> A cabeça do dispositivo trata da situação em que o Governo deixa de executar, parcialmente, o orçamento, vindo a contingenciar os valores ordenados a despesas, **ao passo que, no § 2º, consta exceção consideradas obrigações decorrentes de comandos legais e constitucionais. Tratando o Funpen de recursos com destinação legal específica, é inafastável a circunstância de não poderem ser utilizados para satisfazer exigências de contingenciamento: atendimento de passivos contingentes e outros riscos e eventos fiscais imprevistos** (artigo 5º, inciso III, alínea "b", da Lei Complementar nº 101, de 2000). (ADPF 347, Rel. Min. Marco Aurélio, grifou-se)

31. A situação dos autos é idêntica àquela apreciada no precedente. O contingenciamento, no presente caso, atingiria área – combate às mudanças climáticas – em que, para além de qualquer dúvida, a atuação do Estado é manifestamente insatisfatória e, mais do que isso, encontra-se em franco retrocesso. Os recursos cujo contingenciamento se pretende vedar no presente caso pertencem ao Fundo Clima (assim como aqueles objeto da ADPF 347 pertenciam ao FUNPEN) e têm destinação legal específica, que por sua vez concretiza direitos fundamentais. Não há dúvida, portanto, quanto à impossibilidade de contingenciamento dos recursos em questão.

5. a título de *obiter dictum*

Destinação subótima de recursos e

proporcionalidade como vedação à proteção insuficiente

32. Uma última palavra merece ser dita acerca das alegações dos requerentes e dos *amici curiae* sobre as decisões alocativas do Comitê Gestor do Fundo Clima. A presente ação foi ajuizada para que se superasse a omissão no funcionamento do Fundo e para que seus recursos fossem aplicados. O Fundo retomou seu funcionamento e seus recursos foram aplicados em atividades compatíveis com as normas em vigor. Os pedidos remanescentes, de não omissão e não contingenciamento estão sendo igualmente atendidos. Com isso, esgota-se o objeto da presente ação, nos termos em que proposta.

33. Entretanto, no curso dela os requerentes alegaram, ainda, que os recursos posteriormente alocados foram destinados preferencialmente ao atendimento ao meio ambiente urbano, quando é de conhecimento geral que parte relevante das emissões de GEEs do país decorre do desmatamento e da alteração do uso do solo corrente no meio rural, que deixaram de ser atendidas. Trata-se, portanto, de alegação de possível alocação subótima dos recursos do Fundo, que sacrificaria recursos escassos em situação de grave crise climática. Entendo que a questão escapa aos limites da ação, tal como originalmente formulada. Teço, contudo, algumas considerações sobre o tema a título de *obiter dicta* .

34. Conforme jurisprudência consolidada no STF, o Tribunal deve, em princípio, ser deferente às escolhas alocativas efetuadas pelos representantes eleitos em matéria de políticas públicas, dado que elas implicam decisões difíceis sobre como alocar recursos escassos, insuficientes ao atendimento de demandas concorrentes igualmente relevantes. Caso, todavia, se constate que tais escolhas estão eivadas por vícios de desvio de finalidade, não verossimilhança dos motivos que as determinaram ou violação da proporcionalidade, implicando grave prejuízo ao núcleo essencial de direitos fundamentais, pode e deve o Tribunal exercer o controle sobre tais atos alocativos. Isso porque, em tal caso, trata-se de controle de legalidade e não do mérito ou conveniência política de tais atos.

35. Portanto, embora tal controle escape aos limites da presente ação, a persistência no não enfrentamento de fontes importantes de GEEs – tais como o desmatamento e as alterações de uso do solo – ao longo do tempo, e a consequente frustração da mitigação das alterações climáticas, pode

ensejar a atuação futura do Judiciário no tema, de modo a assegurar que os recursos cumpram os fins a que foram destinados pela norma e/ou a evitar a violação do princípio da proporcionalidade por vedação à proteção deficiente.

III. Conclusão

36. Por tais fundamentos, em respeito ao direito constitucional ao meio ambiente saudável (CF, art. 225), ao dever do país de cumprir com direitos e compromissos assumidos internacionalmente (CF, art. 5º, § 2º), bem como em observância ao princípio da separação dos Poderes, que rege as "despesas que constituam obrigações constitucionais e legais" (CF, art. 2º c /c art. 9º, § 2º, LC 101/2000), julgo procedente a ação para: (i) reconhecer a omissão da União, em razão da não alocação integral dos recursos do Fundo Clima referentes a 2019; (ii) determinar à União que se abstenha de se omitir em fazer funcionar o Fundo Clima ou em destinar seus recursos; e (iii) vedar o contingenciamento das receitas que integram o Fundo.

37. Firmo a seguinte tese: " *O Poder Executivo tem o dever constitucional de fazer funcionar e alocar anualmente os recursos do Fundo Clima, para fins de mitigação das mudanças climáticas, estando vedado seu contingenciamento, em razão do dever constitucional de tutela ao meio ambiente (CF, art. 225), de direitos e compromissos internacionais assumidos pelo Brasil (CF, art. 5º, par. 2º), bem como do princípio constitucional da separação dos poderes (CF, art. 2º c/c art. 9º, par. 2º, LRF).*"

É como voto.

Notas:

[1] Luís Roberto Barroso e Patrícia Perrone Campos Mello. Como salvar a Amazônia: por que a floresta de pé vale mais do que derrubada. *Revista de Direito da Cidade* 12(2), maio 2020.

[2] Lei nº 12.187/2009, art. 12: "Para alcançar os objetivos da PNMC, o País adotará, como compromisso nacional voluntário, ações de mitigação

das emissões de gases de efeito estufa, com vistas em reduzir entre 36,1% (trinta e seis inteiros e um décimo por cento) e 38,9% (trinta e oito inteiros e nove décimos por cento) suas emissões projetadas até 2020".

[3] Ao regulamentar o dispositivo legal, o art. 6º, § 1º, I, do Decreto nº 7.390/2010 estabeleceu como uma das ações a serem implementadas, com vistas ao atingimento do compromisso legal, "a redução de oitenta por cento dos índices anuais de desmatamento na Amazônia Legal em relação à média verificada entre os anos de 1996 a 2005".

[4] O texto da NDC divide as medidas de mitigação das emissões com vistas ao atingimento da meta em determinados setores, entre eles o de florestas e mudanças no uso do solo.

[5] Luís Roberto Barroso e Patrícia Perrone Campos Mello. Como salvar a Amazônia: por que a floresta de pé vale mais do que derrubada. *Revista de Direito da Cidade* 12(2), maio 2020.

[6] Disponível em: <https://previsia.org/>. Acesso em: 27 mar. 2022. Trata-se de ferramenta desenvolvida pela Microsoft, pelo Fundo Vale e pelo Instituto do Homem e Meio Ambiente da Amazônia – Imazon,

Annex 643

Declic et al v Government of Romania, Civil Sentence No 312/2023, Romanian Court of Appeal, Cluj (Romanian original and English machine translation of relevant portions of pages 22-27)

Translated Extract of *Declic et al v Government of Romania*, Civil Sentence No 312/2023, Romanian Court of Appeal, Cluj

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At the outset, however, the Court, without minimizing the importance of respecting and guaranteeing the right to a healthy living environment, considers that, in the light of Article 9 para. 2, Art. 22 para. 6 C.c.p.c., having regard to the manner in which the petitions are formulated (ordering the defendants to *take all necessary measures*, namely *to adopt concrete and coherent plans*), having regard to the arguments set out in

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action (section 3.3, p. 9, para. 4,5, section 4, p. 12, para. 2), **considers that the admission of the action, in the *conditions in which the operative part of the judgment does not identify*, because it has no way to do so, which are those necessary measures and which are those concrete and coherent plans to achieve the climate objectives, *would entail the delivery of a judgment that cannot be enforced*,** which would be in violation of Art. 6 of the European Convention on Human Rights, with reference to the case-law of the European Court of Human Rights, which has held that the right to apply to a court would be illusory if the domestic legal order of a contracting state allowed a final and binding judgment to be ineffective to the detriment of a party (Imobiliara Saffi v. Italy - 1999, paragraph 63; Dorneanu v. Romania - 2007, paragraph 32).

By giving a judgment upholding the plaintiffs' actions, without indicating any criteria on the basis of which the claim contained in the enforceable title becomes certain (the plaintiffs leaving the defendants free to determine the measures to be taken, even though the premiss for the present dispute is, from their perspective, precisely the inadequacy of the measures taken), the debtors are left with the possibility of refusing or determining for themselves the scope and application of the enforceable title.

In this context, on the basis of the principle of availability which governs civil proceedings, there is no need to carry out any verification in relation to the standard of ECHR case-law on Article 8. Even if the defendants were to be found to have infringed the protection of public health and the environment, the manner in which the actions were formulated is not capable of leading to the infringement **being** remedied, since the point which was the premiss of the dispute has been reached, The defendants **are** entitled, on this occasion and with the assistance of the court, to take unidentifiable/quantifiable steps to achieve the parameters sought by the plaintiffs, and any steps taken by the defendants if not considered satisfactory by the plaintiffs (see the issues in section 5.5 pg. 31, section 6.2.2 para. 5 pg. 51) generates the possibility of initiating enforcement proceedings in accordance with Art. 24 et seq. of Law 554/2004, ultimately leading to the plaintiffs and the courts at the enforcement stage substituting themselves for the legislative powers, by regulating the measures necessary to achieve the parameters sought by the plaintiffs in the present dispute.

Having analysed Article 2(11) of **Regulation 2018/1999**, the Court finds that the concept *The Union's "2030 energy and climate objectives"* operate on four concrete and expandable levels:

a) a binding EU-wide **target for** an economy-wide **domestic reduction of** *at least 40% in greenhouse gas emissions* **by** 2030 *compared to 1990*,

b) a binding Union-wide **target** of at *least 32%* **share** *of energy from renewable sources consumed* in the Union in 2030,

c) the Union headline **target** of *at least a 32.5%* **improvement in energy efficiency** *by* 2030

and

d) *15%* **target** for **electricity interconnection** by 2030 or

e) ***any subsequent targets*** agreed to this effect by the European Council or the European

Parliament and the Council for 2030.

According to point 69 of the preamble, the Commission should *review* the implementation of this Regulation *in 2024 and every five years thereafter* and, where appropriate, make proposals for amendments to ensure proper implementation and achievement of its objectives. Those reviews should take account of developments *and be based on the results of the global stocktaking provided for by the Paris Agreement.*

The review procedure is laid down in Article 38 of the Regulation. Similarly, a review procedure is also provided for in Art 17 of Regulation 2018/841 and Art 15 of Regulation 2018/842.

The aim was to keep under constant review, taking into account, inter alia, changing national circumstances, how all sectors of the economy contribute to reducing greenhouse gas emissions, international developments and efforts to achieve

long-term objectives of the Paris Agreement, to ensure that the environmental goals are met as

objectively and as quickly as possible.

In that regard, the Court notes, with the adoption of **Regulation No 2021/1119**, the existence of a ***new EU climate objective for 2030*** which *replaces the objective in Article 2(11) of Regulation No 2018/1999 on greenhouse gas emissions* (the tier highlighted in point a above), *while the objectives set out in tiers b and c remain unchanged.*

According to Art. 4 para. 1 of Regulation 2021/1119, in order to achieve the objective of climate neutrality set out in Article 2(1) - at the latest by 2050, a balance shall be struck at Union level between the emissions and removals of greenhouse gases that are regulated under Union law, so as to achieve zero net emissions by that date, and the Union aims to achieve a negative **emissions** balance thereafter, the ***mandatory Union climate target for 2030*** is a ***domestic reduction of net greenhouse gas emissions*** *(emissions net of removals) of at least 55 % by 2030 compared to 1990 levels.*

According to Art. 2 para. 2 pgf. 1 and 3 of Regulation 2021/1119, *by June 30, 2021,* the Commission shall *review* the relevant Union legislation in order to enable the achievement of the objective set out in paragraph 1 of this Article and the objective on climate neutrality set out in Article 2(1) and

shall consider taking the necessary measures, including the adoption of legislative proposals, in accordance with the Treaties; and after adoption of the legislative proposals by the Commission, the Commission shall monitor the legislative procedures for the individual proposals and may report to the European Parliament and the Council on whether the expected outcome of those legislative procedures, *taken together,* would lead to the achievement of the objective set out in paragraph 1; if the expected outcome is not in accordance with the objective set out in paragraph 1, the Commission may take the necessary measures, including the adoption of legislative proposals, in accordance with the Treaties.

Thus, there is a continuing shift in environmental policy at EU level, and the Commission is required to assess at different intervals how EU legislation implementing the 2030 climate target would need to be amended to achieve such a net emission reduction.

To this end, the Commission has announced a review of relevant climate and energy *legislation to be adopted in a package covering*, among others, *renewable energy, energy efficiency*, land use, energy taxation, CO_2 performance standards for light-duty vehicles, effort sharing and the EU ETS.

At the moment , therefore, tackling climate change threats and the enhancement of adaptive capacity, strengthening resilience and reducing vulnerability to climate change, are constantly changing, and the assessment of the measures adopted by Romania must be made in relation to the EU legislation under which those measures were designed and not by cutting out provisions favourable to the claims put forward by the complainants resulting from Commission positions adopted by the Commission following subsequent assessments carried out on the basis of the provisions of the environmental regulations, which are then used as a starting point for the review of the relevant climate and energy legislation.

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In the light of the foregoing, the Court, on the basis of Article 8, Article 18 of Law 554/2004, ***will dismiss*** the application for judgment filed by the *plaintiffs Asociaţia Declic, Pencea-Brădăţan Elena-Roxana, Brădăţan Tudor-Iulian, Năstăsache-Hopârteanu Cătălina, Mirea Silvia, Dejeu Daniela Luminiţa* against the **defendants Prime Minister, Minister of Environment,**

[. . .]

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Water and Forests and the Minister of Energy, *as being brought against persons without passive legal standing.*

Dismisses the plea of lack of capacity as a party **plaintiff** in respect of pleading No 2 of the application **for leave to intervene**, raised by the Ministry of the Environment, Water and Forests in its response, as *unfounded*.

Dismisses as unfounded the application brought by **the plaintiffs Declic Association,** with Tax ID number **25862117, Pencea-Brădăţan Elena-Roxana,** Personal Identification Number 2820607385628, **Brădăţan Tudor-Iulian,** Personal Identification Number 1820702070095,

Năstăsache-Hopârteanu Cătălina, Personal Identification Number 2870513134120, **Mirea Silvia, Dejeu Daniela Luminița,** Personal Identification Number 2711111120721, against the **Government of Romania, the Ministry of Environment, Water and Forests and the Ministry of Energy.**

Dismisses the applications for ancillary intervention lodged on behalf of the applicants by the interveners **Asociaţia Bankwatch România** and **Asociaţia 2Celsius**.

[. . .]

Cod ECLI ECLI:RO:CACLJ:2023:048.000312

Dosar nr. 114/33/2023

R O M Â N I A
CURTEA DE APEL CLUJ
SECŢIA A III-A CONTENCIOS ADMINISTRATIV ŞI FISCAL

SENTINŢA CIVILĂ nr. 312/2023
Şedinţa publică din data de 06 iunie 2023
Instanţa constituită din:
PREŞEDINTE: George Barbura-Turcu
GREFIER: Alexandra Lucia Bujor

Pe rol fiind soluţionarea cauzei în contencios administrativ şi fiscal formulată de reclamanţii ASOCIAŢIA DECLIC, PENCEA-BRĂDĂŢAN ELENA ROXANA, BRĂDĂŢAN TUDOR IULIAN, NĂSTĂSACHE HOPÂRTEANU CĂTĂLINA, MIREA SILVIA, DEJEU DANIELA LUMINIŢA, în contradictoriu cu pârâţii GUVERNUL ROMÂNIEI, PRIMUL MINISTRU, DOMNUL NICOLAE CIUCĂ, MINISTERUL MEDIULUI, APELOR ŞI PĂDURILOR, MINISTRUL MEDIULUI, APELOR ŞI PĂDURILOR, DOMNUL BARNA TANCZOS, MINISTERUL ENERGIEI, MINISTRUL ENERGIEI, DOMNUL VIRGIL DANIEL POPESCU, având obiect obligaţia de a face.

Mersul dezbaterilor, susţinerile şi concluziile părţilor au fost consemnate în încheierea de şedinţă din data de 22 mai 2023, încheiere ce face parte integrantă din prezenta hotărâre, când instanţa, având nevoie de timp pentru a delibera şi pentru a da posibilitate părţilor să depună concluzii scrise, a dispus amânarea pronunţării la data de azi, 06 iunie 2023.

C U R T E A :

Deliberând asupra cauzei civile de faţă, instanţa constată următoarele:

Prin acţiunea în contencios administrativ înregistrată la data de 31.01.2023, sintetizată prin înscrisul depus la data 19.04.2023 (f.84,vol.V), reclamanţii ASOCIAŢIA DECLIC, PENCEA-BRĂDĂŢAN ELENA ROXANA, BRĂDĂŢAN TUDOR IULIAN, NĂSTĂSACHE HOPÂRTEANU CĂTĂLINA, MIREA SILVIA, DEJEU DANIELA LUMINIŢA, în contradictoriu cu pârâţii GUVERNUL ROMÂNIEI, PRIMUL MINISTRU, DOMNUL NICOLAE CIUCĂ, MINISTERUL MEDIULUI, APELOR ŞI PĂDURILOR, MINISTRUL MEDIULUI, APELOR ŞI PĂDURILOR, DOMNUL BARNA TANCZOS, MINISTERUL ENERGIEI, MINISTRUL ENERGIEI, DOMNUL VIRGIL DANIEL POPESCU, au solicitat instanţei obligarea pârâţilor să ia toate măsurile necesare în vederea reducerii cu 55 % a gazelor cu efect de seră (GES) până în anul 2030, respectiv atingerea neutralităţii climatice până în anul 2050, să ia toate măsurile necesare în vederea creşterii ponderii regenerabilelor din consumul final de energie la 45 % şi creşterii eficienţei energetice cu 13 % până în anul 2030, obligarea pârârţilor ca în termen de 30 de zile de la data rămânerii definitive a hotărârii să adopte planuri concrete şi coerente de atenuare şi adaptare la schimbările climatice ce cuprind inclusiv bugete anuale de carbon, în vederea atingerii obiectivelor asumate potrivit petitelor 1 şi 2 precum şi mecanisme anuale de raportare şi monitorizare a progresului în atingerea acestor obiective precum şi obligarea pârâţilor de rd. 2, 4 şi 6 la plata unei amenzi de 20 % din salariul minim pe economie pe zi de întârziere care se face venit la bugetul de stat, de la expirarea termenului prevăzut în petitul 3 până la adoptarea efectivă a măsurilor ce se impun pentru atingerea obiectivelor prevăzute la petitele 1 şi 2.

În motivarea acţiunii, reclamanţii au arătat, în esenţă, că pârâţii au încălcat obligaţia legală de reducere cu minim 55 % a emisiilor GES faţă de nivelul anului 1990, procent necesar pentru prevenirea schimbărilor climatice periculoase.

PNIESC este singurul document naţional în care este prevăzut angajamentul pârâţilor de a reduce emisiile de GES, respectiv cu 44% faţă de nivelul din 2005(42% faţă de 1990 conform Fişei de ţară întocmite de Climate Analytics), exclusiv prin aplicarea schemei de comercializare a certificatelor de emisii de GES.

Angajamentul pârâţilor este nelegal întrucât:

■ nu este corelat cu obiectivul climatic asumat prin art. 2.1 lit. a) din Acordul de la Paris, de limitare a încălzirii globale la 1,5 grade Celsius, respectiv 2 grade Celsius; Acordul de la Paris constituie legislaţie primară, iar scopul iniţierii oricărei măsuri în materia schimbărilor climatice este prevenirea atingerii pragurilor critice astfel cum au fost stabilite şi asumate prin acest tratat internaţional;

■ în conformitate cu art. 2.1. lit. a) din Acordul de la Paris, statele părţi s-au angajat să menţină creşterea temperaturii globale cu mult sub 2 grade Celsius peste nivelurile preindustriale şi să continue eforturile pentru a limita creşterea temperaturii la 1,5 grade Celsius.

■ limitarea încălzirii globale la 1,5 grade Celsius, chiar dacă presupune un efort colectiv, constituie şi responsabilitatea individuală a pârâţilor, întrucât fiecare parte semnatară trebuie să urmărească acest obiectiv climatic;

■ obiectivul de temperatură pe termen lung este un punct de plecare important pentru evaluarea legalităţii eforturilor pârâţilor în temeiul legislaţiei naţionale. Mai mult, în evaluarea legalităţii eforturilor de combatere a schimbărilor climatice, instanţa va trebui să aibă în vedere şi evoluţia datelor ştiinţifice de la momentul semnării Acordului de la Paris până în prezent, potrivit cărora actualele CND sunt insuficiente.

Pârâţii au încălcat obligaţiile constituţionale prevăzute la art. 135 alin. (2) lit. d-g din Constituţia României, întrucât măsurile propuse a fi adoptate pentru combaterea schimbărilor climatice detaliate în secţiunea 6.1.1. din acţiunea introductivă, nu vor conduce la limitarea încălzirii globale sub pragurile critice mai sus indicate, iar depăşirea acestora creează riscuri pentru siguranţa cetăţenilor, mediul înconjurător şi statul de drept, riscuri de care pârâţii au cunoştinţă, aşa cum reiese fără putinţă de tăgadă din declaraţiile politice ale acestora.

În evaluarea legalităţii măsurilor luate în vederea reducerii emisiilor de GES de către pârâţi, reclamanţii apreciază că se impune aplicat filtrul următoarelor principii:

- principiul precauţiei; Principiul precauţiei este consacrat în art.191 (2) din TFUE, principiul 15 din Declaraţia de la Rio privind mediul şi dezvoltarea din 1992, art. 3 din Convenţia-cadru a Naţiunilor Unite asupra schimbărilor climatice , precum şi pe diverse prevederi ale legislaţiei secundare, cum ar fi cele din art. 3 OUG nr. 195/2005. Acesta presupune, în esenţă, că lipsa sau insuficienţa cunoştinţelor ştiinţifice cu privire la posibilitatea apariţiei degradării mediului nu va constitui un obstacol în calea adoptării măsurilor de precauţie menite să elimine sau să reducă la minimum apariţia daunelor

- principiul echităţii inter-generaţionale. Parte componentă a principiului dezvoltării durabile, consacrat la punctele 4,9 şi 32 din Preambulul Regulamentului (UE) 2021/1119 (Legea europeană a climei), art. 3 din OUG nr. 195/2005, acesta constă în satisfacerea nevoilor generaţiilor prezente fără a compromite capacitatea generaţiilor viitoare de a-şi satisface propriile nevoi.

Practic, pârâţii aveau obligaţia de a lua măsuri "rezonabile" şi "adecvate" pentru a preveni sau pentru a minimiza un risc previzibil şi grav de vătămare a drepturilor omului, în conformitate cu Constituţia României, CEDO si Carta Drepturilor Fundamentale a UE. Lipsa caracterului rezonabil al măsurilor echivalează cu nelegalitatea acestora.

În jurisprudenţa sa, CEDO a reţinut că această obligaţie pozitivă are două aspecte: (a) obligaţia de a oferi un cadru de reglementare; şi (b) obligaţia de a lua măsuri operaţionale preventive.

În cazul particular al litigiilor climatice, aceste eforturi ale pârâţilor ar trebui să reflecte cele mai mari ambiţii de atenuare a schimbărilor climatice şi să ilustreze un progres în timp.

Pârâţii nu au luat toate măsurile necesare pentru respectarea drepturilor omului, prin introducerea energiei curate alternative şi crearea de proceduri simple de acces la aceasta, prin activităţi ce duc la prevenirea defrişărilor şi asigurarea împăduririlor;

Nu a existat o creştere progresivă a ambiţiei şi nu a fost evitat regresul. Potrivit datelor oficiale furnizate de Agenţia Europeană a Mediului (aspect detaliat la punctul 6.2.2. din acţiune)

România se află pe ultimul loc în Europa împreună cu Slovenia, în ceea ce priveşte integrarea surselor de energie regenerabilă în reţeaua naţională de energie electrică. Mai mult, frecventele intervenţii asupra cadrului legislativ şi de reglementare, lipsa de transparenţă şi de viziune strategică şi capacitatea redusă a aparatului administrativ de adaptare la tendinţele din domeniu au condus la pierderea avântului investiţional şi la o stare de incertitudine generală pentru industria regenerabilă. Astfel, din 2016 până în 2021 nu a mai fost instalată nici o capacitate nouă de energie regenerabilă, iar producătorii s-au confruntat cu pierderi mari de capital .

Prin măsurile luate, pârâţii nu intenţionează să reducă emisiile pentru a menţine temperatura medie globală sub 1,5 grade Celsius. Sarcina probei revenea pârâţilor pentru a demonstra de ce nu se poate atinge acest obiectiv, or din toate înscrisurile depuse la dosar de către pârâţi rezultă că nu există o justificare adecvată în acest sens, în acord cu testele de necesitate şi proporţionalitate, având în vedere şi amploarea prejudiciilor aduse drepturilor omului prin faptul că nu se reuşeşte limitarea încălzirii globalae ia 1,5 grade Celsius .

În secţiunea 6.1.1. pct. 10 şi urm. din acţiunea introductivă, arată reclamanţii că au detaliat că deşi există soluţii tehnologice şi măsuri care, implementate corect, ar contribui în mod eficient la combaterea schimbărilor climatice, măsurile pârâţilor pe fiecare segment în parte sunt aproape inexistente sau ineficiente:

=> Lipsa inspecţiei şi controlului defrişărilor.

=> Regresul României în materie de energie regenerabilă şi eficienţă energetică

Prin PNIESC s-a propus o creştere de la 24,3% la 30,7% până în 2030, procent semnificativ inferior celui de 45% stabilit prin REPowerEU şi sub 40% propus anterior prin pachetul „Fitfor 55". Or, nu există o justificare adecvată pentru ambiţii atât de mărunte, de vreme ce România are capacitatea necesară pentru investiţii în energie verde (eoliană şi solară).

O altă problemă stringentă a politicii energetice, ce încalcă obiectivul climatic asumat prin Acordul de la Paris, o constituie alocarea de fonduri pentru investiţii în combustibili fosili, proiecte hidroenergetice desuete şi biomasă lemnoasă; acest fapt determină scăderea fondurilor pentru sursele de energie eoliană şi solară; Privitor la eficienţa energetică, ambiţiile actuale ale României nu stabilesc creşteri reale ale acesteia, astfel:

i) PNRR cuprinde referiri la pompele de căldură, dar nu stabileşte nicio ţintă, fapt ce dovedeşte că nu există o politică clară pentru promovarea şi utilizarea acestora la scară largă;

ii) Pârâţii nu şi-au stabilit ca obiectiv rezolvarea efectivă a problemei sărăciei energetice(tradusă prin veniturile populaţiei, starea locuinţelor etc); prin ajutoarele de încălzire se amplifică dependenţa consumatorilor vulnerabili, iar programele de reabilitare nu au capacitatea de a soluţiona acest fenomen defavorabil pentru populaţie. Lipsa unor obiective clare în vederea creşterii eficienţei energetice încalcă drepturile fundamentale la un trai decent si la un viitor demn.

Concluzionând, în ceea ce priveşte obligaţia legală generală de combatere a efectelor schimbărilor climatice ambiţiile pârâţilor sunt contrare obligaţiilor juridice asumate prin Acordul de ta Paris, Legea Europeană a Climei şi Constituţia României întrucât:

- Procentul modest de 44% este raportat la altă dată de referinţă (2005) decât cea asumată de UE (1990) în condiţiile în care în perioada 1990-2000, România a avut unul dintre cele mai mari niveluri de emisii de gaze cu efect de seră din Europa , ca urmare a utilizării extinse a energiei din surse fosile şi a industriei puternice, iar în 2005 emisiile erau în scădere; astfel, procentul asumat prin raportare la nivelul emisiilor din 1990 este mai mic de 44;

- România îşi asumă un procent de reducere doar prin aplicarea schemei de comercializare a certificatelor de emisii;

- Nu există un procent asumat de România, calculat asupra tuturor tipurilor de emisii (legale şi ilegale);

- Nu există niciun angajament pentru perioada ulterioară anului 2030; ,

- Măsurile pârâţilor nu trec testele de rezonabilitate (pârâţii nu au luat toate măsurile posibile pentru reducerea emisiilor, nu a existat o creştere progresivă a ambiţiei, din contră un regres, măsurile luate nu duc la limitarea încălzirii globale la 1,5 grade Celsius.)

De asemenea, reclamanţii mai susţin şi încălcarea obligaţiilor specifice de combatere a schimbărilor climatice.

Astfel, în ceea ce priveşte ponderea surselor regenerabile în consumul final de energie, în PNIESC este prevăzută creşterea ponderii cu până la 30,7% până în 2030 (şl cu până la 29% prin PNRR), ceea ce este mult sub ţinta de 45% stabilită prin Pachetul de Măsuri REPowerEU. Din nou, este vorba despre nesocotirea standardului celei mai înalte ambiţii climatice posibile.

Există o tendinţă de a raporta date care nu corespund realităţii din teren, pentru a crea impresia unor progrese naţionale, fără a fi urmărită adaptarea şi creşterea ambiţiilor climatice în conformitate cu datele ştiinţifice actualizate şi cu strategiile adoptate în special ia nivel unional.

De asemenea, se continuă proiectele şi investiţiile care implică utilizarea combustibililor fosili, cu o aparenţă de introducere a hidrogenului verde, despre ca re încă nu există date concrete privitoare la fezabilitate.

Programele de investiţii sunt ineficiente în sectorul energiei solare (al instalării panourilor fotovoltaice, fiind astfel impedimente pentru potenţialii cosumatori care ar contribui la sistemul energetic naţional).

Concluzionând, ţintele stabilite de pârâţi nu respectă standardul celei mai mari ambiţii climatice posibile, având în vedere condiţiile geografice ale României, favorabile energiei eoliene offshore si onshore si energiei solare.

De asemenea, reclamanţii mai invocă şi lipsa unor măsuri energice, a unor planuri coerente, precum şi a mecanismelor de monitorizare şi raportare creează un risc imediat şi substanţial pentru drepturile fundamentale colective şi individuale ale reclamanţilor.

Astfel, reclamanţilor le sunt afectate drepturile fundamentale garantate de Constituţie, Carta Drepturilor Fundamentale a UE si Convenţia Europeană a Drepturilor Omului.

În ceea ce priveşte drepturile colective, Asociaţia Declic şi reclamanţii persoane fizice apreciază că din toate rapoartele ştiinţifice reiese legătura de cauzalitate dintre schimbările climatice şi mediu. Lipsa măsurilor adecvate pentru prevenirea schimbărilor climatice periculoase creează un risc imediat şi substanţial pentru dreptul reclamanţilor la un mediu sănătos şi echilibrat ecologic, drept colectiv consacrat în Constituţia României. Mai mult, dreptul la sănătate şi la un viitor demn sunt în mod substanţial legate şi determinate de un mediu sănătos. Acestor libertăţi garantate constituţional le corespunde obligaţia constituţională a pârâţilor, reglementată la art. 135 alin. d-f, de a proteja fundaţiile naturale care susţin viaţa. Obligaţia statului de a menţine echilibrul ecologic şi de a crea condiţiile necesare pentru creşterea calităţii vieţii nu se referă doar la factorii clasici de mediu, cum ar fi apa, aerul, solul, ci şi la climă.

Dimensiunea protecţiei la care sunt obligaţi pârâţii include: prevenirea daunelor; cerinţa de a elimina/compensa daunele care s-au produs deja; cerinţa de a reduce la minimum riscurile; cerinţa de a conserva resursele în mod durabil; interzicerea deteriorării substanţiale a mediului înconjurător.

Angajamentele asumate de pârâţi şi măsurile care se doresc a fi implementate au efectul unei brize uşoare asupra fenomenului schimbărilor climatice, evoluţia acestuia fiind nerestricţionată, fapt ce duce la încălcarea evidentă a obligaţiilor pârâţilor de prevenire a daunelor şi de reducere la minimum a riscurilor. La secţiunea 6.3.1. arată reclamanţii, au subliniat că în Rapoartele Administraţiei Naţionale de Meteorologie (din 2015 şi 2022) se prezintă legătura de cauzalitate între schimbările climatice şi sănătatea populaţiei României (valurile de căldură sunt tot mai intense şi mai persistente, agravând bolile respiratorii şi cardiovasculare, a astmului, alergiilor, bolilor mintale etc). De asemenea, potrivit unei analize a fenomenului schimbărilor climatice în Europa, realizată de Centrul European pentru Prevenirea şi Controlul Bolilor impactul schimbărilor climatice asupra sănătăţii publice se manifestă prin creşterea numărului de spitalizări şi de decese cauzate de valurile de căldură, a numărului de hipotermii determinate de viscole, a numărului de răniţi şi de morţi de pe urma inundaţiilor şi prin modificarea zonelor de transmitere a bolilor prin vectori. De asemenea, Centrul atrage atenţia asupra faptului că aceste efecte negative ale schimbărilor climatice asupra sănătăţii populaţiei vor continua să se intensifice în viitor odată cu deteriorarea condiţiilor de mediu. Practic, prin creşterea temperaturilor, dar şi a nivelului de umiditate, aceşti vectori se vor răspândi inclusiv în zone în care nu au avut acces anterior.

În concluzie, lipsa de politici ferme, concrete şi coordonate în materie de schimbări climatice, deşi pârâţii cunosc pericolul reprezentat de schimbări climatice, se circumscrie intenţiei indirecte, aceasta fiind forma de vinovăţie cu care pârâţii îşi nesocotesc obligaţiile legale şi ne prejudiciază dreptul la sănătate.

În ceea ce priveşte dreptul la un viitor demn, Asociaţia Declic şi reclamanţii sunt o portavoce a generaţiilor viitoare, generaţii care, în lipsa unor măsuri energice din partea pârâţilor pe segmentul de atenuare şi adaptare la schimbările climatice, vor fi nevoite să suporte în mod injust această responsabilitate, fiindu-le golite de conţinut drepturile fundamentale,

Referitor la drepturile fundamentale individuale ale reclamanţilor de rd. 2-6 (dreptul la viaţă, dreptul la viaţă privată, dreptul de proprietate) acestea sunt profund interconectate cu dreptul la un mediu sănătos şi echilibrat ecologic şi dreptul la sănătate, modul în care aceste drepturi sunt afectate fiind detaliate pe larg în acţiunea în contencios formulată. În Raportul întocmit de Banca Mondială pentru Guvernul României se menţionează vulnerabilităţile principale la schimbările climatice care au fost identificate pe teritoriul ţării noastre în diverse sfere de activitate aflate în legătură cu utilizarea apelor. Caracterul esenţial pentru viaţă şi sănătate al acestui element natural este un fapt notoriu, ce nu are nevoie să fie demonstrat. Fiind un element vital implicat în traiul zilnic, orice grad de afectare a acestuia are consecinţe deosebit de importante, iar în funcţie de gravitatea afectării produse, impactul poate fi resimţit mai puternic, respectiv de un număr mai mare de persoane. Astfel, pericolele identificate sunt următoarele: alimentarea cu apă va fi afectată, deoarece iernile mai calde şi mai scurte vor duce la scăderea volumului sezonier de zăpadă şi la topirea timpurie şi rapidă a zăpezii, determinând deficite în lunile de vară; verile mai calde şi mai uscate vor provoca, de asemenea, o deteriorare calitativă a resurselor de apă, reducând prin urmare în mod efectiv alimentarea cu apă; alimentarea cu apă va fi afectată şi de coborârea nivelului apelor subterane în lunile de vară, din cauza reducerilor debitului de suprafaţă; temperaturile ridicate de vară vor determina o evaporare şi o transpirare mai intensă şi prin urmare cereri mai mari de apă în agricultura, în aceeaşi perioadă în care oferta de apă va suferi un deficit. Cererile şi oferta de apă menajeră vor resimţi aceiaşi efect (dar mai puţin pronunţat); flora şi fauna ecosistemelor acvatice {râuri şi lacuri), precum şi a celor care depind de precipitaţii şi de debitele râurilor (precum mlaştinile) vor suferi din cauza reducerii cantitative a debitelor de apă în timpul verii şi a frecvenţei crescute a inundaţiilor şi secetelor; temperaturile ridicate din timpul verii, ce duc la degradarea calităţii apei (prin scăderea nivelului de oxigen dizolvat, eutrofizare şi înmulţirea excesivă a algelor), vor afecta de asemenea, mediul.

Aşadar, numai în legătură cu modul în care schimbările climatice afectează utilizarea apei, impactul asupra dreptului de proprietate, dreptului la un trai decent, dar şi asupra vieţii, dreptul la viaţă privată şi de familie, se resimte negativ în multiple forme şi grade, în funcţie de amploarea consecinţelor provocate.

Pe cale de consecinţă, raportat la considerente expuse în acţiunea introductivă şi prezenta sinteză a motivelor de nelegalitate, reclamanţii solicită admiterea acţiunii astfel cum a fost formulată.

Pârâtul MINISTERUL MEDIULUI, APELOR ŞI PĂDURILOR a depus întâmpinare prin care a invocat: excepţia lipsei calităţii procesuale active şi de interes a reclamanţilor, excepţia lipsei calităţii procesuale pasive pentru persoanele fizice chemate în judecată (conducătorii instituţiilor pârâte), excepţia prematurităţii aplicării amenzii pentru conducătorii instituţiilor pârâte, respectiv Primul-ministru al României, domnul Nicolae Ionel CIUCĂ, domnul Virgil POPESCUL si domnul BÂRNA TÂNCZOS, excepţia inadmisibilităţii petitului nr. 1 al acţiunii şi excepţia lipsei calităţii sale procesuale pasive în ceea ce priveşte petitul nr. 2 al cererii de chemare în judecată, iar pe fond a solicitat respingerea acţiunii astfel cum ea a fost formulată împotriva Ministerul Mediului, Apelor şi Pădurilor; (f.135, vol.III).

Cu privire la excepţia lipsei de interes a reclamantei în promovarea acţiunii, pârâtul invocă dispoziţiile art. 8 alin. (11) şi alin. (12) din Legea nr. 554/2004 şi susţine că reclamanţii nu au făcut dovada şi nici nu au invocat niciun drept sau interes legitim privat vătămat prin actul administrativ a cărui suspendare o solicită, în sensul art. 1 din Legea nr. 554/2004.

Reclamanţii nu au atacat un act administrativ efectiv, ci doar au înţeles să formuleze prezenta acţiune pentru a invoca o pretinsă nerespectare a condiţiilor de mediu şi a atingerii obiectivelor prezentate în cuprinsul acţiunii introductive de instanţă.

Altfel spus, prin acţiune nu se specifică ce act administrativ este atacat sau ce inacţiune concretă este contestată pentru a fi în deplină concordanţă cu scopul pentru care a fost înfiinţată ASOCIAŢIA Declic, motiv pentru care pârâtul solicită admiterea excepţiei invocate. În sprijinul

susţinerilor sale, pârâtul a invocat Decizia nr. 8/02.03.2020 a Înaltei Curţi de Casaţie şi Justiţie şi opinează că în cuprinsul cererii de chemare în judecată reclamanţii nu au reuşit să facă dovada interesului, nici public şi nici privat, raţiune pentru care solicită admiterea excepţiei lipsei de interes invocate.

Cu privire la excepţia lipsei calităţii procesuale pasive a persoanelor fizice chemate în judecată, pârâtul învederează că niciuna dintre persoanele fizice chemate în judecată nu au calitate procesuală pasivă în acest litigiu întrucât atingerea acestor obiective nu poate fi imputată acestora, ci este necesar o colaborare între instituţiile române şi cele europene. Faptul că persoanele chemate în judecată nu au calitate procesuală pasivă, întrucât simpla calitate de conducător la unei autorităţi nu este per se suficientă pentru atragerea răspunderii pentru orice deficienţă a instituţiei.

Cu alte cuvinte, reclamantele nu au făcut dovada existenţei vreunui legături de cauzalitate între fapta pretins prejudiciabilă şi paguba produsă, limitându-se la a chema în judecată persoanele care conduc instituţiile publice.

Invocând dispoziţiile art. 1 alin. (5) din Constituţia României raportat la dispoziţiile Codului de Procedură Civilă, pârâtul opineaz că persoanele fizice, în calitate de conducători ai autorităţilor publice ante-menţionate, nu pot avea calitate procesuală pasivă, motiv pentru care solicită admiterea excepţiei şi scoaterea din cauză a domnului Nkolae Ionel CIUCĂ, a domnului Virqil POPESCU şi a domnului BÂRNA TANCZOS.

Cu privire la excepţiei prematurităţii aplicării amenzii pentru conducătorii autorităţilor publice pârâte, pârâtul învederează că, o astfel de hotărâre nu poate fi pusă în aplicare de o simplă persoană fizică, fie ea şi conducător al autorităţii, iar reclamantele pleacă de la o prezumţie absolută de neaplicare a unui titlul executoriu.

Astfel, având în vedere prevederile art. 24 alin. (3) din Legea contenciosului administrativ nr. 554/2004, cu modificările şi completările ulterioare, pârâtul opinează că hotărârea prin care se poate dispune aplicarea amenzii conducătorului instituţiei se poate face doar ulterior rămânerii definitive a prezentului litigiu, printr-o hotărâre distinctă şi un dosar distinct. În caz contrar s-ar putea deduce că instanţa îşi însuşeşte susţinerile reclamanţilor şi ar putea pleca de la prezumţia de neexecutare culpabilă a obligaţiilor stabilite prin titlul executoriu de către conducătorii autorităţilor publice.

Pe fond, pârâtul susţine că, Potrivit Inventarului Naţional privind Emisiile de Gaze cu Efect de Seră (INEGES) realizat în anul 2022, la nivel României, emisiile totale de C02 echivalent, fără sectoruB LULUCF(Land use Change and Forest), au fost de 109.934,33 kt C02 echivalent în anul 2020.

Potrivit INEGES 2022 şi celui de-al cincilea Raport Bienal al României, din 1989 până în 2020, emisiile totale de gaze cu efect de seră ale României (excluzând sectorul LULUCF) au scăzut cu 64,09%, iar emisiile nete de GES (incluzând LULUCF) au scăzut cu 72.90% .

România are una dintre cele mai scăzute rate de emisii pe cap de locuitor din Uniunea Europeană. între 1990 şi 2020, România şi-a redus şi intensitatea emisiilor de C02 pe unitatea de PIB cu 77%, o rată mai mare decât dublul mediei globale. în 2020, cotele înregistrate în raport cu emisiile totale de GES (fără LULUCF) au fost următoarele: 67% pentru C02, 21% pentru CH4, 10% pentru N20 şi 2% pentru gazele fluorate agregate .

În continuare, pârâtul a prezentat cadrul de politici şi legislativ naţional în domeniul schimbărilor climatice.

Politica de mediu a Uniunii Europene (denumită în continuare „UE") urmăreşte un nivel ridicat de protecţie, inclusiv prin obiective şi acţiuni în vedere limitării impactului schimbărilor climatice aşa cum rezultă din teza I a par. (2) al art. 191 TFUE (ex-art. 174 TCE) prin raportare la par. (1) al art. 191 TFUE (ex-art. 174 TCE). Fiind parte la Convenţia cadru a naţiunilor unite asupra schimbărilor climatice (UNFCCC) şi la Acordul de la Paris, la nivelul Uniunii Europene au fost adoptate următoarele acte normative „piloni ai politicii climatice" a UE şi Statelor Membre (SM):

• Directiva 2003/87/CE a Parlamentului European şi a Consiliului de stabilire a unui sistem de comercializare a cotelor de emisie de gaze cu efect de seră în cadrul Uniunii, cu modificările şi completările ulterioare (denumită „Directiva EU-ETS")

Sistemul UE de comercializare a certificatelor de emisii acoperă toţi marii emiţători de gaze cu efect de seră din sectorul industriei, al energiei şi al aviaţiei. în total, EU-ETS reglementează

emisiile provenite de la 8 757 de centrale electrice şi termice şi instalaţii de producţie, precum şi de la 371 de operatori de aeronave care efectuează zboruri între aeroporturile din Spaţiul Economic European (SEE) şi din SEE către Elveţia şi Regatul Unit . Acestea reprezintă aproximativ 36 % din totalul emisiilor din UE.

Directiva EU-ETS prevede că statele membre ar trebui să utilizeze cel puţin 50 % din veniturile obţinute în urma licitării certificatelor de emisii şi toate veniturile din aviaţie în scopuri legate de climă şi energie. Statele membre raportează anual cu privire la modul în care îşi cheltuiesc veniturile din licitaţii.

La nivel naţional, Directiva EU-ETS a fost transpusă prin Hotărârea Guvernului nr. 780/2006 privind stabilirea schemei de comercializare a certificatelor de emisii de gaze cu efect de seră, cu modificările şi completările ulterioare.

În iulie 2021, Comisia Europeană a prezentat în cadrul "Fit for 55" şi mai multe propuneri legislative în scopul revizuirii sistemului EU-ETS. Comisia a propus ca sectoarele vizate de sistem să realizeze reduceri ale emisiilor de 61 % comparativ cu 2005. în acest scop, propunerea înăspririi plafonul pentru emisii şi reducerea sa anuală.

• Regulamentul (UE) 2018/1999 al Parlamentului European şi al Consiliului din 11 decembrie 2018 privind guvernanta uniunii energetice şi a acţiunilor climatice (denumit „RGUE"), de modificare a Regulamentelor (CE) nr. 663/2009 şi (CE) nr. 715/2009 ale Parlamentului European şi ale Consiliului, a Directivelor 94/22/CE, 98/70/CE, 2009/31/CE, 2009/73/CE, 2010/31/UE, 2012/27/UE şi 2013/30/UE ale Parlamentului European şi ale Consiliului, a Directivelor 2009/119/CE şi (UE) 2015/652 ale Consiliului şi de abrogare a Regulamentului (UE) nr. 525/2013 al Parlamentului European şi al Consiliului

RGUE stabileşte fundamentul legislativ necesar pentru o guvernantă fiabilă, favorabilă incluziunii, eficientă din punctul de vedere al costurilor, transparentă şi previzibilă a uniunii energetice şi a acţiunilor climatice (mecanismul de guvernantă), care să asigure atingerea obiectivelor uniunii energetice prevăzute pentru anul 2030 şi pe termen lung în conformitate cu Acordul de la Paris din 2015. Mecanismul de guvernantă se bazează pe strategii pe termen lung, pe planuri naţionale integrate privind energia şi clima care acoperă perioade de zece ani începând cu perioada 2021-2030, pe rapoartele naţionale intermediare integrate privind energia şi clima corespunzătoare, prezentate de statele membre, şi pe măsurile de monitorizare integrate ale Comisiei.

• Regulamentul (UE) 2018/842 al Parlamentului European şi al Consiliului privind reducerea anuală obligatorie a emisiilor de gaze cu efect de seră de către statele membre în perioada 2021-2030 în vederea unei contribuţii la acţiunile climatice de respectare a angajamentelor asumate în temeiul Acordului de la Paris şi de modificare a Regulamentului (UE) nr. 525/2013 (denumit „Regulamentul ESR")

Regulamentul ESR stabileşte obligaţiile statelor membre în ceea ce priveşte contribuţiile lor minime pentru perioada 2021-2030 la îndeplinirea obiectivului Uniunii de reducere, în 2030, a emisiilor sale de gaze cu efect de seră cu 30 % sub nivelurile din 2005 în sectoarele care intră sub incidenţa articolului 2 din Regulament şi contribuie la atingerea obiectivelor Acordului de la Paris. Până la adoptarea propunerii legislative de revizuire a Regulamentului ESR, conform art. 4 alin. (1) şi Anexa I din Regulamentul ESR actual, România are fixată o obligaţie de reducere a emisiilor sale GES cu 2% în raport cu emisiile sale de gaze cu efect de seră din 2005, stabilite conform art. 4 alin. (3). Regulament fixează totodată normele de stabilire a alocărilor anuale de emisii şi de evaluare a progreselor înregistrate de statele membre în sensul respectării contribuţiilor lor minime.

• Regulamentul (UE) 2018/841 al Parlamentului European şi al Consiliului cu privire la includerea emisiilor de gaze cu efect de seră şi a absorbţiilor rezultate din activităţi legate de exploatarea terenurilor, schimbarea destinaţiei terenurilor şi silvicultură în cadrul de politici privind clima şi energia pentru 2030 şi de modificare a Regulamentului (UE) nr. 525/2013 şi a Deciziei nr. 529/2013/UE (denumit „Regulamentul LULUCF")

Separat de aceste patru acte normative, legislaţia sectorială şi măsurile de atenuare la nivelul UE şi SM contribuie la reducerile necesare pentru atingerea obiectivelor obligatorii stabilite prin art. 1, art. 2 alin. (1) şi art. 4 alin. (1) din Regulamentul (UE) 2021/1119 de instituire a cadrului

pentru realizarea neutralităţii climatice („Legea europeană a climei"), care la rândul său impune din punct de vedere juridic ambiţiile asumate prin Pactul Verde European.

Astfel, Legea europeană a climei a stabilit un obiectiv obligatoriu de realizare a neutralităţii climatice în Uniune până în 2050, în vederea îndeplinirii obiectivului pe termen lung privind temperatura prevăzut la articolul 2 alineatul (1) litera (a) din Acordul de la Paris. Concret, cel târziu până în 2050 se asigură un echilibru la nivelul Uniunii între emisiile şi absorbţiile de gaze cu efect de seră care sunt reglementate în dreptul Uniunii, astfel încât să se ajungă la zero emisii nete până la acea dată, iar Uniunea urmăreşte să obţină ulterior un bilanţ negativ al emisiilor. Pentru a îndeplini obiectivul privind neutralitatea climatică prevăzut la articolul 2 alineatul (1), obiectivul climatic obligatoriu al Uniunii pentru 2030 este o reducere internă a emisiilor nete de gaze cu efect de seră (emisii după deducerea absorbţiilor) cu cel puţin 55 % până în 2030 comparativ cu nivelurile din 1990.

La nivelul documentelor strategice naţionale cu implicaţii în reducerea emisiilor de GES, pârâtul menţionează:

• Hotărârea Guvernului nr. 1.076/2021 privind adoptarea Planului Naţional Integrat în domeniul Energiei şi Schimbărilor Climatice (PNIESC) 2021-2030

• Planul Naţional de Rezilienţă şi Redresare al României (PNRR)

Planul de Redresare şi Rezilienţă al României stabileşte prioritătile investiţionale şi reformele necesare pentru redresare şi creştere sustenabilă, corelate tranziţiei verzi şi digitale avute în vedere de Comisia Europeană. PNNR cuprinde 15 componente vizând diferite domenii de activitate cu impact inclusiv asupra politicilor naţionale în combaterea schimbărilor climatice şi protecţia mediului.

Conform documentului, pentru a atinge ambiţia de energie regenerabilă de peste 30,7% în 2030, România va dezvolta capacităţi suplimentare de energie regenerabilă, de cea. 6,9 GW comparativ cu 2015. Până la 31 decembrie 2025, o capacitate cumulativă de producţie de energie electrică instalată pe cărbune şi lignit de 3.780 MW va fi scoasă din funcţiune.

• Hotărârea Guvernului nr. 877/2018 privind aprobarea Strategiei naţionale pentru dezvoltare durabilă a României 2030

• Hotărârea Guvernului nr. 1.172/2022 pentru aprobarea Strategiei naţionale privind economia circulară (SNEC)

Reducerea emisiilor de GES, în paralel cu eficientizarea continuă a proceselor de producţie a bunurilor, reprezintă un obiectiv cheie al tranziţiei către o economie circulară. La nivel naţional, elemente ale tranziţiei către economie circulară în România sunt prevăzute, de asemenea, în SNDDR şi în PNRR.

• Hotărârea Guvernului nr. 1.227/2022 privind aprobarea Strategiei naţionale pentru păduri 2030 (SNP 2030)

• Hotărârea nr. 10/2023 privind modificarea şi completarea Strategiei naţionale de renovare pe termen lung pentru sprijinirea renovării parcului naţional de clădiri rezidenţiale şi nerezidenţiale, atât publice, cât şi private, şi transformarea sa treptată într-un parc imobiliar cu un nivel ridicat de eficienţă energetică şi decarbonat până în 2050, aprobată prin Hotărârea Guvernului nr. 1.034/2020

• Hotărârea nr. 59/2023 pentru aprobarea Strategiei naţionale privind educaţia pentru mediu şi schimbări climatice 2023-2030

Obiectivul principal al Strategiei este dezvoltarea de competenţe, cunoştinţe, abilităţi şi atitudini, care să le permită elevilor să contribuie la: 1. acţiuni relevante pentru combaterea schimbărilor climatice şi reducerea impactului acestora; 2. acţiuni de adaptare la schimbările climatice şi asigurarea modelelor de rezilienţă la schimbările climatice; 3. protejarea, refacerea şi promovarea folosirii sustenabile a ecosistemelor terestre, apelor curgătoare, lacurilor, mărilor şi resurselor marine şi stoparea pierderii biodiversităţii; 4. asigurarea modelelor sustenabile de consum şi de producţie.

• Planul Naţional Strategic 2023-2027 (Ministerul Agriculturii şi Dezvoltării Rurale) care cuprinde obiective şi măsuri specifice referitoare la contribuţia la atenuarea şi adaptarea la schimbările climatice, precum şi la energia durabilă.

• Stadiul Strategiei pe termen lung a României pentru reducerea emisiilor de gaze cu efect de seră (LTS) (raportat la argumentele reclamanţilor de la par. 4 Secţiunea 5.5. - pag. 31)

În ceea ce priveşte elaborarea Strategiei pe termen lung a României pentru reducerea emisiilor de gaze cu efect de seră (LTS), arătăm că LTS este în curs de elaborare, în concordanţă cu prevederile Regulamentului (UE) 2018/1999, fiind un proces complex, tehnic, care necesită implicare şi colaborare trans-sectorială şi inter-instituţională pentru stabilirea politicilor optime şi realizabile raportat la nevoile climatice şi energetice, sociale, eficiente din punct de vedere al costurilor. LTS va reflecta viziunea pentru o economie modernă şi un sistem energetic eficient care să contribuie la îndeplinirea angajamentelor asumate de România prin Acordul de la Paris şi Pactul ecologic european, precum şi oportunităţile şi provocările în materie de reducere a emisiilor antropice de gaze cu efect de seră.

În ceea ce priveşte cauza C-2022/2090, pârâtul arată că s-a transmis o scrisoare de punere în întârziere pentru neîndeplinirea obligaţiei în temeiul art.15 alin. (1) din Regulamentul (UE) 2018/1999, de notificare a Strategiei pe termen lung în temeiul RGUE. Au fost transmise Comisiei informaţii privind stadiul actual al elaborării LTS, precum şi calendarul activităţilor pentru finalizarea livrabilului LTS.

Cu privire la excepţia lipsei calităţii procesuale pasive a Ministerului Mediului, Apelor şi Pădurilor cu privire la petitul 2 („Să obligaţi pârâţii să ia toate măsurile necesare în vederea creşterii ponderii energiei regenerabile din consumul final de energie la 45% şi creşterii eficienţei energetice cu 13% până în 2030"), pârâtul invocă art. 1 alin. (2) şi (3) din H.G. nr. 43/2020 privind organizarea şi funcţionarea Ministerului Mediului, Apelor şi Pădurilor (denumit în continuare MMAP), cu modificările şi completările ulterioare, care stabileşte domeniile în care MMAP îşi desfăşoară activitatea, respectiv realizează politici la nivel naţional, cu referire şi la art. 1 alin. (1) şi art. 4 din Hotărârea Guvernului nr. 316/2021 privind organizarea şi funcţionarea Ministerului Energiei cu modificările şi completările ulterioare.

Or, al doilea petit cuprinde două capete de cerere distincte, după cum urmează:

• Primul capăt vizează obligarea pârâţilor la luarea tuturor măsurilor necesare în vederea creşterii ponderii regenerabilelor din consumul final de energie la 45% până în anul 2030; Or, cadrul comun unional pentru promovarea energiei din surse regenerabile este Directiva (UE) 2018/2001 a Parlamentului European şi a Consiliului din 11 decembrie 2018 privind promovarea utilizării energiei din surse regenerabile (Directiva RED II), transpusă prin Legea nr. 220/2008 pentru stabilirea sistemului de promovare a producerii energiei din surse regenerabile de energie, cu modificările şi completările ulterioare;

• Cel de-al doilea capăt vizează obligarea pârâţilor la luarea tuturor măsurilor necesare în vederea creşterii eficienţei energetice cu 13% până în anul 2030; Or, cadrul comun unional în scopul creşterii eficienţei energetice este Directiva 2012/27/UE a Parlamentului European şi a Consiliului din 25 octombrie 2012 privind eficienţa energetică, de modificare a Directivelor 2009/125/CE şi 2010/30/UE şi de abrogare a Directivelor 2004/8/CE şi 2006/32/CE (Directiva EED), transpusă prin Legea nr. 121/2014 privind eficienţa energetică, cu modificările şi completările ulterioare;

Obligaţia determinării cadrului procesual şi justificării calităţii procesuale revine reclamanţilor, în acord cu dispoziţiile art. 36 C. proc. civ., coroborate cu cele ale art. 2 alin. (1) lit. b) din Legea nr. 554/2004.

Având în vedere dispoziţiile de drept material invocate anterior, conţinutul petitului al doilea cu care a fost investită instanţa, precum şi argumentele invocate la Secţiunea 5.5 „Angajamentele asumate de România. Insuficienţa angajamentelor ţării noastre" paragrafele (2), (5)- (15) (pag. 31-33 din acţiune), Secţiunea 6.1.2.2 par. (4) pct. 1 (pag. 46), rezultă că legitimitatea procesuală pasivă revine doar autorităţii publice căreia îi aparţine competenţa, respectiv prerogativele stabilirii politicilor în domeniul promovării energiei din surse regenerabile, respectiv eficienţei energetice.

Cu privire la excepţia lipsei de interes şi, respectiv, a lipsei calităţii procesuale active în contencios administrativ a reclamanţilor persoană-fizică Pencea-Brădătan Elena-Roxana, Brădăţan Tudo-Iulian, Năstache-Hopârteanu Cătălina, Mirea Silvia, Dejeu Daniela-Luminiţa, pârâtul susţine că, dispoziţiile Legii nr. 554/2004 reglementează în ansamblu condiţiile speciale ce se impun a fi exercitate pentru a se declanşa controlul judecătoresc cu privire la refuzul nejustificat de a soluţiona o cerere.

Or, în aprecierea „in concreto" a interesului ce stă la baza promovării acţiunii, nu se poate reţine că reclamanţii persoane fizice au calitatea de persoană vătămată de actul administrativ contestat, în sensul dispoziţiilor art. 2 alin. 1 lit. a din Legea nr. 554/2004.

Cei cinci reclamanţi fac afirmaţii generale de tipul „reclamanţii de rând 2-6 suntem cetăţeni români profund îngrijoraţi de indiferenţa deliberată a pârâţilor faţă de drepturile noastre fundamentale la un climat stabil" (par. 2 pag. 6), „atitudinea pârâţilor aduce atingere drepturilor fundamentale individuale ale reclamanţilor de rândul 2-6" (par. 13 pag. 9), „suntem direct afectaţi de politica deficitară a pârâţilor în materia problemelor legate de schimbările climatice" (par. 1 pag. 14), „demersul nostru urmărind prevenirea afectării substanţiale a drepturilor noastre" (par. 5 pag. 15), respectiv enumera un set de drepturi potenţial afectate „inacţiunile pârâţilor, care amplifică provocările climatice, nesocotesc nu doar acest drept al subsemnaţilor, ci şi dreptul la un trai decent, dreptul la proprietate, dreptul la libertate şi însuşi dreptul la viaţă" (par. 3 pag. „inerţia autorităţilor periclitează atât interesul legitim al Asociaţiei Declic, cât şi drepturile fundamentale ale reclamanţilor de la rd. 2-6: dreptul la viaţă şi dreptul la viaţă privată, dreptul de proprietate, dreptul la un trai decent, dreptul la un mediu sănătos şi durabil, dreptul la un viitor demn al generaţiilor viitoare etc." (par. 3 pag. 5). Prin urmare, în baza unor simple alegaţii nu se poate susţine concluzia vătămării drepturilor şi intereselor legitime ale reclamanţilor.

De altfel, nu există o disociere reală între Asociaţia Declic şi cei cinci reclamanţi persoane fizice, reprezentând aceleaşi interese generale, colective. Astfel, reclamanta Pencea-Brădăţan Elena-Roxana şi reclamantul Brădăţan Tudor-Iulian figurează în cuprinsul Anexei 2 „Tabel privind membrii titulari fondatori şi nefondatori ai asociaţiei la data de 15.03.2022" la Statutul Asociaţiei Declic (Anexa nr. 1 depusă de către reclamanţi).

Reclamanta Pencea-Brădăţan Elena-Roxana este preşedintele Asociaţiei Declic aşa cum rezultă chiar din statutul Asociaţiei, iar reclamanţii Brădăţan Tudor, Mirea Silvia, Năstăsache-Hopârteanu Cătălina şi Dejeu Luminiţa fac parte din echipa Declic, aşa cum rezultă chiar de pe website-ul Asociaţiei Declic.

Acest lucru rezultă şi din cuprinsul conţinutului adreselor identice formulate de către Asociaţia Declic la data de 01.09.2022, respectiv 23.09.2022 şi adresa formulată de către reclamanţii persoane fizice la rd. 2-6. De altfel, chiar reclamanţii persoane fizice recunosc acest lucru în cuprinsul par. 4 de la pag. 7 din cerere („reclamanţii de la rd. 2-6 au adresat aceleaşi solicitări autorităţilor publice competente la data de 20.12.2022").

Faţă de toate aceste argumente, pârâtul solicită admiterea excepţiei lipsei de interes şi excepţia lipsei calităţii procesuale active a reclamanţilor persoane fizice şi respingerea cererii de chemare în judecată formulate de reclamanţii de la rândul 2-6 ca fiind lipsită de interes şi formulată de persoane lipsită de calitate procesuală activă.

Cu privire la excepţia inadmisibilităţii petitului nr. 1, pârâtul susţine că, reclamanţii au dedus judecăţii un capăt de cerere prin care solicită obligarea pârâţilor la luarea tuturor măsurilor necesare în vederea reducerii cu 55% a gazelor cu efect de seră până în 2030, respectiv atingerii neutralităţii climatice până în anul 2050.

Reclamanţii au stabilit în mod individual procentul de 55% de reducere a emisiilor GES până în 2030, respectiv de atingere a neutralităţii climatice până în 2050. Procentul de 55% de reducere a emisiilor GES până în 2030, respectiv obiectivul de atingere a neutralităţii climatice până în 2050 este stabilit la nivelul Uniunii, urmând a fi atinse în mod colectiv de către statele membre ale UE, astfel cum rezultă din art. 1, 2 alin. (1) şi 4 alin. (1) din Legea Europeană a Climei.

Fiecare stat membru are dreptul de a-şi stabili nivelul de reducere a emisiilor de GES până în 2030, respectiv până în 2050, raportat la circumstanţele sale sociale, economice şi de mediu.

Investirea instanţei de contencios administrativ cu un capăt de cerere prin care se urmăreşte, în realitate, impunerea cu concursul instanţei a unor procente de reducere a emisiilor de GES până în 2030, respectiv până în 2050, lăsând doar pârâţilor posibilitatea de a-şi stabili măsurile, reprezintă o eludare a principiului separaţiei puterilor în stat consacrat de art. 1 alin. (4) din Constituţia României şi o depăşire în cauză a atribuţiilor puterii judecătoreşti.

Guvernul României, la propunerea şi analiza ministerelor de resort, este singurul în măsură să aprecieze oportunitatea, necesitatea, posibilitatea concretă de realizare a unor procente de reducere a emisiilor de GES până în 2030, respectiv până în 2050, având în vedere toate aspectele

de ordin bugetar şi impactul economic al stabilirii unui asemenea angajament şi a măsurilor aferente atingerii angajamentului.

În plus, instanţa nu poate obliga pârâţii să declare urgenţă climatică (raportat la afirmaţiile de la par. 8 pag. 37), fără a încălca principiul amintit anterior. în mod similar, acelaşi raţionament trebuie avut în vedere cu privire la referirile la inexistenţa unei legi naţionale a climei (par. 8 pag. 37; par. 2 pag. 45).în consecinţă, vă solicităm să respingeţi primul petit ca inadmisibil având în vedere argumentele expuse anterior.

Prin urmare, pârâtul solicită respingerea pe cale de excepţie şi a petitului 4 cu privire la pârâtul Ministrul Mediului, Apelor şi Pădurilor, domnul Bârna Tânczos, având în vedere că obiectul acestuia vizează aplicarea unui amenzi de la expirarea termenului prevăzut la petitul 3 până la adoptarea efectivă a măsurilor ce se impun pentru atingerea obiectivelor prevăzute la petitul 1.

Cu privire la excepţia inadmisibilităţii petitului 3 sub aspectul solicitării reclamanţilor de a adopta planuri concrete şi coerente cu privire la componenta „adaptare" la schimbările climatice, în vederea atingerii obiectivelor asumate potrivit petitelor 1 şi 2 ca urmare a lipsei unei solicitări venite din partea reclamanţilor cu privire la acest aspect şi implicit, inexistentei unui refuz nejustificat de a soluţiona o cerere, pârâtul susţine că din analiza tuturor solicitărilor, rezultă faptul că reclamanţii nu au adresat pârâtei MMAP o cerere privitoare la adoptarea în termen de maximum 30 zile de la primirea cererii a unor planuri concrete şi coerente de adaptare la schimbările climatice. Reclamanţii au solicitat doar „adoptarea în termen de maxim 30 zile de la primirea cererii a unor planuri concrete şi coerente de atenuare a schimbărilor climatice".

Or, în limbajul de specialitate, atenuarea este diferită de adaptare. Potrivit Grupului interguvernamental de experţi în evoluţia climei (Intergovernmental Panel on Climate Change-IPCC), organism din cadrul Naţiunilor Unite responsabil pentru evaluarea aspectului ştiinţific al schimbărilor climatice, prin atenuare (mitigation) se înţelege „o intervenţie antropică pentru a reduce sursele de gaze cu efect de seră sau pentru îmbunătăţirea absorbanţilor de gaze cu efect de seră", în timp ce prin adaptare (adaptation) se înţelege „ajustarea sistemele naturale sau umane în răspunsul la stimuli climatici reali sau preconizaţi sau la efectele acestora, în scopul diminuării impactului negativ sau exploatării beneficiilor oportunităţilor" . Nici în cuprinsul UNFCCC şi nici al Acordului de la Paris nu există o definiţie a atenuării sau adaptării.

În acest sens sunt elocvente dispoziţiile art. 4 par. 1 lit. b) din UNFCCC, ratificată de România prin Legea nr. 24/1994, Acordul de la Paris, ratificat de România prin Legea nr. 57/2017, cuprinde secţiune dedicată adaptării şi obiectivului global de adaptare. MMAP revizuieşte în prezent politicile şi măsurile în domeniul adaptării în cuprinsul „Strategiei Naţionale privind Adaptarea la Schimbările Climatice pentru perioada 2022-2030 cu perspectiva anului 2050" (SNASC) şi „Planului naţional de acţiune pentru implementarea SNASC" (PNASC) în cadrul proiectului RO-ADAPT. SNASC şi PNASC reprezintă documente strategice de politică publică care acoperă următoarele domenii: (1) Resurse de apă, (2) Păduri, (3) Biodiversitate şi servicii ecosistemice, (4) Populaţie, sănătate publică şi calitatea aerului, (5) Educaţie şi conştientizare, (6) Patrimoniu cultural, (7) Sisteme urbane, (8) Agricultură şi dezvoltare rurală, (9) Energie, (10) Transporturi, (11) Turism şi activităţi recreative, (12) Industrie şi (13) Asigurări.

Documentele au parcurs evaluarea strategică de mediu conform Hotărârii Guvernului nr. 1076/2004 privind stabilirea procedurii de realizare a evaluării de mediu pentru planuri şi programe. în baza Deciziei etapei de încadrare nr. 6 din 15.09.2022 pentru SNASC şi PNASC s-a decis faptul că Strategia şi Planul aferent acesteia nu necesită evaluare de mediu şi urmează a fi supuse procedurii de adoptare fără aviz de mediu. Precizăm că toate informaţiile privitoare la parcurgerea procedurii evaluării strategice de mediu sunt disponibile pe website-ul MMAP.

SNASC şi PNASC vor parcurge în cursul acestui an procedura privind transparenţa decizională, parte integrantă din procedura de adoptare a actului normativ de aprobare.

Având în vedere că nu există o identitate între noţiunea de adaptare şi atenuare, vă rugăm să constataţi faptul că pârâţii nu ne-au solicitat să adoptăm în termen de maxim 30 zile de la primirea cererii a unor planuri concrete şi coerente de adaptare la schimbările climatice. Pentru existenţa unui refuz nejustificat, trebuie să fim în prezenţa unei solicitări exprese adresată autorităţii publice, adică în prezenţa unei notificări scrise şi motivată în drept.

Or, în lipsa unei solicitări, nu există un refuz nejustificat din partea MMAP în soluţionarea unui cereri. Pe cale de consecinţă, pârâtul solicită respingerea petitului al treilea ca inadmisibil cu privire la acest aspect.

În continuare, pârâtul a prezentat consideraţii privitoare la respingerea acţiunii ca neîntemeiată. În conformitate cu deciziile luate la cea de-a 20-a sesiune a Conferinţei părţilor (COP) la Convenţia-cadru a Naţiunilor Unite privind schimbările climatice (UNFCCC), Uniunea şi statele sale membre şi-au prezentat contribuţia preconizată stabilită la nivel naţional , împreună cu o anexă care conţine informaţii cuantificabile şi calitative privind atingerea INDC. Chiar înainte de semnarea şi ratificarea Acordului de la Paris, UE şi Statele sale Membre s-au angajat să atingă în comun un obiectiv obligatoriu de reducere pe plan intern cu cel puţin 40 %, faţă de nivelul din 1990, a emisiilor de gaze cu efect de seră la scara întregii economii până în 2030, astfel cum a fost stabilit prin Concluziile Consiliului European din octombrie 2014.

Contribuţiile determinate la nivel naţional (NDC) servesc ca instrument de angajament în cadrul Acordului de la Paris şi sunt o componentă cheie a ciclului său de ambiţie şi a cadrului de responsabilitate. Conform art. 4 din Acordul de la Paris, fiecare ţară îşi stabileşte propriile ţinte NDC (de aceea se numesc determinate la nivel naţional), trebuie apoi să urmărească progresul către implementarea şi realizarea acesteia, însă nu au nicio obligaţie legală în atingerea lor.

În acelaşi timp, nu toate prevederile Acordului de la Paris stabilesc norme obligatorii din punct de vedere juridic pentru statele părţi. De exemplu, o serie de prevederi referitoare la atenuarea emisiilor sunt formulate ca recomandări şi nu ca norme imperative . Cu titlu de exemplu, obligaţia centrală a Acordului de la Paris prevăzută la articolul 4.2 prima teză, prevede că „Fiecare parte pregăteşte, comunică şi menţine contribuţii naţionale determinate succesive (NDC) pe care intenţionează să le realizeze." Aceasta este singura obligaţie efectivă din punct de vedere juridic privitoare la atenuare şi este de natură strict procedurală. Cu alte cuvinte, prevederea nu impune statelor părţi să îşi pună în aplicare NDC-ul, ci doar să îl pregătească, să îl comunice.

Fiecare NDC succesiv trebuie să întruchipeze cel mai înalt nivel de ambiţie al uneia dintre părţi - trebuie să facă tot posibilul pentru a atinge treptat obiectivul Acordului de la Paris privind temperatura [art. 2.1 lit. (c)]. Este important de subliniat că obiectivul menţionat anterior este unul general care nu impune restricţii cantitative privind emisiile de gaze cu efect de seră sau un buget global sau naţional de carbon. În timpul negocierilor privind adoptarea Acordul de la Paris, Părţile au luat în considerare posibilitatea de a „înzestra" Acordul cu un mecanism obligatoriu de monitorizare individuală a angajamentele statelor. însă, în final, Părţile au decis să nu creeze un asemenea mecanism, ci au optat pentru instituirea unui mecanism de monitorizare a implementării Acordului de la Paris, orientat spre facilitare, care funcţionează într-un mod transparent, neconflictual şi nepunitiv.

Implementarea deplină a propunerilor Fit for 55 şi a planului REPowerEU ar pune UE şi statele sale membre pe cale să atingă obiectivul actual NDC .

Performanţa statelor părţi în atingerea NDC-urilor conform Acordului de la Paris se măsoară pe baza rapoartelor IPCC şi Deciziilor luate de către Conferinţele Părţilor la aceste două acorduri, iar nu pe baza testelor Litmus ori a altor teste la care fac referire reclamanţii în cuprinsul acţiunii.

Alegerea mijloacelor (politici şi măsuri) de combatere a schimbărilor climatice se încadrează în marja de apreciere a statului. Având în vedere complexitatea sarcinii, această alegere este dificilă şi are în vedere interese diferite care trebuie echilibrate. De altfel, în chestiuni de mediu, Curtea Europeană a Drepturilor Omului a subliniat de multe ori că aceasta nu poate substitui punctul de vedere al autorităţilor locale cu privire la cea mai bună politică adoptată, astfel încât a recunoscut întotdeauna o marjă „mare" de apreciere pentru state, în special în zonele sociale şi tehnice dificile (Hatton şi colab., supra., para. 100-101; Tătar, supra., para. 108).

În consecinţă, pârâtul solicită respingerea ca neîntemeiate argumentele pârâţilor referitoare la încălcarea art. 4 din Acordul de la Paris şi inexistenţa unor bugete naţionale de carbon.

În ceea ce priveşte alăturarea la nivel de ţară a României la Angajamentul Global privind Metanul, datele actualizate din cel de-al cincilea Raport Bienal al României , publicat la finalul anului 2022, vor permite elaborarea unei analize care să orienteze, pe baze documentare curente, decizia României de raliere la această iniţiativă.

În al doilea rând, la 15 decembrie 2021, Comisia a prezentat propunerea de Regulament privind reducerea emisiilor de metan în sectorul energetic, ca o a doua parte a pachetului de propuneri legislative din „Fit for 55". După numeroase negocieri la nivelul statelor membre, în decembrie 2022, Consiliul a ajuns la un acord (abordare generală) cu privire la propunere. în prezent, Consiliul a demarat negocierile cu Parlamentul pentru a obţine un acord privind un text final.

Referitor la afirmaţii referitoare la certificatele de emisii de GES şi certificatele verzi, pârâtul menţionează faptul că reclamanţii fac confuzie între certificatul verde şi certificatul de emisii de gaze cu efect de seră.

Certificatul verde este titlul ce atestă producerea din surse regenerabile de energiei a unei cantităţi de energie electrică şi este reglementat prin art. 2 lit. h) din Legea nr. 2020/2008.

Certificatul de emisii de gaze cu efect de seră este titlul care conferă dreptul de a emite o tonă de dioxid de carbon echivalent într-o perioadă definită, valabil numai pentru îndeplinirea scopului H.G. nr. 780/2006, cu modificările şi completările ulterioare şi care este transferabil în condiţiile prevăzute de aceeaşi hotărâre. Certificatele de emisii de gaze cu efect de seră sunt alocate gratuit operatorilor care gestionează o instalaţie în care se desfăşoară una sau mai multe activităţi prevăzute în Anexa nr. 1 la H.G. nr. 780/2006, cu modificările şi completările ulterioare.

De asemenea, reclamanţii realizează o mare confuzie între certificatul verde şi unitatea de reducere a emisiilor de gaze cu efect de seră (denumit în continuare „CER").

În consecinţă, pârâtul solicită respingerea ca neîntemeiate a tuturor argumentelor referitoare la certificatul verde şi certificatul de emisii de gaze cu efect de seră.

În final, pârâtul arată că este necesară o acţiune concertată a tuturor statelor parte la UNFCCC şi Acordul de la Paris (în tripla sa dimensiune - (i) atenuarea emisiilor şi dezvoltarea economică cu un nivel scăzut de emisii de gaze cu efect de seră (emisii GES); (ii) creşterea capacităţii de adaptare la efectele negative ale schimbărilor climatice şi de încurajare a rezistenţei la acestea; (iii) alinierea fluxurilor financiare într-un mod care să corespundă unei evoluţii către o dezvoltare cu un nivel scăzut de emisii GES şi rezistentă la schimbările climatice), a actorilor privaţi (de pildă, bănci multilaterale de dezvoltare, companii, în special cele din industrii energointensive sau cu un consum ridicat de combustibili fosili), precum şi a cetăţenilor în luarea de măsuri şi acţiuni eficiente pentru combaterea fenomenului schimbărilor climatice.

În ceea ce priveşte toate solicitările de probatoriu de la pag. 77 acestea nu pot fi depuse de către MMAP, deoarece nu sunt în competenţa MMAP, astfel cum rezultă din art. 1 al HG nr. 43/2020 privind organizarea şi funcţionarea Ministerului Mediului, Apelor şi Pădurilor şi art. 1 alin. (1) din Hotărârea Guvernului nr. 316/2021 privind organizarea şi funcţionarea Ministerului Energiei. În ceea ce priveşte solicitările de probatoriu de la pag. 78 acestea au fost adresate pârâtului Guvernul României, Curţii de Conturi a României (nu este parte în dosar) şi Ministerului Investiţiilor şi Proiectelor Europene (nu este parte în dosar).

În concluzie, având în vedere elementele de fapt şi de drept, pârâtul solicită respingerea cererii de judecată astfel cum aceasta a fot formulată.

Pârâtul MINISTRUL MEDIULUI, APELOR ŞI PĂDURILOR, DOMNUL BARNA TANCZOS a depus întâmpinare prin care a solicitat admiterea excepţiei prematurităţii formulării acţiunii introductive de instanţă si, pe cale de consecinţă, respingerea ca prematur formulată împotriva sa; admiterea excepţiei lipsei calităţii sale procesuale pasive, iar pe fond a solicitat respingă ca nefondată a acţiunii reclamanţilor (f.159, vol.III).

Cu titlu prealabil, pârâtul a menţionat că susţine şi invocă toate apărările şi excepţiile formulate de către Ministerul Mediului, Apelor şi Pădurilor prin întâmpinare.

Cu privire la excepţiei prematurităţii solicitării de amendare, pârâtul susţine că introducerea acţiunii împotriva sa are doar un caracter formal, exclusiv în virtutea faptului că deţine calitatea de conducător al autorităţii publice centrale - Ministerul Mediului, Apelor şi Pădurilor.

În vederea punerii în executare a unei eventuale hotărâri favorabile, reclamanţii solicită instanţei ca, prin hotărârea pe care o va pronunţa, să mi se aplice o amendă în cuantum de 20% din salariul minim brut pe economie pe zi de întârziere.

Pârâtul consideră că acest termen de sancţionare curge de la data rămânerii definitive a hotărârii de sancţionare (care potrivit art. 24 din Legea nr. 554/2004 trebuie să fie un litigiu separat) şi până la data punerii efective în executare.

O hotărâre judecătorească prin care se stabileşte „reducerea cu 55 % a gazelor cu efect de seră" nu poate fi pusă în aplicare de o simplă persoană fizică, fie ea şi conducător al Ministerului Mediului, Apelor şi Pădurilor, iar reclamanţii pleacă de la o prezumţie absolută de neaplicare a unui titlu executoriu, în sensul că ar exista un grad ridicat de nepunere în aplicare a hotărârii şi se solicită şi aplicarea amenzii. În acest context, pârâtul invocă prevederile art. 24 alin. (3) din Legea contenciosului administrativ nr. 554/2004, cu modificările şi completările ulterioare şi susţine că, hotărârea prin care se poate dispune aplicarea amenzii conducătorului instituţiei se poate face doar ulterior rămânerii definitive a prezentului litigiu, printr-o hotărâre distinctă şi un dosar distinct.

În caz contrar, s-ar putea deduce că instanţa îşi însuşeşte susţinerile reclamanţilor şi ar putea pleca de la prezumţia de neexecutare culpabilă a obligaţiilor stabilite prin titlul executoriu de către conducătorii autorităţilor publice.

Cu privire la excepţia lipsei calităţii procesuale pasive, pârâtul a învederat că, în calitate de conducător al Ministerului Mediului, Apelor şi Pădurilor, nu are calitate procesuală pasivă în acest litigiu, întrucât atingerea obiectivelor solicitate prin acţiune nu poate cădea doar în sarcina mea, ci este necesară o colaborare între instituţiile române şi cele europene. Consideră că aspectele de fond din care rezultă lipsa calităţii sale procesuale pasive se pot observa fară putinţă de tăgadă în întâmpinarea Ministerului Mediului, Apelor şi Pădurilor. Mai mult, politica europeană în această privinţă poate suferi modificări/adaptări, iar obligarea sa la o anumită atitudine poate fi contrară modificărilor stabilite la nivel european. Astfel cum a detaliat şi ministerul în întâmpinare, acestea sunt doar anumite obiective la nivel european, iar nu o obligaţie absolută şi de la care nu se poate face excepţie (de pildă reducerea cu 54% a GES).

Nu în ultimul rând, nu persoanele fizice sunt cele care adoptă măsuri/planuri/bugete, ci instituţiile publice în urma unei cooperări solide inter-instituţionale, atât la nivel naţional, cât şi la nivel european, acestea fiind responsabile de atingerea obiectivelor. Totodată, pârâtul consideră că nu are calitate procesuală pasivă, întrucât simpla calitate de conducător al unei autorităţi nu este per se suficientă pentru atragerea răspunderii pentru orice deficienţă a instituţiei.

Cu alte cuvinte, reclamantele nu au făcut dovada existenţei vreunei legături de cauzalitate între fapta pretins prejudiciabilă şi paguba produsă, limitându-se la a chema în judecată persoanele care conduc instituţiile publice.

Pe fond, pârâtul solicită respingerea acţiunii reclamanţilor, prezentând, în esenţă, aceleaşi argumente pe care pârâtul Ministerului Mediului, Apelor şi Pădurilor, le-a susţinut prin propria întâmpinare. Legea europeană a climei a stabilit un obiectiv obligatoriu de realizare a neutralităţii climatice în Uniune până în 2050, în vederea îndeplinirii obiectivului pe termen lung privind temperatura, prevăzut la articolul 2 alineatul (1) litera (a) din Acordul de la Paris.

Concret, cel târziu până în 2050 se asigură un echilibru la nivelul Uniunii între emisiile şi absorbţiile de gaze cu efect de seră care sunt reglementate în dreptul Uniunii, astfel încât să se ajungă la zero emisii nete până la acea dată, iar Uniunea urmăreşte să obţină ulterior un bilanţ negativ al emisiilor.

Pentru a îndeplini obiectivul privind neutralitatea climatică prevăzut la articolul 2 alineatul (i), obiectivul climatic obligatoriu al Uniunii pentru 2030 este o reducere internă a emisiilor nete de gaze cu efect de seră (emisii după deducerea absorbţiilor) cu cel puţin 55 %până în 2030 comparativ cu nivelurile din IQQO.

În ceea ce priveşte obiectivul climatic obligatoriu al Uniunii pentru 2040, conform considerentului 30 şi art. 4 din Legea Europeană a Climei, Comisia ar trebui să propună un obiectiv climatic intermediar al Uniunii pentru 2040, după caz, cel târziu în termen de şase luni de la prima evaluare la nivel global efectuată în temeiul Acordului de la Paris.

La data 05.04.2023, intervenienta ASOCIAŢIA BANKWATCH ROMÂNIA a depus cerere de intervenţie accesorie în favoarea reclamanţilor prin care a solicitat admiterea acţiunii acestora (f.106, vol.IV).

În susţinerea acestei cereri, intervenienta arată că este îndeplinită condiţia interesului, prevăzută prin dispoziţiile art. 61 alin. 1 Cpr.civ., având în vedere că (i) Asociaţia Bankwatch

România are ca scop şi obiectiv statutar protecţia mediului înconjurător, că (ii) aspectele solicitate de reclamanţi în contradictoriu cu pârâţii din prezenta cauză se circumscriu mecanismelor prin care se atinge obiectivul de protecţie a mediului înconjurător şi că (iii) prin sprijinirea apărărilor reclamanţilor în prezenta cauză şi prin potenţiala admitere a cererii acestora, intervenienta contribuie în mod concret la atingerea scopului propriu şi obiectivelor sale statutare. în consecinţă, vă rugăm să constataţi că interesul Bankwatch este legitim şi că sunt îndeplinite condiţiile prevăzute de lege pentru admiterea în principiu a prezentei cereri.

Intervenienta invocă disp. art. 8 ale Convenţiei Europene a Drepturilor Omului care reafirmă dreptul fundamental al omului la un mediu sănătos şi susţine că în România nu există un sistem de sprijin coerent care să susţină atingerea ponderii de 45% în energie regenerabilă. Instalarea de noi capacităţi a stagnat din 2016 când România a atins ţinta pentru 2020 şi a considerat inutilă păstrarea schemei de sprijin.

Respectarea legislaţiei de protecţie a mediului este o provocare continuă la nivel naţional, încălcările şi derogările frecvente sunt realizate chiar cu girul autorităţilor. S-au înregistrat încălcări flagrante ale legislaţiei privind evaluarea impactului de mediu a proiectelor energetice, în special în cazuri de extindere a carierelor de lignit din judeţul Gorj, unde instanţele au anulat sau suspendat în diferite ocazii acordurile de mediu emise pentru astfel de lucrări sau în cazuri notorii precum cel al proiectului de hidrocentrală din Defileul Jiului implementat de compania de stat Hidroelectrica care a fost oprit printr-o decizie definitivă a Curţii de Apel Bucureşti, întrucât autorizaţiile de construcţie emise în cadrul acestui proiect au fost emise fără realizarea unor evaluări de mediu . Interesul autorităţilor naţionale pentru asigurarea sănătăţii şi protecţiei mediului înconjurător este "grăitor" şi din perspectiva încercărilor repetate din ultimul an ale Parlamentului de modifica limitele ariilor protejate din România pentru a facilita construcţia unor proiecte energetice de interes naţional problematice, unele declarate ilegale prin decizii definitive ale instanţelor naţionale, altele făcând obiectul unor procese în curs .

Prin urmare, situaţia de fapt justifică pe deplin prezentul demers judiciar şi, în acest context, admiterea acţiunii introductive formulată de reclamanţi este nu doar necesară, ci şi pe deplin întemeiată.

Potrivit dispoziţiilor legale pârâţii sunt cei cărora le revine responsabilitatea de a lua măsuri în domeniul schimbărilor climatice, inclusiv în scopul reducerii GES (gazelor cu efect de seră) şi poartă responsabilitatea legală şi lor Ie revine obligaţia de a lua măsurile ce fac obiectul primului capăt de cerere.

Măsurile a căror adoptare reprezintă o obligaţie în sarcina pârâţilor trebuie să aibă ca efect reducerea cu minim 55% a GES până în anul 2030. Această împrejurare rezultă în mod direct şt neechivoc din dispoziţiile art. 4 alin. 1 din Regulamentul (UE) 2021/1119, care stabilesc ca obiectiv climatic obligatoriu „o reducere internă a emisiilor nete de gaze cu efect de sera (emisii după deducerea absorbţiilor) cu cel puţin 55% pana în 2030 comparativ cu nivelurile din 1990". Or, măsurile luate de pârâţi în exercitarea obligaţiilor ce le revin potrivit legii nu pot avea efectul reducerii GES în modalitatea la care obligă art. 4 alin. 1 din Regulamentul (UE) 2021/1119 câtă vreme la pct. A, l.l.i, par. 2 din Planul Naţional Integrat în Domeniul Energiei şi Schimbărilor Climatice (PNIESC) 2021-2030, se reţine „obiectivul privind reducerea emisiilor interne de gaze cu efect de seră cu cel puţin 40% până în 2030, comparativ cu 1990". Prin urmare, prin simpla comparaţie a celor două acte juridice se poate concluziona că dispoziţiile art. 4 alin. 1 din Regulamentul (UE) 2021/1119 sunt încălcate de către pârâţii din prezenta cauză.

Măsurile a căror adoptare reprezintă o obligaţie în sarcina pârâţilor trebuie să aibă ca efect atingerea neutralităţii climatice până în anul 2050. Această obligaţie rezultă în mod direct şi neechivoc din dispoziţiile art. 2 din Regulamentul (UE) 2021/1119.

Pârâţii din prezenta cauză nu au elaborat o strategie pe termen lung care să conţină măsurile necesare atingerii obiectivului climatic obligatoriu expus în paragraful anterior, în ciuda faptului că elaborarea unei astfel de strategii este obligatorie şi trebuia realizată până la 1 ianuarie 2020, conform art. 15 alin. 1 din Regulamentul (UE) 2018/1999, ale cărui dispoziţii prevăd că „până la 1 ianuarie 2020 şi apoi până ia 1 ianuarie 2029 şi, ulterior, la fiecare zece ani, fiecare stat membru elaborează şi prezintă Comisiei strategia sa pe termen lung, cu o perspectivă de cel puţin 30 de ani".

Încălcarea obligaţiei art. 15 alin. 1 din Regulamentul (UE) 2018/1999 a făcut obiectul unei scrisori de punere în întârziere din partea Comisiei Europene, 1NFR(2022)2090, notificată pârâtului Guvernul României la data 29.09.2022, însă pârâţii nu s-au conformat nici până în prezent.

România este stat semnatar al Acordului de la Paris, încheiat la Paris la 12 decembrie 2015 şi semnat de România la New York la 22 aprilie 2016, ratificat prin Legea nr. 57/2017. Astfel, văzând dispoziţiile art. 31 din Legea nr. 590/2003 privind tratatele, care prevăd că „aplicarea şi respectarea dispoziţiilor tratatelor în vigoare reprezintă o obligaţie pentru toate autorităţile statului român, inclusiv autoritatea judecătoreasca (...)",inclusiv instanţelor judecătoreşti le revine responsabilitatea de a asigura aplicarea si respectarea dispoziţiilor cuprinse în Acordul de la Paris.

În sensul aspectelor prezentate mai sus, intervenienta invocă dispoziţiile art. 2 din Acord, care definesc obiectivele asumate de semnatari ca fiind „menţinerea creşterii temperaturii medii globale cu mult sub 2°C peste nivelurile preindustriale şi continuarea eforturilor de limitare a creşterii temperaturii la 1,5°Cpeste nivelurile preindustriale". Prin urmare, acest obiectiv reprezintă o obligaţie ce revine autorităţilor române, şi nu o declaraţie formală lipsită de energie juridică, motiv pentru care reclamanţii solicită a se constata că adoptarea măsurilor menite să aibă efect reducerea cu minim 55% a GES (gazelor cu efect de seră) până în anul 2030 şi neutralitatea climatică până în anul 2050 reprezintă o obligaţie ce izvorăşte şi din Acordul climatic de la Paris.

Prin dispoziţiile Directivei (UE) 2018/2001 se stabileşte în sarcina statelor membre obligaţia de a asigura o pondere a consumului de energie din surse regenerabile de cel puţin 32% din consumul final brut de energie la nivelul anului 2030. Totodată, art. 3 alin. 1 al Directivei statuează că o majorare a acestui nivel este probabilă şi se va putea concretiza până în anul 2023. Arătăm instanţei că prin pachetul legislativ „RepowerEU" a fost majorată ponderea de la nivelul de „cel puţin 32%" la nivelul de „cel puţin 45%", ajustându-se astfel în mod concret nivelul minim de ambiţie pe care România trebuie să şi-l asume.

Pârâţii îşi însuşesc doar la nivel declarativ obiectivul creşterii ţintei, aspect ce rezultă din împrejurarea că prin actul normativ de transpunere a Directivei (UE) 2018/2001, respectiv OUG nr. 163/2022, în paragraful al XIX-lea din expunerea de motive, pârâţii care sunt şi semnatari ai actului normativ menţionat anterior, recunosc transpunerea cu întârziere a Directivei şi justifică urgenţa legiferării prin intermediul ordonanţei de urgenţă „ţinând cont de contextul discuţiilor actuale derulate la nivelul Comisiei Europene, privind revizuirea Directivei (UE) 2018/2001 şi creşterea ambiţioasă a ţintei pentru energia din surse regenerabile la 45%". Arătăm că la data adoptării OUG nr. 163/2022, respectiv la data de 29 noiembrie 2022, Parlamentul European deja adoptase (la 16.09.2022) propunerea Comisiei cu privire la majorarea obiectului la nivelul de 45%.

Măsurile luate de pârâţi în exercitarea obligaţiilor ce le revin potrivit legii nu pot avea efectul creşterea ponderii regenerabilelor din consumul final de energie ta 45% câtă vreme la pct. A, 1.1.i, par. 2 din Planul Naţional Integrat în Domeniul Energiei şi Schimbărilor Climatice (PNIESC) 2021-2030, se reţine „în ceea ce priveşte cota de energie regenerabilă, Comisia Europeană a recomandat României să crească nivelul de ambiţie pentru 2030, până la o pondere a energiei din surse regenerabile de cei puţin 34%. In consecinţă, nivelul de ambiţie cu privire la ponderea energiei din surse regenerabile a fost revizuit faţă de varianta actualizată a PNIESC, de la o cotă propusă iniţial de 27,9%, la o cota de 30,7%". Prin urmare, vă rugăm să constataţi că se impune obligarea pârâţilor la a lua toate măsurile necesare în vederea creşterii ponderii regenerabilelor din consumul final de energie la 45% în 2030.

Pârâţii recunosc şi acceptă că sunt necesare măsuri urgente în vederea asigurării atingerii obiectivelor agreate prin Acordul de la Paris. Cu titlu de exemplu, în expunerea de motive a OUG nr. 163/2022, pârâţii semnatari ai actului normativ declară că „prin Directiva (UE) 2018/2001, au fost impuse obligaţii statelor membre, care trebuie să ia în considerare nivelul de ambiţie prevăzut în Acordul de ta Paris, precum şi progresele tehnologice, inclusiv reducerea costurilor investiţiilor în energia din surse regenerabile" şi că „aprobarea completării cadrului legal necesar pentru promovarea utilizării energiei din surse regenerabile pentru perioada 2021-2030 capătă un caracter de urgentă excepţional". Astfel fiind, termenul solicitat de către reclamanţi prin cererea de chemare în judecată, de maxim 30 de zile de la rămânerea definitivă a hotărârii, este un termen ce corespunde urgenţei pe care o cere nevoia luării măsurilor capabile să atingă obiectivele prevăzute în petitele 1 şi 2 din cererea introductivă.

La data 06.04.2023, reclamanţii ASOCIAŢIA DECLIC, PENCEA-BRĂDĂŢAN ELENA-ROXANA, BRĂDĂŢAN TUDOR-IULIAN, NĂSTĂSACHE-HOPÂRTEANU CĂTĂLINA, MIREA SILVIA, DEJEU DANIELA LUMINIŢA au depus note de şedinţă prin care au combătut apărările şi excepţiile invocate de pârâţi şi a susţinut temeinicia cererii sale de chemare în judecată (f.115, vol.IV).

Excepţiile invocate de Ministerul Mediului, Apelor şi Pădurilor sunt neîntemeiate, raportat la următoarele argumente, probe şi considerente legale:

Excepţia lipsei de interes a Asociaţiei Declic nu are suport legal, prin raportare la obiectul acţiunii în contencios, obiectivele Asociaţiei Declic şi decizia ICCJ nr. 8/2020.

Pârâtul Ministerul Mediului, Apelor şi Pădurilor invocă faptul că subscrisa nu am atacat un act administrativ normativ efectiv. Or, aceasta este o viziune limitată asupra obiectului contenciosului administrativ, dat fiind că art. 8 alin. (1) din Legea nr. 554/2004 face referire atât la situaţia atacării unui act administrativ, teza I, cât şi la ipoteza nesoluţionării în termen sau a refuzului nejustificat de soluţionare a unei cereri, teza a ll-a.

Reclamanţii susţin că au dovedit de ce refuzul de a adopta măsurile solicitate constituie un refuz nejustificat. Au adresat pârâţilor cereri având ca obiect petitele formulate, însă prin răspunsurile formulate, pârâţii doar au trecut în revistă planurile deja existente, insistând asupra faptului că fiecare ţară îşi stabileşte în mod autonom propriile contribuţii naţionale determinate (în continuare CND), dar ignorând standardele după care se stabilesc aceste CND: cel mai ridicat nivel de ambiţie posibilă şi transparenţa.

În sprijinul susţinerilor lor, reclamanţii invocă jurisprudenţei CEDO şi jurisprudenţa europeană în care s-a reţinut interesul organizaţiilor neguvernamentale de a promova acţiuni în materia schimbărilor climatice.

Cu privire la excepţia lipsei calităţii procesuale active a reclamanţilor de rd. 2-6, reclamanţii susţin că este neîntemeiată, prin raportare la dispoziţiile art. 9 Convenţia Aarhus, art. 35 alin. (1) Constituţia României şi art. 3 lit. h) teza a ll-a din O.U.G. nr. 195/2005.

Argumentul pârâtului în sensul că reclamanţii nu sunt reprezentativi este contrazis de graficul din ultimul raport de sinteză IPCC în care se ilustrează sugestiv modul în care generaţiile prezente şi viitoare vor experimenta o lume diferită şi temperaturile tot mai ridicate.

Reclamanţii susţin că deţin calitatea procesuală activă necesară pentru a promova o acţiune cu acest specific, acest drept fiindu-le conferit atât de normele constituţionale, legislaţia secundară, cât şi de tratatele internaţionale pe care România le-a ratificat, integrându-le în dreptul intern, cu referire şi la art. 35 alin. (1) din Constituţia României.

De asemenea, Statul Român, din rolul său de garant al dreptului la un mediu sănătos şi echilibrat ecologic, a reglementat, la nivel de principiu, dreptul de acces la justiţie în probleme de mediu (art. 3 lit. h) teza a doua din O.U.G. nr. 195/2005), şi la nivel de aplicare directă, dreptul oricăror persoane de „a se adresa direct autorităţilor judecătoreşti în probleme de mediu, indiferent dacă s-a produs sau nu un prejudiciu" la art. 5 lit. d) din O.U.G. nr. 195/2005. Important este de menţionat că în urma modificării acestui act normativ prin Legea nr. 265/2006, persoanele fizice au dreptul de a se adresa instanţelor judecătoreşti, indiferent dacă s-a produs sau nu un prejudiciu mediului.

Pe cale de consecinţă, datorită existenţei acestor reglementări internaţionale, constituţionale şî legislative, în contextul existenţei unei identităţi între persoana subsemnaţilor de rd. 2-6 şî titularul dreptului afirmat, excepţia calităţii procesuale active invocată de Ministerul Mediului, Apelor şi Pădurilor este necesar a fi respinsă ca neîntemeiată.

De asemenea şi excepţia lipsei de interes a reclamanţilor de rd. 2-6 se impune a fi respinsă, raportat atât încălcarea unor drepturi fundamentale individuale şi riscul imediat de afectare substanţială a drepturilor şi libertăţilor în viitor, consecinţă a încălcării de către pârât a obligaţiilor pozitive, cât şi încălcarea drepturilor colective, interesul legitim privat fiind dublat de interesul public.

Reclamanţi de rd. 2-6 susţin că au justificat în secţiunea 4.2. a acţiunii introductive interesul legitim privat prin raportare la încălcarea drepturilor şi libertăţilor subiective garantate de Constituţia României, Carta Drepturilor Fundamentale a UE, aceste două acte de legislaţie primară consacrând inclusiv dreptul fundamental la un mediu sănătos, drept ce nu se regăseşte şi în CEDO.

Drepturile fundamentale individuale şi colective ale reclamanţilor sunt periclitate din cauza legăturii dintre un mediu sănătos şi prerogativele supra legale cum sunt viaţa, sănătatea sau demnitatea umană, având totodată atât calitatea de victimă cât şi pe aceea de potenţială victimă, în sensul reţinut de CEDO în jurisprudenţa sa.

Pe cale de consecinţă, interesul legitim public ce dublează interesul legitim privat este şi el dovedit şi suficient argumentat în prezenta speţă.

Excepţia inadmisibilităţii petitului 1 se impune a fi respinsă întrucât solicitarea adresată instanţei nu duce la încălcarea principiului separaţiei puterilor în stat

Prin cererea introductivă, arată reclamanţii, au invocat atât încălcarea de către pârâţi a unor obligaţii pozitive, cât şi a drepturilor omului. Nici din perspectiva drepturilor omului, teoria elaborată de pârât privind încălcarea separaţiei puterilor în stat nu are fundament legal.

Solicitarea de obligare a pârâţilor la intrarea în limitele legii, respectiv adoptarea de măsuri (marja de apreciere cu privire la tipurile de măsuri le aparţine) compatibile cu obiectivele climatice asumate prin art. 2 (1) lit. a) din Acordul de la Paris: limitarea încălzirii globale la 1,5 grade Celsius, respectiv 2 grade Celsius.

Excepţia inadmisibilităţii parţiale a petitului 3, sub aspectul obligării pârâtului la adoptarea unor planuri privind adaptarea la schimbările climatice, este vădit nefondată, întrucât din întreaga argumentaţie a cererilor formulate în procedura graţioasă reiese fără echivoc că reclamanţii se referă atât la lipsa măsurilor de atenuare cât şi de adaptare la schimbările climatice.

Printre strategiile de adaptare se numără şi promovarea producerii de energie din surse regenerabile, precum şi elaborarea de strategii privind creşterea eficienţei energetice.

Singura utilitate a acestui argument invocat în apărare de către pârât este că poate fi echivalat cu o recunoaştere a refuzului nejustificat.

Excepţia lipsei calităţii procesuale pasive a persoanelor fizice chemate în judecată nu are nîciun suport legal, motiv pentru care se impune respingerea acesteia.

Pârâtul Ministerul Mediului, Apelor şi Pădurilor invocă această excepţie, argumentând că persoanele fizice chemate în judecată, la acest moment miniştrii de resort ai Ministerelor chemate în judecată, respectiv domnii miniştri Tanczos Bârna, Nicoale-lonel Ciucă şi Virgil Popescu, nu sunt responsabili în mod direct pentru „deficienţa instituţiei" specializate pe mediu. Or, susţin reclamanţii această „răspundere" există şi este aplicabilă fiindcă:

Pârâtul Ministrul Mediului, Apelor şi Pădurilor, potrivit art. 56 alin. 1 lit. c) din Codul Administrativ, „elaborează şi aplică strategia proprie a ministerului, integrată strategiei de dezvoltare economico-socială a Guvernului precum şi politicile şi strategiile în domeniile de activitate ale ministerului", iar potrivit art. 13 alin. 1 din H.G. nr. 43/2020, asigură conducerea Ministerului Mediului, Apelor şi Pădurilor;

Pârâtul Ministrul Energiei, potrivit art. 56 alin. 1 lit. c) din Codul Administrativ, „elaborează şi aplică strategia proprie a ministerului, integrată strategiei de dezvoltare economico-socială a Guvernului, precum şi politicile şi strategiile în domeniile de activitate ale ministerului", iar potrivit art. 10 alin. 1 din H.G. nr. 316/2021, asigură conducerea Ministerului Energiei;

Pârâtul Prim-ministrul României, potrivit dispoziţiilor art. 107 alin. (1) din Constituţia României, „conduce Guvernul şi coordonează activitatea membrilor acestuia"; suplimentar, potrivit art. 1 alin. 2 din H.G. nr. 563/2022 pentru constituirea, organizarea şi funcţionarea Comitetului interministerial privind schimbările climatice, pârâtul conduce Comitetul care, potrivit art. 3 lit. a) „analizează şi propune soluţii în vederea asigurării concordanţei politicilor din sectoarele care au impact asupra schimbărilor climatice, propuse de ministerele de resort, cu angajamentele luate la nivel naţional, faţă de Uniunea Europeană, Organizaţia Naţiunilor Unite şi alte organizaţii internaţionale la care România este parte, şi monitorizează progresele înregistrate de instituţiile din România în implementarea acestora".

Pârâtul MINISTRUL ENERGIEI a depus întâmpinare prin care a solicitat admiterea excepţiei lipsei calităţii procesuale active şi de interes a reclamanţilor, a excepţiei lipsei calităţii procesuale pasive pentru persoanele fizice chemate în judecată (conducătorii instituţiilor pârâte) a excepţiei prematurităţii aplicării amenzii pentru conducătorii instituţiilor pârâte, iar pe fond respingerea acţiunii reclamanţilor împotriva Ministerului Energiei ca neîntemeiată (f.49, vol.V).

Referitor la excepţia lipsei de interes a reclamanţilor, pârâtul precizează că, reclamanţii au înţeles să formuleze prezenta acţiune invocând o pretinsă nerespectare a condiţiilor de mediu şi a atingerii obiectivelor prezentate în cuprinsul cererii de chemare în judecată, fară să atace un act administrativ efectiv, nespecificând ce act administrativ este atacat sau ce inacţiune concretă este contestată şi invocă dispoziţiile art. 8 alin. (I^1) şi alin. (I^2) din Legea nr. 554/2004, Decizia Curţii Constituţionale a României nr. 66 din 15 ianuarie 2009, referitoare la excepţia de neconstituţionalitate a prevederilor art. 8 alin. (1^1) din Legea nr. 554/2004, Decizia nr. 8/02.03.2020 a Înaltei Curţi de Casaţie şi Justiţie.

In ceea ce priveşte excepţia lipsei de interes şi lipsa calităţii procesuale active a reclamanţilor persoane fizice: Pencea Brădăţan Elena Roxana, Bradăţan Tudor Iulian, Năstache-Hopârteanu Cătălina, Mirea Silvia, Dejeu Daniela Luminiţa, pârâtul invocă dispoziţiile art. 2 lit. a), art. 2 alin. (1) lit. p) din Legea nr. 554/2004 art. 2 alin. (1) lit. p) din Legea nr. 554/2004, potrivit cărora, reclamanţii în calitatea lor de persoane fizice ori grup de persoane fizice, fară personalitate juridică, nu pot acţiona ca atare în contenciosul administrativ subiectiv, decât dacă şi sub condiţia în care dovedesc că sunt titulari ai unor drepturi subiective sau interese legitime private [art. 2 alin. (1) lit. a) din Legea nr. 554/2004] şi, drept urmare, nu pot formula o acţiune în contencios obiectiv, respectiv să ceară anularea unui act administrativ, pornind de la premisa lezării unui interes legitim public, decât dacă şi sub condiţia în care probează că vătămarea interesului legitim public exhibat decurge logic (ca o consecinţă, să existe deci raport de cauzalitate) din încălcarea dreptului subiectiv sau interesului legitim privat [art. 8 alin. (l^1) din Legea nr. 554/2004.

Raportat la cele prezentate, pârâtul apreciază că simplele afirmaţii generale ale reclamanţilor nu pot susţine concluzia vătămării drepturilor şi intereselor legitime. În acest scop, reclamanţii trebuiau să probeze folosul practic concret materializat prin raportare la propria persoană, conform scopului şi obiectivelor asociaţiei prevăzute în statutul acesteia. Consecinţele absenţei interesului, a vătămării personale a reclamantei se extend şi asupra unei alte condiţii de exerciţiu a acţiunii civile, cea a calităţii procesuale active.

Referitor la excepţia lipsei calităţii procesuale pasive pentru persoanele fizice chemate în judecată (conducătorii instituţiilor pârâte), pârâtul susţine că, acceptând modalitatea de stabilire a cadrului procesual aleasă de reclamant, s-ar accepta ca ministrul energiei să deţină dublă calitate de pârât în cadrul aceluiaşi litigiu, ceea ce este inadmisibil din punct de vedere procedural.

Având în vedere dispoziţiile art. 5 lit. k), art. 2 alin. 1, art. 54, coroborat cu art. 55 din Codului Administrativ, pârâtul precizează că ministrul nu este autoritate publica centrala, ci are calitatea de demnitar (persoana care exercita funcţii de demnitate publica in temeiul unui mandat, potrivit Constituţiei, codului administrativ si altor acte normative) si asigura conducerea si reprezentarea autorităţii administraţiei publice centrale (minister).

In temeiul art. 117 din Constituţie, prin Hotărârea Guvernului nr. 316/2021 s-a aprobat organizarea şi funcţionarea Ministerului Energiei. Conform art. 10, conducerea ministerului se asigură de către ministrul energiei care reprezintă şi angajează instituţia injustiţie. Potrivit alin. (5), în faţa autorităţilor jurisdicţionale Ministerul Energiei este reprezentat prin personalul de specialitate, pe baza împuternicirilor acordate pentru fiecare cauză în parte, conform competenţei stabilite prin ordin al ministrului energiei.

Aşadar, partea care se considerară vătămată printr-un act emis de o autoritate publică are posibilitatea chemării în judecată a organului emitent al actului administrativ ca pârât, calitate procesuală pasivă având persoana juridică de drept public care a emis actul administrativ, respectiv are competenţă de a soluţiona cererea reclamantului în procedura administrativă prealabilă.

Această soluţie este în acord si cu respectarea principiului securităţii actelor juridice (claritatea şi previzibilitatea dreptului), mai ales că însăşi persoanei juridice de drept public i se recunoaşte calitatea de autoritate emitentă. Aceasta se întemeiază pe de altă parte şi pe prevederile Codului civil care dobândind aplicabilitate în materia contenciosului administrativ în temeiul art. 28 din Legea nr. 554/2004 supun regulilor mandatului raporturile dintre persoana juridică şi organele sale. Noţiunea de capacitate administrativă a dobândit aplicabilitate prin art. 5 lit. o) din OUG nr. 57/2019 privind Codul administrativ.

În consecinţă, exista coerenta in reglementarea generala, în sensul că actele sunt emise de autorităţile publice, iar nu de către demnitari, conducători ai autorităţii respective. Astfel, excepţia

privind lipsa calităţii procesuale pasive a ministrului energiei este întemeiată, având în vedere că pârâtul nu este autoritatea publica care a emis actele contestate, în sensul art. 2 alin. 1 lit. b) din Legea nr. 554/2004.

Potrivit doctrinei juridice calitatea procesuală pasiva presupune identitatea între persoana

Devine incident art. 15 din Codul Civil, conform căruia niciun drept nu poate fi exercitat în scopul de a vătăma sau păgubi pe altul ori într-un mod excesiv şi nerezonabil, contrar bunei-credinţe, deoarece factorul declanşator al acestei acţiuni şi care ar putea reprezenta interesul în justificarea introducerii cererii de chemare in judecată, îl reprezintă aşa numitele "acţiuni populare", înaintate de diverse persoane de drept privat care nu sunt în măsură să justifice, prin raportare Ia propria persoană, o vătămare a unui drept sau interes legitim privat şi ca atare, îşi întemeiază acţiunea numai pe teza generică a vătămării interesului public,

Referitor la excepţia prematurităiii aplicării amenzii pentru conducătorii instituţiilor pârâte, pârâtul apreciază că, aplicarea amenzii conducătorului instituţiei se poate face doar ulterior rămâne definitive a hotărârii ce va fi dispusă în prezentul litigiu, ca o măsură de constrângere a conducătorul autorităţii de a proceda la executarea obligaţiei, în acord şi cu dispoziţiile art. 24 alin. 3 din Legea nr. 554/2004 cu modif.şi complet. ulterioare.

Pe fondul cauzei, se susţine că, în ceea ce priveşte energia regenerabilă, pentru perioada 2021-2030, obiectivul privind un consum de energie din surse regenerabile de 32% în 2030, reprezintă ţinta de surse regenerabile de energie (SRE) asumată nivelul Uniunii Europene. Statele Membre se situează între 30.4% şi 31,9%, iar în cazul României, conform Planului Naţional Integrat în domeniul Energiei şi Schimbărilor Climatice (PNIESC), ponderea globală energiei din surse regenerabile în consumul final brut de energie la nivelul anului 2030 este de 30,7%, Menţionăm faptul că ţintele propuse de România în PNIESC au rezultat în urma unor procese de modelare bază de date macroeconomice, strategii şi documente de politică publică aflate în vigoare Ia moment respectiv, ţinându-se cont de caracteristicile economiei naţionale şi de impactul şi costurile acestor măsuri asupra consumatorului final.

In prezent, la nivelul Ministerului Energiei, pentru revizuirea PNIESC care se va realiza conform Regulamentului UE 2018/1999 sunt analizate mai multe scenarii printre care şi cel de atingere a neutralităţii climatice în 2050, ce va fi consultat şi actualizat de autorităţile responsabile.

Astfel, ţinând cont de cele menţionate anterior, în ceea ce priveşte sursele regenerabile de energie, noile ţin şi obiective din PNIESC şi fondurile disponibile în Planul Naţional de Redresare şi Rezilienţă (PNRR) Fondul pentru Modernizare (FM), la acest moment ME intenţionează să finanţeze dezvoltarea de capacita noi de producţie din surse regenerabile până în anul 2030.

în plus, Ia creşterea ponderii energiei din surse regenerabile şi la reducerea gazelor cu efect de seră vor contribui şi prosumatorii (13.109 prosumatori persoane fizice şi 492 prosumatori persoane juridice) cu o putere totală instalată de 15.811 kW conform celor mai recente date din documentul "Raport privind Monitorizarea Activităţii Prosumatorilor pentru anul 2021" al ANRE.

În legislaţia naţională, conform OUG nr. 163/20225, energia electrică din surse regenerabile autoprodusă de prosumatori, care rămâne în spaţiile lor, nu va face obiectul unor proceduri discriminatorii sau disproporţionate şi oricărei taxe au oricărui tarif, susţinând astfel dezvoltarea acestora.

Ţinta la nivelul Uniunii Europene privind eficienţa energetică este în prezent stabilită prin Directiva (UE) 2018/2002 din 11 decembrie 2018 de modificare a Directivei 2012/27/UE privind eficienţa energetică şi este de cel puţin 32,5% până în 2030 faţă de proiecţiile de modelare din 2007 pentru 2030.

Prin pianul REPoyverEU, Comisia Europeană a propus creşterea ţintei Uniunii Europene privind eficienţa energetică de la 9% la 13% comparativ cu Scenariul de Referinţă 2020 având în vedere faptul că în prezent sunt purtate negocieri la nivelul Consiliului şi Parlamentului European cu privire la propunerea de revizuire a Directivei privind Eficienţa Energetica. Ţinta de creştere a eficienţei energetice, până la 13 % faţă de Scenariul de Referinţă 2020 se regăseşte doar în stadiul de propunere şi nu generează obligaţii pentru statele membre.

Având în vedere faptul că Directiva privind eficienţa energetică este în curs de revizuire, până la publicarea acesteia în Jurnalul Oficial al Uniunii Europene precum şi faptul că transpunerea ei trebuie efectuată, în termenul stabilit la momentul adoptării acesteia.

La data de 10.04.2023, intervenienta ASOCIAŢIA 2CELSIUS a depus cerere de intervenţie accesorie în favoarea reclamanţilor, solicitând admiterea cererii de chemare în judecată (f.64, vol.V).

Având în vedere dispoziţiile art. 61 alin. 1 şi 2 C.pr.civ., intervenienta susţine că justifică un interes privat, legitim, născut şi actual, în formularea cererii de intervenţie accesorie în privinţa controlului de legalitate vizând un act administrativ cu impact asupra mediului.

În acest context, intervenienta invocă şi dispoziţiile art. 20 alin. (6) din O.U.G nr. 195/2005, prevederile art. 9 pct. 2, art. 2 pct. 5 din Convenţia din 25 iunie 1998 privind accesul la informaţie, participarea publicului la luarea deciziei şi accesul la justiţie în probleme de mediu (Convenţia de la Aarhus) şi susţine că a dovedit, prin statutul asociaţiei, că este o organizaţie înregistrată în conformitate cu prevederile legale, care are drept scop promovarea, iniţierea, consultanta, caritatea şi pregătirea în domeniul ecologiei ori protecţiei mediului şi schimbărilor climatice, iar acest litigiu are o legătură directă cu schimbările climatice - legislaţie şi politici publice, astfel că raportat la toate aceste considerente expuse, apreciem că cererea de intervenţie accesorie se impune a fi admisă.

Asociaţia 2Celsius intervine în acest dosar aducând argumente din aria emisiilor de gaze cu efect de seră (GES) din domeniul transporturilor, un domeniu ale cărui emisii au un caracter excepţional, urgent şi masiv - cu implicaţii grave şi imediate asupra sănătăţii publice.

Emisiile GES generate de România (peste 14% din emisiile UE)) provin din sectorul transporturilor (peste 20% din emisiile C02 la nivel naţional). Transportul este singurul sector din România ale cărui emisii sunt în creştere.

Promovarea electromobilităţii în transportul rutier (vehicule uşoare şi transport public urban), precum şi promovarea transportului electric feroviar sunt măsuri esenţiale la care statul roman s-a obligat prin Planul Naţional Integrat în domeniul Energiei şi Schimbărilor Climatice (PNIESC).

Pârâţii recunosc şi acceptă că sunt necesare măsuri urgenţe în vederea asigurării atingerii obiectivelor agreate prin Acordul de la Paris.

Până la începutului anului 2023 au fost înregistrate doar 23.000 de automobile electrice. Cu toate acestea, importul de maşini second-hand s-a menţinut la un nivel ridicat începând 2017, anul în care s-a anulat taxa la înmatriculare. Anual, numărul maşinilor second-hand din import înmatriculate în România a fost în medie de peste 400.000 pe an. în aceste condiţii, în 2022, parcul auto din România este al doilea cel mai vechi din Europa cu o medie de 16,9 ani. Prin urmare, subvenţiile la achiziţie nu pot fi singurul instrument fiscal pentru a oferi un parc auto cu emisii zero, iar România a subutilizat alte forme de impozitare a autovehiculelor.

Conform studiilor rezultate în urma cercetărilor 2Celsius, programe guvernamentale precum Programul Rabla nu îşi ating obiectivele de mediu şi de reducere a emisiilor de gaze cu efect de seră'3'. Scopul asumat al programului este „îmbunătăţirea calităţii mediului", iar obiectivele vizează poluarea aerului din emisiile de gaze de eşapament provenite de la maşinile vechi, poluarea solului şi a apei din cauza scurgerilor toxice şi realizarea obiectivelor stabilite pentru reciclarea şi reutilizarea deşeurilor provenite din vehicule scoase din funcţiune. Cu toate acestea, cu excepţia primelor ecologice suplimentare acordate pentru achiziţionarea de maşini care emit mai puţin de 96 g C02 / km, nu există indicatori clari stabiliţi sau disponibili pentru monitorizarea şi evaluarea realizării acestor obiective de mediu.

La data de 09.05.2023, reclamanţii au depus răspuns la întâmpinările formulate de pârâţi prin care au solicitat respingerea argumentelor invocate de aceştia, cu consecinţa admiterii cererii lor de chemare în judecată (f.139, vol.V).

Pârâtul MINISTERUL MEDIULUI, APELOR ŞI PĂDURILOR a depus întâmpinare prin care au solicitat respingerea cererilor de intervenţie întrucât intervenienţii nu au făcut dovada şi nici nu au invocat nici un drept sau interes legitim privat vătămat prin actul administrativ atacat, în sensul art. 1 din Legea nr. 554/2004 (f.14,vol.V).

La data de 22.05.2023, reclamanţii au depus note de şedinţă prin care au combătut argumentele invocate de Ministerul Mediului, Apelor şi Pădurilor prin întâmpinarea la cererile de intervenţie (f.73, vol.V).

Analizând actele şi lucrările dosarului, instanţa reţine următoarele:

În raport de modul de soluţionare al excepţiei lipsei calităţii procesuale pasive a Primului Ministru, a Ministrului Mediului, Apelor şi Pădurilor şi a Ministrului Energiei, încheierea de şedinţă din data de 10.04.2023 (f.77 Vol. V) are caracter interlocutoriu (art. 235 C.p.c.). Prin urmare, cum prin încheierea de şedinţă din data de 10.04.2023 Curtea a admis această excepţie, se va respinge, în consecinţă, cererea de chemare în judecată în raport de pârâţii Primul Ministru, Ministrul Mediului, Apelor şi Pădurilor şi Ministrul Energiei, ca fiind formulată împotriva unor persoane fără calitate procesuală pasivă.

Potrivit art. 248 alin. (1) N.C.P.C. *Instanţa se va pronunţa mai întâi asupra excepţiilor de procedură, precum şi asupra celor de fond care fac inutilă, în tot sau în parte, administrarea de probe ori, după caz, cercetarea în fond a cauzei*.

Calitatea procesuală presupune existenţa unei identităţi între persoana chemată în judecată (pârâtul) şi cel care este subiect pasiv în raportul juridic dedus judecăţii (calitate procesuală pasivă). Reclamantul, fiind cel care porneşte acţiunea, trebuie să justifice atât calitatea procesuală activă, cât şi calitatea procesuală pasivă a persoanei pe care a chemat-o în judecată. Această obligaţie îşi are temeiul în dispoziţiile art. 32, 36 C.p.c. Prin indicarea pretenţiei sale, precum şi a împrejurărilor de fapt şi de drept pe care se bazează această pretenţie reclamantul justifică îndreptăţirea de a introduce cererea împotriva unui anumit pârât.

Curtea apreciază ca *neîntemeiată, excepţia lipsei calităţii procesuale pasive cu privire la petitul nr. 2 al cererii de chemare în judecată, invocată de Ministerul Mediului, Apelor şi Pădurilor prin întâmpinare*, având în vedere prevederile art. 1 alin. 2-4, alin. 7, art. 5 şi art. 6 din HG 43/2020, art. 1 alin. 1, art. 4 din HG 316/2021, în raport de care Curtea apreciază că este instituită o competenţa partajată/interdependentă între Ministerul Mediului, Apelor şi Pădurilor şi Ministerul Energiei în vederea asigurării: creşterii ponderii consumului de energie din surse regenerabile din valoarea consumului final de energie, respectiv a creşterii eficienţei energetice, iar aspectul privind existenţa sau inexistenţa drepturilor şi a obligaţiilor afirmate în raport cu anumite măsuri punctuale necesare atingerii cotelor expuse în cererea de chemare în judecată constituie o chestiune de fond.

Totodată, Curtea apreciază că în cazul unei acţiuni introductive de instanţă complexe, care cuprinde petite ce interferează unele cu altele, existenţa calităţii procesuale pasive a pârâţilor se analizează cu privire la ansamblul mijlocului procesual exercitat, iar nu raportat la fiecare capăt de cerere, fracţionat, deoarece o asemenea analiză ar fi formală şi lipsită de finalitate juridică; chiar dacă Curtea ar fi admis excepţia lipsei calităţii procesuale pasive a Ministerul Mediului, Apelor şi Pădurilor pe un anumit petit din cererea de chemare în judecată, acest Minister tot ar fi rămas în proces în raport de celelalte petite, faţă de care nu a invocat excepţia lipsei calităţii procesuale pasive. Ca urmare, finalitatea admiterii excepţiei, aceea de a fi scos din proces, nu ar fi atinsă, fiind chiar în interesul pârâtului să rămână împrocesuat cu privire la ansamblul petitelor acţiunii în raport de argumentele aduse de reclamanţi ce impun verificări prin prisma atribuţiilor Ministerului Mediului, Apelor şi Pădurilor, neputând fi omis aspectul invocat în adresa nr. DGEICPSC/107169/10.01.2023 (f.134 vol. I) de către Ministerul Mediului, Apelor şi Pădurilor potrivit căruia acest minister întreprinde în mod constant măsuri menite să contribuie la creşterea ponderii regenerabilelor în consumul final de energie şi la creşterea eficienţei energetice prin intermediul strategiilor de dezvoltare la nivelul ministerului cât şi prin intermediul diverselor programe finanţate prin AFM.

În fapt, Curtea reţine, văzând preambulul Regulamentelor UE nr. 2018/841, nr. 2018/842, nr. 2018/1999 şi nr. 2021/1119 (emise în vederea punerii în aplicare a angajamentelor Uniunii asumate în cadrul Acordului de la Paris) că sunt de necontestat ameninţările date de schimbările climatice şi impactul poluării asupra dreptului la un mediu de viaţă sănătos.

Dintru-nceput însă, Curtea, *fără a minimiza importanţa respectării şi garantării dreptului la un mediu de viaţă sănătos*, apreciază că în raport de art. 9 alin. 2, art. 22 alin. 6 C.p.c., văzând modalitatea în care sunt formulate petitele acţiunii (obligarea pârâţilor *să ia toate măsurile necesare,* respectiv *să adopte planuri concrete şi coerente*), văzând şi argumentele expuse în

acţiune (secţiunea 3.3 pg. 9 pct. 4,5, secţiunea 4 pg. 12, pct. 2), **apreciază că admiterea acţiunii, *în condiţiile în care dispozitivul sentinţei nu ar identifica*, pentru că nu are cum, care sunt acele măsuri necesare şi care sunt acele planuri concrete şi coerente în vederea atingerii obiectivelor climatice, *ar presupune pronunţarea unei hotărâri judecătoreşti nesusceptibile de executare***, de natură a reprezenta o încălcare a art. 6 din Convenţia europeană a drepturilor omului, cu referire la jurisprudenţa Curţii Europene a Drepturilor Omului în care s-a reţinut că dreptul de a apela la o instanţă ar fi iluzoriu, dacă ordinea juridică internă a unui stat contractant ar permite ca o hotărâre judecătorească definitivă şi obligatorie să fie ineficientă în detrimentul unei părţi (Imobiliara Saffi împotriva Italiei - 1999, paragraful 63; Dorneanu împotriva României - 2007, paragraful 32).

Prin pronunţarea unei hotărâri de admitere a acţiunii reclamanţilor, fără indicarea unor criterii pe baza cărora creanţa conţinută de titlul executoriu să devină certă (reclamanţii lăsând la libera marjă de apreciere a pârâţilor măsurile ce urmează a fi întreprinse deşi premisa în promovarea prezentului litigiu o constituie din perspectiva acestora tocmai insuficienţa măsurilor luate), se lasă posibilitatea debitorilor de a refuza ori de a stabili ei înşăşi întinderea şi aplicarea titlului executoriu.

În acest context, pornind de la principiul disponibilităţii care guvernează procesul civil, nu se impune efectuarea vreunei verificări în raport de standardul jurisprudenţei CEDO relativ la art. 8. Chiar şi în eventualitatea în care s-ar ajunge la a se reţine o încălcare a protejării sănătăţii populaţiei şi a mediului din partea pârâţilor, modalitatea în care au fost formulate petitele acţiunii nu este aptă să conducă la înlăturarea încălcării, ajungându-se exact în punctul care a constituit premisa declanşării litigiului, pârâţii fiind abilitaţi, de această dată şi cu concursul instanţei, la a întreprinde demersuri neidentificate/necuantificabile, în vederea atingerii parametrilor doriţi de reclamanţi, iar orice măsură luată de către pârâţi dacă nu este apreciată satisfăcătoare de către reclamanţi (a se vedea aspectele de la secţiunea 5.5 pg. 31, secţiunea 6.2.2 pct. 5 pg. 51) generează posibilitatea declanşării procedurii de executare în acord cu art. 24 şi urm. din Legea 554/2004, ajungându-se în final ca reclamanţii şi instanţele de judecată în etapa executării să se substituie puterii legislative, prin reglementarea măsurilor necesare atingerii parametrilor urmăriţi de reclamanţi în cadrul prezentului litigiu.

Analizând art. 2 pct. 11 din **Regulamentul 2018/1999**, Curtea constată că noţiunea „*obiectivele Uniunii privind energia şi clima pentru 2030*" operează pe patru paliere concrete cu posibilitatea de extindere a acestora:

a) **obiectivul** obligatoriu la nivelul Uniunii **de reducere internă cu** *cel puțin 40 % față de anul 1990 a emisiilor de gaze cu efect de seră* la nivelul întregii economii, care trebuie îndeplinit până în 2030,

b) **obiectivul** obligatoriu la nivelul Uniunii privind **o pondere de cel** *puțin 32 % a energiei din surse regenerabile consumate* în Uniune în anul 2030,

c) **obiectivul** principal la nivelul Uniunii de **îmbunătățire** *cu cel puțin 32,5 %* **a eficienței energetice** în 2030

și

d) **obiectivul** *de 15 %* privind **interconectarea rețelelor electrice** pentru 2030

sau

e) ***orice obiective ulterioare*** convenite în acest sens de Consiliul European sau de Parlamentul European și de Consiliu pentru anul 2030.

Potrivit pct. 69 din preambul, Comisia ar trebui *să revizuiască* punerea în aplicare a prezentului regulament *în 2024 și, ulterior, la fiecare cinci ani* și, după caz, să prezinte propuneri de modificare pentru a asigura punerea în aplicare corespunzătoare și realizarea obiectivelor acestuia. Revizuirile respective ar trebui să țină seama de evoluția situației *și să se bazeze pe rezultatele bilanțului la nivel mondial prevăzut prin Acordul de la Paris*.

Procedura revizuirii este prevăzută la art. 38 din Regulament. Similar, o procedură de revizuire este prevăzută și de art. 17 din Regulamentul 2018/841, respectiv de art. 15 Regulamentul 2018/842.

Astfel, s-a urmărit a se realiza o revizuire constantă luând în considerare, printre altele, evoluția circumstanțelor naționale, modul în care toate sectoarele economiei contribuie la reducerea emisiilor de gaze cu efect de seră, evoluțiile internaționale și eforturile întreprinse pentru atingerea

obiectivelor pe termen lung ale Acordului de la Paris, pentru a se garanta o îndeplinire cât mai obiectivă şi rapidă posibilă a obiectivelor de mediu.

În acest sens, Curtea remarcă, prin adoptarea **Regulamentului nr. 2021/1119,** existenţa ***unui nou obiectiv climatic*** **al Uniunii pentru 2030** care *înlocuieşte obiectivul de la art. 2 pct. 11 din Regulamentul 2018/1999 privind emisiile de gaze cu efect de seră* (palierul evidenţiat la lit. a anterior), *iar obiectivele enunţate la palierele b şi c nu au suferit modificări*.

Astfel, potrivit art. 4 alin. 1 din Regulamentul 2021/1119, pentru a îndeplini obiectivul privind neutralitatea climatică prevăzut la articolul 2 alineatul (1) - cel târziu până în 2050 se asigură un echilibru la nivelul Uniunii între emisiile şi absorbţiile de gaze cu efect de seră care sunt reglementate în dreptul Uniunii, *astfel încât să se ajungă la zero emisii nete* până la acea dată, iar Uniunea urmăreşte să obţină ulterior un bilanţ negativ al emisiilor, ***obiectivul climatic obligatoriu al Uniunii pentru 2030*** *este o* ***reducere internă a emisiilor nete de gaze cu efect de seră*** *(emisii după deducerea absorbţiilor) cu cel puţin 55 % până în 2030 comparativ cu nivelurile din 1990.*

Potrivit art. 2 alin. 2 pgf. 1 şi 3 din Regulamentul 2021/1119, *până la 30 iunie 2021*, Comisia *revizuieşte* legislaţia relevantă a Uniunii pentru a permite îndeplinirea obiectivului stabilit la alineatul (1) de la prezentul articol şi a obiectivului privind neutralitatea climatică prevăzut la articolul 2 alineatul (1) şi ia în considerare adoptarea măsurilor necesare, inclusiv adoptarea de propuneri legislative, în conformitate cu tratatele; iar după adoptarea propunerilor legislative de către Comisie, aceasta monitorizează procedurile legislative pentru diferitele propuneri şi poate raporta Parlamentului European şi Consiliului dacă rezultatul preconizat al respectivelor proceduri legislative, *analizate împreună*, ar duce la îndeplinirea obiectivului stabilit la alineatul (1); în cazul în care rezultatul preconizat nu este în conformitate cu obiectivul stabilit la alineatul (1), Comisia poate lua măsurile necesare, inclusiv adoptarea de propuneri legislative, în conformitate cu tratatele.

Astfel, se poate observa continua modificare a politicii în privinţa mediului la nivelul UE, iar Comisia este ţinută să evalueze, la diferite intervale de timp modul în care ar trebui modificată legislaţia Uniunii care pune în aplicare obiectivul climatic pentru 2030 pentru a se realiza o astfel de reducere a emisiilor nete.

În acest scop, Comisia a anunţat o revizuire a legislaţiei relevante în domeniul climei şi al energiei, *care va fi adoptată într-un pachet care va acoperi,* printre altele, *energia din surse regenerabile, eficienţa energetică*, exploatarea terenurilor, impozitarea energiei, standardele de performanţă privind emisiile de CO_2 pentru autovehiculele uşoare, *partajarea eforturilor* şi EU ETS.

Prin urmare, la momentul actual, combaterea ameninţărilor la schimbările climatice şi sporirea capacităţii de adaptare, consolidarea rezilienţei şi reducerea vulnerabilităţii la schimbările climatice, sunt în permanentă modificare, evaluarea măsurilor adoptate de România trebuind a fi făcută în raport de legislaţia la nivel UE sub imperiul căreia aceste măsuri au fost concepute şi nu prin decuparea unor prevederi favorabile susţinerilor expuse de reclamanţi rezultate din poziţii ale Comisiei adoptate de aceasta ca urmare a unor evaluări ulterioare întreprinse în baza prevederilor regulamentelor în materie de mediu, poziţii de la care mai apoi se porneşte în revizuirea legislaţiei relevante în domeniul climei şi al energiei.

Curtea apreciază că în mod greşit consideră pârâtul Ministerul Mediului Apelor şi Pădurilor că petitul 3 al acţiunii -teza referitoare la planuri concrete şi coerente privind adaptarea, ar fi inadmisibil raportat la lipsa oricăror cereri iniţiale, respectiv lipsa oricărui demers anterior promovării cererii de chemare în judecată care să fie de natură să determine un refuz nejustificat. Lecturând cererile prealabile formulate de reclamanţi (f.94, 111, 121 Vol. I), Curtea apreciază că prin raportare la argumentele expuse reclamanţii au solicitat implicit pârâţilor în prealabil, alături de adoptarea unor planuri privind atenuarea şi planuri privind adaptarea la schimbările climatice.

Referirile la Acordul de la Paris fiind suficiente pentru a se reţine acest aspect, în contextul în care acest acord (ratificat prin Legea 57/2017, art. 11 Constituţie) stabileşte un obiectiv pe termen lung privind temperatura la articolul 2 alineatul (1) litera (a) şi urmăreşte să consolideze răspunsul global la ameninţarea reprezentată de schimbările climatice ***prin creşterea capacităţii de adaptare*** la efectele negative ale schimbărilor climatice, astfel cum se prevede la articolul 2 alineatul (1) litera (b) din acordul respectiv, şi prin asigurarea faptului că fluxurile financiare corespund unei evoluţii către o dezvoltare cu un nivel scăzut de emisii de gaze cu efect de seră ***şi rezilientă la***

schimbările climatice, astfel cum se prevede la articolul 2 alineatul (1) litera (c) din acordul respectiv.

Pe plan intern, prin HG 1076/2021 s-a aprobat Planul naţional integrat în domeniul energiei şi schimbărilor climatice 2021-2030 (PNIESC). Alături de măsurile stabilite prin PNIESC, au fost adoptate strategii în atingerea obiectivelor de mediu prin: PNRR, HG 877/2018 -Strategia naţională pentru dezvoltare durabilă a României 2030, HG 1172/2022 -Strategia naţională pentru economia circulară (SNEC), HG 1227/2022 -Strategia naţională pentru păduri 2030 (SNP 2030), HG 10/2023 privind modificarea şi completarea Strategiei naţionale de renovare pe termen lung pentru sprijinirea renovării parcului naţional de clădiri rezidenţiale şi nerezidenţiale, atât publice, cât şi private, şi transformarea sa treptată într-un parc imobiliar cu un nivel ridicat de eficienţă energetică şi decarbonat până în 2050, aprobată prin HG 1034/2020; HG 59/2023 -Strategia naţională privind educaţia pentru mediu şi schimbări climatice 2023-2030; Planul Naţional Strategic 2023-2027 (PNS). În prezent este în lucru Strategia pe Termen Lung a României pentru Reducerea Emisiilor de Gaze cu Efect de Seră (http://www.mmediu.ro/articol/strategia-pe-termen-lung-a-romaniei-pentru-reducerea-emisiilor-de-gaze-cu-efect-de-sera/6135).

Prin urmare, nu se poate discuta despre un dezinteres manifest al pârâţilor în atingerea obiectivelor de mediu.

Potrivit pct. 40 din preambulul Regulamentului 2021/1119 schimbările climatice sunt, prin definiţie, o provocare transfrontalieră; aşadar, *este necesară acţiunea coordonată la nivelul Uniunii pentru a completa şi a consolida în mod eficient politicile naţionale*. Întrucât obiectivul prezentului regulament, şi anume realizarea neutralităţii climatice în Uniune până în 2050, nu poate fi îndeplinit în mod satisfăcător de către statele membre, dar, având în vedere efectele sale, acesta poate fi îndeplinit mai bine la nivelul Uniunii, aceasta poate adopta măsuri în conformitate cu *principiul subsidiarităţii*, astfel cum este prevăzut la articolul 5 din Tratatul privind Uniunea Europeană. În conformitate cu principiul proporţionalităţii, astfel cum este prevăzut la articolul respectiv, prezentul regulament nu depăşeşte ceea ce este necesar pentru îndeplinirea acestui obiectiv.

Prin urmare se remarcă efortul conjugat al Uniunii *şi al statelor membre* în atingerea obiectivelor de mediu, statele membre rămânând abilitate să adopte măsurile necesare la nivel naţional pentru a permite îndeplinirea colectivă a obiectivelor, ţinând seama de importanţa eficienţei costurilor în îndeplinirea acestui obiectiv.

Analizând PNIESC, Curtea observă în cadrul secţiunii A.1. Prezentare Generală, secţiunea i. Contextul politic, economic, social şi de mediu al planului, că se fac referiri la Regulamentul 2018/1999, prin urmare în mod greşit se raportează reclamanţii la prevederile art. 4 alin. 1 din Regulamentul 2021/1119 referitor la obiectivul privind emisiile de gaze cu efect de seră (după cum s-a arătat anterior), acest din urmă regulament nefiind avut în vedere la momentul redactării planului de măsuri naţionale, iar obiectivul privind un consum de energie din surse regenerabile de 32% în 2030 este conform cu cel din art. 2 pct. 11 din Regulamentul 2018/1999. Neîntemeiate sunt de asemenea şi criticile referitoare la o pretinsă dată greşită de referinţă la stabilirea plafonului privind emisiile de gaze cu efect de seră în raport de art. 4 alin. 1 din Regulamentul 2018/842 (fiecare stat membru îşi limitează în 2030 emisiile de gaze cu efect de seră, cel puţin cu procentul stabilit pentru statul membru respectiv în anexa I la prezentul regulament în raport cu emisiile sale de gaze cu efect de seră din 2005, stabilite conform alineatului (3) din prezentul articol) cu referire la secţiunea **2.1.1.** Emisiile şi absorbţiile GES din PNIESC, în contextul în care pentru România, Comisia Europeană a stabilit o ţintă de reducere cu 2% în 2030 faţă de nivelul din 2005, cu mult sub media la nivel de UE (cotele cele mai ridicate de reducere a emisiilor de gaze cu efect de seră fiind de 40% şi sunt stabilite pentru Luxemburg şi Suedia).

Cu toate că acţiunile climatice ale Uniunii şi ale statelor membre au scopul de a proteja populaţia şi planeta, bunăstarea, prosperitatea, economia, sănătatea, sistemele alimentare, integritatea ecosistemelor şi biodiversitatea de ameninţarea pe care o reprezintă schimbările climatice, nu trebuie omis faptul că tranziţia către neutralitatea climatică necesită schimbări la nivelul tuturor politicilor şi un efort colectiv al tuturor sectoarelor economiei (investiţii masive publice şi private) şi ale societăţii, fiind necesar a se acţiona cu prudenţă şi echilibru, fără a periclita în mod ireversibil anumite domenii ale economiei naţionale.

Curtea observă că reclamanţii în cadrul criticilor referitoare la angajamentele asumate de România, în încercarea de a induce ideea insuficienţei măsurilor luate, prin raportare la soluţiile tehnologice propuse de aceştia (pg. 31-41) urmăresc defapt substituirea *motivelor de oportunitate* ale autorităţii publice în atingerea obiectivelor de mediu cu propriile lor motive de oportunitate, iar apoi, pornind de la acestea solicită instanţei să efectueze o analiză de legalitate a respectării obiectivelor de mediu, aspect apreciat de Curte a fi inadmisibil. Astfel, cu titlu exemplificativ Curtea observă că reclamanţii dezaprobă măsurile pârâţilor în materie de comercializare a certificatelor de emisii de gaze cu efect de seră (EU ETS), or din pgf. 13 al preambulului la Regulamentul 2021/1119 rezultă că EU ETS reprezintă un element fundamental al politicii Uniunii în domeniul climei şi instrumentul său ***esenţial*** pentru reducerea emisiilor de gaze cu efect de seră într-o manieră eficientă din punctul de vedere al costurilor.

Calea de urmat pentru atingerea tranziţiei necesare către o societate neutră din punct de vedere climatic până cel târziu în 2050, modalitatea de realizare a eficientizării energetice, sunt lăsate la aprecierea statelor membre UE, iar faptul că România consideră că poate atinge obiectivele prin proiecte hidroenergetice sau alte proiecte care nu converg integral cu cele promovate de reclamanţi (a se vedea secţiunea 6.1.1 pct. 10 pg. 38 acţiune) nu poate primi conotaţiile dorite de aceştia, în contextul în care, dacă ar exista vreo problemă în acest sens Consiliul ar fi uzat de dispoziţiile art. 192 alin. 2 lit. c TFUE.

În raport de pgf. 36 din Regulamentul 2021/1119, Curtea reţine că pentru a se asigura că Uniunea *şi statele membre* fac în continuare progrese suficiente în vederea îndeplinirii obiectivului privind *neutralitatea climatică şi în materie de adaptare*, Comisia ar trebui să evalueze periodic progresele înregistrate, bazându-se pe informaţiile prevăzute în prezentul regulament, inclusiv informaţiile transmise şi raportate în temeiul Regulamentului (UE) 2018/1999, iar în măsura în care se constată eventuale încălcări de către România a obligaţiilor asumate se poate uza de procedura prevăzută de art. 258 TFUE, cum de altfel s-a şi întâmplat în raport de neîndeplinirea obligaţiei prevăzută de art. 15 alin. 1 din Regulamentul 2018/1999 (aspect evidenţiat de reclamanţi secţiunea 5.5 pct. 4 pg. 31 cererea de chemare în judecată, notele de şedinţă de la filele 125 vol. V şi de Ministerul Mediului, Apelor şi Pădurilor f.142 pg. 14 întâmpinare vol. III).

Relativ la eliminarea subvenţiilor pentru energie care sunt incompatibile cu obiectivul de mediu, în special a celor pentru combustibilii fosili, această măsură *se impune a se realiza treptat,* fără a afecta eforturile de reducere a sărăciei energetice şi fără a arunca în colaps financiar populaţia ţării, fiind de notorietate preţul extrem de ridicat al energiei.

Trimiterile făcute de reclamanţi la planul de măsuri urmărit de Comisie „Fit for 55” şi REPowerEU” (aspectele referitoare la ponderea regenerabilelor din consumul final de energie), sunt irelevante în acest moment cât timp aceste măsuri nu au fost adoptate la nivel de legislaţie de către UE (aspect recunoscut de reclamanţi la secţiunea 5.4 pct. 5,6 f.30 acţiune), aceasta în contextul în care pentru îndeplinirea contribuţiei Uniunii la Acordul de la Paris, Regulamentul nr. 2021/1119 ar trebui să garanteze că atât Uniunea, ***cât şi statele membre*** contribuie la răspunsul mondial la schimbările climatice, astfel cum se menţionează în acordul respectiv, ştiut fiind că Uniunea a instituit un cadru de reglementare pentru a îndeplini obiectivul pentru 2030 de reducere a emisiilor de gaze cu efect de seră convenit în 2014, înainte de intrarea în vigoare a Acordului de la Paris. Printre actele legislative de punere în aplicare a obiectivului respectiv se numără *Directiva 2003/87/CE care instituie EU ETS*, *Regulamentul (UE) 2018/842 care a introdus obiective naţionale de reducere a emisiilor de gaze cu efect de seră până în 2030*, şi Regulamentul (UE) 2018/841 *care prevede obligaţia statelor membre de a echilibra emisiile de gaze cu efect de seră şi absorbţiile rezultate din exploatarea terenurilor, schimbarea destinaţiei terenurilor şi silvicultură*. Totodată nu poate fi omis angajamentul pârâţilor de actualizare a PNIESC în acord cu obiectivele concrete ce vor rezulta la finalul negocierilor din pachetul „Fit for 55” şi planul „RepowerEU” (a se vedea adresa de răspuns nr. 10200/22.09.2022 a Ministerului Mediului, Apelor şi Pădurilor f.109 Vol. I).

În raport de cele arătate anterior, Curtea în baza art. 8, art. 18 din Legea 554/2004, **va *respinge***, cererea de chemare în judecată formulată de *reclamanţii Asociaţia Declic, Pencea-Brădăţan Elena-Roxana, Brădăţan Tudor-Iulian, Năstăsache-Hopârteanu Cătălina, Mirea Silvia, Dejeu Daniela Luminiţa*, în contradictoriu cu **pârâţii Primul Ministru, Ministrul Mediului,**

Apelor şi Pădurilor şi Ministrul Energiei, *ca fiind formulată împotriva unor persoane fără calitate procesuală pasivă.*

Va respinge, excepţia lipsei calităţii procesuale pasive cu privire la petitul nr. 2 al cererii de chemare în judecată, invocată de Ministerul Mediului, Apelor şi Pădurilor prin întâmpinare, *ca neîntemeiată.*

Va respinge cererea de chemare în judecată formulată de **reclamanţii Asociaţia Declic,** având CIF 25862117**, Pencea-Brădăţan Elena-Roxana,** CNP 2820607385628, **Brădăţan Tudor-Iulian,** CNP 1820702070095, **Năstăsache-Hopârteanu Cătălina,** CNP 2870513134120, **Mirea Silvia,** CNP 2910322045355, **Dejeu Daniela Luminiţa,** CNP 2711111120721, în contradictoriu cu pârâţii **Guvernul României, Ministerul Mediului, Apelor şi Pădurilor şi Ministerul Energiei**, *ca neîntemeiată*.

Va respinge cererile de intervenţie accesorie formulate în numele reclamanţilor de intervenienţii **Asociaţia Bankwatch România** şi **Asociaţia 2Celsius**.

PENTRU ACESTE MOTIVE
IN NUMELE LEGII
HOTARASTE:

Respinge, cererea de chemare în judecată formulată de *reclamanţii Asociaţia Declic, Pencea-Brădăţan Elena-Roxana, Brădăţan Tudor-Iulian, Năstăsache-Hopârteanu Cătălina, Mirea Silvia, Dejeu Daniela Luminiţa*, în contradictoriu cu **pârâţii Primul Ministru,** cu sediul în Palatul Victoriei, Piaţa Victoriei nr. 1 sector 1 Bucureşti, **Ministrul Mediului, Apelor şi Pădurilor,** cu sediul în Bucureşti, b-dul Libertăţii nr. 12, sector 5, **şi Ministrul Energiei**, cu sediul în Bucureşti, str. Academiei nr. 39-41, sector 1, *ca fiind formulată împotriva unor persoane fără calitate procesuală pasivă.*

Respinge, excepţia lipsei calităţii procesuale pasive cu privire la petitul nr. 2 al cererii de chemare în judecată, invocată de Ministerul Mediului, Apelor şi Pădurilor prin întâmpinare, *ca neîntemeiată.*

Respinge cererea de chemare în judecată formulată de **reclamanţii Asociaţia Declic,** având CIF 25862117**, Pencea-Brădăţan Elena-Roxana,** CNP 2820607385628, **Brădăţan Tudor-Iulian,** CNP 1820702070095, **Năstăsache-Hopârteanu Cătălina,** CNP 2870513134120, **Mirea Silvia,** CNP 2910322045355, **Dejeu Daniela Luminiţa,** CNP 2711111120721, *toţi cu domiciliul procesual ales la* SCA Revnic, Cristian & Asociaţii situat în Cluj-Napoca, str. Pavel Roşca, nr. 1, ap. 7, jud. Cluj, *adresă de e-mail* roxana.mandrutiu@revnic.ro,lucia.turcu@revnic.ro, isabela.porcius@revnic.ro, în contradictoriu cu pârâţii **Guvernul României,** cu sediul în cu sediul în Bucureşti, Piaţa Victoriei nr. l, sector 1, **Ministerul Mediului, Apelor şi Pădurilor,** cu sediul în Bucureşti, b-dul Libertăţii nr. 12, sector 5, **şi Ministerul Energiei**, cu sediul în Bucureşti, str. Academiei nr. 39-41, sector 1, *ca neîntemeiată*.

Respinge cererile de intervenţie accesorie formulate în numele reclamanţilor de intervenienţii **Asociaţia Bankwatch România,** cu sediul în Bucureşti, Splaiul Independenţei nr. 1, bl. 16, sc. 1, ap. 6, sector 1, şi **Asociaţia 2Celsius,** cu sediul în Cugir, str. Al. Sahia nr. 18, sc. C, ap. 5, jud. Alba.

Cu drept de recurs în termen de 15 zile de la comunicare.

Recursul se depune la Curtea de Apel Cluj, Secţia a III a Contencios Administrativ şi Fiscal.

Pronunţată prin punerea solutiei la dispozitia partilor de catre grefa instantei, azi 06.06.2023.

JUDECĂTOR,
George Barbura-Turcu

GREFIER,
Alexandra Lucia Bujor

Red.G.B.T./ 15.06.2023.
Dact.H.C./15 ex.

Annex 644

National Environment Management Authority & another v KM & 17 others, Decision of the Court of Appeal of Kenya, 23 June 2023

National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 775 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E004 OF 2020 & E032 OF 2021 (CONSOLIDATED)

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JUNE 23, 2023

BETWEEN

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... APPELLANT

AND

KM (MINOR SUING THROUGH MOTHER AND BEST FRIEND SKS) ..... 1ST RESPONDENT

IRENE AKINYI ODHIAMBO ..... 2ND RESPONDENT

MILLICENT ACHIENG AWAKA ..... 3RD RESPONDENT

ELIZABETH FRANCISCA MWAILU ..... 4TH RESPONDENT

ELIAS OCHIENG ..... 5TH RESPONDENT

JACKSON OSEYA ..... 6TH RESPONDENT

HAMISI MWAMERO ..... 7TH RESPONDENT

DANIEL OCHIENG OGOLA ..... 8TH RESPONDENT

MARGARET AKINYI ..... 9TH RESPONDENT

CENTER FOR JUSTICE, GOVERNANCE & ENVIRONMENTAL ACTION (SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE RESIDENTS OF OWINO-UHURU VILLAGE IN MIKINDANI, CHANGAMWE AREA, MOMBASA) ..... 10TH RESPONDENT

ATTORNEY GENERAL ..... 11TH RESPONDENT

CABINET SECRETARY, MINISTRY OF ENVIRONMENT, WATER AND NATURAL RESOURCES ..... 12TH RESPONDENT

CABINET SECRETARY, MINISTRY OF HEALTH ..... 13TH RESPONDENT

COUNTY GOVERNMENT OF MOMBASA ..... 14TH RESPONDENT

EXPORT PROCESSING ZONES AUTHORITY ..... 15TH RESPONDENT

METAL REFINERY (EPZ) LIMITED ..... 16TH RESPONDENT

PENGUIN PAPER AND BOOK COMPANY LTD ..... 17TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E032 OF 2021

BETWEEN

EXPORT PROCESSING ZONES AUTHORITY ..... APPELLANT

AND

KM (MINOR SUING THROUGH MOTHER AND BEST FRIEND SKS) ..... 1ST RESPONDENT

IRENE AKINYI ODHIAMBO ..... 2ND RESPONDENT

MILLICENT ACHIENG AWAKA ..... 3RD RESPONDENT

ELIZABETH FRANCISCA MWAILU ..... 4TH RESPONDENT

ELIAS OCHIENG ..... 5TH RESPONDENT

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CABINET SECRETARY, MINISTRY OF ENVIRONMENT, WATER AND NATURAL RESOURCES ..... 12TH RESPONDENT

CABINET SECRETARY, MINISTRY OF HEALTH ..... 13TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 14TH RESPONDENT

COUNTY GOVERNMENT OF MOMBASA ..... 15TH RESPONDENT

METAL REFINERY (EPZ) LIMITED ..... 16TH RESPONDENT

PENGUIN PAPER AND BOOK COMPANY LTD ..... 17TH RESPONDENT

(Appeals from the Judgment and decision of Environment and Land Court at Mombasa (A. Omollo J.) delivered on 16th July 2020 in Mombasa ELC Petition No. 1 of 2016)

It is not an absolute rule that the State and State agencies are exempt from the application of the polluter pays principle

The residents of Owino-Uhuru Village filed a suit at the Environment and Land Court (trial court) and contended that the smelting process by the 16th respondent's factory led to the poisoning of the environment arising from poor management of its liquid, solid and gaseous waste. The trial court awarded Kshs 1.3 billion to the petitioners for personal injury and loss of life in accordance with the apportionment of their liability. The court held that there was no arrogation of jurisdiction by the trial court as the claim was one of violation of the rights to a clean and healthy environment and the remedies sought were well within its jurisdiction and powers, which powers were not specifically granted to the National Environment Tribunal under the Environmental Management and Co-ordination Act. The court further held that it was not a hard and fast rule that the State and State agencies were exempt from the application of the polluter pays principle. Further, the violation of the right to a healthy environment may be invoked not only where the pollution or nuisance originated from the actions of the State or its organs, but also if it resulted from lack of effective regulation of private activities.

Reported by Kakai Toili

Environmental Law *- polluter pays principle and precautionary principle - nature of polluter pays principle and precautionary principle - whether the State and State agencies were exempt from the application of the polluter pays principle - , sections 2 and 3(5); , No 19 of 2011, section 18(a).*

Constitutional Law *- fundamental rights and freedoms - right to a clean and healthy environment - when did the State's liability occur in relation to the right to a clean and healthy environment and environment protection.*

Environmental Law *- environment impact assessment (EIA) - EIA licence - effect of approving operations of a factory before it was issued with an EIA licence - whether the Exports Processing Zones Authority assumed the legal risk and responsibility for any shortcomings by the National Environment Management Authority in approving operations of factory before it was issued with an EIA licence - of Kenya, 2010, article 69; , section 23.*

Jurisdiction *- jurisdiction of the National Environment Tribunal - jurisdiction to determine claims of violation of constitutional rights as a result of pollution and granting of judicial review orders and orders for compensation - whether the National Environment Tribunal had the jurisdiction to determine claims of violation of constitutional rights as a result of pollution and jurisdiction to grant judicial review orders and orders for compensation - , sections 129(1) and (3).*

Jurisdiction *- jurisdiction of appellate courts - jurisdiction to interfere with the award of damages by a trial court - what were the principles to be considered in deciding whether an appellate court could disturb the quantum of damages awarded by a trial court.*

Constitutional Law *- fundamental rights and freedoms - enforcement of fundamental rights and freedoms - reliefs for violations of fundamental rights and freedoms - compensation - what was the rationale for the relief or compensation.*

Brief facts

The 1st to 9th respondents on behalf the residents of Owino-Uhuru village (the residents) situated in Mombasa County and the 10th respondent (CJGEA) claimed in their petition at the Environment and Land Court (trial court) that the 17th respondent, the owner of the suit property, which was approximately 50 metres from the Owino-Uhuru Village, had been issued with a license by the Export Processing Zones Authority (EPZA) to operate as an export processing zone (EPZ) company in violation of the . They further claimed that the 17th respondent leased part of the suit land to the 16th respondent, which was issued with a trading licence by the Mombasa County Council to construct and operate a factory dealing with toxic lead.

The residents averred that the smelting process by the 16th respondent produced liquid solid waste and gaseous emissions which contained lead particles. The residents contended that shortly after the 16th respondent commenced operations, complaints began emerging from the village that the factory was poisoning the

environment arising from the poor management of its liquid, solid and gaseous waste. The complaints centered on the fact that the incidence of diseases, especially respiratory diseases, increased tremendously in the village after the factory began its operations, and that the dust and gases emitted from the factory houses corroded the iron sheet roofs of the houses in the village.

According to the residents, several studies conducted on the soil, air, water bodies and dust on houses in Owino-Uhuru village revealed high levels of lead contamination that was not safe for human habitation. Additionally, that tests conducted to determine the blood lead levels of the petitioners and residents of the village revealed unacceptably high levels of lead poisoning. The case by the residents and CJGEA was that the National Environment Management Authority (NEMA), EPZA, the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health, and the Mombasa County Government were responsible for constitutional infractions in their regulation of the 16th and 17th respondents. The residents faulted those authorities for failing to enforce national laws and standards on the environment and human rights. The residents and CJGEA accordingly sought for among other orders; an order for compensation for the damage to the resident's' health and environment and for loss of life.

The trial court allowed the petition and held that the gist of the petition revolved around the violations of the rights of the residents towards a clean and healthy environment and that the residents could seek redress in the trial court. The court held that there was a threat and actual violation of the residents' rights under the of Kenya, 2010 (Constitution). The trial court apportioned liability to; NEMA at 40%; the 16th respondent at 25%; the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources, Ministry of Health, and EPZA at 10% each; and the 17th respondent at 5%. The trial court awarded Kshs 1.3 billion to the petitioners for personal injury and loss of life payable within ninety (90) days from the date of judgment by NEMA, the 16th respondent, the Cabinet Secretaries, EPZA and the 17th respondents in accordance with the apportionment of their liability. Aggrieved, NEMA and EPZA filed the instant consolidated appeal.

Issues

i. What was the nature of polluter pays principle and whether the State and State agencies were exempt from the application of the polluter pays principle.
ii. When did the State's liability occur in relation to the right to a clean and healthy environment and environment protection?
iii. Whether the Exports Processing Zones Authority assumed the legal risk and responsibility for any shortcomings by National Environment Management Authority in approving operations of factory before it was issued with an environment impact assessment licence.
iv. Whether the National Environment Tribunal had the jurisdiction to determine claims of violation of constitutional rights as a result of pollution and jurisdiction to grant of judicial review orders and orders for compensation.
v. What was the nature of the precautionary principle in environmental matters?
vi. What were the principles to be considered in deciding whether an appellate court could disturb the quantum of damages awarded by a trial court?
vii. What was the rationale for the relief or compensation for human rights violations?

Relevant provisions of the Law

Section 129 - Appeals to the Tribunal

(1) Any person who is aggrieved by—

(a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

(b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

(c) the revocation, suspension or variation of the person's licence under this Act or its regulations;

(d) the amount of money required to paid as a fee under this Act or its regulations;

(e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations,

may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

(d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;

(e) if satisfied upon application by any party, review any orders made under paragraph (a).

(4) Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issue fresh orders maintaining the status quo in accordance with subsection (3)(a).

Held

1. The starting point in determining the jurisdiction of any court or tribunal was either the or legislation or both, and a court or tribunal could only exercise jurisdiction as conferred by the or other written law. A court could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law or divest a tribunal of its jurisdiction vested upon it by Parliament by judicial craft or innovation.
2. Section 129(1) of the Environmental Management and Co-ordination Act (EMCA) provided for the matters that may be appealed to the National Environment Tribunal (NET) established by that Act. Section 129(3) of EMCA provided for the relief that NET could grant. The claim by the residents and CJGEA in the trial court exclusively concerned the violation of constitutional rights by the respondents, arising from the operations of the 16th respondent, and for which specific remedies were sought including compensation and judicial review orders (*mandamus*) against the respondents. There was no issue or prayer raised by the residents and CJGEA that was within the ambit of section 129(1).
3. The alleged harm and violations arising from the adverse effects of the subject pollution happened outside the timelines provided in section 129(1) of EMCA. NET had no powers to grant the remedies that were sought by the residents and CJGEA, and the court was reluctant to adopt the interpretation of section 129(3) of EMCA as being an all encompassing provision that empowered NET to grant any relief that may be sought by a party in the appeal, since NET's powers could only be exercised within the context of the objectives and four corners of EMCA, which was the parent Act, and the powers and duties granted to the various agencies created thereunder. Section 129(3) could not be used to arrogate to the NET specific powers given to the courts under the , particularly the powers under article 23(3) of the which provided for relief that could be granted in a claim for violation of constitutional rights.
4. Section 13 (3) of the specifically granted the Environment and Land Court jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the . Article 70 also provided that if a person alleged that a right to a clean and healthy environment under article 42 had been, was being or was likely to be, denied, violated, infringed, or threatened, the person may apply to a court for redress in addition to any other legal remedies that were available in respect to

the same matter. The article provided for additional remedies that could be granted by a court in that respect to include any order or directions it considered appropriate.

5. There was no arrogation of jurisdiction by the Environment and Land Court either by judicial craft or arising from the pleadings before it, as the claim was one of violation of the rights to a clean and healthy environment and the remedies sought were well within its jurisdiction and powers, which powers were not specifically granted to the NET under EMCA.

6. The premise of the petition brought by the residents was the violation of their constitutional rights, and the basis for liability in that respect was proof of conduct or acts or omissions on the part of NEMA, EPZA and other State agencies sued that were responsible for, or contributed to the infringement of the resident's rights. The residents in that respect set out the manner in which their rights were violated by NEMA and EPZA, as well as the other State agencies, and also set out the violations by the 16th and 17th respondents who were private entities.

7. The applicable principles that applied in determining liability were both private and public law principles. The private or civil law principles on liability which centered on the torts of nuisance and negligence, only determined the liability of the private persons, and of public bodies to a limited extent with respect to breach of statutory duties. The liability under the principle of *Rylands v Fletcher* of the 16th and 17th respondents as the persons who discharged the waste that polluted the environment and caused adverse effects to the residents, and owner of the land from which such discharge emanated was not contested.

8. The rule in *Rylands v Fletcher* was relevant in environmental regulation, as the standard of care was imposed in terms of hazardous activities. The findings by the trial court led to a contrary view. The trial court relied on other provisions of the and EMCA in allocating liability to NEMA and EPZA. The trial court did not exclusively or solely rely on the polluter pays principle to establish liability on the part of NEMA and EPZA and other State agencies.

9. The polluter pays principle was an economic instrument which initially required a producer of goods or other items to be responsible for the costs of preventing or dealing with any pollution that the process causes. That included environmental costs as well as direct costs to people or property, and also covered costs incurred in avoiding pollution as well as remedying any damage. However, there were difficulties in the application of that principle and its exact scope and extent of payable costs, and identifying the responsible persons or polluters.

10. Section 2 of EMCA defined the polluter-pays principle to mean that the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that were connected with or incidental to the foregoing, was to be paid or borne by the person convicted of pollution under the Act or any other applicable law. Conviction of pollution connoted the application of criminal law and sanctions to private operators as opposed to State agencies, and primary liability appeared to be assigned to private actors as the primary polluters under the section.

11. The State as an economic operator in the process of regulation and development of economic policies was well recognized, and the State and State agencies also engaged in economic activities as operators. Therefore, it was not a hard and fast rule that the State and State agencies were exempt from the application of the polluter pays principle. Both the (in section 18(a)) and EMCA (in section 3(5)) in that respect required the Environment and Land Court in exercising the jurisdiction conferred upon it, to be guided by principles of sustainable development including the polluter pays principle.

12. The law that regulated the State's obligations in relation to the right to a clean and healthy environment and environment protection was public law, and the State's liability occurred when it violated its statutory or constitutional obligation or duty, (the wrongful act), and a linkage was established between the wrongful act and the damage or injury caused by the environment (the causal link). The placed

positive obligations upon the State and State agencies to promote and protect the right to a healthy environment by taking all necessary measures.

13. State liability may derive from an administrative authorization, an absence of regulation, or from inadequate measures relating to activities of the private actors, which resulted in harm to the environment. The violation of the right to a healthy environment may be invoked not only where the pollution or nuisance originated from the actions of the State or its organs, but also if it resulted from lack of effective regulation of private activities.

14. The imposed shared obligations and responsibility for environmental protection, management and conservation on both the state actors as well as private actors under article 69. Under article 260 of the , the State was defined to mean the collectivity of offices, organs and other entities comprising the Government of the Republic under the ; a State organ meant a commission, office, agency or other body established under the while a person included a company, association or other body of persons whether incorporated or unincorporated.

15. Both NEMA and EPZA were statutory bodies that were established under Acts enacted by Parliament pursuant to powers granted by the , and of relevance in the appeal was that article 69 of the which specifically required systems of environmental impact assessment (EIA), environmental audit and monitoring of the environment to be established, and which had been principally been implemented under EMCA.

16. Article 69 of the embodied the shift that had occurred over the years in the regulation of the environment, from reactive provision of remedies for environmental pollution to more proactive provisions of standards and preventative measures designed to reduce or eliminate the risk of environmental damage. In particular article 69 embodied the principle of sustainable development which attempted to reconcile the conflicting demands of economic development and environmental protection so as to ensure that the benefit of any development outweighed its costs, including costs to the environment.

17. The diverse and complex nature of the environment, and of the causes and extent of its pollution and degradation required a broad range of regulatory tools and mechanisms. In that respect, the typical regulatory process involved the establishing the general policies on the environment, setting standards or specific policies in relation to the environmental issue concerned, applying the standards and policies to individual situations, normally through some licensing system, enforcing standards and permissions through administrative and criminal sanctions, providing information about the environment and the regulatory process itself, and using mechanisms to monitor and improve the regulatory system.

18. EMCA provided for the responsible agencies and tools for environmental protection, environmental planning, guidelines on environmental protection of various sectors, integrated environmental impact assessment of plans and projects, environmental audits and monitoring, environmental quality standards and various environmental enforcement measures. NEMA and EPZA did not dispute that they approved operations by the 16th respondent before the issuance of the EIA licence to it.

19. In addition to being subject to the obligations under article 69 of the, EPZA was under a specific duty under section 23(c) of the EPZ Act to ensure that the business entities it licenced under the Act shall not have a deleterious impact on the environment, or engage in unlawful activities, impinging on national security or prove to be a health hazard. EPZA was not only in direct violation of article 69 and section 23 of the EPZ Act, but also assumed the legal risk and responsibility for any shortcomings by NEMA in its processes of issue of the EIA licence to 16th respondent.

20. The Cabinet Secretary Ministry of Environment Water and Natural Resources issued license No. 78 of 2006 to the16th respondent valid until December 31, 2006 for operations at the 17th respondent's godowns despite having noted in its letter dated June 13, 2006 to EPZA advising that exports of lead were allowed for those who had the necessary licenses from its department and NEMA. Further, the export of lead from scrap batteries should be done in accordance with the provisions of the . Under

section 103 of the , the Cabinet Secretary was to issue a mining licence where *inter alia* the applicant had obtained an approved EIA licence, a social heritage assessment and environmental management plan in respect of the applicant's proposed mining operations. The EIA license was eventually issued by NEMA on February 5, 2008.

21. The Second Schedule to EMCA listed the projects that required submission of an EIA study report, which were categorized by low, medium and high risk. Sections 59-62 of EMCA provided the processes that followed after the EIA study. After those processes, NEMA may, under section 63, after being satisfied as to the adequacy of an EIA study, evaluation or review report, issue an EIA licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.

22. Regulation 17 of the Environmental Management and Co-ordination (Waste Management) Regulations, 2006 provided that no person shall engage in any activity likely to generate any hazardous waste without a valid EIA licence issued by NEMA under the provisions of the Act. An EIA was a key environmental law and regulation mechanism, and its essence was that information about likely environmental impacts of development projects, plans and programs was properly considered before potentially harmful decisions were made.

23. It was the responsibility of NEMA to not only ensure compliance with the requirements and processes of an EIA, but to also take into account the information thereon when making a decision whether or not to approve and license a project. The effects of the failure to do so may be development that had unmitigated damaging effects on nearby properties and human health, as happened in the instant appeal. The issues that were required to be identified and addressed in the EIA were specified in the Second Schedule to the Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations. In addition, the standards as regards hazardous waste were provided in the Fourth Schedule to the Environmental Management and Co-ordination (Waste Management) Regulations, 2006 and included control of wastes containing 0.1% or more by weight of lead and wastes in solid and liquid form.

24. NEMA did not provide evidence that the EIA Study report undertaken by the 16th respondent dated March 13, 2007 that was produced in evidence was subjected to technical evaluation in light of the parameters required to be satisfied in terms of impact, as set out in the Second Schedule to the Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, and confirmation of the relevant standards that were required to be met by the 16th respondent, including on hazardous waste.

25. The causal link between the approval of the operations of the 16th respondent before completion of the EIA process and the damage suffered as a result of effects of the project was evident, since appropriate anticipatory controls could have been put in place by NEMA *ex ante* were the hazardous impacts of the project properly identified, including an absolute prohibition of the project. Put differently, the project would never have seen the light of day, and hence no damage would have been resulted.

26. The allocation and apportion of liability to NEMA and EPZA for approving the project and its commencement before the full impact of the project were considered and evaluated was near equal in measure to that of the actual perpetrators of the pollution. The main actors in that respect in so far as the cause of the deleterious activities were concerned were NEMA, EPZA and the 16th respondent, with the liability of the other agencies and actors being either passive or reactive in relation to the pollution.

27. Once the evidence of the adverse and hazardous effects of the operations of the project became apparent, and given the nature of the wide ranging of the effects on both the ecosystem, human health, water and air quality, NEMA ought to have applied the wide range of enforcement measures at its disposal, including cancellation of the EIA licence, restoration orders and prosecution of the perpetrators of the pollution. NEMA for that reason bore greater responsibility than EPZA and the Ministry of Health for the harmful environmental and health effects of the project. From the analysis,

it was necessary to slightly revise and review the original allocation and apportion of liability set out by the trial court.

28. The court was constrained to comment on the finding by the trial court that no liability attached to the County Government of Mombasa, on the ground that the evidence adduced did not show any direct role of the County Government in failing to comply with the environmental laws, and that the Physical Planning Act ceased to apply to the EPZ zone once the area was gazetted as such under the EPZ Act. Thus:

    1. There was no evidence on record that the area, land or building where the 16th respondent was operating had been declared an export processing zone, which declaration was required to be done by the relevant minister by way of a notice in the Gazette under section 15 of the EPZ Act.
    2. The trial court found that the issuance of single business permit was not attached to fulfilment of any conditions prior to its being issued, and the timeline with respect to the deleterious operations by the 16th respondent was between 2006 and 2014 when its factory was closed. Prior to the of Kenya, 2010, the Physical Planning Act which was then in operation and was repealed by the in 2019, gave local authorities power under section 29 to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area and to consider and approve all development applications and grant all development permissions, and under section 32, when considering a development application, such authority was to have regard to the health, amenities and conveniences of the community generally and to the proper planning and density of development and land use in the area. Under section 116 of the , it was also the duty of every local authority to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition.
    3. Under article 186 of the of Kenya, 2010, the functions and powers of the county governments were as set out in Part II Fourth Schedule to the , which included in paragraph 2, county health services including refuse removal, refuse dumps and solid waste disposal, in paragraph 3 control of air pollution, noise pollution, other public nuisances and outdoor advertising, and in paragraph 10, implementation of specific National Government policies on natural resources and environmental conservation, including soil and water conservation. There were therefore clear duties with respect to environmental protection which were imposed on the County Government of Mombasa and its predecessor in that regard. However, since there was no cross appeal on the trial court's findings on the County Government's liability by the counsels for the Attorney General and the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health who only raised their concerns in their submissions, the court would say no more about the issue.

29. NEMA relied on the precautionary principle as the reason for allowing the operations of the 16th respondent before its licensing and trial runs. The precautionary principle was defined in section 2 of EMCA as the principle that where there were threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The court was concerned that NEMA's interpretation of the principle was that it permitted the taking of risks in unknown cases, whereas to the contrary, the principle required caution to be taken even when there was no evidence of harm or risk of harm from a project, and that proof of harm should not be the basis of taking action.

30. The proper application of the precautionary principle was that scientific analysis of risks should form the core of environmental rules and decisions, notwithstanding the fact that such analysis may be

uncertain. In the alternative, the principle was also used when there were limits to the extent that science could inform actions, and ultimately rules and decisions had to be made having regard to other considerations such as the public perception of the risk and the potential for harm. The EIA processes provided opportunity for such analysis and perceptions to be taken into account.

31. There would always be competing values that needed to be balanced in environmental regulation, as well as the costs and benefits of compliance, and that was one of the main objectives of an EIA and article 69 the emphasized on ecologically sustainable development.

32. The principles to be observed by an appellate court in deciding whether it was justified in disturbing the quantum of damages awarded by a trial court were that it must be satisfied that either that the trial court, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of that, the amount was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

33. Compensation was a recognised remedy for constitutional violations under articles 23(3)(e) and 70(2)(c) of the , and article 70(3) specifically provided that, an applicant whose rights to a clean and healthy environment had been violated did not have to demonstrate that any person had incurred loss or suffered injury. Where general damages were sought for personal injury that arose from the violation, the law would grant damages for the losses that presumed were the natural and probable consequence of a wrong, and may be given for a loss that was incapable of precise estimation, such as pain and suffering. An award of general damages in constitutional petitions was discretionary and depended on the circumstances of each case.

34. *Orbit Chemicals Industries v Professor David M. Ndetei* [2021] eKLR and *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR were not comparable with respect to general damages payable as they did not involve awards for personal injury, and in *Mohamed Ali Baadi and others v Attorney General & 11 others* the affected fishermen were known and identifiable. The trial court in the instant case awarded the amount of Ksh 1.3 billion as compensation for the 9 petitioners and persons claiming through them who were not identified. The object of compensation was to remedy a wrong that a person had suffered, and the victim must of necessity be identified for purposes of causation and enforcement of the remedy.

35. An award for the cost of restoration of the soil was an award as special damages, and in that respect the award of Kshs 700,000,000 to CJGEA was therefore awarded when it had not been specifically pleaded or proved. Restoration of contaminated land was a fairly technical exercise, as it entailed the removal or treatment of the contaminated land, and eventual restoration and reclamation of the land and habitat restoration, which required scientific methodologies and techniques which were not demonstrated by the residents and CJGEA, to justify the order and award.

36. The relevant legal and institutional framework for restoration of contaminated land resided with NEMA under the EMCA, in terms of its functions, powers, structures, and capacity, as opposed to CJGEA. The trial court failed to take into account various relevant factors and principles of law in the award of damages, and the instant case was a proper case to interfere with the exercise of the trial court's discretion.

37. The nature of environmental harm that was caused by the activities of the 16th respondent was two-fold: the harm to the environment in term of the contamination of the soil, air and water in the Owino-Uhuru Settlement; and second was the harm to human health, and in particular the high lead levels in the blood of the residents who were tested. It was therefore in the interests of justice that appropriate remedies were granted in the appeal. Article 23(3) of the empowered the court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. In addition, rule 33 of the Court of Appeal Rules, 2022 provided that on any appeal from a decision of a superior court, the Court of Appeal shall have power, so far as its jurisdiction permitted; to confirm, reverse or vary the decision of the superior court; to remit the proceedings to the superior court with

such directions as may be appropriate; or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.

38. From the various reports produced in evidence, only a sample of the residents were tested for lead levels in their blood. The court appreciated the difficulties and costs involved in proving causation in injuries caused by environmental pollution, and in particular in proving that all residents of Uhuru village were exposed to and injured by the activities of the 16th respondent. That difficulty was compounded by the extent of exposure, both spatially in terms of the period of time the subject factory operated by the 16th respondent was functioning and producing hazardous waste, and also geographically, in terms of the areas that were affected. It was however necessary that all possible claimants were identified, ascertained and compensated, both in the interests of justice, but also in the interests of proportionality and costs effectiveness, to ensure that the case was not an open door for free riders and opportunists to make personal gain from the tragedy that befell the residents.

Appeal partly allowed.

Orders

i. The following orders granted by the Environment and Land Court at Mombasa on July 16, 2020 in KM & 9 others v Attorney General & 7 others, Mombasa ELC Petition No. 1 of 2016 [2020] eKLR were set aside:

a. (d)That the sum of Kshs 1.3 billion (Kenya Shillings one billion three hundred million) was awarded to the petitioners for personal injury and loss of life payable within a period of 90 days from the date of judgment and in default, the petitioners shall be at liberty to execute

b. (e)That the sum of Kshs 1.3 billion (Kenya Shillings one billion three hundred million) shall be payable to the 2nd, 3rd, 4th, 6th, 7th, and 8th respondents in accordance with the apportionment of liability at paragraph 158 of the judgment as for as follows.

1. *2nd respondent -10%*
2. *3rd respondent -10%*
3. *4th respondent - 40%*
4. *6th respondent - 10%*
5. *7th respondent -25%*
6. *8th respondent - 5%*

c. (f) That an order be issued directing the respondents to clean up the soil, water and to remove any wastes deposited within Owino Uhuru Settlement by the 7th respondent within 4 months, (120) days from the date of the judgment, and in default the sum of Kshs 700,000,000 became due and payable to the 10th petitioner to coordinate the soil and environmental cleanup exercise.

d. (e)That in the event that the monetary award given in terms of prayer (v) of the petition was not honored, then prayer (vii) of the petition shall lie.

ii. The apportionment of liability by the trial court set aside and substituted it with the following apportionment of liability:

a. The Cabinet Secretary in the Ministry of Environment, Water and Natural Resources - 5%

b. The Cabinet Secretary in the Ministry of Health -5%

c. NEMA - 30%

d. EPZA - 10%

e. The 16th respondent - 40%

f. Penguin Paper and Book Company Ltd - 10%

iii. The issue of the compensation payable to the petitioners as prayed in prayer (e) of the petition dated February 20, 2016 filed in KM & 9 others v Attorney General & 7 others, Mombasa ELC Petition No. 1 of 2016 [2020] eKLR remitted for rehearing before a judge at the Environment and Land Court at Mombasa other than A

Omollo, J, including the taking of additional evidence limited to that issue and assessment of damages payable to the petitioners, and taking into account the principles set out in the judgment.

iv. NEMA ordered and directed to within 12 months from the date of the judgment, and in consultation with all the relevant agencies and private actors and in appropriate exercise of its functions and powers to;

a. identify the extent of contamination and pollution caused by the operations of the 16th respondent as the Owino-Uhuru Settlement;

b. remove any contamination and pollution in the affected areas of Owino-Uhuru Settlement, and

c. restore the environment of Owino Uhuru Settlement and its ecosystem;

d. periodically report every 3 months to the Environment and Land Court at Mombasa on the progress made in that regard, and for any consequent directions, until the satisfactory completion of the restoration.

v. All the other orders granted by the Environment and Land Court at Mombasa on July 16, 2020 in KM & 9 others v Attorney General & 7 others, Mombasa ELC Petition No. 1 of 2016 [2020] eKLR were affirmed and upheld except to the extent modified by the findings in the judgment.

vi. No order as to costs.

Citations

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1. Attorney General v Zinj Limited (Petition 1 of 2020; [2021] KESC 23 (KLR)) — Explained
2. Baadi, Mohamed Ali & others v Attorney General & 11 others (Petition 22 of 2012; [2018] eKLR) — Explained
3. Board of Trustees Anglican Church of Kenya Diocese of Marsabit v THW (suing through her father and guardian ad litem HWG) (Civil Appeal 7 of 2019; [2019] KEHC 8215 (KLR)) — Explained
4. Dobs Entertainment Limited v National Environment Management Authority (Tribunal Appeal 016 of 2019; [2021] KENET 658 (KLR)) — Explained
5. Imanyara, Gitobu & 2 others v Attorney General (Civil Appeal 98 of 2014; [2016] KECA 557 (KLR)) — Explained
6. Imanyara, Gitobu & 2 others v Attorney General (Petition No 15 of 2017) — Explained
7. Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) (Civil Appeal 21 of 1984; [1985] KECA 137 (KLR)) — Explained
8. Kenya Tourist Development Corporation v Sundowner Lodge Limited (Civil Appeal 120 of 2017; [2018] KECA 312 (KLR)) — Mentioned
9. Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited (Petition 11 of 2015; [2018] KESC 48 (KLR)) — Explained
10. Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others (Civil Appeal 153 of 2019; [2020] KECA 875 (KLR)) — Explained
11. Kibui, Michael & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Construzioni Giuseppe Maltauro SPA & 2 others (Constitutional Petition 1 of 2012; [2019] KEELC 4468 (KLR)) — Explained
12. Kiema Mutuku v Kenya Cargo Handling Services Ltd ((1991) 2 KAR 258) — Explained
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14. Kipkemboi, John & another v Morris Kedolo (Civil Appeal 88 of 2017; [2019] KEHC 8736 (KLR)) — Explained
15. Kiplagat, Hosea & 6 others v National Environment Management Authority (NEMA) & 2 others (Environment & Land Case 52 of 2015; [2018] KEELC 2546 (KLR)) — Explained
16. KM & 9 others v Attorney General & 7 others (Petition 1 of 2016; [2020] eKLR) — Explained
17. Macharia, Samuel Kamau & another v Kenya Commercial Bank & 2 others (Application 2 of 2011; [2012] eKLR) — Explained

18. Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018; [2021] KESC 34 (KLR)) — Explained
19. Mumba, Albert Chaurembo & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the plaintiffs and other members/beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016; [2019] eKLR) — Explained
20. Municipal Council of Eldoret v Titus Gatitu Njau (Civil Appeal 106 of 2015; [2020] KECA 782 (KLR)) — Explained
21. Musembi William & 13 others v Moi Educational Centre Co Ltd & 3 others (Petition 2 of 2018; [2021] eKLR) — Explained
22. Muthui, John & 19 others v County Government of Kitui & 7 others (Environment and Land Petition E06 of 2020; [2020] eKLR) — Explained
23. MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015; [2017] KEHC 1496 (KLR)) — Explained
24. Ndetei, David M v Orbit Chemical Industries Limited (Civil Suit 147 of 2008; [2014] KEHC 4354 (KLR)) — Explained
25. Orbit Chemicals Industries v David M Ndetei (Civil Appeal 445 of 2018; [2021] KECA 741 (KLR)) — Explained
26. Oyugi, Edward Akong'o & 2 others v Attorney General (Constitutional Petition 441 of 2015; [2019] KEHC 10211 (KLR)) — Explained
27. Save Lamu & 5 others v National Environmental Management Authority (Nema) & another (Appeal 3 of 2019; [2019] KEELC 4739 (KLR)) — Explained
28. Fose v Minister of Safety and Security ((CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786) — Explained
29. Indian Council for Enviro-Legal Action & others v Union of India & others (1996 AIR 1446; 1996 SCC (3) 212) — Explained
30. MC Mehta v Union of India & others (1987 AIR 1086; 1987 SCR (1) 819) — Explained
31. Association of Victims of Post Elections Violence and lnterights v Cameroon (Communication No 272/2003; 46th Ordinary Session (11-25 November 2009)) — Explained
32. Kaya v Turkey (App No 22535/93; ECHR 2000-III) — Explained
33. Tătar v Romania (Application No 67021/01; [2009] ECtHR) — Explained
34. Ramanoop v Attorney General (TT 2003 CA 19) — Explained
35. Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment (Trinidad and Tobago) ([2017] UKPC 37) — Explained
36. Rylands v Fletcher ((1868) LR 3 HL 330) — Explained

Statutes

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — order 1; rule 8 — Interpreted
2. Constitution of Kenya (2010) — article 10, 21, 23 (3) (e), 26, 42, 43, 63, 69, 70 (c), 162 (2) (6), 186, 260; Schedule 4; part 2 — Interpreted
3. Court of Appeal Rules, 2022 (cap 9 Sub Leg) — rule 33 — Interpreted
4. Environmental (Impact Assessment and Audit) Regulations, 2003 (Act No 8 of 1999 Sub Leg) — Schedule 2 — Interpreted
5. Environmental Management and Co-ordination Act, 1999 (Act No 8 of 1999) — section 2, 3 (3) (5), 9 (1) (2) (k), 25, 58, 59 - 62, 108, 126, 129 (1) (2) (3) — Interpreted
6. Environmental Management and Co-ordination (Waste Management Regulations), 2006 (Act No 8 of 1999 Sub Leg) — regulation 17; Schedule 4 — Interpreted

7. Environment and Land Court Act, 2011 (Act No 19 of 2011) — section 13 (3), 18 (a) — Interpreted
8. Evidence Act (cap 80) — section 107, 108 — Interpreted
9. Export Processing Zones Act (cap 517) — section 9, 15, 23 (c) — Interpreted
10. Mining Act, 2016 (Act No12 of 2016) — section 103 — Interpreted
11. Physical and Land Use Planning Act, 2019 (Act No 13 of 2019) — In general — Cited
12. Physical Planning Act (Repealed) (cap 286) — section 29, 32 — Interpreted
13. Public Health Act (cap 242) — section 116 — Interpreted

Texts

1. Bell, S., et al (Eds) (2017), Environmental Law (London: Oxford University Press 7th Edn p 224, 432)
2. Lead Poisoning Investigations Team (2015), Assessment of Blood Lead Levels among Children in Owino Ouro Settlement in Mombasa County, Kenya (Nairobi: Ministry of Health)
3. Maljean- Dubois, S., (Ed) (2017), International Litigation and State Liability for Environmental Damages: Recent Evolutions and Perspectives (Taipei: National Taiwan University Press)
4. Task Force on Decommissioning Strategy for the Metal Refinery EPZ Ltd (Later Max Industry Limited) in Mombasa (2015), Draft Report of the Task Force (Nairobi: National Environment Management Authority)

International Instruments

1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989
2. Basel Convention Technical Guidelines for Environmentally Sound Management of Waste Lead-Acid Batteries, 2010
3. Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, 1999 — article 4
4. Rio Declaration on Environment and Development, 1992 — Principle 15, 16

Advocates

None mentioned

JUDGMENT

1. The consolidated appeals herein have been filed by National Environment Management Authority (NEMA), the appellant in Mombasa Civil Appeal No E004 of 2020; and Export Processing Zones Authority (EPZA), the appellant in Mombasa Civil Appeal No E032 of 2020 and who were designated as the 1st appellant and 2nd appellant respectively during the consolidation of the appeals. Both appeals arise out of a judgment of the Environment and Land Court at Mombasa delivered on July 16, 2020 in *KM & 9 others vs Attorney General & 7 others*, Mombasa ELC Petition No 1 of 2016 [2020] eKLR. The suit in the Environment and Land Court was brought by way of a petition dated February 20, 2016 filed by various petitioners, being KM, a minor suing through SKS, his mother and best friend; Irene Akinyi Odhiambo; Millicent Achieng Awaka; Elizabeth Francisca Mwailu; Elias Ochieng; Jackson Oseya; Hamisi Mwamero; Daniel Ochieng Ogola; and Center for Justice, Governance & Environmental Action, who are the 1st to 10th respondents in the consolidated appeals.

2. The said suit was instituted by the above-named respondents on behalf the residents of Owino-Uhuru village situated within Changamwe Division, Mikindani area of Mombasa County. For ease of reference in this judgment, we shall refer to the 1st to 9th respondents as the residents of Owino- Uhuru village and the 10th respondent as CJGEA. The said residents and CJGEA claimed in their petition that Penguin Paper and Book Company Ltd, the owner of a parcel of land being 1707/ Sect/V/MN/ Mikidani/Mombasa, which was situated approximately 50 metres from the village, had been issued

with a license by the EPZA to operate as an Export Processing Zone (EPZ) Company in violation of the *Export Processing Zones Act*, which prohibits the licencing of entities engaged in activities that have an adverse effect on the environment. Further, that Penguin Paper and Book Company Ltd in turn leased part of its land to Metal Refinery EPZ Ltd, which was thereupon issued with a trading licence by the Mombasa County Council to construct and operate a factory dealing with toxic lead, contrary to the provisions of the *Physical Planning Act*.

3. Metal Refinery EPZ Ltd consequently started operating a lead acid batteries recycling factory on the said parcel of land in 2007, by smelting the lead electrodes and lead carbon compounds of used lead batteries at high temperatures for export, and the residents of Owino- Uhuru village averred that the smelting process produced liquid solid waste and gaseous emissions which contained lead particles. The residents further contended that shortly after Metal Refinery EPZ Limited commenced operations, complaints began emerging from the village that the factory was poisoning the environment arising from poor managements of its liquid, solid and gaseous waste. The complaints centered on the fact that the incidence of diseases, especially respiratory diseases, increased tremendously in the village after the factory began its operation, and that the dust and gases emitted from the factory houses corroded the iron sheet roofs of the houses in the village.

4. The residents and CJGEA thereupon commenced campaigns for the permanent closure of the factory and for the concerned authorities to investigate the environmental degradation wrought by the activities of the factory as well as the negative health impacts suffered. They detailed the complaints made, and the various closures of the said factory by the County Government of Mombasa, only for the factory to be subsequently reopened several times. In particular, that the Municipal Council of Mombasa closed the factory in June 2008 but in July 2008, the factory reopened after it was deemed that Metal Refinery EPZ Ltd had substantially complied with the safety requirements. That on February 20, 2009, the Cabinet Secretary, Ministry of Health closed the factory for not meeting the public health and sanitation standards, and following a complaint made to, and investigations by the Public Complaints Committee (PCC) of the National Environment Management Authority,the PCC made findings that Metal Refinery EPZ Ltd had been discharging effluent to the drainage system which posed significant health risk to those who came into contact with it since it was contaminated with lead, and ordered the closure of the factory. However, that the factory was reopened shortly thereafter, and that after several intermittent closures and re-openings, was eventually permanently closed in 2014.

5. The adverse effects of lead on the environment and humans was also detailed by the residents and CJGEA in their petition, as well as the regulation of lead production and exposure to lead levels by various international instruments and bodies; including the classification of used lead acid batteries as hazardous waste by the *Basel Convention*, and the designation of acceptable blood lead levels by the Centre for Disease Control (CDC), the Food and Agriculture Organization (FAO), and World Health Organization (WHO). According to the residents, several studies conducted on the soil, air, water bodies and dust on houses in Owino-Uhuru village by the Government Chemist and other experts from the Ministry of Health revealed high levels of lead contamination that was not safe for human habitation. Additionally, that tests conducted to determine the blood lead levels of the petitioners and residents of the village revealed unacceptably high levels of lead poisoning, and the 1st to 9th respondents were suffering various illnesses and ailments as result that required immediate medical intervention, which they could not afford. Lastly, that there had been at least 20 cases of death in the village directly attributable to the lead poisoning.

6. The case by the residents of Owino-Uhuru village and CJGEA therefore, was that NEMA, EPZA, the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health, and the Mombasa County Government were responsible for constitutional infractions in their

regulation of Metal Refinery EPZ Ltd and Penguin Paper and Book Company Ltd, and the residents faulted the said authorities for failing to enforce national laws and standards on the environment and human rights. Further, that the said authorities had violated the residents' constitutional rights to a clean and healthy environment, highest attainable standard of health and to clean and safe water by permitting, authorising and licensing the Metal Refinery EPZ Ltd's lead and lead alloys manufacturing plant without reasonable measures to prevent human and environmental harm; by failing to monitor and enforce environmental, health and safety regulations and adequately protect the residents from the effects of excess exposure to lead, and by failing to act upon the complaints made and recommendations on the reparation and minimizing of harm, after being made aware and receiving information of the actual cases of negative effects of exposure to lead from the residents and other institutions.

7. Metal Refinery EPZ and Penguin Paper and Book Company Limited were in this respect also alleged to have been under a duty to cooperate with state organs and other persons to protect and conserve the environment, and that the Metal Refinery EPZ's actions of operating a lead factory without taking any measures to protect the environment and human life, and Penguin Paper and Book Company Limited's action of allowing Metal Refinery EPZ to operate within its premises and conniving to influence its licensing also contributed to the violation of the right of the residents of Owino-Uhuru village to a clean and healthy environment.

8. Additional violations alleged by the residents and CJGEA was the systematic denial of access to information on the effects of exposure to hazardous materials and activities and how to mitigate the said effects, which violated their right to information, and the failure to undertake comprehensive background check including comprehensive environmental and social impact assessment and provide the residents with an opportunity to meaningful engage in the said processes and participate in development decisions.

9. The residents of Owino-Uhuru village and CJGEA accordingly sought various reliefs as follows:

    a. declarations that their right to a clean and healthy environment, right to highest attainable standard of health, right to clean and safe water in adequate quantities, right to life and right to information had been violated;

    b. an order for compensation for the damage to the resident's' health and environment and for loss of life;

    c. various orders of *mandamus* against the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health, NEMA, EPZA, the Mombasa County Government, Metal Refinery EPZ Ltd and Penguin Paper and Book Company Ltd, directing them to carry out a comprehensive participatory study to ascertain the levels of lead in the residents' environment and bodies, to implement the recommendations in the *reports* by the Ministry of Health's Lead Poisoning Investigation Team dated May 2015 and by the Senate Standing Committee on Health dated March 17, 2015 on the lead exposure to the residents; to develop and implement regulations with regards to lead and lead alloys manufacturing plants and on the licensing, operations and monitoring of entities dealing with hazardous waste; and to develop a national action plan towards operationalising the *Basel Conventions Technical Guidelines for Environmentally Sound Management of Waste Lead-Acid Batteries*.

10. The Attorney General and the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health detailed the efforts they made to address the complaints made by the residents in a replying affidavit sworn on July 5, 2018 by John K Ndungu, a Public Health Officer in the Ministry of Health. The gist of their response was that after having become aware of the protests by the residents of Owino-Uhuru village, a team from the Ministry of Health which included the said

deponent carried out an inspection of the factory operated by Metal Refinary EPZ Ltd on February 26, 2009, which was the basis of the closure order in a letter dated March 13, 2009 and that on April 24, 2009, an environment measurement report was prepared and delivered to the Provincial Director of Public Health Officer indicating the various analyses carried out and the results and passed/ approved by SGS , a private laboratory. That by letters dated March 16, 2009, April 8, 2009, and April 15, 2009, and June 4, 2009, the management of Metal Refinery EPZ Ltd confirmed steps taken in compliance with directions and recommendation made by the public health team, and further inspections were carried out by the team which revealed that recommendations with regards to waste disposal had not been complied and the closure order remained in force. However, that during the period of closure the Ministry of Health received a letter from NEMA dated May 12, 2010 indicating consideration of reopening of the factory, and that on June 10, 2010, another inspection was made of the factory which ascertained that most of the recommendations had been met. A letter dated June 15, 2010 was subsequently issued authorizing the reopening of the factory with caution of continued compliance with recommendation of the District Public Health Officer-Kilindini.

11. The factory subsequently operated for 11 months and during a routine visit, the Ministry of Health officers discovered that some waste had been disposed along a seasonal riverbed and closed the factory on June 17, 2011 and after removal of the waste, issued a conditional closure lifting order on September 2, 2011. In August 2014, the deponent was summoned by the Senate Health Committee to shed light on the factory and, and that the Senate Committee consequently made several recommendations including testing of persons living 100 meters from the factory. That the Ministry of Health in Mombasa thereupon carried out water and soil sampling, took blood samples from various age groups of residents for testing, opened a special ward at Port Reitz Hospital to offerlead treatment and health services to the residents, and physicians were trained on management of lead cases.

12. The County Government of Mombasa, in their replying affidavit sworn on March 16, 2018 by its Attorney, Mtalaki Mwashimba, stated that its role was to issue a single business permit to Metal Refinery EPZ Ltd after it had set up a factory and obtained the approvals of all relevant ministries and departments at national level. That the County Government's officers visited the factory to see whether the plant complied with physical health requirements which included, whether it was well ventilated and had firefighting equipment and fire exits, and the deponent asserted that the County Government of Mombasa was not involved in measuring and determining the toxicity of the lead levels that came into contact with humans. Further, that all the necessary environmental impact assessment tests were done by NEMA in conjunction with the stakeholders dealing with environmental matters at national level before giving the go ahead for setting up of the plant, and that the County Government of Mombasa played no role in the setting up of the plant and were not to blame for the misfortune that befell the residents of Owino-Uhuru Village.

13. NEMA responded by way of replying affidavit sworn on March 15, 2018 by Zephaniah Ouma, its Deputy Director of Compliance, and detailed the actions it took after Metal Refinery EPZ Ltd submitted an environment impact assessment project report on March 13, 2007. The key interventions in this respect were that NEMA gave a cessation and restoration order to Metal Refinery EPZ Ltd contained in a letter dated April 23, 2007, after inspection of the site revealed that they were undertaking smelting of scrap lead acid batteries without an environmental impact assessment licence; that it gave a conditional approval to Metal Refinery EPZ Ltd on May 16, 2007 and requested them to confirm in writing that they would comply with the conditions, which the 16th respondent did on May 17, 2007; that the 1st appellant then gave Metal Refinery EPZ Ltd authority to carry out trial runs by a letter dated June 11, 2007, and by a letter dated August 14, 2007 lifted the cessation and restoration order of April 23, 2007 after an inspection found out that the its plant was functioning

well, and reinstated the approval of May 16, 2007. The environment impact assessment (EIA) licence was subsequently issued on February 5, 2008.

14. Further, that on June 15, 2009, upon receiving the initial environmental audit, NEMA issued an improvement order dated September 15, 2008, and on May 12, 2010, it issued conditions for reopening the factory. A further inspection was done on September 30, 2011 by NEMA and another improvement order issued to Metal Refinery EPZ Ltd on October 3, 2011, who updated on the steps taken to comply with the improvement orders by a letter dated October 24, 2011. A further inspection carried out by NEMA on November 27, 2013 revealed non- compliance with the earlier improvement notice, which led to a decision to close the factory which was communicated to Metal Refinery EPZ Ltd on November 29, 2013. On August 5, 2014, NEMA was invited by the Senate Standing Committee to investigate Metal Refinery EPZ Ltd following a petition by the residents. NEMA subsequently wrote letters dated March 30, 2015 and April 17, 2015 addressed to the Director of Medical Services requesting for the epidemiological results in order to take corrective measures, and in May 2015, constituted a task force that initiated a decommissioning strategy and prepared a report dated October 2015. NEMA stated that it forwarded the task force report together with a policy paper on remediation to the Cabinet Secretary, Environment, Water and Natural Resources and the Director of Public Prosecutions for further policy directions and action. NEMA therefore denied that it was negligent in granting the EIA licence, and averred that it undertook all the necessary steps in ensuring that Metal Refinery EPZ Ltd complied with the set procedure and regulations, and acted according to the provisions of the *Environment Management and Conservation Act*.

15. EPZA on its part opposed the petition in a response sworn on March 1, 2008 by Fanuel Kidenda, its Chief Executive Officer. Its case was that Metal Refinery EPZ Ltd applied for an export processing zone manufacturing license, which application was provisionally approved in principle vide a letter which had conditions to be fulfilled before they could be issued with an EPZ manufacturing licence, including the submission of a certified copy of an environmental impact assessment license from NEMA, and issuance of an export permit and mineral dealers license issued by the Commissioner of Mines and Geology, which were fulfilled. That by a letter dated June 12, 2008, the then Municipal Council of Mombasa shut down Metal Refinery EPZ Ltd's factory under the *Public Health Act* and that when the closure notice was lifted by a letter dated July 4, 2008, EPZA wrote to Metal Refinery EPZ Ltd highlighting environmental and public health compliance issues to be undertaken before its licence could be renewed. Further, that the Ministry of Public Health and Sanitation Services also gave Metal Refinery EPZ Ltd compliance measures that required to be met as evidenced by various correspondences dated May 7, 2009, July 14, 2009, and 2nd and September 14, 2009.That by a letter dated December 23, 2009, the Ministry of Public Health and Sanitation Services directed Metal Refinery EPZ Ltd to cease operations, and the said company closed down its manufacturing unit in July 2012, whereupon it was advised by EPZA on the procedure for closure. EPZA denied that it failed to monitor and enforce environmental, health and safety regulations, and averred that it executed its mandate and issued licenses in accordance with the requirements of the *Export Processing Zones Act*, and also took issue with the credibility of the evidence presented by the residents of Owino Uhuru village.

16. A hearing of the petition was held by the Environment and Land Court (ELC) in which ten witnesses gave oral testimony on behalf of the residents of Owino Uhuru village, six of whom (PW1 to PW6) were residents of the village and two (PW6 and PW7) were also former employees at Metal Refinery EPZ Ltd's factory. PW1-PW5 testified as to the dark smoke, dust and liquid waste that was discharged to the village by the factory operated by Metal Refinery EPZ Ltd before its closure, and the effects on their houses, health and family members' health. PW1 in this respect informed the court that the 1st respondent herein was her grandchild, and had suffered injuries on his leg after stepping on waste

discharged from the factory, and after various hospital visits he was tested and found to have lead particles in his blood and put on treatment. Further, that PW1 was also tested and found to have lead particles in her blood, and that since she could not afford the treatment for the 1st petitioner, she put him in a children's home.

17. PW2 likewise testified that he and two of his children were tested and found to have lead particles in their blood; PW3 testified that her son developed rashes and scars on his legs and upon being tested he was found to have lead poisoning and was put on treatment; PW4 testified that he and other villagers organized demonstration and were arrested, and that he was also tested and found to have lead in his blood; PW5 testified that one of his sons who was born in 2011 started developing rashes on the body and coughing when he was 2½ years old, and after being tested was found to have lead and put on treatment. However, that his son's health did not improve and he passed on September 30, 2016.

18. PW6 stated that he was employed by Metal Refinery EPZ Ltd in 2010 and also resident in Owino-Uhuru village, and that his wife who used to wash his overalls started becoming ill in 2010, and their two children who were born in 2011 and 2015 died in November 2012 and September 2015 respectively. In addition, that his wife was tested and found to have high lead levels in her blood, and also died in 2015. PW7 detailed the work he was employed to do at Metal Refinery EPZ Ltd in his testimony, and stated that he was also tested and found to have lead in his blood levels, and that some of his co-workers died, while his wife had three miscarriages.

19. The residents and CJGEA also called various experts to testify on their behalf. PW8, who had since retired, testified that in 2014 while he worked as Deputy Government Chemist, he carried out tests on fifty (50) blood samples he received from the Ministry of Health, and on additional blood, water, soil and dust samples collected from Uhuru-Owino residents and village, which were found to contain high levels of lead. He produced his report as an exhibit, which had recommended *inter alia* immediate closure of the metal factory that was the suspected source of the lead. PW9, a medical doctor, also physically examined some residents of the village upon a request from CJGEA, and observed manifestations of lead exposure on their skin and bodies. He however did not undertake any tests on the residents. The last witness who testified on behalf of the residents of Uhuru-Owino village (PW10) was the Executive Director of CJGEA who stated that she was initially employed by Metal Refinery EPZ from January to April 2009, and that her son fell ill, and tests revealed that it was as a result of lead in the blood, which may have been as result of exposure when he visited the factory. She thereupon resigned from Metal Refinery EPZ and started mobilising the residents of Owino- Uhuru village and to lobby various government institutions to take action against the lead pollution by Metal Refinery EPZ, and formed CJGEA in the process. PW10 detailed the correspondence made and activities undertaken in this regard in her testimony.

20. The Attorney General and the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health called two witnesses, DW1, a Principal Public Health Officer at the Ministry of Health and deponent of their replying affidavit, reiterated the averments he had made in the said affidavit, while referring to various correspondence, and stated that the Ministry did not receive any letters from the residents of Owino-Uhuru village prior to their demonstrations, on the lead poisoning by the Metal Refinery EPZ Ltd's factory, nor any report from NEMA or EPZ on the said lead poisoning, and that the Ministry did not lift its closure order of the factory. DW2 was the then Director of Medical Services, and confirmed that she was part of the team that undertook investigations on the complaints made about the waste from the factory, and prepared the report produced by PW8 that found elevated lead levels in the blood and environmental samples collected from the residents and environs of Owino-Uhuru village.

21. NEMA's witnesses (DW3 and DW4) was its acting deputy director of compliance and enforcement and deponent of NEMA's replying affidavit,and an environmental officer, and both adopted their respective witness statements. On cross-examination, DW3, while stating that the operations of Metal Refinery EPZ Ltd's factory before the issuance of the EIA licence on February 5, 2009 were illegal, confirmed that there was a letter dated December 6, 2006 which gave the factory permission to operate before the EIA licence, and that no audit of its operations was done between December 2006 and April 2007 when the factory was ordered to stop operations. DW4 on his part confirmed visiting the factory during the EIA exercise and Owino-Uhuru village.

22. The acting County Attorney of Mombasa County testified as DW5, and adopted his witness statement which was similar to the contents of the replying affidavit filed by the County, and reiterated that its role was limited to issuance of a single business permit and was not tasked with measuring lead levels in the environment. While admitting that the County was the successor in title to the Municipal Council of Mombasa and was responsible for planning and zoning issues, the witness stated that it was not proper for the council to authorize the dumping of waste and ought to have closed the factory.

23. Similarly, DW6, a liaison officer at EPZA Mombasa regional office adopted the replying affidavit filed by EPZA as his evidence, and stated that EPZA issued the Metal Refinery EPZ Ltd with a licence after it had been issued with an EIA licence and licence from the Mines and Geology department as required by the law. The last witness to testify was DW7,an environmental officer from EPZA, who confirmed that he was part of, and secretary of meetings held on April 27, 2009 called by the public health department over the closure of Metal Refinery EPZ Ltd's factory, and wrote the minutes that confirmed that most of the corrective measures were undertaken by Metal Refinery EPZ Ltd and that it had complied with the requirements to re-open the factory.

24. After hearing the parties, the Environment and Land Court (A Omollo J) delivered a judgment on July 16, 2020 allowing the petition by the residents of Owino-Uhuru village and CJGEA, which set out in detail the pleadings, evidence and submissions made by the parties, and made various findings as follows. On the issue of the trial court's jurisdiction to hear and determine the petition, the learned trial judge held that the gist of the petition revolved around the violations of the rights of the residents of Owino- Uhuru village towards a clean and healthy environment as provided for in article 42 of the *Constitution*, the rights to life in article 26, and right to the highest attainable standard of health care and sanitation as guaranteed by article 43; and that by dint of article 70 of the *Constitution* and section 3(3) of the *Environmental Management and Coordination Act* No 8 of 1999 the said residents could seek redress in the Environment and Land Court.

25. On the issue of proof of violations of the rights of the residents of Owino- Uhuru village, while noting that seven of the witnesses who testified in support of the petition and injuries and loss suffered were residents of Owino-Uhuru village, and that the court had opportunity to observe their injuries, the court in addition considered the report of the Deputy Government Chemist who testified as PW8, a report by the Parliamentary Standing Committee on Health on the Owino-Uhuru Petition, and the evidence of PW9, and was satisfied that the the residents of Owino-Uhuru village and CJGEA demonstrated that there was a threat of violation of their rights under *Constitution* and proved the actual violation to their personal life, the environment (soil and dust) where they stayed and the water which they consumed. It was added none of the respondents to the petition gave any reports to contradict the scientific reports produced on record.

26. On the issue of culpability for the violations, it was noted that the source of the pollutant was Metal Refinery EPZ Ltd, and that Metal Refinery EPZ Ltd and Penguin Paper and Book Company Ltd did not contradict the violations levelled against them. The trial court detailed the violations of law

committed by the other respondents, who it noted were aware of the presence of the residents of Owino-Uhuru village at the time they were licensing the operations of the Metal Refinery EPZ Ltd. Specifically, it was found that the Cabinet Secretary in the Ministry of Environment, Water and Natural Resources issued a license for operations to Metal Refinery EPZ Ltd prior to issue of an EIA licence and without supporting documents and public participation. The Cabinet Secretary in the Ministry of Health was found liable for breaching the rights to life and clean and healthy environment of the residents of Owino-Uhuru village for failing to take steps to have Metal Refinery EPZ Ltd remove the nuisance and for failing to provide required treatment to the residents of Owino-Uhuru village.

27. NEMA was found not to have fulfilled its mandate as set out in section 58 of the *Environment Management and Coordination Act* by allowing Metal Refinery EPZ Ltd to operate a factory without an EIA licence, by allowing trial runs by Metal Refinery EPZ Ltd before an EIA licence, by ordering reopening of Metal Refinery EPZ Ltd's factory without confirmation of compliance of the improvement orders it issued, and by not invoking the principle of polluter pays. EPZA was found in violation of the law when it issued Metal Refinery EPZ Ltd with a license without prior submission of an EIA license and premised on letters that were in respect of distinct parcels of land. The court found no role or liability on the part of the Mombasa County Government in failing to comply with environmental laws. Liability was therefore apportioned to NEMA at 40%; Metal Refinery EPZ Ltd at 25%; the Cabinet Secretary in the Ministry of Environment, Water and Natural Resources, the Cabinet Secretary in the Ministry of Health and EPZA at 10% each; and Penguin Paper and Book Company Ltd at 5%.

28. On the issue of compensation, the court while considering the concept of strict liability and section 108 of the *Environment Management and Compliance Act* as well as article 70(c) of the *Constitution*, and as set out in the case of *David M Ndetei v Orbit Chemical Industries Ltd* [2014] eKLR found that the 1st to 10th respondents are entitled to compensation in monetary and non-monetary reliefs pleaded in the petition. The trial court accordingly made the following orders:

    a. Declarations that the petitioners' rights to a clean and healthy environment; rights to the highest attainable standard of health and right to clean and safe water; and rights to life were violated by the actions and omissions of the respondents.

    b. An award of Kshs 1.3 billion to the petitioners for personal injury and loss of life payable within ninety (90) days from the date of judgment by NEMA, Metal Refinery EPZ Ltd, the Cabinet Secretary in the Ministry of Environment, Water and Natural Resources, the Cabinet Secretary in the Ministry of Health, EPZA and Penguin Paper and Book Company in accordance with the apportionment of their liability set out in the judgment. In default the petitioners be at liberty to execute.

    c. The respondents were directed to clean-up the soil, water and remove any wastes deposited within the Owino-Uhuru Settlement by the settlement by Metal Refinery EPZ Ltd within 4 months (120 days) from date of the judgment. In default, the sum of Kshs 700,000,000 became due and payable to the CJGEA to coordinate the soil andenvironmental clean-up exercise.

    d. An order of *mandamus* against the Attorney General, Cabinet Secretary in the Ministry of Environment, Water and Natural Resources and NEMA directing them to develop and implement regulations adopted from best practices with regard to lead and lead alloys manufacturing plants.

    e. The costs of the petition be granted to the petitioners.

29. NEMA, being dissatisfied with the judgment proffered an appeal and filed a memorandum of appeal dated October 9, 2020 in which it has raised nine (9) grounds of appeal challenging the findings by the trial court on liability and award of compensation and damages. NEMA faulted the findings of liability on the ground that the trial court misconstrued the interpretation of the principles of strict liability, 'polluter pays', and causation in apportioning liability; and failed to appreciate the environment impact assessment process, the importance of trial runs and the 'precautionary principle' in environmental governance. The quantum of compensation of Kshs 1,300,000,000.00/= and Kshs 700,000,000/= was challenged for having been based on proposals given by the petitioners only, and for the finding that CJGEA, a non- governmental organisation, could be paid the Kshs 700,000,000/= to conduct a soil contamination clean up in favour of the public and without any expert input.

30. EPZA was equally dissatisfied with the judgment and raised twenty-three (23) grounds of appeal in its memorandum of appeal dated May 7, 2021, in which it faulted the findings of the trial court in five broad areas. First, the trial court's jurisdiction to hear and determine the constitutional petition; second, the violations of the law found to have been committed by EPZA and apportioning of liability to EPZA; third the application of the "polluter pays principle" and lastly, the award of excessive damages of Kshs 1.3 billion to the 1st to 9th petitioners and persons claiming through them for personal injury and loss of life and of Kshs 700,000,000/= payable to the 10th petitioner for soil / environment clean up exercise without justification and evidence, and ascertainment of affected persons in the representative suit.

31. The two appeals were consolidated and heard during a virtual hearing held on July 20, 2022, learned counsel Mr Erastus K Gitonga appeared for NEMA, learned counsel Mr Kisaka and Mr Masafu appeared for EPZA, and learned counsels, Mr Francis Olel, Mr Charles Onyango and Mr Gideon Odongo appeared for the 1st to 10th respondents, while learned counsel Mr Emmanuel Makuto and Ms Nimwaka Kiti appeared for the 11th to the 13th respondents. There was no appearance for the County Council of Mombasa. The parties while highlighting their submissions reiterated their written submissions. NEMA filed two sets of submissions, the first dated October 13, 2021 and truncated submissions dated February 21, 2022. Mr Gitonga highlighted the said submissions during the hearing. Mr Masafu and Mr Kisaka highlighted submissions dated while Mr Olel and Mr Onyango highlighted submissions.

32. We need to address the preliminary issue raised by EPZA of the trial court's jurisdiction to hear the petition filed by the residents and CJGEA at the outset, as it has the potential of disposing of this appeal. Mr Masafu's submissions on the issue were that the Environment and Land Court did not have jurisdiction to determine the petition, as the issues raised therein lay in the purview of the National Environment Tribunal. The counsel cited section 126 of the *Environment and Management Act, 1999*; the decision of Asike-Makhandia JA in the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR and the Supreme Court decision in the case of *Albert Chaurembo Mumba & 7 others (Sued on their own and on behalf of predecessor and or successor in title in their capacities as Registered Trustees of Kenya Ports Authority Pension Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the plaintiffs and other members/ beneficiaries of the Kenya Ports Authority)* [2019] eKLR (hereinafter "the *Albert Chaurembo Mumba* case") which we will examine later on in this judgment.

33. Mr Olel, the counsel for the residents, in reply submitted that the provision relied upon by EPZA refers to a situation where there is ongoing pollution and a complaint has been made to NEMA and the petition filed by the residents and CJGEA was not an appeal from a refusal to grant a license, refusal to transfer the same, or imposition of any condition, limitation, revocation, suspension or variation

of the same; or the decision of any committee or environmental inspector performing their functions under*EMCA*within the context of section 129(2) and (3) of *EMCA*. Further, that Metal Refinery EPZ Ltd closed shop in the year 2014, while the petition was filed in February 2016 seeking several declarations and damages arising from pollution practices occasioned by the direct and complicit negligence on the part of all respondents in the petition, and it would have been illogical to expect that the petitioners would make their complaint to NEMA about a factory not in operation. Mr Olel placed reliance on the provisions of article 162(2)(6) of the *Constitution of Kenya 2010* and section 13 of the *Environment & Land Court Act* No 19 of 2012 as the provisions giving the *Environment and Land Court Act* jurisdiction to hear and determine all disputes relating to land and environment and address any issue regarding denial, violation or infringement of or threat to rights or fundamental freedoms relating to a clean and healthy environment under articles 42, 43 and 70 of the *Constitution of Kenya 2010* . Reference was made to decision in the case of *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR in this regard.

34. The starting point in determining the jurisdiction of any court or tribunal, as restated by the Supreme Court of Kenya in *Samuel Kamau Macharia and another vs Kenya Commercial Bank and 2 others*, Application No 2 of 2011 [2012] eKLR, is either the *Constitution* or legislation or both, and a court or tribunal can only exercise jurisdiction as conferred by the *Constitution* or other written law. The Supreme Court also emphasised that a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law or divest a tribunal of its jurisdiction vested upon it by Parliament by judicial craft or innovation.

35. In the *Albert Chaurembo Mumba* case (*supra*) the Supreme Court of Kenya further explained the jurisdictional question as follows:

> "(135) By jurisdiction, it is clearly meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which jurisdiction shall extend, or it may partake both these characteristics. If for example, the jurisdiction of an inferior court depends on the existence of a particular state of facts, the court must inquire into the existence of the facts in order to decide whether it has jurisdiction. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to a nullity. Jurisdiction, therefore, must be acquired before judgment is given."

36. Section 129 (1) of the *Environment Management and Co-ordination Act* (EMCA) provides for the matters that may be appealed to the National Environment Tribunal (NET) established by the said Act as follows:

> "1. Any person who is aggrieved by:
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> a. a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder:
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> b. the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

c. the revocation, suspension or variation of his licence under this Act or regulations made thereunder:

d. the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

e. the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder:

may within sixty days after the occurrence of the event against which he is dissatisfied appeal to the tribunal in such manner as may be prescribed by the tribunal."

37. Section 129(3) provides for the relief that the tribunal can grant as follows:

"3. Upon any appeal, the tribunal may—

a. confirm, set aside or vary the order or decision in question;

b. exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

c. make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

d. if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;

e. if satisfied upon application by any party, review any orders made under paragraph (a)."

38. The Supreme Court of Kenya noted in the *Albert Chaurembo Mumba* case that in order to give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute, In, *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [*supra*] this court (Asike-Makhandia, Kiage & Odek, JJA) noted that a court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted, and that the concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body. In addition, that section 129(3) of *EMCA* confers power upon the NET to *inter alia* exercise any power which could have been exercised by NEMA or make such other order as it may deem fit, and is an all-encompassing provision that confers at first instance jurisdiction upon the tribunal to consider various prayers in the petition that was before the trial court including that of violation of constitutional right to a healthy environment. Further, that it was never the intention of the *Constitution* makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court. The court found that the key dispute in the petition before the trial court was whether the appellants therein were polluting the environment and whether their EIA licences were lawfully procured, and that the competent organ with original jurisdiction to hear and determine the matter was the NET or the NECC (National Environment Complaints Committee). It was in this context

that the court in that appeal found that the learned trial judge erred in usurping the jurisdiction of the tribunal and or the NECC.

39. On the other hand, in the instant appeal the claim by the residents and CJGEA in the trial court exclusively concerned the violation of constitutional rights by the respondents, arising from the operations of Metal Refinery EPZ Ltd, and for which specific remedies were sought including compensation and judicial review orders (*mandamus*) against the respondents. There was no issue or prayer raised by the residents and CJGEA that was within the ambit of section 129(1) of *EMCA* as was the case in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [*supra*]. In addition, the alleged harm and violations arising from the adverse effects of the subject pollution happened outside the timelines provided in section 129(1) of *EMCA*. Lastly, NET has no powers to grant the remedies that were sought by the residents and CJGEA, and we are reluctant to adopt the interpretation of section 129(3) of *EMCA* as being an all encompassing provision that empowers NET to grant any relief that may be sought by a party in this appeal, since in our view NET's powers can only be exercised within the context of the objectives and four corners of *EMCA*, which is the parent Act, and the powers and duties granted to the various agencies created thereunder.

40. It is also our view that section 129(3) of the *EMCA* cannot be used to arrogate to the NET specific powers given to the courts under the *Constitution*, particularly the powers under article 23(3) which provide for relief that can be granted in a claim for violation of constitutional rights as follows:

> "(3) In any proceedings brought under article 22, a court may grant appropriate relief, including––
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> a. a declaration of rights;
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> b. an injunction;
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> c. a conservatory order;
>
> d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
>
> e. an order for compensation; and
>
> f. an order of judicial review."

41. Section 13(3) of the *Environment and Land Court Act* in this respect specifically grants the Environment and Land Court jurisdiction to hear and determinee applications for redress of a denial, violation, or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the *Constitution*. It is notable that article 70 of the *Constitution* also provides that if a person alleges that a right to a clean and healthy environment under article 42 has been, is being or is likely to be, denied, violated, infringed, or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. The article provides for additional remedies that can be granted by a court in this respect to include any order or directions it considers appropriate––

a. to prevent, stop or discontinue any act or omission that is harmful to the environment;

b. to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

c. to provide compensation for any victim of a violation of the right to a clean and healthy environment.

42. We therefore find no arrogation of jurisdiction by the Environment and Land Court either by judicial craft or arising from the pleadings before it, as the claim was one of violation of the rights to a clean and healthy environment and the remedies sought were well within its jurisdiction and powers, which powers are not specifically granted to the NET under *EMCA*.

43. On the outstanding substantive issues arising from the consolidated appeals, we have perused the submissions filed by the parties herein, and note that the findings by the trial court on the adverse effects of the activities and operations of the factory run by Metal Refinery EPZ Ltd are not contested. In particular, the two appellants do not contest the observations by the trial court as follows:

> " 128. The report presented by PW8 was in effect the report by the 1st – 3rd respondents. Since this witness (PW8) was not declared as a hostile witness, there was no basis laid to doubt his findings. The findings of PW8 which were very detailed is found at pages 182-195 of the petition. All the people whose samples were tested were residents of Owino-Uhuru. Amongst these were Alfred Mullo (PW2), Margaret Akinyi – 9th petitioner, Elias Ochieng Oseya - 5th petitioner, Daniel Ochieng Ogola – 8th petitioner and Elizabeth Francisca – 4th petitioner.
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> 129. Paragraph 3 of the report (187 – 188 of the petition) gave a summary of blood lead (Pb) levels results for the 50 residents of Owino-Uhuru and table 2 gave summary of persons (which included petitioners) with elevated blood lead levels which required one form of intervention or another. The government chemist report also included soil lead levels and their findings. At page 189 of the petition was table 3 which gave the sample points; table 4 was summary of dust levels and also water levels. Foot note to table 4 stated thus;
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> i. Lead at levels 40mg/ft2 on floors is a hazard.
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> ii. Lead levels 250mg/ft2 on interior windows is a hazard.
>
> iii. There are pockets of dust with high lead levels which is hazardous especially for children in play areas including persons who spend time in enclosed places."

44. The court also referred to the report of the standing committee on health on the Owino-Uhuru public petition and noted as follows:

> " 130 ....The committee held it sittings pursuant to a petition they received from residents of Owino-Uhuru alleging violation of their rights stipulated in article 42, 43, 69 and 70 of the Constitution. The committee which comprised members of the 11th Parliament stated that they did a fact finding tour in Owino-Uhuru village as well as the 7th respondent's premises. They also held meetings with various stakeholders such as Mombasa County Health Department officials, Public Complaints Committee and National Environment and Management Authority officials.
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> 131. The committee further stated that they reviewed documents presented and the reports of the different institutions charged with protection of

the Environment such as Public Complaints Committee (PCC), National Environment and Management Authority, Public Health etc. For instance at page 25 of the report (page 121 of the petition), the PCC stated thus under paragraph 3.8.1.2;

i. The PCC team observed evidence suggestive of air pollution ie corrosion of corrugated iron sheets on the rooftops of homes of the residents of Owino-Uhuru.

ii. The factory has been discharging effluent through a hole in their boundary wall into a trench that runs through Owino- Uhuru village and into the municipal drainage system. That this effluent posed a significant health risk to human and animal health life; and

iii. Lead dust produced from the factory had had negative impact on the health of workers therein.

132. The Parliamentary Committee in their report made a raft of recommendations *inter alia*;

a. The immediate cleaning of the environment including detoxifying and restoring the soil.

b. The replanting of destroyed trees.

c. The immediate testing of all the residents of Owino-Uhuru village for lead exposure.

d. The removal of hazardous waste slug the plant has disposed of over the years and continues to dispose of at Mwakirunge Dumpsite."

45. Lastly it is also notable in this regard that the *Zero Draft Report* dated July 15, 2015 of the task force on decommissioning strategy for Metal Refinery EPZ Ltd set up by NEMA found sufficient evidence of lead exposure at the factory and among the residents of Owino-Uhuru village in chapter three thereof.

46. It is not disputed that the factory in question was operated by Metal Refinery EPZ Limited on land owned by Penguin Paper and Book Company Ltd. It is also notable that the findings as regards infringement of the rights of the residents of Owino-Uhuru village were not disputed by NEMA and EPZA. The issues raised in the consolidated appeal largely turn on the legality and propriety of the findings by the trial court on the liability of NEMA, EPZA and the other state agencies for the adverse effects from the operations of the said factory, and the basis for the quantum of the award of damages and compensation.

47. On the basis and apportionment of liability, Mr Gitonga for NEMA submitted that the trial court misconstrued the doctrine of strict liability and the "polluter pays" principle when it found NEMA culpable and apportioned it 40% liability. The counsel, while citing section 107 and 108 of the *Evidence Act*; the decisions on strict liability in *David M Ndetei vs Orbit Chemical Industries Limited* [2014] eKLR and *Rylands v Fletcher* (1861-73) All ER; and comparative Indian Supreme Court decisions in *MC Mehta vs Union of India* [1987] 1 SCC 395 and *Indian Council for Enviro-Legal Action vs Union of India* Supreme Court Of India (1996) 3 SCC 212, submitted that it is established in law that strict liability is typically imposed absolutely on the owner of the land causing the pollution for damages

caused by escape of substances to a neighbour's land, and that the trial court therefore erroneously found NEMA liable and apportioned it 40% liability.

48. In addition, that the trial court, should have found Metal Refinery EPZ Ltd fully culpable and liable for the damages and environmental restoration based on the "polluter pays" principle, and while citing the decision in the case of *Kiema Mutuku v Kenya Cargo Handling Services Ltd* (1991) 2 KAR 258, the counsel submitted that there no liability without fault in the legal system in Kenya and that fault has to be pleaded and proved by evidence at the hearing. The counsel also cited principle 16 of the *Rio Declaration on Environment and Development* (hereinafter "the Rio Declaration") and the case of *Fishermen & Friends of the Sea vs The Minister of Planning, Housing and the Environment (Trinidad and Tobago)* [2017] UKPC 37 and *Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Construzioni Giuseppe Maltauro SPA & 2 others* [2019] eKLR in support of the position that the costs of pollution control and remediation are borne by the person who cause the pollution, who should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. Therefore, that the trial court, having found that the residents suffered individually through inhalation and absorption of pollutants from Metal Refineries EPZ Limited should have for purposes of consistency found that Metal Refineries EPZ Limited was the polluter and therefore ought to have solely met the costs of compensation and environment restoration.

49. The findings by the trial court on the processes of the issue of the EIA licence were also faulted by the learned counsel for NEMA. In particular, that the learned judge failed to appreciate that the environment impact assessment process is a time bound process, and thus could not have allowed for the back and forth correspondence before a decision to license can be arrived at. Reference was made to section 58 of the*EMCA*and the decision in the case of *Save Lamu & 5 others vs National Environmental Management Authority & another* [2019] eKLR for the position that the court is only required to ensure that the statutory steps and processes in the Act are followed, but must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of mitigating factors proposed, and that it is not for the judges to decide what projects are to be authorised but as long as they follow the statutory process, it is for the responsible authorities.

50. In addition, that the trial court failed to acknowledge that NEMA discharged its mandate and followed procedure by making site visits and issuing statutory instructions and orders upon Metal Refineries EPZ Limited, both before and after licensing, and that NEMA adopted a consultative approach hence the "legion" of correspondence by way of statutory letters that were issued to Metal Refineries EPZ Limited.

    Reliance was placed on the decision in the case of *Hosea Kiplagat & 6 others v National Environment and Management Authority (NEMA) & 2 others* [2018] eKLR that NEMA has the capacity and mandate to do an environmental audit and monitoring of the project after it's operational, and it was submitted that the issuance of the environmental impact assessment licence was not an end of the environmental impact assessment process but rather part of the process, and that learned trial judge was wrong to impute liability on NEMA simply because the appellant licensed the project. Lastly, that the trial judge failed to appreciate the importance of trial runs and the 'precautionary principle' in environmental governance; and the counsel submitted that the trial runs directive was issued based on the precautionary principle as formulated in the *1992 Rio Declaration* principle 15. It was submitted that lead smelting was a relatively new industry in the Country and the first to be subjected to the environmental impact assessment process and that a trial run is a preliminary test of how a new or proposed project would work and is applied in novel areas with a view to inspecting the environmental

impacts beforehand where the national environmental agency is not fully possessed with the relevant expertise. In the event of negative impacts then the proponent would be required to mitigate the impacts or discontinue the undertaking.

51. Mr Kisaka for EPZA on his part submitted that the trial court failed to appreciate the documents that an investor is required to provide before being allowed to operate under the *Export Processing Zones Act*,and in particular that EPZA granted Metal Refinery EPZ Limited an EPZ licence based on a letter dated December 12, 2006 written by NEMA that confirmed that the project could proceed and that the environmental impact assessment (EIA) licence would be issued in due course.

52. Therefore, that under the presumption of regularity, the trial court ought to have proceeded on the premise that the award of the EPZ licence was properly done and that official duties were properly discharged and all procedures duly followed. According to the counsel, the residents of Owino-Uhuru village and CJGEA were consequently required to provide cogent, clear and uncontroverted evidence to rebut the regular issuance of the EPZ licence. Further, that the learned trial judge erred in failing to appreciate that section 23 of the *Export Processing Zones Act* did not require EPZA to receive an environmental impact assessment licence from Metal Refinery EPZ Limited , but rather was to grant the EPZ license if the proposed business enterprise did not have a deleterious impact on the environment, engage in unlawful activities, impinging on national security or prove to be a health hazard. In this respect, that by a letter dated September 26, 2006 written by NEMA to Metal Refinery EPZ Limited, it was stated that the proposed project was approved with conditions, and directed Metal Refinery EPZ Limited to confirm in writing the conditions shall be complied with prior to the commencement of the project to enable the authority to process the environmental impact assessment licence.

53. Additionally, that Metal Refinery EPZ Limited having undertaken to comply with the conditions imposed by NEMA prior to the commencement of its project by a letter dated November 1, 2006 and in answer, NEMA, in its letter dated December 6, 2006 having confirmed that the project could proceed and therefore being satisfied that the proposed business would not be deleterious to the environment, the reasonable and available option to EPZA was to grant an EPZ Licence to Metal Refinery EPZ Limited. Further, that EPZA had also received the Mineral Dealers Licence which the Commissioner for Mines and Geology had issued to Metal Refinery EPZ Limited on November 22, 2006. Metal Refinery EPZ Limited was found to thereafter have caused pollution, and that the trial court therefore failed to apply the polluter pays principle as set out in principle number 16 of the *Rio Declaration* and restated in section 2 of *EMCA*, and erred in law and fact in relying on *David Ndetei v Orbit Chemicals Industries Ltd* (2014) eKLR and failing to appreciate that Metal Refinery EPZ Limited , being the polluter, should have been entirely liable for the harm, if any, and not EPZA.

54. The counsel relied on the decision by the India Supreme Court in *Indian Council for Enviro-Legal Action and others vs Union of India and others* (1986) 2 LRC 258 that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution and that it is not the role of the Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The imposition of liability-on a public body when pollution was caused by a private entity is untenable and illogical and more so where the appellant discharged its statutory duties accordingly. It was thus counsel's position that Metal Refinery EPZ Ltd should bear the costs of environmental remediation and compensation of the affected parties. In any event, that the EIA license was eventually issued to Metal Refinery EPZ Limited by NEMA on February 5, 2008, while EPZA issued the EPZA licence on December 13, 2006, and was therefore in error, if at all, for only one year which should have affected EPZA's portion of liability, if any.

55. Ms Kiti and Mr Makuto's submissions on liability were along four fronts. Firstly, that the trial judge erred by apportioning more culpability on NEMA, the Ministry of Environment Water and Natural Resources and Ministry of Health cumulatively than on Metal Refinery EPZ Limited and Penguin Paper and Book Company Limited contrary to the laid down principle of "polluter pays" that is elaborated in principle 16 of the *Rio Declaration*, sections 2 and 3 of the *EMCA* and case of *Dobs Entertainment Limited vs National Environment Management Authority* [2021] eKLR that apportions blame on the polluting entity and on a fault basis Further, that the learned trial judge rightly stated in the judgment that there was sufficient evidence to show that the pain and suffering of the residents was because of lead poisoning from the waste discarded by the metal refinery in their vicinity, and from the evidence adduced in the trial court, there was no doubt that resultant pollution was stemmed from unsanctioned and illegal actions by Metal Refinery EPZ Limited , which did not have a license to operate as a metal refinery and whose actions were in violation of the license issued to it which only allowed the exporting of metals as a metal dealer and not a metal refinery.

56. Secondly, that the trial court did not find that the Ministry of Environment, Water and Natural Resources and Ministry of Health were negligent in their duties in protecting the environment nor failed to take action as and when they were called to do so, and that there was sufficient proof that the various administrative actions were commenced to prevent Metal Refinery EPZ Limited from continuing to operate in a manner that polluted the environment. In particular, that the Ministry of Health acted swiftly after it was made aware of the concerns of the villagers with regards to the effects of the factory on their health in conducting investigations, inspections, ordering closure of the factory and providing medical care and treatment to the victims of the pollution as illustrated by the evidence of some of the witnesses for both the residents and the Ministry.

57. Thirdly, that the Ministry of Environment Water and Natural Resources is the parent ministry of NEMA and based on the distribution of responsibilities, the ministry is in charge of policy formulation and appointments to various institutions dealing with environmental protection, while the roles of day-to-day regulation of environmental issues are granted to the NEMA, which includes issuance of environmental impact assessments (EIA) as provided in the EMCA under section 58. Further, that the Ministry is mandated to provide regulatory framework for the issuance of the EIA and fulfilled the statutory obligations in policy formulation, and there were no policy deficiencies that required it to be held liable nor was it found culpable for failure to provide sufficient policy that led to the pollution. Likewise, that the Ministry of Health discharged its statutory duty having provided the necessary policy framework and made all required appointments to various lead agencies, and could not be held liable should the lead agencies fail to implement policy. In addition, that no direct link was established between a policy gap and actions of the polluter for the Ministry to have been found culpable. Therefore, that the finding of liability on the part of the ministries without allegations of insufficient policy framework in preventing the pollution goes against the principle of causation, and the decision by the Supreme Court of Kenya in *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* [2018] eKLR was cited for the position that four key elements predominate in establishing a negligence claim - a duty of care, a breach of that duty, causation, and damage.

58. Lastly, that the learned trial judge erred by stating that liability of the County Government of Mombasa was negligible, yet the environmental discharge was allowed to harm the residents since the said county government had not provided safety measures for disposal of waste, which is a function of county governments under schedule 4 part 2 of the *Constitution* which. Further, that the County Government of Mombasa authorised the reopening of the metal refinery occasioning further harm to the residents of Owino- Uhuru village despite actions by officials of the Ministry of Health to close the metal refinery.

59. Mr Onyango, the counsel for the residents of Owino-Uhuru village and CJGEA, in response challenged the position that the "polluter pays" principle provides that only the direct polluter, namely Metal Refinery (EPZ) Limited, should have been held liable, and submitted that a reading of section 2 of *EMCA* reveals that the law does not state categorically that recompense must be paid only by the person who runs the establishment that is responsible directly for pollution, but by a person convicted of such pollution. Therefore, that in cases of pollution, the court must look at the circumstances under which the pollution took place and then proceed to apportion blame based solely on available facts. In addition, that whereas principle 16 of *Rio Declaration* promotes the taking into account of the fact that the polluter should, in principle, bear the cost of pollution, this principle does not take away, the ultimate responsibility of a state as a duty bearer under international human rights laws and standards to ensure human rights for all are respected, protected and fulfilled. That the obligations of States requires them to refrain from interfering with or curtailing the enjoyment of human rights, to protect individuals and groups against human rights abuses and to take positive action to facilitate the enjoyment of basic human rights. Therefore, that NEMA and EPZA, being state organs within article 21 of the *Constitution*, had an obligation under article 69 of the *Constitution* to take necessary steps to promote environmental rights. The counsel also pointed out that article 69 of the *Constitution* is in line with principle 15 of the *Rio Declaration*.

60. Coming to the present case, the counsel submitted that the toxic gas, solid waste dust and contaminated water that was dumped on Owino- Uhuru Village emanated from a factory run by the Metal Refineries (EPZ) Limited, but that the NEMA and EPZA, being state organs. are enjoined to observe the national values and principles of governance as set out in article 10 of the *Constitution of Kenya 2010* and had a responsibility to apply the provisions of this *Constitution* in a manner that respects and upholds the right and fundamental freedoms that are set up in the bill of rights. The counsel set out the statutory duties of NEMA and EPZA, and pointed out that under section 9(1) of *EMCA*, the main object and purpose for which NEMA is established is to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

    Further, that among the NEMA's principal duties under section 58 of *EMCA* is to ensure that projects that legally require EIA licenses are commenced only after consideration of an EIA report and issue of an EIA license, and that it is in this way that NEMA executes its mandate of protecting the environment and to protect citizens from harmful projects.

61. The counsel submitted that after EIA report was submitted to NEMA on behalf of Metal Refinery (EPZ) Limited on the March 13, 2007 and before the EIA license was issued by NEMA on the February 5, 2008, Metal Refinery (EPZ) Limited had already commenced operations in violation of the provisions of section 58 of *EMCA* set out above. Further, that despite NEMA being aware of the actions by Metal Refinery (EPZ) Limited of operating illegally without an ElA license, it did not apply the punishment set out at section 138 of EMCA, and instead, rewarded wrong doing by issuing it with an ElA license the following year. In addition, that NEMA proceeded to issue an ElA license to Metal Refinery (EPZ) Limited when the ElA report presented for its consideration did not contain any comments from the immediate neighbours of the premises where it was already carrying out its activities.

62. On the liability of EPZA, the counsel submitted that under section 9 of the *Export Processing Zones Act*, one of the objectives of the EPZA is the regulation and administration of approved activities within the Export Processing Zones (EPZ) through, *inter alia*, the examination and processing of applications for licences by the export processing zone developers, export processing zone operators, and export processing zone enterprises and issue of the relevant licences. Further, that section 23 of

the Act provides for licensing of EPZ firms and in particular that a license shall only be issued by EPZA if the proposed enterprise shall not have a deleterious impact on the environment. However, that EPZA, in response to Metal Refinery (EPZ) Limited's application to be issued with an EPZ enterprise license, responded by a letter dated 2th June 2006 setting out conditions upon which the licence could reasonably be issued including requiring the 15"' respondent to submit a copy of ElA license from NEMA. EPZA then proceeded to issue Metal Refinery (EPZ) Limited with a license on 13'" December 2006 thereby enabling it to begin operations as an EPZ enterprise, yet the said company did not obtain an EIA license until the February 5, 2008.

63. The counsel submitted that EPZA therefore did not follow its own conditions set for issuing an operating license, and in so doing, issued a license to Metal Refinery (EPZ) Limited to operate its factory without knowing or caring to find out about the effects that the activities of the factory would have on the environment or on the health of the community living around the factory in complete abdication of its responsibility as set out in section 23 of the Act. In addition, that instead of seeking to enforce compliance by Metal Refinery (EPZ) Limited to safety standards that would have prevented the pollution, available documents showed that EPZA differed with the decisions of other government agencies which closed the factory, by arguing that the factory ought to be opened forthwith to continue with its business.

64. In conclusion the counsel submitted that the picture which emerges is of statutory bodies who failed in their responsibilities to superintend the activities of Metal Refinery (EPZ) Limited, and that even when complaints began to emerge during the initial operations of the company that the operations were harmful to the environment and to the health of those living around it, NEMA and EPZA refused to act to avert further disaster and were thus responsible as enablers of the pollution that was carried out by the Metal Refinery (EPZ) Limited. Therefore, that whereas the actual pollution was committed by the Metal Refinery (EPZ) Limited, the inaction and omission of NEMA and EPZA as duty bearers makes them responsible for violations suffered by the residents of Owino-Uhuru village and that the consequences of that failure to carry out correctly statutory functions must also fall on them under the principle of strict liability established by the decisions in in the *Rylands vs Fletcher* (*supra*) , *MC Mehta v Union of India* (*supra*) and *David_M Ndetei v Orbit Chemical Industries Ltd* (*supra*).

65. The counsel also cited the decision by the European Court of Justice in *Muhammad Kaya v Turkey*, 22535/93 that a positive obligation arises if the authorities knew or ought to have known of the existence of a real and immediate risk to life from the acts of third parties and failed to take reasonable measures within the scope of their powers, and the decision by the African Commission on Human and People's Rights in *Association of Victims of PEV and lnterights v Cameroon*, 272/03, where it ruled that state parties shall not only protect rights through appropriate legislation and effective enforcement but by also protecting the citizens from damaging acts that may be perpetrated by private parties.

66. In commencing our determination of the issue of whether there was a legal basis to find NEMA and EPZA liable for the adverse effects of the operations of Metal Refinery EPZ Limited, we need to reiterate that the premise of the petition brought by the residents of Owino-Uhuru village was the violation of their constitutional rights, and the basis for liability in this respect was proof of conduct or acts or omissions on the part of NEMA, EPZA and other state agencies sued that was responsible for, or contributed to the infringement of the resident's rights. The residents in this respect set out the manner in which their rights were violated by NEMA and EPZA, as well as the other state agencies, and also set out the violations by Metal Refinery (EPZ) Limited and Penguin Paper and Book Company Ltd who were private entities. The applicable principles that apply in determining liability in this appeal are therefore both private and public law principles. The private or civil law principles on liability which center on the torts of nuisance and negligence, only determine the liability of the private persons, and

of public bodies to a limited extent with respect to breach of statutory duties. In this respect it is notable that the liability under the principle of *Ryland v Fletcher* (*supra*) of Metal Refinery (EPZ) Limited and Penguin Paper and Book Company Ltd as the persons who discharged the waste that polluted the environment and caused adverse effects to the residents, and owner of the land from which such discharge emanated is not contested.

67. NEMA and EPZA have contended that they were allocated and apportioned liability using this rule, and that Metal Refinery (EPZ) Limited and Penguin Paper and Book Company Ltd ought to have been held solely liable or shouldered the greater portion of liability. It is notable that the rule in *Ryland v Fletcher* remains relevant in environmental regulation, as the standard of care that is imposed in terms of hazardous activities. An example in this regard is article 4 of the *Basel Convention's Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal*, which applies strict liability for any damage resulting from the movement of hazardous wastes on the entity in operational control, and if two or more persons are liable, liability is joint and several. Our reading and appreciation of the findings by the trial court leads us to a contrary view. It is also notable that the trial court considered the principle of strict liability and the decisions thereon in *Rylands vs Fletcher* (*supra*) , *MC Mehta v Union of India* (*supra*) and *David_M Ndetei v Orbit Chemical Industries Ltd* (*supra*) when addressing the issue of compensation and held as follows:

> " 168. In light of the provisions of article 70(c) of the Constitution; section 108 of EMCA and the case law highlighted hereinabove, I am persuaded to make a finding that the petitioners are entitled to compensation in monetary and non-monetary reliefs as pleaded in the petition which reliefs I had set out at the beginning of this judgment."

68. The trial court clearly relied on other provisions of the *Constitution* and *EMCA* in allocating liability to NEMA and EPZA. In this respect, it is also notable that the trial court did not exclusively or solely rely on the "polluter pays" principle to establish liability on the part of NEMA and EPZA and other state agencies. In analyzing the submissions made on behalf of the residents and CJGEA the trial court observed as follows:

> " 72. The petitioners submitted that the 7th respondent should ideally be the party to bear the cost of remediation and compensate the petitioners in accordance with the polluter pays principle as per principle 16 of the Rio Declaration. The said principle does not however take away the responsibilities of the 1st to 6th respondents as state duty bearers to ensure that international human rights laws and standards are respected protected and fulfilled. The said duties are stipulated in article 21 of the Constitution with those pertaining to environmental rights in article 69(1) (d), (f), and (g). That the provisions of article 69 in line with principle 15 of the 1992 Rio Declaration on application of the precautionary approach in environmental protection are to the effect that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent actual degradation."

69. Likewise, on the submissions made on behalf of the Attorney General, and Cabinet Secretaries for the Ministries of Environment and of Health urging the trial court to adopt the polluter pays principle

embedded in the *Rio Declaration* principle 16 and find that Metal Refinery (EPZ) Limited was solely liable for the pollution, the trial court observed as follows:.

> " 87 ...The Rio Declaration passed 27 principles to guide the protection of the environment for the present and future generations. Inter alia, principle 8 and 18 states thus;
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> "Principle 8: To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."
>
> 88. This principle imposes upon the State a responsibility to ensure that activities within their jurisdiction to eliminate unsustainable patterns of production and consumption. The inference being that before the 1st to 3rd respondents can argue that the polluter shall pay, they have a duty to regulate. The duty is explained in principle 13 which provides thus;
>
> "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction".

70. We agree with this observations, and in addition, note that the "polluter pays" principle is an economic instrument which initially required a producer of goods or other items to be responsible for the costs of preventing or dealing with any pollution that the process causes. This includes environmental costs as well as direct costs to people or property, and also covers costs incurred in avoiding pollution as well as remedying any damage. However there are difficulties in the application of this principle and its exact scope and extent of payable costs, and identifying the responsible persons or "polluters". Section 2 of *EMCA* defines the "polluter-pays principle" to means " that the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law." Conviction of pollution connotes the application of criminal law and sanctions to private operators as opposed to state agencies, and primary liability appears to be assigned to private actors as the primary polluters under the section.

71. However, the state as an economic operator in the process of regulation and development of economic policies is well recognized, and the state and state agencies also engage in economic activities as operators. Therefore, it is not a hard and fast rule that state and state agencies are exempt from the application of the "polluter pays" principle. It is also instructive that both the *Environment and Land Court Act* (in section 18(a)) and *EMCA* (in section 3(5)) in this respect require the Environment and Land Court in exercising the jurisdiction conferred upon it, to be guided by principles of sustainable development including the "polluter pays" principle.

72. These findings notwithstanding, in the present appeal, the law that regulates the state's obligations in relation to the right to a clean and healthy environment and environment protection is public law, and the state's liability occurs when it violates its statutory or constitutional obligation or duty, (the wrongful act), and a linkage is established between the wrongful act and the damage or injury

caused by the environment (the causal link). The *Constitution* places positive obligations upon the State and state agencies to promote and protect the right to a healthy environment by taking "all necessary measures". State liability may thus derive from an administrative authorisation, an absence of regulation, or from inadequate measures relating to activities of the private actors, which result in harm to the environment. The violation of the right to a healthy environment may be invoked not only where the pollution or nuisance originates from the actions of the State or its organs, but also if it results from lack of effective regulation of private activities. In a translation of the decision of European Court of Human Rights in *Tătar vs Romania* (Application no 67021/01) published in *International Litigation and State Liability for Environmental Damages: Recent Evolutions and Perspectives* by Sandrine Maljean-Dubois in Jiunn-rong Yeh : Climate Change Liability and Beyond, National Taiwan University Press, 2017 (accessed from https:shs.hal.science halshs- 01675506f on June 9, 2023), the court stated as follows:

> " The positive obligation to take all reasonable and adequate measures implies, before anything else, for all States, the duty to develop an administrative and legislative framework for the efficient prevention of environmental damages and human health. When a State has to address complex questions of environmental and economic policy, and especially when it is about dangerous activities, it is necessary, in addition, to reserve a special place for regulations adapted to the specificities of the activity, especially for the risk that could result from it. This obligation must determine the authorisation, implementation, exploitation, security and control of the activity and impose to everyone concerned the adoption of practical measures that can guarantee the effective protection of citizens whose lives could be exposed to dangers inherent to the area. It is also necessary to underline that the decision process must include the conduction of appropriate enquiries and studies, to prevent and evaluate in advance the effect of activities that can damage the environment and violate individual rights, and that allow the establishment of a just balance between the different concurrent interests . The importance of public access to the conclusions of these studies as well as information that allows an assessment of the danger it is exposed to makes no doubt Finally, concerned individuals must also be able to stand a claim against any decision, act or omission before courts if they consider that their interests or observations were not sufficiently taken into account in the decision-making process "

73. The Kenyan *Constitution* in this respect imposes shared obligations and responsibility for environmental protection, management and conservation on both the state actors as well as private actors under article 69 as follows:

> "1. The State shall—
>
> a. ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
>
> b. work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
>
> c. protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
>
> d. encourage public participation in the management, protection and conservation of the environment;

e. protect genetic resources and biological diversity;

f. establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

g. eliminate processes and activities that are likely to endanger the environment; and

h. utilise the environment and natural resources for the benefit of the people of Kenya.

2. Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources."

74. Under article 260 of the *Constitution*, the "State" is defined to mean "the collectivity of offices, organs and other entities comprising the government of the Republic under the *Constitution*"; a "state organ" means a commission, office, agency or other body established under the *Constitution* while a person includes a company, association or other body of persons whether incorporated or unincorporated. It is notable in this respect that both NEMA and EPZA are statutory bodies that are established under Acts made by Parliament pursuant to powers granted by the *Constitution*, and of relevance in this appeal is that article 69 specifically requires systems of environmental impact assessment, environmental audit and monitoring of the environment to be established, which has been principally been done under *EMCA*.

75. Article 69 also embodies the shift that has occurred over the years in the regulation of the environment, from reactive provision of remedies for environmental pollution to more proactive provisions of standards and preventative measures designed to reduce or eliminate the risk of environmental damage. In particular article 69 embodies the principle of sustainable development which attempts to reconcile the conflicting demands of economic development and environmental protection so as to ensure that the benefit of any development outweighs its costs,including costs to the environment. The diverse and complex nature of the environment, and of the causes and extent of its pollution and degradation requires a broad range of regulatory tools and mechanisms. In this respect, the typical regulatory process involves the establishing the general policies on the environment, setting standards or specific policies in relation to the environmental issue concerned, applying these standards and policies to individual situations, normally through some licensing system, enforcing standards and permissions through administrative and criminal sanctions, providing information about the environment and the regulatory process itself, and using mechanisms to monitor and improve the regulatory system. See in this regard the text on *Environmental Law* by Bell and McGillivray 7th edition, at pages 224 to 227.

76. The questions that we need to answer in this appeal are the legal implications and environmental effects if any, of the actions and conduct or omissions of the NEMA and EPZA during the processes of licensing of Metal Refinery (EPZ) Limited, and adequacy of the monitoring and enforcement of it activities and operations. It is notable that with respect to the regulatory framework,*EMCA* in this respect provides for the responsible agencies and tools for environmental protection, environmental planning, guidelines on environmental protection of various sectors, integrated environmental impact assessment of plans and projects, environmental audits and monitoring, environmental quality standards and various environmental enforcement measures. NEMA and EPZA do not dispute that they approved operations by Metal Refinery (EPZ) Limited before the issuance of the EIA licence to

it, and in this regard, we will reproduce the sequence of events illustrated by the evidence adduced and as captured by the trial court as follows:

> " 146 ... According to the 4th respondent's evidence, an environment impact assessment license was issued in February 2008 pursuant to an environment impact assessment project report submitted on March 13, 2007. The 4th respondent annexed a letter dated September 26, 2006 (page 70 of Ouma's affidavit) which approved the 7th respondent's project to be undertaken on LR No MN/II/3697, Kilifi District and letter by the 7th respondent dated 1/6/2006 requesting for change of address on the National Environment Management Authority license and environment impact assessment approval (NEMA/PR/5/1213) to the 8th respondent's premises.
>
> 147. However, on December 6, 2006, the 4th respondent issued another letter to the 7th respondent which stated thus,
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> > " Further to the approval letter dated September 26, 2006, and your letter of compliance to the conditions of approval sent to us on 24th November, we would like to advice you that the manufacture of lead alloys using scrap metal batteries from the region as raw material can carry on. The EIA license will be given to you in due course. However, do ensure that the conditions set out in the approval letter will be strictly adhered to".
>
> 148. The question which arises, was the 4th respondent approving another project after it already did so on September 26, 2006 for the project in the Kilifi land" Secondly the 6th respondent stated that it relied on this letter to issue the 7th respondent with a license. Yet the letter referred to LR No MN/III/3697 Kilifi District while the 6th respondent was stationed in Changamwe Mombasa. As at March 2007, the project on the 8th respondent's land had not been issued with approval to operate as the 4th respondent did not provide evidence on its response for the request to transfer the license from Kilifi District to Mombasa."

77. The learned trial judge proceeded to observe as follows:

> " 149. It is interesting to note that while the 4th respondent was considering the environment impact assessment project report dated March 13, 2007, it went ahead to issue a letter dated April 23, 2007 referenced "Cessation and restoration order for the Scrap Battery processing plant, Birikani area off New Holland/CMC Yard Nairobi Road, Mombasa". The letter directed the 7th respondent to do the following;
>
> > a. Cease operations immediately.
> >
> > b. Initiate an environmental impact assessment (EIA) study to facilitate in depth evaluation of the potential impacts associated with the project and to materialize harmony with the affected and interested stakeholders.

c. Submit a letter of commitment to the Authority to the effect that you will comply with the above requirements within seven (7) days from the date of receipt of this letter.

d. Call environmental inspectors from NEMA to inspect the level of the compliance, which should be to the satisfaction of the Authority on such terms and conditions as may be deemed appropriate and necessary.

150. Within 3 weeks of the cessation and restoration order, the 4th respondent on May 16, 2007 proceeded to approve the 7th respondent's project. The 4th respondent's action in my view amount to assisting the 7th respondent in breaching the law instead of holding them to account. If the law allowed them to issue a cessation order why issue an environment impact assessment (EIA) license before confirming that their letter of April 23, 2007 had been complied with" To show the contradiction by the 4th respondent in carrying out its mandate, it issued another letter dated June 11, 2007 stating thus, "This is to inform you that the authority has reviewed your request and hereby grant you permission to carry out trial runs." The letter of May 16, 2007 had in conclusion asked the 7th respondent to, "Kindly confirm in writing that the condition shall be complied with prior to commencement of the project to enable the authority process the environment impact assessment license." The 7th respondent gave the commitment vide their letter of May 17, 2007. So was the letter of May 17, 2007 the basis for giving permission for trial runs before a license was issued" Does the law allow for trial runs before an environment impact assessment license is given"

78. Likewise, EPZA does not dispute that it issued the EPZ licence to Metal Refinery (EPZ) Limited before the issuance of the EIA licence. In addition to being subject to the obligations under article 69 of the *Constitution*, EPZA was under a specific duty under section 23(c) of the *EPZ Act* was to ensure that the business entities it licenced under the Act "shall not have a deleterious impact on the environment, or engage in unlawful activities, impinging on national security or may prove to be a health hazard". EPZA in its letter dated June 27, 2006 responding to Metal Refinery EPZ Ltd application for a an EPZ business enterprise licence, required it to "submit certified copy of environmental impact assessessment license from National Environmental Management. Authority (NEMA) For the project". EPZA nevertheless proceeded to issue an EPZ licence without the EIA licence and has urged that it complied with its duty by relying on NEMA's approvals to Metal Refinery EPZ Ltd before issuance of the EIA licence. EPZA therefore not only was in direct violation of article 69 of the *Constitution* and section 23 of the *EPZ Act*, but also assumed the legal risk and responsibility for any shortcomings by NEMA in its processes of issue of the EIA licence to Metal Refinery EPZ Ltd in this regard.

79. Likewise, as also noted by the trial court, also noted that the Cabinet Secretary Ministry of Environment Water; and Natural Resources issued license No 78 of 2006 to the Metal Refinery EPZ Ltd valid until December 31, 2006 for operations at Penguin Paper and Book Company EPZ Limited Godowns despite having noted in its letter dated June 13, 2006 to EPZA advising that "exports of lead are still allowed for those who have the necessary licenses from our department and NEMA. Further, the export of lead from scrap batteries should be done in accordance with the provisions of the *Mining Act*. ....". It is also notable that under section 103 of the *Mining Act*, the Cabinet Secretary is to issue a mining licence where *inter alia* "the applicant has obtained an approved environmental impact assessment licence, a social heritage assessment and environmental management plan in respect of the

applicant's proposed mining operations". We need to emphasize that the EIA license was eventually issued by NEMA on February 5, 2008.

80. What then were the legal implications and effects of the approvals and licences given by the various state agencies to Metal Refinery EPZ Ltd to commence operations before the issuance of an EIA licence? Section 58 of the EMCA which deals with application for an environmental impact assessment licence provides as follows as regards the EIA study and reports:

> "(1). Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the second schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
>
> (2). The proponent of any project specified in the second schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority: Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.
>
> (3). The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.
>
> (4). The Cabinet Secretary may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the second schedule to this Act by notice in the Gazette.
>
> (5). Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.
>
> (6). The Director-General may, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.
>
> (6A) The Cabinet Secretary in consultation with the Authority shall make regulations and formulate guidelines for the practice of Integrated Environmental Impact Assessments and Environmental Audits.
>
> (6B) The Cabinet Secretary shall make regulations for the accreditation of experts on environmental impact assessments.

(7). Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

(8). The Director-General shall respond to the applications for environmental impact assessment license within three months.

(9). Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.

(10). A person who knowingly submits a report which contains information that is false or misleading commits an offence and is liable on conviction, to a term of imprisonment of not more than three years, or to a fine of not more than five million shillings, or to both such fine and imprisonment and in addition, his licence shall be revoked."

81. The second schedule lists the projects that require submission of an environmental impact assessment study report, which are categorized by low, medium and high risk. Sections 59 -62 of *EMCA* provide the processes that follow after the environmental impact assessment study, including publication of the report by NEMA in the Kenya Gazette and two local newspapers, comments on environmental impact assessment report by lead agencies, setting up of a technical advisory committee to advise it on environmental impact assessment if need be, or a further evaluation or environmental impact assessment study, review or submission of additional information if necessary. After these processes, NEMA may, under section 63, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. It is also notable that regulation 17 of the *Environmental Management and Co-ordination (Waste Management) Regulations, 2006* specifically provides that no person shall engage in any activity likely to generate any hazardous waste without a valid environmental impact assessment licence issued by Authority under the provisions of the Act.

82. An environmental impact assessment is a key environmental law and regulation mechanism, and its essence is that information about likely environmental impacts of development projects, plans and programs is properly considered before potentially harmful decisions are made. As explained in the text on *Environmental Law* by Bell and McGillivray at page 432:

> " Thus, environmental assessment is both a technique and a process. EIA's and SEA's are inanimate rather than tangible. The key point is that., strictly, the 'assessment' is undertaken by the decision maker on the basis of environmental information with which it is supplied. This information consists, in part, of an 'environmental statement' prepared by the developer, (or more likely, by hired consultants), which details at least the main environmental impacts of the project and any mitigating measures that are proposed to reduce the significance of those impacts... But just as importantly, the environmental information also includes other information supplied by various statutory consultees.. independent third parties, members of the public, and even the decision maker itself. So it is worth stressing that the developer does not produce an environmental assessment (a mistake that even some judges still make); the decision maker carries out the assessment on the basis of environmental information supplied."

83. It is therefore the responsibility of NEMA to not only ensure compliance with the requirements and processes of an environmental impact assessment, but to also take into account the information thereon when making a decision whether or not to approve and licence a project. The effects of the failure to do so may be development that has unmitigated damaging effects on nearby properties and human health, as happened in the present appeal. The issues that are required to be identified and addressed in the EIA are specified in the second schedule to the *Environmental (Impact Assessment and Audit) Regulations, 2003* Regulations, namely the ecological considerations including biological diversity, sustainable use and ecosystem maintenance; the social considerations including effect on human health; landscape; land uses; and the effects on water sources in terms of quantity and quality and drainage patterns/drainage systems. In addition, the standards as regards hazardous wastes are provided in the fourth schedule of the *Environmental Management and Co-ordination (Waste Management) Regulations, 2006* and include control of wastes containing 0.1% or more by weight of lead and wastes in solid and liquid form.

84. NEMA did not provide evidence that the EIA study report undertaken by Metal Refinery (EPZ) Limited dated March 13, 2007 that was produced in evidence was subjected to technical evaluation in light of the parameters that require to be satisfied in terms of impact, as set out in the second schedule to the *Environmental (Impact Assessment and Audit) Regulations, 2003* Regulations, and confirmation of the relevant standards that required to be met by Metal Refinery EPZ Ltd, including on hazardous waste. The causal link between the approval of the operations of Metal Refinery EPZ limited before completion of the EIA process and the damage suffered as a result of effects of the project is therefore evident, since appropriate anticipatory controls could have been put in place by NEMA *ex ante* were the hazardous impacts of the project properly identified, including an absolute prohibition of the project. Put differently, the project would never have seen the light of day, and hence no damage would have been resulted.

85. For these reasons, it is our view that the allocation and apportion of liability to NEMA and EPZA for approving the project and its commencement before the full impact of the project were considered and evaluated was near equal in measure to that of the actual perpetrators of the pollution. The main actors in this respect in so far as the cause of the deleterious activities were concerned were NEMA, EPZA and Metal Refinery EPZ Ltd, with the liability of the other agencies and actors being either passive or reactive in relation to the pollution.

86. In addition, once the evidence of the adverse and hazardous effects of the operations of the project became apparent, and given the nature of the wide ranging of the effects on both the ecosystem, human health, water and air quality, NEMA ought to have applied the wide range of enforcement measures at its disposal, including cancellation of the EIA licence, restoration orders and prosecution of the perpetrators of the pollution. We therefore find that NEMA for this reason bears greater responsibility than EPZA and the Ministry of Health for the harmful environmental and health effects of the project. From our analysis as set out in the foregoing, we find it necessary to slightly revise and review the original allocation and apportion of of liability set out by the trial court in paragraph 158 of its judgment as follows:

    i. 2nd respondent (The Cabinet Secretary in the Ministry of Environment, Water and Natural Resources)-5%

    ii. 3rd respondent (The Cabinet Secretary in the Ministry of Health)-5%

    iii. 4th respondent (NEMA)-30%

    iv. 6th respondent (EPZA)- 10%

v. 7th respondent(Metal Refinery EPZ Ltd) - 40%

vi. 8th respondent(Penguin Paper and Book Company Ltd) - 10%

87. We also feel constrained to comment on the finding by the trial court that no liability attached to the County Government of Mombasa, on the ground that the evidence adduced did not show any direct role of the County Government in failing to comply with the environmental laws, and that the *Physical Planning Act* ceased to apply to the EPZ zone once the area was gazetted as such under the *EPZ Act*. There was no evidence on record that the area, land or building where Metal Refinery EPZ Ltd was operating had been declared an export processing zone, which declaration is required to be done by the relevant Minister by way of a notice in the Gazette under section 15 of the *EPZ Act*.

88. Secondly, the trial court found that the issuance of single business permit is not attached to fulfilment of any conditions prior to its being issued, and it is notable that the timeline with respect to the deleterious operations by the Metal Refinery EPZ Ltd was between 2006 and 2014 when its factory was closed. Prior to the new *Constitution*, the *Physical Planning Act* which was then in operation and was repealed by the *Physical and Land Use Planning Act* in 2019, gave local authorities power under section 29 to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area and to consider and approve all development applications and grant all development permissions, and under section 32, when considering a development application, was have regard to the health, amenities and conveniences of the community generally and to the proper planning and density of development and land use in the area.

Under section 116 of the *Public Health Act*, it is also the duty of every local authority

> " to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition."

89. Lastly, under article 186 of the *Constitution of 2010*, the functions and powers of the County Governments are as set out in part II fourth schedule to the *Constitution*, which include in paragraph 2, county health services including refuse removal, refuse dumps and solid waste disposal, in paragraph 3 control of air pollution, noise pollution, other public nuisances and outdoor advertising, and in paragraph 10, implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation. There are therefore clear duties with respect to environmental protection which were imposed on the County Government of Mombasa and its predecessor in this regard. However, since there was no cross appeal on the trial court's findings on the said County Government's liability by the counsels for the Attorney General and the Cabinet Secretaries in the Ministry of Environment, Water and Natural Resources and Ministry of Health who only raised their concerns their submissions, we shall say no more about the issue.

90. We are also minded to address the two justifications raised by NEMA and EPZA in concluding on the issue of liability. NEMA relied on the precautionary principle as the reason for allowing the operations of Metal Refinery EPZ Ltd before its licensing and trial runs. The precautionary principle is defined in section 2 of *EMCA* as the "principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". We are concerned that NEMA's interpretation of the principle is that it permits the taking of risks in unknown cases, whereas to the contrary, the principle requires caution to be taken even when there is no evidence of harm

or risk of harm from a project, and that proof of harm should not be the basis of taking action. The proper application of the principle therefore is that scientific analysis of risks should form the core of environmental rules and decisions, notwithstanding the fact that such analysis may be uncertain. In the alternative, the principle is also used when there are limits to the extent that science can inform actions, and ultimately rules and decisions have to be made having regard to other considerations such as the public perception of the risk and the potential for harm. It is notable that the EIA processes provide opportunity for such analysis and perceptions to be taken into account.

91. EPZA on the other hand made an economic argument to justify the operations of Metal Refinery (EPZ) Limited, in terms of the contribution thereby to economic development. In this respect there will always be competing values that need to be balanced in environmental regulation, as well as the costs and benefits of compliance, and it is notable in this respect that this is one of the main objectives of an EIA and that article 69 emphasizes on ecologically sustainable development.

92. On the issue of quantum of damages, Mr Gitonga for NEMA submitted that the learned trial judge erred by arriving at the quantum of Kshs 1,300,000,000.00/= and Kshs 700,000,000/= on the basis of proposals given by the residents and CJGEA only and without any expert input especially for the clean-up exercise. Reliance was placed on the Court of Appeal decision in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR for the position that the award of damages for constitutional violations of an individual's right reliefs under public law remedies and the court's discretion is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. Further, that the trial judge directed public funds of Kshs 700,000,000/- be channelled to a non-governmental organization to undertake the soil contamination clean-up, when the said exercise inevitably required expertise not reposed in the non-governmental organisation. In addition, that there would be no statutory obligation placed upon the said non- governmental organisation for audit and monitoring of their work, and in the event of default there would no enforceable remedy. Therefore, that the learned judge should have directed that clean up responsibility be squarely on the polluter and in default, a state actor. Lastly, that it was unclear how the court arrived at the sum of Kshs 700,000,000/-as the appropriate figure for clean-up exercise, and that no scientific or statistical formula was applied by the learned trial judge in arriving at the dispute quantum. In conclusion, the counsel pointed out that NEMA is a state corporation funded by exchequer, and that the award by the trial court is so exorbitant and if left to stand, it would cripple it and effectively deny the public of the otherwise statutory functions that it dispensed.

93. Mr Kisaka while submitting on behalf of EPZA made reference to the cases of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, *Kigaragari v Aya* (1985) KLR 273, *John Kipkemboi & another v Morris Kedolo* [2019] eKLR and *Board of Trustees Anglican Church of Kenya, Diocese of Mandera v THW (Suing through her father ad guardian ad litem HWG)* [2019] eKLR and *Attorney General v Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment) which held that the quantum of damages to be awarded depends on the nature of right that is proven to have been violated, the extent of the violation and the gravity of the injury caused. The counsel submitted that the award of damages was neither reasonable nor moderate in so far as it was based on the wrong comparison, and made reference to the case of *Mohammed Ali Baadi & others v AG & 11 others* [2018] eKLR as relied on by the trial judge stating that the facts, circumstances and prayers therein were completely different.

94. In addition, that the residents and CJGEA bore the burden of proving the number of people affected, the extent of the damages suffered, the evidence that the damage resulted from the pollution and the cost of treating any condition that they had. Further, that they were under obligation to plead and prove the damages they suffered and any compensation to be made to them was special damages not

general damages, because the cost of treating the affected person could be calculated, and the cost of the restoration should have been specifically pleaded and proved. Reliance was in this regard placed on the cases of *Orbit Chemicals Industries vs Professor David M Ndetei* [2021] eKLR and *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR. Counsel concluded that the trial court did not satisfy itself as to the number of residents of the Owino-Uhuru village, there was no evidence to show that the persons were 3,000 in number, no list of persons on whose behalf the residents brought the petition to court, and that a representative suit could not have been the mechanism for proving the damages to all the alleged 3,000 persons in the estate of Owino Uhuru nor afford the court the opportunity to evaluate the extent of the injury of each of the individuals.

95. Therefore, that thee trial court erred in awarding damages that were not deserved and which were excessive, capricious and arbitrary as no reasons underpinned them; the comparative case applied was not apt in the circumstances thus taking into account irrelevant factors; there was no evidence to confirm the actual number of persons involved; the trial court did not ascertain the extent of injury suffered by the alleged 3,000 resident before arriving at the award of damages of Kshs 1.3 billion; the award was contrary to public policy in so far as it sought to divert huge sums of public funds to private programmes and finally, the trial court did not consider the economic and commercial impact of the award. The counsel urged that the trial court thereby misapprehended the evidence in material respects, and that the damages awarded were manifestly excessive and inordinately high and based on wrong principles, and asked us to interfere with the award.

96. The counsel for the residents of Owino -Uhuru village and CJGEA, Mr Olel, placed reliance on various decisions including in the cases of *William Musembe & others v Moi Education Centre & others*, SC Pet No 2 of 2018; *Edward Akong'o Oyugi & 2 others vs Attorney General* [2019] eKLR for the principles that apply in awarding compensation in constitutional petition, and submitted that from the evidence presented in court it is clear that the residents did adequately and in a robust manner discharge the burden of proof that indeed they are victims of lead poisoning, in that not only was their health irreversibly affected, but also the environment where they live had been condemned as inhabitable and must be remediated at a great cost to make it safely habitable again. Further, that the damages and/or effects of lead poisoning were amply proved by the witnesses who testified and also scientifically by various reports admitted and laboratory reports which clearly showed there was extensive lead poison not only to persons residing in Owino –Uhuru village but the contamination spread to the soil and water. Further, that the Ministry of Health acknowledged that the treatment of lead poisoning needed a process known as chelation in their report christened 'An Integrated Plan to Reduce lead Exposure in Owino Uhuru Settlement' and that the drug to be used in the process, namely oral succimer meso 2,3, dimercaptosucinnic Acid (DMSA) (CDC, 1991) was not available locally and needed to be procured from abroad.

97. The counsel further submitted that the damages awarded in the petition were commensurate and appropriate, and that the appellants herein had misconstrued the basis used in arriving at damages as they wrongly based it on quantum as awarded in tort. The damages awarded was a global figure of Kshs 1,300,000,000/-, and if divided among the roughly 4000 residents amounted to Kshs 325,000/-, and the environmental damage was irreversible and the residents would have to move out of the said village when remediation action was taken; their houses would be demolished and the top soil be removed, the corrugated iron sheets of their houses were corroded by sulfuric acid and even had holes and could not be reused; the water of Owino –Uhuru was contaminated by lead; nor was it necessary for all the 4,000 persons to produce medical reports to show ill health and lead contamination, since the various government reports confirmed that the entire village was contaminated and thus damages became applicable.

98. Therefore that the appellants had not shown that the damages awarded were excessive, or that the trial judge exercised her discretion in a wrong manner, and counsel requested this court not to interfere with the award by the trial court. In addition, that the appellants did not address the question of quantum in their submissions in the trial court or offer an alternate proposal and the trial judge exercised her discretion in granting an award. The counsel noted that in *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR, Mativo J (as he then was), awarded the petitioners a global compensation award of Kshs 20,000,000/- for the 1st petitioners and Kshs 6,000,000/- for the 2nd petitioner; in *MWK & another v Attorney General & 3 others* [2017] eKLR Mativo J (as he then was), awarded the petitioner a global sum of Kshs 4,000,000/- for infringement of rights; in *Mohamed Ali Baadi & others v Attorney General & 11 others* [2018] eKLR, the constitutional court awarded the petitioners therein a global compensatory award of Kshs 1,760,424,000.00/-, and that in *Hon Gitobu Imanyara & 2 others v Attorney General*, Supreme Court Petition No 15 of 2017, the Supreme Court enhanced an award of damages from Kshs 25 million to Kshs 60 million.

99. Lastly, the counsel submitted that the argument that the residents were under obligation to plead and prove damages suffered and any compensation to be made to them was special damages and not general damages failed to appreciate the effects of the provisions of article 70(3) that in a case of enforcement of environment protection, it was crystal clear that a party was under no obligation to prove or show any loss or injury. However, that in the present case, the residents went beyond the scope of the provisions of this law and were able to prove actual loss and injury. The counsel urged that the residents had locus to file the petition in the trial court and that there was an express provision of the *Constitution* and the rules pertaining to the filing of petitions/ public interest litigations, and it was not necessary to use provisions of the *Civil Procedure Rules* especially order 1 rule 8 to submit those lists of the those they represented or those who reside at Owino Uhuru village.

100. The circumstances in which this court will disturb the finding of a trial judge as to the amount of damages were set out in *Kemfro Africa Limited t/a Meru Express Services (1976) & another vs Lubia & Anor (No 2)* [1985] eKLR, thus; -

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

101. The prayers that were sought by the residents of Owino Uhuru village against the respondents with respect to reparation were two, firstly an order for compensation for the damage to the petitioners' health and environment, and loss of life; and secondly that a *mandamus* order be issued against the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents directing them to within 90 days from the date of the judgment to implement the recommendations in a report prepared by a Lead Poisoning Investigation Team of the 3rd respondent dated May 2015 and another by the Senate Standing Committee on Health dated the 17th day of March 2015 including adequately cleaning up and remediating contaminated soil in Owino Uhuru Village and offer adequate health services to the residents including the petitioners and animals affected by exposure to lead from the 7th respondent's manufacturing plant.

102. The applicable principles with respect to payment of compensation to remedy constitutional violations were stated by the South African Constitutional Court in *Ntanda Zeli Fose vs Minister of Safety and Security*, 1996 (2) BCLR 232 (W), and the court acknowledged that compensation

against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the *Constitution*, as a distinct remedy and additional to remedies in private law for damages. Further, that the comparable common law measures of damages will be a useful guide in assessing the amount of compensation, which will depend on the facts and circumstances of each case.

103. Compensation is also a recognised remedy for constitutional violations under articles 23(3)(e) and 70(2)(c) of the *Constitution*, and article 70(3) specifically provides that, an applicant whose rights to a clean and healthy environment has been violated does not have to demonstrate that any person has incurred loss or suffered injury. Where general damages are sought for personal injury that arises from the violation, the law will grant damages for the losses that presume are the natural and probable consequence of a wrong, and may be given for a loss that is incapable of precise estimation, such as pain and suffering. The relevant principles applicable to award of damages for constitutional violations under the *Constitution* were also explained by the Privy Council in the case of *Siewchand Ramanoop v AG of T&T*, PC Appeal No 13 of 2004. It was held by Lord Nicholls at paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:

> "When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
>
> An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches."

104. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case.

105. The trial judge's findings on the quantum of damages were as follows:

> "170. The petitioners further asked for compensation for general damages as a result of damage to their health, the environment and for loss of life. They have proposed a sum of Kshs 2,000,000,000 for the damage to humans and Kshs one billion (Kshs 1,000,000,000) for soil clean up. The 1st – 6th respondents urged the court to dismiss the prayer for compensation. Not even the 2nd and 4th respondent proposed that they can undertake to do the soil clean up nor the 3rd respondent propose a module to provide the chelation treatment of some of the ailing petitioners yet it is a mandate imposed on them under statute. The dismissive approach demonstrates a lack of commitment on the part of the respondents to protect the right to clean and healthy environment as well as the ecosystem. The petitioners cited the LAPSSET and David Ndetei cases (*supra*) to support their submission for an award of a total sum of Kshs 3 billion.

171. In the absence of alternate proposals, this court is persuaded to adopt the proposal given by the petitioners in regard to the sum awardable. I have considered the fact that the comparative case law cited awarded amounts which is close to the submitted amount. Consequently: in place of Kshs 2 billion proposed for personal injury and loss of 1 life, I shall award Kshs 1.3 billion due and payable to the 1st – 9th petitioners and persons claiming through them. The 2nd, 3rd, 4th, and 6th – 8th respondents shall pay in accordance with apportionment of their liability in paragraph 158 above the total sum of Kshs 1.3 billion within a period of 90 days from the date hereof and in default, the petitioners are at liberty to execute. The court further direct the named liable respondents to within 4 months (120 days) from date of this judgment to clean-up the soil, water and remove any wastes deposited within the settlement by the 7th respondent. In default, the sum of Kshs 700,000,000 comes due and payable to the 10th petitioner to coordinate the soil/environmental clean-up exercise."

106. We need to distinguish the decisions in *Orbit Chemicals Industries v Professor David M Ndetei* [2021] eKLR and *Mohamed Ali Baadi & others v Attorney General & 11 others* [2018] eKLR in this respect. In *Orbit Chemicals Industries v Professor David M Ndetei* [*supra*] eKLR the claim was for general damages for loss of use of land and nuisance, while in *Mohamed Ali Baadi & others v Attorney General & 11 others* concerned the traditional fishing rights of the fishermen, and in addition, the award was based on a valuation report in which the fishermen, who were organized into beach management units had participated, and the figure awarded of Kshs 1,760,424,000/- was sourced from the valuation report and therefore largely accepted by the parties as the amount needed to compensate all the fishermen in Lamu County. They two decisions are therefore not comparable with respect to general damages payable as they did not involve awards for personal injury, and in *Mohamed Ali Baadi & others v Attorney General & 11 others* [2018] the affected fishermen were known and identifiable. We in this respect note that the learned trial judge awarded the amount of Ksh 1.3 billion as compensation for the 9 petitioners and persons claiming through them who were not identified. It is notable in this respect that the object of compensation is to remedy a wrong that a person has suffered, and the victim must of necessity be identified for purposes of causation and enforcement of the remedy.

107. As regards the award of restoration, we have three concerns. The first was as noted by the Court of Appeal in *Orbit Chemicals Industries vs Professor David M Ndetei* [*supra*] an award for the cost of restoration of the soil is an award as special damages, and in this respect the award of Kshs 700,000,000/= to CJGEA was therefore awarded when it had not been specifically pleaded or proved. The second is that restoration of contaminated land is a fairly technical exercise, as it entails the removal or treatment of the contaminated land, and eventual restoration and reclamation of the land and habitat restoration, which requires scientific methodologies and techniques which were not demonstrated by the residents and CJGEA, to justify the order and award. Lastly, the relevant legal and institutional framework for restoration of contaminated land resides with NEMA under the *EMCA*, in terms of its functions, powers, structures, and capacity, as opposed to CJGEA. In particular, one of the functions of NEMA under section 9(2)(k) of *EMCA* is to "initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur", whereas under section 25, a National Environment Restoration Fund is created which is vested in, and administered by NEMA, and whose objective is to be "a supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require the Authority to intervene towards the control or mitigation

of environmental degradation".Lastly, under section 108, NEMA has powers to issue and serve on any person in respect of any matter relating to the management of the environment an environmental restoration order, which may require the person to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order, an/or pay compensation to other persons whose environment or livelihood has been harmed by the action which is the subject of the order.

108. We are therefore of the view that the trial court failed to take into account various relevant factors and principles of law in the award of damages, and this is a proper case to interfere with the exercise of the learned trial judge's discretion. We have in this respect deliberated at length on what the appropriate action should be in the circumstances of this appeal, and have had to undertake further research on this issue, which has regrettably caused some delay in the delivery of this judgment. In this respect it is notable that the nature of environmental harm that was caused by the activities of Metal Refinery EPZ Ltd was two-fold: the harm to the environment in term of the contamination of the soil air and water in the Owino- Uhuru Settlement, which was noted both by the *Report of the Standing Committee on Health on the Owino-Uhuru Public Petition* dated March 17, 2015 and the *Zero Draft Report* dated July 15, 2015 of the Task Force on Decommissioning Strategy for Metal Refinery EPZ Ltd, . Second was the harm to human health, and in particular the high lead levels in the blood of the residents who were tested which also noted in the said reports, as well as the report by the Government Chemist of the e Ministry Health titled *Report on Lead Exposure in Owino -Uhuru Settlement, Mombasa County Kenya* dated April 2015 and the report of the Lead Poisoning Team of the Ministry of Health on *Assessment of Blood levels among Children in Owino Ouru Settlement in Mombasa County Kenya*, 2015, which is dated May 2015. All these reports were produced as evidence by the residents, who in addition also provided evidence and medical reports of the injuries caused to them.

109. It is therefore in the interests of justice that appropriate remedies are granted in this appeal, and in this regard the Supreme Court of Kenya did confirm in *Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) that article 23(3) of the *Constitution* empowers the court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. In addition, rule 33 of the *Court of Appeal Rules of 2022* provide that on any appeal from a decision of a superior court, the Court of Appeal shall have power, so far as its jurisdiction permits—

a. to confirm, reverse or vary the decision of the superior court

b. to remit the proceedings to the superior court with such directions as may be appropriate; or

c. to order a new trial,

and to make any necessary incidental or consequential orders, including orders as to costs.

110. It was evident from the various reports produced in evidence that only a sample of the residents were tested for lead levels in their blood. and we appreciate the difficulties and costs involved in proving causation in injuries caused by environmental pollution, and in particular in proving that all residents of Uhuru village were exposed to and injured by the activities of Metal Refinery EPZ Ltd. This difficulty is compounded by the extent of exposure, both spatially in terms of the period of time the subject factory operated by Metal Refinery EPZ Ltd was functioning and producing hazardous waste, and also geographically, in terms of the areas that were affected. It is however necessary that all possible claimants are identified, ascertained and compensated, both in the interests of justice, but also in the interests of proportionality and costs effectiveness, to ensure that this case is not an open door for free

riders and opportunists to make personal gain from the tragedy that befell the residents of Owino-Uhuru village.

111. In conclusion, this appeal therefore partially succeeds only to the extent of our findings on the apportionment of liability, award and quantum of damages, and we accordingly order as follows:

1. We hereby set aside the following orders granted by the Environment and Land Court at Mombasa on July 16, 2020 in *KM & 9 others v Attorney General & 7 others*, Mombasa ELC Petition No 1 of 2016; [2020] eKLR be and are hereby set aside:

> "(d) That the sum of Kshs 1.3 billion (Kenya Shillings one billion three hundred million) be and is hereby awarded to the petitioners for personal injury and loss of life payable within a period of 90 days from the date of judgment and in default, the Petitioners shall be at liberty to execute.
>
> (e) That the sum of Kshs 1.3 billion (Kenya Shillings one billion three hundred million) shall be payable to the 2nd, 3rd, 4th, 6th, 7th., and 8th respondents in accordance with the apportionment of liability at paragraph 158 of the judgment as for as follows.
>
> i. 2nd respondent -10%
>
> ii. 3rd respondent -10%
>
> iii. 4th respondent -40%
>
> iv. 6th respondent - 10%
>
> v. 7th respondent -25%
>
> vi. 8th respondent - 5%
>
> f. That an order be and is hereby issued directing the respondents to clean up the soil, water and to remove any wastes deposited within Owino Uhuru settlement by the 7th respondent within 4 months, (120) days from the date of the judgment herein, and in default the sum of Kshs 700,000,000/= becomes due and payable to the 10th petitioner to coordinate the soil and environmental cleanup exercise.
>
> e. That in the event that the monetary award given in terms of prayer (v) of the petition is not honored, then prayer (vii) of the petition shall lie".

2. We hereby set aside the apportionment of liability by the trial judge and substitute it with the following apportionment of liability:

> a. The Cabinet Secretary in the Ministry of Environment, Water and Natural Resources -5%
>
> b. The Cabinet Secretary in the Ministry of Health -5%
>
> c. NEMA-30%
>
> d. EPZA- 10%

e. Metal Refinery EPZ Ltd - 40%

f. Penguin Paper and Book Company Ltd - 10%

3. We hereby remit the issue of the compensation payable to the petitioners as prayed in prayer (e) of the petition dated February 20, 2016 filed in *KM & 9 others vs Attorney General & 7 others*, Mombasa ELC Petition No 1 of 2016 [2020] eKLR for rehearing before a judge at the Environment and Land Court at Mombasa other than A Omollo J, including the taking of additional evidence limited to the said issue and assessment of damages payable to the petitioners, and taking into account the principles set out in this judgment.

4. We hereby order and direct the National Environmental Management Agency, within 12 months from the date of this judgment, and in consultation with all the relevant agencies and private actors and in appropriate exercise of its functions and powers to:

   a. identify the extent of contamination and pollution caused by the operations of Metal Refinery EPZ Ltd as the Owino- Uhuru Settlement,

   b. remove any contamination and pollution in the affected areas of Owino-Uhuru Settlement, and

   c. restore the environment of Owino Uhuru Settlement and its ecosystem;

   d. periodically report every 3 months to the Environment and Land Court at Mombasa on the progress made in this regard, and for any consequent directions, until the satisfactory completion of the restoration.

5. All the other orders granted by the Environment and Land Court at Mombasa on July 16, 2020 in *KM & 9 others vs Attorney General & 7 others*, Mombasa ELC Petition No 1 of 2016 [2020] eKLR are affirmed and upheld except to the extent modified by the findings in this judgement.

6. We make no order as to costs of the appeals, since the appellants have partially succeeded in the consolidated appeals herein.

112. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE 2023

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

Annex 645

M K Ranjitsinh & Ors v Union of India & Ors. 2024 INSC 280

2024 INSC 280

Reportable

IN THE SUPREME COURT OF INDIA
ORIGINAL CIVIL JURISDICTION

Writ Petition (Civil) No. 838 of 2019

M K Ranjitsinh & Ors. **…Petitioners**

Versus

Union of India & Ors. **…Respondents**

And with

Civil Appeal No. 3570 of 2022

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

Table of Contents

1. The jurisdiction of this Court has been invoked for protecting the Great Indian Bustard[1] and the Lesser Florican, both of whom are on the verge of extinction. Given the importance of the issue at hand, a brief background of various aspects which pertain to the matter are discussed below.

A. The Great Indian Bustard

2. The GIB (the scientific name of which is *ardeotis nigriceps*) is native to southern and western India. It typically occupies grasslands or arid regions. The State of Rajasthan is home to a majority of the current population. With time, the country has seen a rapid and steady decline in the population of the GIB. As of 2018, the International Union for Conservation of Nature, or IUCN as it is popularly known, classified the GIB as a 'critically endangered' species. In IUCN's system of classification, only two categories indicate a graver threat to a particular species – 'extinct in the wild' and 'extinct'. The GIB has been classified as a critically endangered species from 2011 until the most recent assessment in 2018. From 1994 to 2008, it was classified as 'endangered' and in 1988, it was labelled 'threatened'. IUCN notes the justification for its classification of the GIB as a critically endangered species in the following terms:[2]

> "This species is listed as Critically Endangered because it has an extremely small population that has undergone an extremely rapid decline owing to a multitude of threats including habitat loss and degradation, hunting and direct disturbance. It now requires an urgent acceleration in targeted

[1] "GIB"
[2] IUCN Red List, 'Great Indian Bustard' <https://www.iucnredlist.org/species/22691932/134188105#population>

> conservation actions in order to prevent it from becoming functionally extinct within a few decades."

3. The Rajasthan government estimated that only about 125 GIBs were present in the year 2013[3] while IUCN placed the number of mature GIBs between 50 and 249.[4] There are significant factors bearing upon the dwindling numbers and low rate of reproduction of the existing population of these species. Pollution, climate change, predators and competition with invasive species are among the many threats that exacerbate the challenges faced by these vulnerable species. The attrition of the existing population of these endangered birds has been partly attributed to overhead transmission lines. GIBs usually lay a single egg which has an incubation period of approximately one month. The GIBs nest on open ground or in cavities in the soil. Consequently, their eggs are also laid and incubated on the ground. The eggs are therefore at risk of being preyed upon by local predators including mongooses, monitor lizards, and other birds. Cows may also trample on or crush the eggs while grazing in the grasslands. The loss of habitat is also a serious concern. As humans have expanded their settlements and economic activities into the grasslands, the natural habitat of the GIB has diminished. The expansion of human population and accompanying activities has also resulted in the fragmentation of the GIB's habitat. The expansion of infrastructure such as roads, mining and farming activities have cumulatively contributed to the dangers faced by the avian species.

[3] Government of Rajasthan, Forest Department, 'Project Great Indian Bustard' <https://forest.rajasthan.gov.in/content/raj/forest/en/footernav/department-wings/project-great-indian-bustard.html>
[4] IUCN Red List (n 2).

4. In the context of the dwindling population of GIBs and the existential threat looming over them, a writ petition invoking the constitutional jurisdiction under Article 32 - Writ Petition (Civil) No 838 of 2019 - was instituted for seeking directions relating to the conservation of the species. The petitioner *inter alia* sought that this Court:

   a. Issue directions to the respondents to urgently frame and implement an emergency response plan for the protection and recovery of the GIB, including directions for the installation of bird diverters, an immediate embargo on the sanction of new projects and the renewal of leases of existing projects, dismantling power lines, wind turbines, and solar panels in and around critical habitats, installation of predator-proof enclosures in breeding habitats, implementation of a population control program for dogs, provision of no-grazing zones and restricted grazing zones in critical and semi-critical habitats, a prohibition on the use of insecticides and pesticides within a radius of 5 km of critical habitats and a prohibition on the encroachment of grasslands in and around critical and semi-critical habitats;

   b. Issue directions to the concerned respondents to submit a report on the status of the breeding centres at Jaisalmer, Sorsan, and Velavadar;

   c. Issue directions to the concerned respondents to take all measures necessary for the protection of grasslands including by ensuring that no remaining grasslands are classified as ‘wastelands’ and diverted to other uses, adopting a grasslands conservation policy, and adopting a national grazing policy;

d. Issue directions to the Ministry of Defence (Respondent No. 2) to sensitise the armed forces about the need for conservation of the GIB and to collaborate with scientific bodies in conservation efforts;

e. Appoint an Empowered Committee to oversee the implementation of the directions issued by the Court, to preserve and manage the endangered species and their habitats; and

f. Issue a declaration that the two endangered birds constitute one meta population of the nation and that all state authorities are bound to cooperate and take all steps necessary to ensure their conservation and to implement the decisions of the Empowered Committee.

B. The judgment dated 19 April 2021 and subsequent developments

5. In the order of this Court dated 19 April 2021, restrictions were imposed on the setting up of overhead transmission lines in a large swath of territory of about 99,000 square kilometres. These directions were in IA No 85618 of 2020 in Writ Petition (Civil) No 838 of 2019. In the operative directions, this Court, observed :

> " 14. In the light of the contentions urged on this aspect of the matter, we are conscious that the laying of the underground power line more particularly of high-voltage though not impossible, would require technical evaluation on case-to-case basis and an omnibus conclusion cannot be reached laying down a uniform method and directions cannot be issued unmindful of the fact situation. Though that be the position the consensus shall be that all low voltage powerlines to be laid in the priority and potential habitats of GIB shall in all cases be laid

> underground in future. In respect of low voltage overhead powerlines existing presently in the priority and potential habitats of GIB, the same shall be converted into underground powerlines. In respect of high-voltage powerlines in the priority and potential habitats of GIB, more particularly the powerlines referred in the prayer column of I.A. No.85618/2020 and indicated in the operative portion of this order shall be converted into underground power line."

6. This Court appointed a committee for assessing the feasibility of laying high voltage underground power lines. In paragraph 18 of its order, this Court directed that in all cases where overhead power lines exist as on date in the priority and potential GIB areas, steps shall be taken to install bird diverters pending consideration of the conversion of overhead power lines into underground power lines. Moreover, the court directed that in all cases, where it is found feasible to convert the overhead lines to underground power lines, this shall be undertaken and completed within a year.

7. The order of this Court has been implemented by the Committee by granting case-specific sanctions to projects where undergrounding was found not to be possible. Respondent Nos 1, 3, and 4 (the Ministry of Environment, Forests, and Climate Change, the Ministry of Power, and the Ministry of New and Renewable Energy respectively) filed IA No 149293 of 2021 on 17 November 2021 for modification of the directions issued by the judgment of this Court dated 19 April 2021. The grounds on which modification was sought are indicated below in brief:

    a. The judgment has vast adverse implications for the power sector in India

and energy transition away from fossil fuels;

b. Respondent No. 4 was not heard before passing the judgment;

c. India has made International commitments including under the agreement signed in Paris in 2015 under the United Nations Framework Convention on Climate Change[5] for transition to non-fossil fuels and for the reduction of emissions. The area in respect of which the directions were issued is much larger than the actual area in which the GIBs dwell. Moreover, that area contains a very large proportion of the solar and wind energy potential of the country;

d. Undergrounding high voltage power lines is technically not possible; and

e. The coal fired power which would be used to replace the untapped energy from renewable sources in the concerned area would cause pollution.

8. By an order dated 19 January 2024, this Court directed as follows:

> "1 (The) Attorney General for India states that a comprehensive status report will be filed before this Court indicating the way forward as proposed by the Union Government which would take into account both the need for preservation of the Great Indian Bustard which faces a danger of extinction and need to ensure the development of solar power keeping in mind India's commitments at the international level.
>
> 2 The Union of India shall place its status report on the record...

[5] "UNFCCC"

> 3 In the meantime, we direct (i) the Chief Secretaries of the States of Gujarat and Rajasthan; and (ii) the Committee appointed by this Court, to file updated status reports.
>
> …"

9. In pursuance of this order, the Union of India has filed an additional affidavit and an updated, comprehensive status report. In the course of its affidavit, the Union of India has submitted that:

   a. The reduction in the population of GIBs began in the 1960s, much before the electrification of the area and the construction of transmission lines. Research indicates that the reasons for the dwindling population include a low birth rate, poaching, habitat destruction and predation. The use of insecticides and pesticides has resulted in the reduction of locusts and grasshoppers, which form an essential part of the prey of GIBs. The livestock population has also increased due to which there has been overgrazing in the pastures;

   b. The direction by this Court for laying high voltage, or as the case may be, low voltage lines underground is practically impossible to implement;

   c. The Union Government has a commitment at the international level to reduce India's carbon footprint and recourse to renewable sources of energy including solar installations provides the key to the

implementation of these commitments;

d. The Union of India as well as the concerned state governments are taking comprehensive steps for the conservation and protection of the endangered species of the GIB. They are:

i. The GIB is listed in Part III of Schedule I of the Wild Life (Protection) Act 1972. The species listed in Schedule I are granted the highest level of protection from hunting, in terms of this statute;

ii. Under the centrally sponsored scheme titled 'Development of Wildlife Habitats', financial and technical assistance is being provided to the state governments for the conservation of the habitat of the GIB;

iii. The Forest departments of the states of Rajasthan, Maharashtra, and Gujarat, in collaboration with the Wildlife Institute of India,[6] Dehradun, are carrying out conservation breeding with the aim of building a captive population of the species for release in the wild and promoting in-situ conservation of the species;

iv. The Government of India has launched a program called the 'Habitat Improvement and Conservation Breeding of Great Indian Bustard' in 2016 for in-situ conservation of the GIB. It is being implemented in

[6] "WII"

collaboration with the Government of Rajasthan;

v. At present, conservation breeding facilities are operational at Sam and Ramdeora in Jaisalmer. A partial founder population of the GIB consisting of twenty-one individuals and seven chicks has been secured. The chicks were artificially hatched from eggs collected from the wild. Captive breeding has been commenced;

vi. The conservation project is being supervised by a team of three scientists, three veterinarians, eighteen project associates, and forty local support staff;

vii. The WII has entered into a Memorandum of Understanding with the International Fund for Houbara Conservation which is dedicated to the conservation of the Houbara Bustard. The MoU outlines various areas of collaboration including training of staff, technical support and advice, and the supply of bird cages and food pellets in the initial stages of the conservation program; and

viii. A study of international efforts to conserve other species of bustards as well as other birds indicates that large swathes of land have not been closed off as a strategy of conservation. Instead, artificial insemination techniques have been used in concert with constructing enclosures in which chicks are nurtured until they are less vulnerable to predators. Such chicks are then released into the wild. This

strategy has proved successful and the Government of India is replicating it with respect to the GIB.

e. A blanket direction of the nature that has been imposed by this Court, besides not being feasible to implement, would also not result in achieving its stated purpose, i.e., the conservation of the GIB.

10. Prior to adjudicating the application for modification, it is necessary to briefly advert to India's obligations towards preventing climate change and tackling its adverse effects. This will assist the Court to take a decision based upon a holistic view of competing considerations.

C. The mission to combat climate change

I. India's commitment under international conventions

11. India has made significant international commitments in its pursuit of global environmental conservation goals. India was a participant in the Kyoto Protocol, which came into force on February 16, 2005. This international agreement, linked to the UNFCCC, obligates its Parties to establish binding emission reduction targets. The Protocol allows countries to meet these targets through national measures and offers additional mechanisms such as International Emissions Trading, Clean Development Mechanism, and Joint Implementation.

12. The UNFCCC is founded on the recognition that climate change is a global issue

demanding a collective global response.[7] As greenhouse gas emissions originate from the territories of all nations and also impact all nations, it is imperative that all countries undertake measures to address this challenge. This fundamental premise is articulated in the preamble of the UNFCCC:

> "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 … 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."

13. The primary objective of the UNFCCC is to stabilize greenhouse gas concentrations in the atmosphere to prevent dangerous human-induced interference with the climate system, as articulated in Article 2.[8] Article 3 elaborates on the principles guiding this objective. Notably, Article 3(1) underscores the responsibility of parties to protect the climate system for the benefit of present and future generations, based on equity and in line with their capabilities.[9] Article 3(3) emphasizes the importance of precautionary measures to anticipate, prevent, or minimize the causes and

[7] United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly (Adopted 20 January 1994).
[8] *Ibid*, art 2.
[9] *Ibid*, art 3(1).

adverse effects of climate change.[10]

14. At the 18th Conference of the Parties in Doha, Qatar in December 2012[11], States reaffirmed their commitment to addressing climate change and laid the groundwork for greater ambition and action. Among various decisions, they set a timetable to adopt a Universal Climate Agreement by 2015. The objective was to build consensus on a binding and universal agreement which would limit greenhouse gas emissions to levels that would prevent global temperatures from increasing more than 2 degrees Celsius (3.6 degrees F) above the temperature benchmark set before the Industrial revolution. The COP 21 meeting was convened in Paris in December 2015, where 196 countries, including India signed a new Climate Change Agreement on 12 December 2015.[12] This is termed as the Paris Agreement.[13]

15. In the build-up to the Paris meeting, the UN had called upon parties to submit their plans on how they intended to reduce their greenhouse emissions. India submitted its Intended Nationally Determined Contribution (NDC) to the UNFCCC on October 2, 2015. The Paris Agreement mandates that each Party communicate a nationally determined contribution every five years. India communicated an update to its first NDC submitted earlier on 2 October 2015, for the period up to 2030. India's

[10] *Ibid*, art 3(3).
[11] "The Doha Climate Gateway"
[12] Conference of the Parties, Adoption of the Paris Agreement (Adopted 12 December 2015). U.N. Doc. FCCC/CP/2015/L.9/Rev/1.
[13] "Paris Agreement"

commitment under the Paris Agreement includes the following key features[14]:

a. To achieve approximately 50 per cent cumulative electric power installed capacity from non-fossil fuel-based energy resources by 2030, with support from the transfer of technology and low-cost international finance, including from the Green Climate Fund;

b. To enhance investments in development programs in sectors vulnerable to climate change, particularly agriculture, water resources, the Himalayan region, coastal areas, health, and disaster management, to better adapt to climate change impacts; and

c. To establish domestic frameworks and international architectures for the rapid dissemination of cutting-edge climate technology in India and to engage in joint collaborative research and development for future climate technologies.

As part of its pledge, India has committed to transitioning to non-fossil fuel sources and reducing emissions.

16. One of the key strategies in India's efforts towards sustainability is the ambitious target for renewable energy capacity installation. By 2022, India aimed to achieve an installed renewable energy capacity (excluding large hydro) of 175 GW (Gigawatts), a goal that signifies the country's commitment to clean energy adoption.

[14] See UNFCCC, India's Updated First Nationally Determined Contribution Under Paris Agreement (2021-2030). https://unfccc.int/sites/default/files/NDC/202208/India%20Updated%20First%20Nationally%20Determined%20Contrib.pdf

Looking ahead, India has set an even more ambitious target for 2030, aiming to ramp up its installed renewable energy capacity to 450 GW. This long-term goal underscores India's recognition of the urgent need to accelerate the transition towards renewable energy to mitigate the impacts of climate change and achieve sustainable development.

17. To achieve these targets, India has implemented various policy measures and initiatives to promote renewable energy investment, innovation, and adoption. As highlighted in the Union's additional affidavit, India's commitment to transitioning to non-fossil fuels is not just a strategic energy goal but a fundamental necessity for environmental preservation. Investing in renewable energy not only addresses these urgent environmental concerns but also yields a plethora of socio-economic benefits. By shifting towards renewable energy sources, India enhances its energy security, reducing reliance on volatile fossil fuel markets and mitigating the risks associated with energy scarcity. Additionally, the adoption of renewable energy technologies helps in curbing air pollution, thereby improving public health and reducing healthcare costs.

18. The promotion of renewable energy sources plays a crucial role in promoting social equity by ensuring access to clean and affordable energy for all segments of society, especially in rural and underserved areas. This contributes to poverty alleviation, enhances quality of life, and fosters inclusive growth and development across the nation. Therefore, transitioning to renewable energy is not just an environmental

imperative but also a strategic investment in India's future prosperity, resilience, and sustainability.

II. *The right to a healthy environment and the right to be free from the adverse effects of climate change*

19. India’s efforts to combat climate change are manifold. Parliament has enacted the Wild Life (Protection)Act 1972, the Water (Prevention and Control of Pollution) Act 1974, the Air (Prevention and Control of Pollution) Act 1981, the Environment (Protection) Act 1986, the National Green Tribunal Act 2010, amongst others. In 2022, the Energy Conservation Act 2001 was amended to empower the Central Government to provide for a carbon credit trading scheme.[15] The Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules 2022 were made in exercise of the powers under the Electricity Act 2003 to ensure access to and incentivise green energy. The executive wing of the government has implemented a host of projects over the years including the National Solar Mission (discussed in greater detail in the subsequent segment), the National Mission for Enhanced Energy Efficiency, the National Mission for a Green India, and the National Mission on Strategic Knowledge for Climate Change, amongst others. Despite governmental policy and rules and regulations recognising the adverse effects of climate change and seeking to combat it, there is no single or umbrella legislation in India which relates to climate change and the attendant concerns.

[15] Energy Conservation Act 2001, Section 14(w).

However, this does not mean that the people of India do not have a right against the adverse effects of climate change.

20. Article 48A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Clause (g) of Article 51A stipulates that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures. Although these are not justiciable provisions of the Constitution, they are indications that the Constitution recognises the importance of the natural world. The importance of the environment, as indicated by these provisions, becomes a right in other parts of the Constitution. Article 21 recognises the right to life and personal liberty while Article 14 indicates that all persons shall have equality before law and the equal protection of laws. These articles are important sources of the right to a clean environment and the right against the adverse effects of climate change.

21. In **M.C. Mehta** v. **Kamal Nath**,[16] this Court held that Articles 48A and 51A(g) must be interpreted in light of Article 21:

> "8. …. These two articles have to be considered in the light of Article 21 of the Constitution which provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21 of the Constitution."

[16] (2000) 6 SCC 213.

22. In **Virender Gaur** v. **State of Haryana**,[17] this Court recognised the right to a clean environment in the following terms:

> "7. … The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment."

23. In **Karnataka Industrial Areas Development Board** v. **C. Kenchappa**,[18] this Court took note of the adverse effects of rising sea levels and rising global temperatures. In **Bombay Dyeing & Mfg. Co. Ltd. (3)** v. **Bombay Environmental Action**

[17] (1995) 2 SCC 577.
[18] (2006) 6 SCC 371.

Group,[19] this Court recognised that climate change posed a "major threat" to the environment.

24. Despite a plethora of decisions on the right to a clean environment, some decisions which recognise climate change as a serious threat, and national policies which seek to combat climate change, it is yet to be articulated that the people have a right against the adverse effects of climate change. This is perhaps because this right and the right to a clean environment are two sides of the same coin. As the havoc caused by climate change increases year by year, it becomes necessary to articulate this as a distinct right. It is recognised by Articles 14 and 21.

25. Without a clean environment which is stable and unimpacted by the vagaries of climate change, the right to life is not fully realised. The right to health (which is a part of the right to life under Article 21) is impacted due to factors such as air pollution, shifts in vector-borne diseases, rising temperatures, droughts, shortages in food supplies due to crop failure, storms, and flooding. The inability of underserved communities to adapt to climate change or cope with its effects violates the right to life as well as the right to equality. This is better understood with the help of an example. If climate change and environmental degradation lead to acute food and water shortages in a particular area, poorer communities will suffer more than richer ones. The right to equality would undoubtedly be impacted in each of these instances.

[19] (2006) 3 SCC 434.

26. The right to equality may also be violated in ways that are more difficult to remedy. For example, a person living in say, the Lakshadweep Islands, will be in a disadvantageous position compared to person living in say, Madhya Pradesh when sea levels rise and oceanic problems ensue. Similarly, forest dwellers or tribal and indigenous communities are at a high risk of losing not only their homes but also their culture, which is inextricably intertwined with the places they live in and the resources of that place. In India, the tribal population in the Nicobar islands continues to lead a traditional life which is unconnected to and separate from any other part of the country or world. Indigenous communities often lead traditional lives, whose dependence on the land is of a different character from the dependence which urban populations have on the land. Traditional activities such as fishing and hunting may be impacted by climate change, affecting the source of sustenance for such people. Further, the relationship that indigenous communities have with nature may be tied to their culture or religion. The destruction of their lands and forests or their displacement from their homes may result in a permanent loss of their unique culture. In these ways too, climate change may impact the constitutional guarantee of the right to equality.

27. The right to equality under Article 14 and the right to life under Article 21 must be appreciated in the context of the decisions of this Court, the actions and commitments of the state on the national and international level, and scientific consensus on climate change and its adverse effects. From these, it emerges that there is a right to be free from the adverse effects of climate change. It is important

to note that while giving effect to this right, courts must be alive to other rights of affected communities such as the right against displacement and allied rights. Different constitutional rights must be carefully considered before a decision is reached in a particular case.

28. In 2019, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities jointly issued a statement in which they recognised that "…*State parties have obligations, including extra-territorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations*."[20]

29. Of late, the intersection between climate change and human rights has been put in sharp focus, underscoring the imperative for states to address climate impacts through the lens of rights. For instance, the contribution of the UN High Commissioner for Human Rights to the 2015 Climate Conference in Paris emphasized that climate change directly and indirectly affects a broad spectrum of

[20] UN Office of the High Commissioner, Five UN human rights treaty bodies issue a joint statement on human rights and climate change, 16 September 2019. <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>.

internationally guaranteed human rights.[21] States owe a duty of care to citizens to prevent harm and to ensure overall well-being. The right to a healthy and clean environment is undoubtedly a part of this duty of care. States are compelled to take effective measures to mitigate climate change and ensure that all individuals have the necessary capacity to adapt to the climate crisis.

30. This acknowledgement of human rights in the context of climate change is underscored in the preamble of the Paris Agreement, which recognizes the interconnection between climate change and various human rights, including the right to health, indigenous rights, gender equality, and the right to development:

> "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."

31. The 2015 United Nations Environment Programme report also outlined five human rights obligations related to climate change, including both mitigation and adaptation efforts.[22] In 2018, the UN Special Rapporteur on Human Rights and the Environment emphasized that human rights necessitate states to establish effective laws and

[21] UN Human Rights Office, Understanding Human Rights and Climate Change. Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 26 November 2015.
[22] M. Burger and J. Wentz (eds.), Climate Change and Human Rights, UNEP: December 2015, p.11, 19. <wedocs.unep.org/handle/20.500.11822/9934>

policies to reduce greenhouse gas emissions, aligning with the framework principles on human rights and the environment.[23]

32. The Inter-American Court of Human Rights[24] issued an advisory opinion in 2017 affirming the right to a healthy environment as a fundamental human right. The IACtHR delineated state obligations regarding significant environmental harm, including cross-border impacts, recognizing the inherent relationship between environmental protection and the enjoyment of various human rights. Violations of the right to a healthy environment can reverberate across numerous rights domains, including the right to life, personal integrity, health, water, and housing, as well as procedural rights such as information, expression, association, and participation.

33. In her comprehensive study exploring climate obligations under international law, Wewerinke-Singh underscores the imperative for states to both adapt to and mitigate the impacts of climate change in alignment with human rights principles.[25] This resonates deeply with the burgeoning recognition of the right to a healthy environment as a fundamental human right within the global discourse on environmental protection and sustainability. When discussing the right to a healthy environment, it is crucial to address access to clean and sustainable energy. Clean energy aligns with the human right to a healthy environment, as first recognized by

[23] J.H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, A/HRC/37/59 of 24 January 2018 (available at <undocs.org/A/HRC/37/59>; See also D.R. Boyd, Statement on the human rights obligations related to climate change, with a particular focus on the right to life, 25 October 2018, p. 2 -8.
[24] "IACtHR"
[25] M. Wewerinke-Singh, State Responsibility, Climate Change and Human Rights under International Law, Oxford etc.: Hart 2019, pp. 108-109 and 130.

the UN Special Rapporteur on Human Rights and the Environment in 1994.[26]

34. Unequal energy access disproportionately affects women and girls due to their gender roles and responsibilities such as through time spent on domestic chores and unpaid care work. Women in many developing countries spend on average 1.4 hours a day collecting fuelwood and four hours cooking, in addition to other household tasks that could be supported by energy access.[27] The importance of prioritizing clean energy initiatives to ensure environmental sustainability and uphold human rights obligations cannot be understated.

35. India faces a number of pressing near-term challenges that directly impact the right to a healthy environment, particularly for vulnerable and indigenous communities including forest dwellers. The lack of reliable electricity supply for many citizens not only hinders economic development but also disproportionately affects communities, including women and low-income households, further perpetuating inequalities. Therefore, the right to a healthy environment encapsulates the principle that every individual has the entitlement to live in an environment that is clean, safe, and conducive to their well-being. By recognizing the right to a healthy environment and the right to be free from the adverse effects of climate change, states are compelled to prioritize environmental protection and sustainable development,

[26] UN Special Rapporteur on Human Rights and the Environment (1994). "Draft Declaration of Principles on Human Rights and the Environment." Report to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1994/9, Appendix.
[27] UN Sustainable Development Goals, Accelerating SDG 7, Achievement Policy Brief- 12 Global Progress of SDG 7—Energy and Gender, UN High-Level Political Forum. 2018. <https://sustainabledevelopment.un.org/content/documents/17489PB12.pdf>

thereby addressing the root causes of climate change and safeguarding the well-being of present and future generations. It is imperative for states like India, to uphold their obligations under international law, including their responsibilities to mitigate greenhouse gas emissions, adapt to climate impacts, and protect the fundamental rights of all individuals to live in a healthy and sustainable environment.

III. Importance of solar power as a source of renewable energy

36. There are many sources of air pollution which harm public health and infringe upon the right to a healthy environment. High levels of pollution caused by industries and vehicular pollution has left Indian cities amongst those with the poorest air quality in the world, posing significant health risks to citizens. Addressing these challenges requires prioritizing the transition to clean and sustainable energy sources, ensuring a healthier environment for all individuals in India, and safeguarding the well-being of future generations, with particular attention to the rights and needs of vulnerable communities. Therefore, while speaking about climate change, the importance of solar power cannot be overstated. In addition to being sustainable and renewable, solar energy stands out as a pivotal solution in the global transition towards cleaner energy sources. Its significance lies in its capacity to significantly reduce reliance on fossil fuels, thereby curbing greenhouse gas emissions responsible for global warming and climate change.

37. India is endowed with vast solar energy potential and receives about 5,000 trillion kWh per year of solar energy, with most regions receiving 4-7 kWh per sqm per

day.[28] Solar photovoltaic power offers immense scalability in India, allowing for effective harnessing of solar energy. Moreover, solar energy facilitates distributed power generation, allowing for rapid capacity addition with short lead times. The impact of solar energy on India's energy landscape has been tangible in recent years. Decentralized and distributed solar applications have brought substantial benefits to millions of people in Indian villages, addressing their cooking, lighting, and other energy needs in an environmentally friendly manner. These initiatives have led to social and economic benefits, including reducing drudgery among rural women and girls, minimizing health risks associated with indoor air pollution, generating employment at the village level, and ultimately improving living standards and fostering economic activities. Additionally, the solar energy sector in India has emerged as a significant contributor to grid-connected power generation capacity. It aligns with India’s agenda of sustainable growth and plays a crucial role in meeting the nation's energy needs while enhancing energy security.

38. Solar energy holds a central place in India's National Action Plan on Climate Change, with the National Solar Mission[29] being one of its key initiatives. Launched on 11 January 2010, NSM aims to establish India as a global leader in solar energy by creating favourable policy conditions for the diffusion of solar technology across the country. This mission is in line with India's Nationally Determined Contributions

[28] Ministry of New and Renewable Energy, Solar Overview (2023). See also, Ref. REN21’s Global Status Report 2023 & IRENA’s Renewable Capacity Statistics 2023.

[29] “NSM”

target, which aims to achieve about 50 per cent cumulative electric power installed capacity from non-fossil fuel-based energy resources and reduce the emission intensity of its GDP by 45 per cent from 2005 levels by 2030. India's goal to achieve 500 GW of non-fossil-based electricity generation capacity by 2030 aligns with its efforts to be Net Zero by 2070. In 2023-24, out of the total generation capacity of 9,943 MW added, 8,269 is from non-fossil fuel sources. According to the Renewable Energy Statistics 2023 released by the International Renewable Energy Agency (IRENA), India has the 4th largest installed capacity of renewable energy. [30]

39. The International Solar Alliance[31] was formed at the COP21 held in Paris in 2015, as a joint effort by India and France. It is an international platform with 94 member countries.[32] It works with governments to improve energy access and security worldwide and promote solar power as a sustainable way to transition to a carbon-neutral future. ISA's mission is to unlock USD 1 trillion of investments in solar energy by 2030 while reducing the cost of the technology and its financing. It is partnering with multilateral development banks, development financial institutions, private and public sector organisations, civil society, and other international institutions to deploy cost-effective and transformational energy solutions powered by the sun, especially in the least Developed Countries[33] and the Small Island Developing States[34]

[30] IRENA, 'Renewable capacity statistics 2023'. International Renewable Energy Agency, Abu Dhabi. < https://www.irena.org/Publications/2023/Mar/Renewable-capacity-statistics-2023>
[31] "ISA"
[32] See International Solar Alliance, 'Background' <https://isolaralliance.org/about/background>
[33] "LDCs"
[34] "SIDS"

40. The idea for the One Sun One World One Grid [35]initiative was put forth by India at the First Assembly of the ISA in October 2018. [36] The vision behind the OSOWOG initiative is the mantra that "the sun never sets". This initiative aims to connect different regional grids through a common grid that will be used to transfer renewable energy power and, thus, realize the potential of renewable energy sources, especially solar energy.

41. In 2021, the Green Grids Initiative[37] was launched in partnership with OSOWOG during the COP26 World Leaders' Summit. The UK and India jointly adopted the One Sun Declaration which was endorsed by 92 countries. [38] This represented a flagship area for climate collaboration and established the partnership between the two initiatives to tackle arguably the greatest global challenge to a clean powered future: how to build and operate electricity grids capable of absorbing ever greater shares of renewable energy while meeting growing power demands sustainably, securely, reliably, and affordably.

42. It is imperative for India to not only find alternatives to coal-based fuels but also secure its energy demands in a sustainable manner. India urgently needs to shift to solar power due to three impending issues.[39] Firstly, India is likely to account for 25% of global energy demand growth over the next two decades, necessitating a

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[35] "OSOWOG"
[36] International Solar Alliance, 'Annual Report 2020', pp. 4. <https://isolaralliance.org/uploads/docs/20469ea05e2b897ca9ffec8a17273f.pdf >
[37] "GGI"
[38] Ministry of New Renewable Energy, Green Grids Initiative-One Sun One World One Grid Northwest Europe Cooperative Event, (2022) <https://pib.gov.in/PressReleasePage.aspx?PRID=1763712>
[39] See Invest India, 'One Sun, One World, One Grid: Empowering Sustainability', 10 January 2024. < https://www.investindia.gov.in/team-india-blogs/one-sun-one-world-one-grid-empowering-sustainability>

move towards solar for enhanced energy security and self-sufficiency while mitigating environmental impacts. Failure to do so may increase dependence on coal and oil, leading to economic and environmental costs. Secondly, rampant air pollution emphasizes the need for cleaner energy sources like solar to combat pollution caused by fossil fuels. Lastly, declining groundwater levels and decreasing annual rainfall underscore the importance of diversifying energy sources. Solar power, unlike coal, does not strain groundwater supplies. The extensive use of solar power plants is a crucial step towards cleaner, cheaper, and sustainable energy

43. The geographical landscape of Gujarat and Rajasthan, characterized by vast expanses of arid desert terrain and an abundance of sunlight, positions these regions as prime areas for solar power generation. The arid climate of these desert regions ensures minimal cloud cover and precipitation, resulting in uninterrupted exposure to sunlight for prolonged durations throughout the year. The consistent and intense sunlight creates ideal conditions for photovoltaic (PV) solar panels to efficiently convert solar radiation into electricity. Additionally, the relatively flat topography of these areas facilitates the installation and operation of large-scale solar energy projects, further enhancing their suitability for solar power generation. By harnessing this natural advantage, India can significantly reduce its reliance on fossil fuels and transition towards cleaner energy sources. Solar power not only meets the country's growing energy demands but also helps mitigate the adverse effects of climate change by reducing greenhouse gas emissions.

IV. Climate change litigation in other jurisdictions

44. Climate change litigation serves as a pivotal tool in advancing rights-based energy transitions and promoting energy justice, intertwined with human rights principles.[40] Article 3(1) of the UNFCCC underscores the imperative for parties to safeguard the climate system for the well-being of present and future generations, grounded in equity and is reflective of their differentiated responsibilities and capabilities. This obligation places a particular onus on developed countries to take the lead in addressing climate change and its adverse impacts. Moreover, the mechanisms established under international climate change law contribute to a more comprehensive and cohesive approach to monitoring and implementing Sustainable Development Goal 7 (SDG7) (i.e., ensuring access to affordable, reliable, sustainable and modern energy for all) and related international obligations.[41]

45. Internationally, courts have been confronted with the challenging task of adjudicating cases where significant issues related to climate change are at stake. The topics of environmental degradation, pollution, industries, and infrastructure projects have long formed the corpus of cases before courts across countries. Of late, however, an increasing number of cases are to do with climate change, in one way or another. It is necessary to advert to the judgments from other jurisdictions, not because they have precedential value in the adjudication of this case but to

[40] J Setzer and R Byrnes, 'Global Trends in Climate Change Litigation: 2023 Snapshot', London School of Economics and Political Science, (2023). < https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf>

[41] D Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110 American Journal of International Law, 288.

highlight global trends in climate change litigation and to assess the manner in which courts have understood their own role in such litigation.

46. In **State of the Netherlands** v. **Urgenda Foundation,**[42] the respondent sought directions to the State of the Netherlands directing it to reduce the emission of greenhouse gases. The District Court and the Court of Appeal ruled in favour of the respondent. On appeal, the Dutch Supreme Court affirmed the decisions of the lower courts. It acknowledged the obligations under Articles 2 (right to life)[43] and 8 (right to private and family life)[44] of the European Convention on Human Rights,[45] compelling the State to adopt more ambitious climate policies. The case addressed whether the Dutch government was obligated to reduce greenhouse gas emissions originating from its territory by at least 25% compared to 1990 levels by the end of 2020, and whether a judicial intervention was warranted.

47. The Supreme Court of the Netherlands recognized the direct correlation between anthropogenic greenhouse gas emissions and global warming, emphasizing the potentially severe consequences of exceeding a 2°C temperature rise, which could threaten the right to life and disrupt family life.[46] Additionally, it observed that the right to private and family life applies to environmental matters where pollution directly impacts these rights, requiring States to implement "reasonable and

[42] The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation, HR 20 December 2019, ECLI:NL:HR:2019:2006, para 2.1
[43] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), art 2.
[44] *Ibid*, art 8.
[45] "ECHR"
[46] *Ibid.*

appropriate measures" to safeguard individuals from significant environmental harm.[47]

48. In **Sacchi, et al.** v. **Argentina, et al**[48] sixteen children from different countries sent a communication to the Committee on the Rights of the Child[49] alleging violations of their rights under the UN Convention on the Rights of the Child[50] by Argentina, Brazil, France, Germany, and Turkey. The communication asserted that these nations had not reduced their greenhouse gas emissions to an adequate level and that they had failed to curb carbon pollution. Although the CRC found that the communication was inadmissible for failure to exhaust domestic remedies, it affirmed that States exercise effective control over carbon emissions and bear responsibility for transboundary harm arising from such emissions. Notably, it observed that while climate change necessitates a global response, individual states retain accountability for their actions or inactions concerning climate change and their contribution to its effects.

49. In **Ioane Teitiota** v. **The Chief Executive of the Ministry of Business, Innovation and Employment**,[51] the appellant travelled to New Zealand from Kiribati, a small island country in the Pacific Ocean, and remained there after his permit expired. He later applied for refugee status and / or protected person status on the ground that sea levels in Kiribati were rising due to climate change. He anticipated being forced

[47] *Ibid.* Para 5.2.3.
[48] Committee on the Rights of the Child, Sacchi et al. v. Argentina (dec.), 22 September 2021, CRC/C/88/D/104/2019.
[49] "CRC"
[50] "UNCRC"
[51] [2015] NZSC 107.

to leave Kiribati in the future due to this. The relevant authorities rejected his application and the concerned tribunal dismissed the appeal. The appellant sought leave to appeal the decision of the tribunal, which was rejected by two appellate courts. Finally, the Supreme Court of New Zealand dismissed his application for leave to appeal. It held that the appellant would not face serious harm if he returned to Kiribati and that there was "*no evidence that the Government of Kiribati [was] failing to take steps to protect its citizens from the effects of environmental degradation*." Significantly, it also held that its decision in this case would not rule out the possibility of a similar application succeeding in an appropriate case in the future.

50. These cases, all instituted and decided in the past decade, indicate the type of concerns which will travel to the courts in the next few years.

D. The reasons for the modification of the judgement dated 19 April 2021

51. During the course of the hearing, reference has been made to several reports which were prepared by the Wild Life Institute of India, identifying 13,663 square kilometres as the "priority area"; 80,680 square kilometres as "potential areas"; and 6,654 square kilometres as "additional important areas" for the GIB. These areas are distributed between the States of Rajasthan and Gujarat. The tabulation is reproduced below:

AREAS	State of Rajasthan	State of Gujarat	Total

Priority Areas	13,163 sq. kms.	500 sq. kms.	13,663 sq. kms
Potential Areas	78,580 sq. kms	2,100 sq. kms.	80,680 sq. kms
Additionally Important Areas	5977 sq. kms.	677 sq. kms.	6654 sq. kms.

52. During the course of the hearing and by its previous orders, this Court has underscored the importance of taking proactive measures to protect the GIB. The GIB is seriously endangered as a species. At the same time, it has emerged in the course of the hearing that there is no basis to impose a general prohibition in regard to the installation of transmission lines for the distribution of solar power in an area about 99,000 square kilometres. There are several reasons due to which it is not feasible to convert all transmission lines into underground power transmission lines:

a. In view of the diverse factors responsible for the reduction in the population of the GIB as discussed in the preceding paragraphs, the conversion of overhead into underground transmission lines is not likely to lead to the conservation of the species. Other factors such as low fecundity, fragmentation, habitat loss, predators, and loss of prey must be addressed;

b. Underground power transmission cables are available only in 400 kV. The drum size for such cables is 250 m. These cables have a greater number of joints. The current is more likely to leak from joints. For a 1 km stretch, about 4 to 5 joints will be present. When laid for longer distances spanning thousands of kilometres, the number of joints will

increase proportionately. As the number of joints increases, there is a corresponding rise in the risk to safety, especially to farmers under whose land the cables are laid. The downtime of electricity plants will also increase. Further, 400 kV lines can be laid for a maximum of 5 to 8 km;

c. 220 kV lines have been laid underground in some areas. In those places where they have been laid underground, flag marks were placed to trace the route of the cable and to avoid accidents while digging around the cable. However, such marks do not serve their intended purpose in desert regions because of strong winds which blow and carry sand. The effect is that the landscape and sand dunes change. This may cover or otherwise impact the flag markings. In the absence of functional markings, it is unsafe and impractical to underground high voltage cables in deserts;

d. Underground cables do not efficiently transmit AC power. The transmission loss in such cables is higher by about five times;

e. It is difficult and time-consuming to detect faults with underground cables. If there is a delay in attending to and repairing problems with such cables, the rise in the temperature of the cable may result in it bursting. This would endanger the safety of GIBs;

f. The Electricity Act does not contemplate the acquisition of land.

However land may be required to be acquired if cables are to be undergrounded. In contrast, overhead transmission lines require only the right of way;

g. Underground cables may give rise to environmental issues for many vulnerable species. They may also result in forest fires or other fires;

h. The cost of laying underground cables is prohibitive. It is about four to five times higher than laying overhead transmission lines. The cost is estimated to run into thousands of crores. If the cables are undergrounded in their entirety, the cost of harnessing renewable energy would be prohibitive;

i. Cables are not generally used for the evacuation of power from a generating station;

j. The report prepared by the technical expert committee constituted by the Ministry of Power indicates that the undergrounding of transmission lines of 60kV and above is not technically feasible because any outage would result in large generation losses;

k. It is essential to harness power from sources of renewable energy in Rajasthan and Gujarat to meet the rising power demand in the country in an expeditious and sustainable manner. This is also necessitated by India's international commitments with respect to climate change;

l. The area in which undergrounding has been directed to be implemented is about 80,688 sq km, which is larger than many states in India. Even globally, undergrounding of cables in such a large area has not been attempted; and

m. The same area in which undergrounding has been directed to be implemented contains the lion's share of the potential areas from which wind and solar energy may be harnessed. Until now, only 3% of this potential has been tapped. If the remaining potential remains untapped, an additional 93,000 MW of coal would be required in the future. An estimated 623 billion kg of carbon dioxide would be released from coal fired power generation. This would significantly damage the environment and hinder global efforts to combat climate change. Thermal power plants would also adversely impact the health of the local populace.

53. In addition to the reasons listed above, it is imperative to recognize the intricate interface between the conservation of an endangered species, such as the Great Indian Bustard, and the imperative of protecting against climate change. Unlike the conventional notion of sustainable development, which often pits economic growth against environmental conservation, the dilemma here involves a nuanced interplay between safeguarding biodiversity and mitigating the impact of climate change. It is

not a binary choice between conservation and development but rather a dynamic interplay between protecting a critically endangered species and addressing the pressing global challenge of climate change.

54. India's commitment to promoting renewable energy sources, particularly in regions like Gujarat and Rajasthan, aligns with its broader sustainable development objectives. By transitioning towards solar power and other renewable energy sources, India aims to not only reduce carbon emissions but also improve energy access, foster economic growth, and create employment opportunities.

55. India's commitment to sustainable development is also underpinned by its international obligations and commitments. As a signatory to various international conventions and agreements, including the UNFCCC and the Convention on Biological Diversity, India has pledged to uphold principles of environmental stewardship, biodiversity conservation, and climate action on the global stage. Through partnerships, knowledge sharing, and collaborative action, India seeks to amplify the impact of its sustainable development efforts, contributing to collective efforts aimed at addressing global challenges.

56. Needless to say, it is the duty of the Court to give effect to international agreements and treaties to which India is a party. In **Entertainment Network (India) Ltd.** v. **Super Cassette Industries Ltd.**,[52] this Court observed that it has relied on international law extensively including for the purpose of fulfilling the spirit of

[52] (2008) 13 SCC 30.

international obligations which India has entered into, when they are not in conflict with the existing domestic law.[53] It also rightly observed:

> "80. Furthermore, as regards the question where the protection of human rights, environment, ecology and other second-generation or third-generation rights is involved, the courts should not be loathe to refer to the international conventions."

57. In **Apparel Export Promotion Council** v. **A.K. Chopra**,[54] this Court cited numerous cases which constituted precedent for the proposition that this Court must give effect to international instruments which India is party to:

> "This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. (See with advantage — Prem Shankar Shukla v. Delhi Admn. [(1980) 3 SCC 526 : 1980 SCC (Cri) 815 : AIR 1980 SC 1535] ; Mackinnon Mackenzie and Co. Ltd. v. Audrey D' Costa [(1987) 2 SCC 469 : 1987 SCC (L&S) 100 : JT (1987) 2 SC 34] ; Sheela Barse v. Secy., Children's Aid Society [(1987) 3 SCC 50, 54 : 1987 SCC (Cri) 458] SCC at p. 54; Vishaka v. State of Rajasthan [(1997) 6 SCC 241 : 1997 SCC (Cri) 932 : JT (1997) 7 SC 384] ; People's Union for Civil Liberties v. Union of India [(1997) 3 SCC 433 : 1997 SCC (Cri) 434 : JT (1997) 2 SC 311] and D.K. Basu v. State of W.B. [(1997) 1 SCC 416, 438 : 1997 SCC (Cri) 92] SCC at p. 438.)"

[53] This position has been reiterated by various other decisions of this Court. See, for instance, National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
[54] (1999) 1 SCC 759.

58. India’s international obligations and commitments in the present case (detailed in the preceding segments of this judgment) have not been enacted in domestic law. Regardless, the Court must be alive to these obligations while adjudicating writ petitions which seek reliefs that may hinder these obligations from being fulfilled or otherwise interfere with India’s international commitments as well as the right to be free from the adverse effects of climate change.

59. Beyond mere adherence to international agreements, India's pursuit of sustainable development reflects the complex interplay between environmental conservation, social equity, economic prosperity and climate change. Its national goals in this regard require a holistic understanding of sustainable development that balances immediate needs with long-term sustainability, ensuring that present actions do not compromise the well-being of future generations. It acknowledges that solutions to today's challenges must not only address pressing issues but also lay the groundwork for a resilient and equitable future.

60. While balancing two equally crucial goals - the conservation of the GIB on one hand, with the conservation of the environment as a whole on the other hand - it is necessary to adopt a holistic approach which does not sacrifice either of the two goals at the altar of the other. The delicate balance between the two aims must not be disturbed. Rather, care must be taken by all actors including the state and the courts to ensure that both goals are met without compromising on either. Unlike other competing considerations, these do not exist in disjunctive silos. Therefore, a

dilemma such as the present one does not permit the foregrounding of one of these as a priority, at the cost of the other. If this Court were to direct that the power transmission lines be undergrounded in the entire area delineated above, many other parts of the environment would be adversely impacted. Other endangered species may suffer due to the emission of harmful gases from fossil fuels. Rising temperatures and the attendant evils of climate change may not be halted in a timely fashion, leading to disastrous consequences for humankind and civilisation as a whole. The existential threat may not be averted.

61. Moreover, the decision on whether to convert the overhead power transmission lines into underground lines is a matter of environmental policy. While adjudicating writ petitions which seek reliefs which are of the nature sought in the present case, this Court must conduct judicial review while relying on domain experts. Those who are equipped and trained to assess the various facets of a problem which is litigated before the Court must be consulted before a decision is taken. If this is not done, the Court may be in danger of passing directions without a full understanding of the issue in question. Consequently, in the absence of evidence which forms a certain basis for the directions sought, this Court must be circumspect in issuing sweeping directions. In view of the implications of the direction issuing a blanket prohibition on overhead transmission lines, we are of the view that the direction needs to be recalled and it will be appropriate if an expert committee is appointed. The committee may balance the need for the preservation of the GIB which is non-negotiable, on one hand, with the need for sustainable development, especially in

the context of meeting the international commitments of the country towards promoting renewable sources of energy, on the other hand. By leveraging scientific expertise and engaging stakeholders in meaningful consultations, this approach ensures that conservation efforts are grounded in evidence and inclusive of diverse perspectives.

62. We are accordingly of the view that the order passed by this Court on 19 April 2021 needs to be suitably modified. A blanket direction for undergrounding high voltage and low voltage power lines of the nature that was directed by this Court would need recalibration for the reasons discussed above. This task is best left to domain experts instead of an a priori adjudication by the Court. Experts can assess the feasibility of undergrounding power lines in specific areas, considering factors such as terrain, population density, and infrastructure requirements. This approach allows for more nuanced decision-making tailored to the unique circumstances of each location, ensuring that conservation objectives are met in a sustainable manner.

63. During the course of the hearing, we had requested Mr Shyam Divan, senior counsel appearing on behalf of the petitioners, Mr R Venkataramani, Attorney General for India, Mr. Tushar Mehta, Solicitor General of India, and Ms Aishwarya Bhati, Additional Solicitor General to propose names of experts for the constitution of a Committee to perform the task which the Court will assign to it.

64. Having received their suggestions and upon evaluating them, we constitute an Expert Committee, the composition of which will be as follows:

(i) Director, Wildlife Institute of India, Dehradun;

(ii) Dr Hari Shankar Singh, Member, National Board for Wildlife;

(iii) Dr Niranjan Kumar Vasu, Former Principal Chief Conservator of Forest;

(iv) Mr B Majumdar, former Chief Wildlife Warden and Principal Chief Conservator of Forest, Maharashtra;

(v) Dr Devesh Gadhavi, Deputy Director, The Corbett Foundation.

(vi) Shri Lalit Bohra, Joint Secretary (Green Energy Corridor), Ministry of New and Renewable Energy; and

(vii) Joint Secretary, Ministry of Environment, Forests and Climate Change.

65. Since the work of the Committee, as assigned below, would also traverse the area of the setting up of transmission lines to facilitate solar power generation, we direct that the Committee shall consist of the following two special invitees:

(i) Shri Ashok Kumar Rajpur, Member Power Systems, Central Electricity Authority; and

(ii) Mr. PC Garg, Chief Operating Officer, Central Transmission Utility of India Ltd.

66. The remit of the Committee which has been appointed by the Court shall encompass the following:

a. Determining the scope, feasibility and extent of overhead and underground electric lines in the area identified as priority areas in the reports of the Wild Life Institute of India in the States of Rajasthan and Gujarat;

b. The need for adopting conservation and protection measures for the GIB as well as other fauna specific to the topography;

c. Identification of the measures to be adopted in the priority areas to ensure the long-term survival of the GIB and facilitating an increase in its population. Such measures may include habitat restoration, anti-poaching initiatives, and community engagement programs;

d. Evaluating the potential consequences of climate change on GIB habitats, considering factors such as shifting precipitation patterns, temperature extremes, habitat degradation and developing adaptive management strategies to enhance their resilience;

e. Identification of suitable options in the context of sustainable development in the matter of laying power lines in the future. The alternatives identified should balance the conservation and protection of the GIB with the arrangement of power lines in a manner that would facilitate the fulfilment of the international commitments made by India for developing renewable sources of energy.

f. Engaging with relevant stakeholders, including government agencies, environmental organizations, wildlife biologists, local communities, and energy

industry representatives, to solicit inputs, build consensus, and promote collaborative efforts towards achieving conservation and sustainable development goals;

g. Conducting a thorough review of conservation efforts and innovative approaches in similar contexts globally, such as the Houbara Bustard in the Middle East or the Black Stilt in New Zealand, to inform best practices;

h. Implementing a robust monitoring and research program to track GIB populations, habitat dynamics, and the effectiveness of conservation measures over time. This may include employing techniques such as satellite tracking, camera trapping, and ecological surveys to gather essential data for informed decision-making; and

i. Adopting any additional measures both in regard to the priority and potential areas, as the Committee considers appropriate including considering the efficacy and suitability of installing bird diverters on existing and future power lines on the basis of a scientific study. The installation of sub-standard bird diverters which are of a poor quality would give the impression that conservation efforts are underway even as such efforts are destined for failure. Hence, it is of utmost importance to ensure that any direction by the Committee to install bird diverters by any party whose activities concern the GIB (including private operators) is implemented by installing bird diverters of a requisite standard and quality. Accordingly, if the Committee is of the view that the installation of bird diverters would subserve the conservation of the GIB species, it shall identify the indicators of high-quality bird diverters and

specify the parameters that they must meet before they are installed. The Central Electricity Authority, Ministry of Power has released a document titled 'Technical Specification for Bird Flight Diverter'. These specifications concern the GIB in particular. By its undated letter to various power transmission companies and other concerned parties, the Central Electricity Authority noted that it had received complaints stating that the quality of the bird diverters being installed was unsatisfactory. It also requested the addressees to install diverters which are of a high quality. The relevant portion of the letter is extracted below:

> "We are in receipt of complaint/representation that poor quality bird flight diverters are being installed on the lines and sometimes disc of bird diverter is found strewn in the farm and land below transmission lines that may be due to poor quality of the product, inadequate designe by manufacturer, not installed properly due to lack of experienced manpower etc.
>
> CEA's "Technical Specifications for Bird Flight Diverter" were prepared after consultation with utilities and manufacturers. The document specifies that the minimum expected service life of the bird flight diverter should be at least 15 years and to ensure that the supplied bird diverter is of good quality, various tests have also been specified. To safeguard the Great Indian Bustard which is on the verge of extinction and other birds, you are requested to take necessary action so that good quality bird flight diverters are installed which shall be durable and effective for whole life and to be installed by experienced professionals so that these diverters can serve their designated purpose."

67. The Committee shall be at liberty to assess the efficacy of bird diverters and subject to its own findings on efficacy, to lay down specifications for bird diverters with due

regard to the parameters specified by the Central Electricity Authority. It shall also identify the number of bird diverters required for the successful implementation of conservation efforts. In this regard, the Committee may also consider the recommendations of the technical expert committee constituted by the Ministry of Power by OM No 25–7/42/2019 – PG dated 27 May 2022.

68. The injunction which has been imposed in the order dated 19 April 2021 in respect of the area described as the priority and potential areas shall accordingly stand recalled subject to the condition that the Expert Committee appointed by this Court may lay down suitable parameters covering both the priority and potential areas.

69. In the event that the Committee considers it appropriate and necessary to do so, it would be at liberty to recommend to this Court any further measures that are required to enhance the protection of the GIB. This may include identifying and adding suitable areas beyond the designated priority zones outlined above, if deemed crucial for the conservation of the species. Such additional areas could serve as vital habitats, corridors, or breeding grounds for the GIB, contributing significantly to its long-term survival.

70. We request the Committee to complete its task and submit a report to this Court through the Union Government on or before 31 July 2024.

71. In its affidavit, the Union of India has detailed the steps it has taken thus far and has also undertaken to implement a host of measures in the future, which are aimed at conserving the critically endangered GIB. They include:

a. The Ministry of Environment, Forest and Climate Change has implemented the national GIB Project which undertakes ex-situ conservation measures to provide and conserve habitats into which captive bred birds may be released. Insulation breeding centres will be established in range states other than Rajasthan where they do not currently exist. In-situ operations will be implemented in the desert National Park Sanctuary, Rajasthan, Kachch Bustard Sanctuary, Gujarat, Great Indian Bustard Sanctuary, Maharashtra, Rollapadu Sanctuary, Andhra Pradesh, Ranebennur Sanctuary, Karnataka and Ghatigao Sanctuary, Madhya Pradesh;

b. Predator-proof enclosures will be developed to prevent the entry of predators including foxes, mongooses, hedgehogs, and monitor lizards. Anthropogenic activities will not take place in these enclosures;

c. Local grass seed dissemination will be used to restore degraded grasslands. Water will be supplied to these grasslands;

d. Undesirable and invasive species will be eliminated to make the grasslands more friendly to GIBs released from captivity;

e. GIB movement shall be monitored using satellite telemetry;

f. Ongoing administration and maintenance will include the repair and restoration of water points and historic watch towers as well as the maintenance of existing fences and fire lines;

g. ‘National Bustard Day’ will be celebrated to highlight the need for conservation;

h. Capacity building programmes will be conducted and collaboration with scientific organisations will be fostered. Further, local stakeholders will be involved in initiatives aimed at conserving the GIB and awareness programs will be implemented in the relevant areas;

i. As the majority of villages and settlements in the concerned region depend on grasslands for the supply of fodder, the pastures in these lands are in need of revival. These lands will be revived and innovative strategies of fodder management will be implemented; and

j. The conservation activities detailed above will be upscaled from the financial year commencing on 1 April 2024 and will continue for at least ten years.

72. The Union of India and the concerned ministries are directed to implement the measures described in the preceding paragraph, which it has undertaken to implement. Further, they are directed to continue implementing the measures detailed in paragraph 8(d) of this judgment. The directions contained in the order dated 19 April 2021 shall accordingly stand substituted by those contained in the present judgment. The project clearances which have been granted pursuant to the recommendations of the earlier committee appointed in terms of the order dated 19 April 2021 shall not be affected by the present judgment.

73. This Court records its appreciation to the work which was done by the Committee which was appointed in terms of the order dated 19 April 2021.

74. List in the second week of August 2024 for consideration of the report of the expert committee appointed in terms of the present judgment.

……CJI
[Dr Dhananjaya Y Chandrachud]

……J
[J B Pardiwala]

……J
[Manoj Misra]

New Delhi
March 21, 2024

Annex 646

Activities of United Nations Organizations and programmes relevant to the human environment: report of the Secretary-General, E/4553, 11 July 1968, as cited at paragraph 34 in the Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change, 29 January 2024 at page 91 of the Exhibit Bundle to the Written Statement submitted by the Republic of Vanuatu, 21 March 2024, pages 21-23

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QUESTION OF CONVENING AN INTERNATIONAL CONFERENCE ON PROBLEMS OF THE HUMAN ENVIRONMENT

Activities of United Nations Organizations and Programmes relevant to the Human Environment

Report of the Secretary-General

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GE.68-12838

70. In order to prevent adverse effects from the rapid transition from the rural to the urban way of life, WHO provides guidance and assistance on the planning, organization and operation of sanitation and health services in urban communities, including the public health aspects of housing, transport, town-planning and urbanization in general - and on the organization of public health services. The latter work includes the planning and administration of community health services in which maternal and child health have an important place, and research and guidance on mental health including problems of drug-abuse and criminality.

VI WORLD METEOROLOGICAL ORGANIZATION

71. WMO, by one of its basic terms of reference, has to further the application of meteorology to all human activities and to the solution of human problems. As the atmosphere forms important part of the environment of man, application of meteorology to the steadily increasing problems of the human environment both nationally and internationally is within the purpose of the organization and is summarized below:

Planning the use of the environment

72. Planning for a most suitable use of land with regard to economic efficiency and human wellbeing for example for agricultural regions, industrial areas, urban settlements and resort areas calls for a collection of climatological data to be used for investigating where in view of the weather conditions different activities may most suitably be carried out. Hence meteorological services promote the collection and processing of data and WMO co-ordinates these activities through its Commission for Climatology.

73. Planning in agriculture is a field where efficiency may be promoted in a particularly high degree by making use both of climatological data and weather forecasting. WMO co-ordinates these national activities within its Commission for Agricultural Meteorology, and co-operates with FAO and UNESCO to promote improved planning of agricultural activities all over the world.

74. Similar planning activities are needed in relation to the use of water resources being closely related to phenomena such as precipitation and evaporation. Here WMO promotes studies and encourages standardization through its Commission for Hydrometeorolog presently in close co-operation with UNESCO.

75. WMO has noted a growing interest in making use of meteorological data in planning urban settlements and for building and other industries. Hence WMO will arrange a symposium in Brussels in October this year on Urban Climate and Building Climatology to discuss the promotion of these fields.

76. In planning activities it is essential to know to which extent the normal atmospheric conditions are stable. Hence the problem of changes of climate enters as an important issue which has to be considered, either the changes have been introduced by man or through atmospheric events. In most cases the modifications introduced by man are not deliberate, in some other they are and it is thought that in the future man may be able to influence upon weather and climate not only at a small scale but also over larger areas. WMO, through its Commission for Atmospheric Sciences of course follows closely the development in the fields of weather modification particularly in relation to artificial precipitation, prevention of evaporation etc.

77. Closely related to the question of changes of the environment's climate is the problem of long-range weather forecasting. Obviously planning the suitable use of the human environment would be much facilitated if weather forecasts for months and seasons would be available. No such reliable methods are as yet in existence but WMO through participation in global research projects and by the launching of the World Weather Watch (WWW) takes a very active part in promoting this aim.

Protecting the atmospheric environment

78. Application of meteorology to the protection of the atmosphere is mainly related to the problem of increasing air-pollution. There are large-scale air pollution problems where we are interested in global spread of debris from nuclear tests, the increase of acidity due to increased industrialization over a large part of the globe or the increase of the carbon-dioxide in the earth's atmosphere which may change our climate. In all these cases the general circulation of the atmosphere enters as the machinery. In the case of small scale problems we are interested in the spread of pollution from a single plant or over large urban communities due to central heating with carbon fuels or from heavy motor traffic; then the meteorological parameters of greatest interest are such as turbulence, stability and wind which govern the spread and concentration of pollutants.

79. It is the task of WMO to collect information and propose standardization on methods applied for use of meteorological theory together with suitable samples of data as well as in forecasting weather conditions that forms the concentration of air pollutants in planning communities and location of plants.

80. It is also the task of WMO to encourage Members to establish "background" stations in areas of low air-pollution in order to arrive at a suitable minimum standard to be applied in consideration of an overall regional or global increase of chemical components in the atmosphere.

81. These tasks are taken care of by a working group of six specialists established by the Commission for Atmospheric Sciences of WMO. Application of air-pollution problems in planning agriculture, urban communities and industry location is dealt with by the above-mentioned Commissions for Agricultural Meteorology and Climatology.

Protection against catastrophic weather events

82. The possibility of protecting the human settlements and man in all his activities against catastrophic weather events, of course, is a very important problem for WMO. Arriving at such a protection implies both a scientific research aspect where the meteorological behaviour of the phenomena such as tropical cyclones, tornadoes and floods is studied and an applied aspect where techniques to plan for the actual protection are invented. WMO takes an active part in promoting research as well as in establishing for example with support from UNDP, warning and other protection systems. The Co-ordination in this field is taken care of by the Commissions for Synoptic Meteorology and Maritime Meteorology. The possibilities for WMO to make even larger contributions in this connexion will be further improved by the implementation of WWW.

Human biometeorology

83. WMO through its Commission for Climatology promotes also the development of the meteorological field which is concerned with the interrelation between the conditions in the atmospheric environment and human health i.e. human biometeorology.

Annex 647

Report of the United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14/Rev.1, 16 June 1972, pages 9-22, 43-44

A/CONF.48/14/Rev.1

REPORT
OF THE
UNITED NATIONS
CONFERENCE
ON THE
HUMAN ENVIRONMENT

Stockholm, 5-16 June 1972

UNITED NATIONS

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

* * *

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ANNEXES

Recommendation 16

The programmes referred to in recommendation 15 should include the establishment of subregional centres to undertake, *inter alia*, the following functions:

(*a*) Training;

(*b*) Research;

(*c*) Exchange of information;

(*d*) Financial, technical and material assistance.

Recommendation 17

It is recommended that Governments and the Secretary-General take immediate steps towards the establishment of an international fund or a financial institution whose primary operative objectives will be to assist in strengthening national programmes relating to human settlements through the provision of seed capital and the extension of the necessary technical assistance to permit an effective mobilization of domestic resources for housing and the environmental improvement of human settlements.

Recommendation 18

It is recommended that the following recommendations be referred to the Disaster Relief Co-ordinator for his consideration, more particularly in the context of the preparation of a report to the Economic and Social Council:

1. *It is recommended* that the Secretary-General, with the assistance of the Disaster Relief Co-ordinator and in consultation with the appropriate bodies of the United Nations system and non-governmental bodies:

(*a*) Assess the over-all requirements for the timely and widespread distribution of warnings which the observational and communications networks must satisfy;

(*b*) Assess the needs for additional observational networks and other observational systems for natural disaster detection and warnings for tropical cyclones (typhoons, hurricanes, cyclones etc.) and their associated storm surges, torrential rains, floods, tsunamis, earthquakes etc.;

(*c*) Evaluate the existing systems for the international communication of disaster warnings, in order to determine the extent to which these require improvement;

(*d*) On the basis of these assessments, promote, through existing national and international organizations, the establishment of an effective world-wide natural disaster warning system, with special emphasis on tropical cyclones and earthquakes, taking full advantage on existing systems and plans, such as the World Weather Watch, the World Meteorological Organization's Tropical Cyclone Project, the International Tsunami Warning System, the World-Wide Standardized Seismic Network, and the Desert Locust Control Organization;

(*e*) Invite the World Meteorological Organization to promote research on the periodicity and intensity of the occurrence of droughts, with a view to developing improved forecasting techniques.

2. *It is further recommended* that the United Nations Development Programme and other appropriate international assistance agencies give priority in responding to requests from Governments for the establishment and improvement of natural disaster research programmes and warning systems.

3. *It is recommended* that the Secretary-General ensure that the United Nations system shall provide to Governments a comprehensive programme of advice and support in disaster prevention. More specifically, the question of disaster prevention should be seen as an integral part of the country programme as submitted to, and reviewed by, the United Nations Development Programme.

4. *It is recommended* that the Secretary-General take the necessary steps to ensure that the United Nations system shall assist countries with their planning for pre-disaster preparedness. To this end:

(*a*) An international programme of technical co-operation should be developed, designed to strengthen the capabilities of Governments in the field of pre-disaster planning, drawing upon the services of the resident representatives of the United Nations Development Programme;

(*b*) The United Nations Disaster Relief Office, with the assistance of relevant agencies of the United Nations, should organize plans and programmes for international co-operation in cases of natural disasters;

(*c*) As appropriate, non-governmental international agencies and individual Governments should be invited to participate in the preparation of such plans and programmes.

ENVIRONMENTAL ASPECTS OF NATURAL RESOURCES MANAGEMENT

Recommendation 19

It is recommended that the Food and Agriculture Organization of the United Nations, in co-operation with other relevant international organizations, should include in its programme questions relating to rural planning in relation to environmental policy, since environmental policy is formulated in close association with physical planning and with medium-term and long-term economic and social planning. Even in highly industrialized countries, rural areas still cover more than 90 per cent of the territory and consequently should not be regarded as a residual sector and a mere reserve of land and manpower. The programme should therefore include, in particular:

(*a*) Arrangements for exchanges of such data as are available;

(*b*) Assistance in training and informing specialists and the public, especially young people, from primary school age onwards;

(*c*) The formulation of principles for the development of rural areas, which should be understood to comprise not only agricultural areas as such but also small- and medium-sized settlements and their hinterland.

Recommendation 20

It is recommended that the Food and Agriculture Organization of the United Nations, in co-operation

with other international agencies concerned, strengthen the necessary machinery for the international acquisition of knowledge and transfer of experience on soil capabilities, degradation, conservation and restoration, and to this end:

(*a*) Co-operative information exchange should be facilitated among those nations sharing similar soils, climate and agricultural conditions;

(i) The Soil Map of the World being prepared by the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the International Society of Soil Science should serve to indicate those areas among which transfer of knowledge on soil potentialities and soil degradation and restoration would be most valuable;

(ii) This map should be supplemented through the establishment of international criteria and methods for the assessment of soil capabilities and degradations and the collection of additional data based upon these methods and criteria. This should permit the preparation of a World Map of Soil Degradation Hazards as a framework for information exchange in this area;

(iii) Information exchange on soil use should account for similarities in vegetation and other environmental conditions as well as those of soil, climate, and agricultural practices;

(iv) The FAO Soil Data-Processing System should be developed beyond soil productivity considerations, to include the above-mentioned data and relevant environmental parameters, and to facilitate information exchange between national soil institutions, and eventually soil-monitoring stations;

(*b*) International co-operative research on soil capabilities and conservation should be strengthened and broadened to include:

(i) Basic research on soil degradation processes in selected ecosystems under the auspices of the Man and the Biosphere Programme. This research should be directed as a matter of priority to those arid areas that are most threatened;

(ii) Applied research on soil and water conservation practices under specific land-use conditions with the assistance of the Food and Agriculture Organization of the United Nations and, where appropriate, other agencies (United Nations Educational, Scientific and Cultural Organization, World Health Organization and International Atomic Energy Agency);

(iii) Strengthening of existing research centres and, where necessary, establishment of new centres with the object of increasing the production from dry farming areas without any undue impairment of the environment;

(iv) Research on the use of suitable soils for waste disposal and recycling; the United Nations Industrial Development Organization, the Food and Agriculture Organization of the United Nations, and the World Health Organization should enter into joint consultations regarding the feasibility of an international programme in this area;

(*c*) These efforts for international co-operation in research and information exchange on soils should be closely associated with those of the UNDP/WMO/FAO/UNESCO programme of agricultural biometeorology, in order to facilitate integration of data and practical findings and to support the national programmes of conservation of soil resources recommended above;

(*d*) It should moreover be noted that in addition to the various physical and climatic phenomena which contribute to soil degradation, economic and social factors contribute to it as well; among the economic contributory factors, one which should be particularly emphasized is the payment of inadequate prices for the agricultural produce of developing countries, which prevents farmers in those countries from setting aside sufficient savings for necessary investments in soil regeneration and conservation. Consequently, urgent remedial action should be taken by the organizations concerned to give new value and stability to the prices of raw materials of the developing countries.

Recommendation 21

It is recommended that Governments, the Food and Agriculture Organization of the United Nations and the World Health Organization, in co-operation with the United Nations Educational, Scientific and Cultural Organization and the International Atomic Energy Agency, strengthen and co-ordinate international programmes for integrated pest control and reduction of the harmful effects of agro-chemicals:

(*a*) Existing international activities for the exchange of information and co-operative research and technical assistance to developing countries should be strengthened to support the national programmes described above, with particular reference to:

(i) Basic research on ecological effects of pesticides and fertilizers (MAB);

(ii) Use of radio-isotope and radiation techniques in studying the fate of pesticides in the environment (joint IAEA/FAO Division);

(iii) Evaluation of the possibility of using pesticides of biological origin in substitution for certain chemical insecticides which cause serious disturbances in the environment;

(iv) Dose and timing of fertilizers' application and their effects on soil productivity and the environment (Food and Agriculture Organization of the United Nations);

(v) Management practices and techniques for integrated pest control, including biological control (Food and Agriculture Organization of the United Nations and World Health Organization);

(vi) Establishment and/or strengthening of national and regional centres for integrated pest control, particularly in developing countries (Food and Agriculture Organization of the United Nations and World Health Organization);

(*b*) Existing expert committees of the Food and Agriculture Organization of the United Nations and the World Health Organization on various aspects of pest control should be convened periodically:

(i) To assess recent advances in the relevant fields of research mentioned above;

(ii) To review and further develop international guidelines and standards with special reference to national and ecological conditions in relation to the use of chlorinated hydrocarbons, pesticides containing heavy metals, and the use and experimentation of biological controls;

(*c*) In addition, *ad hoc* panels of experts should be convened, by the Food and Agriculture Organization of the United Nations, the World Health Organization and, where appropriate, the International Atomic Energy Agency, in order to study specific problems, and facilitate the work of the above-mentioned committees.

Recommendation 22

It is recommended that the Food and Agriculture Organization of the United Nations, under its "War on Waste" programme, place increased emphasis on control and recycling of wastes in agriculture:

(*a*) This programme should assist the national activities relating to:

(i) Control and recycling of crop residues and animal wastes;

(ii) Control and recycling of agro-industrial waste;

(iii) Use of municipal wastes as fertilizers;

(*b*) The programme should also include measures to avoid wasteful use of natural resources through the destruction of unmarketable agricultural products or their use for improper purposes.

Recommendation 23

It is recommended that Governments, in co-operation with the Food and Agriculture Organization of the United Nations and other agencies and bodies, establish and strengthen regional and international machinery for the rapid development and management of domesticated livestock of economic importance and their related environmental aspects as part of the ecosystems, particularly in areas of low annual productivity, and thus encourage the establishment of regional livestock research facilities, councils and commissions, as appropriate.

Recommendation 24

It is recommended that the Secretary-General take steps to ensure that the United Nations bodies concerned co-operate to meet the needs for new knowledge on the environmental aspects of forests and forest management:

(*a*) Where appropriate, research should be promoted, assisted, co-ordinated, or undertaken by the Man and the Biosphere Programme (UNESCO), in close co-operation with the Food and Agriculture Organization of the United Nations and the World Meteorological Organization, and with the collaboration of the International Council of Scientific Unions and the International Union of Forestry Research Organizations;

(*b*) Research on comparative legislation, land tenure, institutions, tropical forest management, the effects of the international trade in forest products on national forest environments, and public administration, should be sponsored or co-ordinated by FAO, in co-operation with other appropriate international and regional organizations;

(*c*) The Food and Agriculture Organization of the United Nations, in conjunction with the United Nations Educational, Scientific and Cultural Organization and other appropriate international organizations, should give positive advice to member countries on the important role of forests with reference to, and in conjunction with, the conservation of soil, watersheds, the protection of tourist sites and wildlife, and recreation, within the over-all framework of the interests of the biosphere.

Recommendation 25

It is recommended that the Secretary-General take steps to ensure that continuing surveillance, with the co-operation of Member States, of the world's forest cover shall be provided for through the programmes of the Food and Agriculture Organization of the United Nations and the United Nations Educational, Scientific and Cultural Organization.

(*a*) Such a World Forest Appraisal Programme would provide basic data, including data on the balance between the world's forest biomass and the prevailing environment, and changes in the forest biomass, considered to have a significant impact on the environment;

(*b*) The information could be collected from existing inventories and on-going activities and through remote-sensing techniques;

(*c*) The forest protection programme described above might be incorporated within this effort, through the use of advanced technology, such as satellites which use different types of imagery and which could constantly survey all forests.

Recommendation 26

It is recommended that the Food and Agriculture Organization of the United Nations co-ordinate an international programme for research and exchange of information on forest fires, pests and diseases:

(*a*) The programme should include data collection and dissemination, identification of potentially susceptible areas and of means of suppression; exchange of information on technologies, equipment and techniques; research, including integrated pest control and the influence of fires on forest ecosystems, to be undertaken by the International Union of Forestry Research Organizations; establishment of a forecasting system in co-operation with the World Meteorological Organization; organization of seminars and study tours; the facilitation of bilateral agreements for forest protection between neighbouring countries, and the development of effective international quarantines;

(*b*) Forest fires, pests and diseases will frequently each require separate individual treatment.

Recommendation 27

It is recommended that the Food and Agriculture Organization of the United Nations facilitate the transfer of information on forests and forest management:

(*a*) The amount of knowledge that can usefully be exchanged is limited by the differences of climatic zones and forest types;

(*b*) The exchange of information should, however, be encouraged among nations sharing similarities; considerable knowledge is already exchanged among the industrialized nations of the temperate zone;

(*c*) Opportunities exist, despite differences, for the useful transfer of information to developing countries on the environmental aspects of such items as: (i) the harvesting and industrialization of some tropical hardwoods; (ii) pine cultures; (iii) the principles of forest management systems and management science; (iv) soils and soil interpretations relating to forest management; (v) water régimes and watershed management; (vi) forest industries pollution controls, including both technical and economic data; (vii) methods for the evaluation of forest resources through sampling techniques, remote sensing, and data-processing; (viii) control of destructive fires and pest outbreaks; and (ix) co-ordination in the area of the definition and standardization of criteria and methods for the economic appraisal of forest environmental influences and for the comparison of alternative uses.

Recommendation 28

It is recommended that the Food and Agriculture Organization of the United Nations strengthen its efforts in support of forestry projects and research projects, possibly for production, in finding species which are adaptable even in areas where this is exceptionally difficult because of ecological conditions.

Recommendation 29

It is recommended that the Secretary-General ensure that the effect of pollutants upon wildlife shall be considered, where appropriate, within environmental monitoring systems. Particular attention should be paid to those species of wildlife that may serve as indicators for future wide environmental disturbances, and an ultimate impact upon human populations.

Recommendation 30

It is recommended that the Secretary-General ensure the establishment of a programme to expand present data-gathering processes so as to assess the total economic value of wildlife resources.

(*a*) Such data would facilitate the task of monitoring the current situation of animals endangered by their trade value, and demonstrate to questioning nations the value of their resources;

(*b*) Such a programme should elaborate upon current efforts of the Food and Agriculture Organization of the United Nations and might well produce a yearbook of wildlife [2] statistics.

Recommendation 31

It is recommended that the Secretary-General ensure that the appropriate United Nations agencies co-operate with the Governments of the developing countries to develop special short-term training courses on wildlife [2] management:

(*a*) Priority should be given to conversion courses for personnel trained in related disciplines such as forestry or animal husbandry;

(*b*) Special attention should be given to the establishment and support of regional training schools for technicians.

Recommendation 32

It is recommended that Governments give attention to the need to enact international conventions and treaties to protect species inhabiting international waters or those which migrate from one country to another:

(*a*) A broadly-based convention should be considered which would provide a framework by which criteria for game regulations could be agreed upon and the over-exploitation of resources curtailed by signatory countries;

(*b*) A working group should be set up as soon as possible by the appropriate authorities to consider these problems and to advise on the need for, and possible scope of, such conventions or treaties.

Recommendation 33

It is recommended that Governments agree to strengthen the International Whaling Commission, to increase international research efforts, and as a matter of urgency to call for an international agreement, under the auspices of the International Whaling Commission and involving all Governments concerned, for a 10-year moratorium on commercial whaling.

Recommendation 34

It is recommended that Governments and the Secretary-General give special attention to training requirements in the management of parks and protected areas:

(*a*) High-level training should be provided and supported:

(i) In addition to integrating aspects of national parks planning and management into courses on forestry and other subjects, special degrees should be offered in park management; the traditional forestry, soil and geology background of the park manager must be broadened into an integrated approach;

(ii) Graduate courses in natural resources administration should be made available in at least one major university in every continent;

[2] Whereas elsewhere in this report the expression "wildlife" is meant to include both animals and plants, it should be understood here to be restricted to the most important animals.

(*b*) Schools offering courses in national park management at a medium-grade level should be assisted by the establishment or expansion of facilities, particularly in Latin America and Asia.

Recommendation 35

It is recommended that the Secretary-General take steps to ensure that an appropriate mechanism shall exist for the exchange of information on national parks legislation and planning and management techniques developed in some countries which could serve as guidelines to be made available to any interested country.

Recommendation 36

It is recommended that the Secretary-General take steps to ensure that the appropriate United Nations agencies shall assist the developing countries to plan for the inflow of visitors into their protected areas in such a way as to reconcile revenue and environmental considerations within the context of the recommendations approved by the Conference. The other international organizations concerned may likewise make their contribution.

Recommendation 37

It is recommended that Governments take steps to co-ordinate, and co-operate in the management of, neighbouring or contiguous protected areas. Agreement should be reached on such aspects as mutual legislation, patrolling systems, exchange of information, research projects, collaboration on measures of burning, plant and animal control, fishery regulations, censuses, tourist circuits and frontier formalities.

Recommendation 38

It is recommended that Governments take steps to set aside areas representing ecosystems of international significance for protection under international agreement.

Recommendation 39

It is recommended that Governments, in co-operation with the Secretary-General of the United Nations and the Food and Agriculture Organization of the United Nations where indicated, agree to an international programme to preserve the world's genetic resources:

(*a*) Active participation at the national and international levels is involved. It must be recognized, however, that while survey, collection, and dissemination of these genetic resources are best carried out on a regional or international basis, their actual evaluation and utilization are matters for specific institutions and individual workers; international participation in the latter should concern exchange of techniques and findings;

(*b*) An international network is required with appropriate machinery to facilitate the interchange of information and genetic material among countries;

(*c*) Both static (seed banks, culture collection etc.) and dynamic (conservation of populations in evolving natural environments) ways are needed.

(*d*) Action is necessary in six interrelated areas:

(i) Survey of genetic resources;

(ii) Inventory of collections;

(iii) Exploration and collecting;

(iv) Documentation;

(v) Evaluation and utilization;

(vi) Conservation, which represents the crucial element to which all other programmes relate;

(*e*) Although the international programme relates to all types of genetic resources, the action required for each resource will vary according to existing needs and activities.

Recommendation 40

It is recommended that Governments, in co-operation with the Secretary-General of the United Nations and the Food and Agriculture Organization of the United Nations where indicated, make inventories of the genetic resources most endangered by depletion or extinction:

(*a*) All species threatened by man's development should be included in such inventories;

(*b*) Special attention should be given to locating in this field those areas of natural genetic diversity that are disappearing;

(*c*) These inventories should be reviewed periodically and brought up to date by appropriate monitoring;

(*d*) The survey conducted by FAO in collaboration with the International Biological Programme is designed to provide information on endangered crop genetic resources by 1972, but will require extension and follow-up.

Recommendation 41

It is recommended that Governments, in co-operation with the Secretary-General of the United Nations and the Food and Agriculture Organization of the United Nations where indicated, compile or extend, as necessary, registers of existing collections of genetic resources:

(*a*) Such registers should identify which breeding and experiment stations, research institutions and Universities maintain which collections;

(*b*) Major gaps in existing collections should be identified where material is in danger of being lost;

(*c*) These inventories of collections should be transformed for computer handling and made available to all potential users;

(*d*) In respect of plants:

(i) It would be expected that the "advanced varieties" would be well represented, but that primitive materials would be found to be scarce and require subsequent action;

(ii) The action already initiated by FAO, several national institutions, and international foundations should be supported and expanded.

(*e*) In respect of micro-organisms, it is recommended that each nation develop comprehensive inventories of culture collections:

(i) A cataloguing of the large and small collections and the value of their holdings is required, rather than a listing of individual strains;

(ii) Many very small but unique collections, sometimes the works of a single specialist, are lost;

(iii) Governments should make sure that valuable gene pools held by individuals or small institutes are also held in national or regional collections.

(*f*) In respect of animal germ plasm, it is recommended that FAO establish a continuing mechanism to assess and maintain catalogues of the characteristics of domestic animal breeds, types and varieties in all nations of the world. Likewise, FAO should establish such lists where required.

(*g*) In respect of aquatic organisms, it is recommended that FAO compile a catalogue of genetic resources of cultivated species and promote intensive studies on the methods of preservation and storage of genetic material.

Recommendation 42

It is recommended that Governments, in co-operation with the Secretary-General of the United Nations and the Food and Agriculture Organization of the United Nations where indicated, initiate immediately, in co-operation with all interested parties, programmes of exploration and collection wherever endangered species have been identified which are not included in existing collections:

(*a*) An emergency programme, with the co-operation of the Man and the Biosphere Programme, of plant exploration and collection should be launched on the basis of the FAO List of Emergency Situations for a five-year period;

(*b*) With regard to forestry species, in addition to the efforts of the Danish/FAO Forest Tree Seed Centre, the International Union of Forestry Research Organizations, and the FAO Panel of Experts on Forest Gene Resources, support is needed for missions planned for Latin America, West Africa, the East Indies and India.

Recommendation 43

It is recommended that Governments, in co-operation with the Secretary-General of the United Nations and the Food and Agriculture Organization of the United Nations where indicated:

1. Recognize that conservation is a most crucial part of any genetic resources programme. Moreover, major types of genetic resources must be treated separately because:

(*a*) They are each subject to different programmes and priorities;

(*b*) They serve different uses and purposes;

(*c*) They require different expertise, techniques and facilities;

2. In respect of plant germ plasms (agriculture and forestry), organize and equip national or regional genetic resources conservation centres:

(*a*) Such centres as the National Seed Storage Laboratory in the United States of America and the Vavilov Institute of Plant Industry in the Union of Soviet Socialist Republics already provide good examples;

(*b*) Working collections should be established separately from the basic collections; these will usually be located at plant and breeding stations and will be widely distributed;

(*c*) Three classes of genetic crop resources must be conserved:

(i) High-producing varieties in current use and those they have superseded;

(ii) Primitive varieties of traditional pre-scientific agriculture (recognized as genetic treasuries for plant improvement);

(iii) Mutations induced by radiation or chemical means;

(*d*) Species contributing to environmental improvement, such as sedge used to stabilize sand-dunes, should be conserved;

(*e*) Wild or weed relatives of crop species and those wild species of actual or potential use in rangelands, industry, new crops etc. should be included;

3. In respect of plant germ plasms (agriculture and forestry), maintain gene pools of wild plant species within their natural communities. Therefore:

(*a*) It is essential that primeval forests, bushlands and grasslands which contain important forest genetic resources be identified and protected by appropriate technical and legal means; systems of reserves exist in most countries, but a strengthening of international understanding on methods of protection and on availability of material may be desired;

(*b*) Conservation of species of medical, aesthetic or research value should be assured;

(*c*) The network of biological reserves proposed by UNESCO (Man and the Biosphere Programme) should be designed, where feasible, to protect these natural communities;

(*d*) Where protection in nature becomes uncertain or impossible, then means such as seed storage or living collections in provenance trials or botanic gardens must be adopted;

4. Fully implement the programmes initiated by the FAO Panels of Experts on forest gene resources in 1968 and on plant exploration and introduction in 1970;

5. In respect of animal germ plasms, consider the desirability and feasibility of international action to preserve breeds or varieties of animals:

(*a*) Because such an endeavour would constitute a major effort beyond the scope of any one nation, FAO would be the logical executor of such a project. Close co-operation with Governments would be necessary, however. The International Union for Conservation of Nature and Natural Resources might, logically, be given responsibility for wild species, in co-operation with FAO, the Man and the Biosphere Programme (UNESCO), and Governments;

(*b*) Any such effort should also include research on methods of preserving, storing, and transporting germ plasm;

(*c*) Specific methods for the maintenance of gene pools of aquatic species should be developed;

(*d*) The recommendations of the FAO Working Party Meeting on Genetic Selection and Conservation of Genetic Resources of Fish, held in 1971, should be implemented;

6. In respect of micro-organism germ plasms, co-operatively establish and properly fund a few large regional collections:

(*a*) Full use should be made of major collections now in existence;

(*b*) In order to provide geographical distribution and access to the developing nations, regional centres should be established in Africa, Asia and Latin America and the existing centres in the developed world should be strengthened;

7. Establish conservation centres of insect germ plasm. The very difficult and long process of selecting or breeding insects conducive to biological control programmes can begin only in this manner.

Recommendation 44

It is recommended that Governments, in co-operation with the Secretary-General of the United Nations and the Food and Agriculture Organization of the United Nations where indicated, recognize that evaluation and utilization are critical corollaries to the conservation of genetic resources. In respect of crop-breeding programmes, it is recommended that Governments give special emphasis to:

(*a*) The quality of varieties and breeds and the potential for increased yields;

(*b*) The ecological conditions to which the species are adapted;

(*c*) The resistance to diseases, pests and other adverse factors;

(*d*) The need for a multiplicity of efforts so as to increase the chances of success.

Recommendation 45

It is recommended that Governments, in co-operation with the Secretary-General of the United Nations and the Food and Agriculture Organization of the United Nations where indicated:

1. Collaborate to establish a global network of national and regional institutes relating to genetic resource conservation based on agreements on the availability of material and information, on methods, on technical standards, and on the need for technical and financial assistance wherever required:

(*a*) Facilities should be designed to assure the use of the materials and information: (i) by breeders, to develop varieties and breeds both giving higher yields and having higher resistance to local pests and diseases and other adverse factors; and (ii) by users providing facilities and advice for the safest and most profitable utilization of varieties and breeds most adapted to local conditions;

(*b*) Such co-operation would apply to all genetic resource conservation centres and to all types mentioned in the foregoing recommendations;

(*c*) Standardized storage and retrieval facilities for the exchange of information and genetic material should be developed:

(i) Information should be made generally available and its exchange facilitated through agreement on methods and technical standards;

(ii) International standards and regulations for the shipment of materials should be agreed upon;

(iii) Basic collections and data banks should be replicated in at least two distinct sites, and should remain a national responsibility;

(iv) A standardized and computerized system of documentation is required;

(*d*) Technical and financial assistance should be provided where required; areas of genetic diversity are most frequently located in those countries most poorly equipped to institute the necessary programmes;

2. Recognize that the need for liaison among the parties participating in the global system of genetic resources conservation requires certain institutional innovations. To this end:

(*a*) *It is recommended* that the appropriate United Nations agency establish an international liaison unit for plant genetic resources in order:

(i) To improve liaison between governmental and non-governmental efforts;

(ii) To assist in the liaison and co-operation between national and regional centres, with special emphasis on international agreements on methodology and standards of conservation of genetic material, standardization and co-ordination of computerized record systems, and the exchange of information and material between such centres;

(iii) To assist in implementing training courses in exploration, conservation and breeding methods and techniques;

(iv) To act as a central repository for copies of computerized information on gene pools (discs and tapes);

(v) To provide the secretariat for periodic meetings of international panels and seminars on the subject; a conference on germ plasm conservation might be convened to follow up the successful conference of 1967;

(vi) To plan and co-ordinate the five-year emergency programme on the conservation of endangered species;

(vii) To assist Governments further, wherever required, in implementing their national programmes;

(viii) To promote the evaluation and utilization of genetic resources at the national and international levels;

(*b*) *It is recommended* that the appropriate United Nations agency initiate the required programme on micro-organism germ plasm:

(i) Periodic international conferences involving those concerned with the maintenance of and research

on gene pools of micro-organisms should be supported;

(ii) Such a programme might interact with the proposed regional culture centres by assuring that each centre places high priority on the training of scientists and technicians from the developing nations; acting as a necessary liaison; and lending financial assistance to those countries established outside the developed countries;

(iii) The international exchange of pure collections of micro-organisms between the major collections of the world has operated for many years and requires little re-enforcement;

(iv) Study should be conducted particularly on waste disposal and recycling, controlling diseases and pests, and food technology and nutrition;

(*c*) *It is recommended* that the Food and Agriculture Organization of the United Nations institute a programme in respect of animal germ plasm to assess and maintain catalogues of the economic characteristics of domestic animal breeds and types and of wild species and to establish gene pools of potentially useful types;

(*d*) *It is recommended* that the Man and the Biosphere project on the conservation of natural areas and the genetic material contained therein should be adequately supported.

Recommendation 46

It is recommended that Governments, and the Secretary-General in co-operation with the Food and Agriculture Organization of the United Nations and other United Nations organizations concerned, as well as development assistance agencies, take steps to support recent guidelines, recommendations and programmes of the various international fishing organizations. A large part of the needed international action has been identified with action programmes initiated by FAO and its Intergovernmental Committee on Fisheries and approximately 24 other bilateral and multilateral international commissions, councils and committees. In particular these organizations are planning and undertaking:

(*a*) Co-operative programmes such as that of LEPOR (Long-Term and Expanded Programme of Oceanic Research), GIPME (Global Investigation of Pollution in the Marine Environment) and IBP (International Biological Programme);

(*b*) Exchange of data, supplementing and expanding the services maintained by FAO and bodies within its framework in compiling, disseminating and co-ordinating information on living aquatic resources and their environment and fisheries activities;

(*c*) Evaluation and monitoring of world fishery resources, environmental conditions, stock assessment, including statistics on catch and effort, and the economics of fisheries;

(*d*) Assistance to Governments in interpreting the implications of such assessments, identifying alternative management measures, and formulating required actions;

(*e*) Special programmes and recommendations for management of stocks of fish and other aquatic animals proposed by the existing international fishery bodies. Damage to fish stocks has often occurred because regulatory action is taken too slowly. In the past, the need for management action to be nearly unanimous has reduced action to the minimum acceptable level.

Recommendation 47

It is recommended that Governments, and the Secretary-General of the United Nations in co-operation with the Food and Agriculture Organization of the United Nations and other United Nations organizations concerned, as well as development assistance agencies, take steps to ensure close participation of fishery agencies and interests in the preparations for the United Nations Conference on the Law of the Sea. In order to safeguard the marine environment and its resources through the development of effective and workable principles and laws, the information and insight of international and regional fishery bodies, as well as the national fishery agencies are essential.

Recommendation 48

It is recommended that Governments, and the Secretary-General in co-operation with the Food and Agriculture Organization of the United Nations and other United Nations organizations concerned, as well as development assistance agencies, take steps to ensure international co-operation in the research, control and regulation of the side effects of national activities in resource utilization where these affect the aquatic resources of other nations:

(*a*) Estuaries, intertidal marshes, and other near-shore and in-shore environments play a crucial role in the maintenance of several marine fish stocks. Similar problems exist in those fresh-water fisheries that occur in shared waters;

(*b*) Discharge of toxic chemicals, heavy metals, and other wastes may affect even high-seas resources;

(*c*) Certain exotic species, notably the carp, lamprey and alewife, have invaded international waters with deleterious effects as a result of unregulated unilateral action.

Recommendation 49

It is recommended that Governments, and the Secretary-General of the United Nations in co-operation with the Food and Agriculture Organization of the United Nations and other United Nations organizations concerned, as well as development assistance agencies, take steps to develop further and strengthen facilities for collecting, analysing and disseminating data on living aquatic resources and the environment in which they live:

(*a*) Data already exist concerning the total harvest from the oceans and from certain regions in respect of individual fish stocks, their quantity, and the fishing efforts expended on them, and in respect of their population structure, distribution and changes. This coverage needs to be improved and extended;

(*b*) It is clear that a much greater range of biological parameters must be monitored and analysed in order to provide an adequate basis for evaluating the interaction of stocks and managing the combined resources of many stocks. There is no institutional constraint on this

expansion but a substantial increase in funding is needed by FAO and other international organizations concerned to meet this expanding need for data;

(*c*) Full utilization of present and expanded data facilities is dependent on the co-operation of Governments in developing local and regional data networks, making existing data available to FAO and to the international bodies, and formalizing the links between national and international agencies responsible for monitoring and evaluating fishery resources.

Recommendation 50

It is recommended that Governments, and the Secretary-General of the United Nations in co-operation with the Food and Agriculture Organization of the United Nations and other United Nations organizations concerned, as well as development assistance agencies, take steps to ensure full co-operation among Governments by strengthening the existing international and regional machinery for development and management of fisheries and their related environmental aspects and, in those regions where these do not exist, to encourage the establishment of fishery councils and commissions as appropriate.

(*a*) The operational efficiency of these bodies will depend largely on the ability of the participating countries to carry out their share of the activities and programmes;

(*b*) Technical support and servicing from the specialized agencies, in particular from FAO, is also required;

(*c*) The assistance of bilateral and international funding agencies will be needed to ensure the full participation of the developing countries in these activities.

Recommendation 51

It is recommended that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for co-operation between interested States for water resources common to more than one jurisdiction.

(*a*) In accordance with the Charter of the United Nations and the principles of international law, full consideration must be given to the right of permanent sovereignty of each country concerned to develop its own resources;

(*b*) The following principles should be considered by the States concerned when appropriate:

(i) Nations agree that when major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activity envisaged;

(ii) The basic objective of all water resource use and development activities from the environmental point of view is to ensure the best use of water and to avoid its pollution in each country;

(iii) The net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations affected;

(*c*) Such arrangements, when deemed appropriate by the States concerned, will permit undertaking on a regional basis:

(i) Collection, analysis, and exchanges of hydrologic data through some international mechanism agreed upon by the States concerned;

(ii) Joint data-collection programmes to serve planning needs;

(iii) Assessment of environmental effects of existing water uses;

(iv) Joint study of the causes and symptoms of problems related to water resources, taking into account the technical, economic, and social considerations of water quality control;

(v) Rational use, including a programme of quality control, of the water resource as an environmental asset;

(vi) Provision for the judicial and administrative protection of water rights and claims;

(vii) Prevention and settlement of disputes with reference to the management and conservation of water resources;

(viii) Financial and technical co-operation of a shared resource;

(*d*) Regional conferences should be organized to promote the above considerations.

Recommendation 52

It is recommended that the Secretary-General take steps to ensure that appropriate United Nations bodies support government action with regard to water resources where required:

1. Reference is made to the Food and Agriculture Organization of the United Nations, the World Health Organization, the World Meteorological Organization, the Department of Economic and Social Affairs of the United Nations Secretariat (Resources and Transport Division), the United Nations Educational, Scientific and Cultural Organization/International Hydrological Decade, the regional economic commissions and the United Nations Economic and Social Office in Beirut. For example:

(*a*) The Food and Agriculture Organization of the United Nations has established a Commission on Land and Water Use for the Middle East which promotes regional co-operation in research, training and information, *inter alia* on water management problems;

(*b*) The World Health Organization has available the International Reference Centre for Waste Disposal located at Dübendorf, Switzerland, and International Reference Centre on Community Water Supply in the Netherlands;

(*c*) The World Meteorological Organization has a Commission on Hydrology which provides guidance on data collection and on the establishment of hydrological networks;

(*d*) The Resources and Transport Division of the Department of Economic and Social Affairs, United Nations Secretariat, has the United Nations Water Resources Development Centre;

(*e*) The United Nations Educational, Scientific and Cultural Organization is sponsoring the International

Hydrological Decade programme of co-ordinated research on the quality and quantity of world water resources.

2. Similar specialized centres should be established at the regional level in developing countries for training research and information exchange on:

(*a*) Inland water pollution and waste disposal in co-operation with the World Health Organization, the Food and Agriculture Organization of the United Nations, the United Nations regional economic commissions and the United Nations Economic and Social Office in Beirut;

(*b*) Water management for rain-fed and irrigated agriculture, by the Food and Agriculture Organization of the United Nations in co-operation with the regional economic commissions and the United Nations Economic and Social Office in Beirut;

(*c*) Integrated water resources planning and management in co-operation with the Department of Economic and Social Affairs of the United Nations Secretariat (Resources and Transport Division), the regional economic commissions, and the United Nations Economic and Social Office in Beirut.

Recommendation 53

It is recommended that the Secretary-General take steps to ensure that the United Nations system is prepared to provide technical and financial assistance to Governments when requested in the different functions of water resources management:

(*a*) Surveys and inventories;

(*b*) Water resources administration and policies, including:

(i) The establishment of institutional frameworks;

(ii) Economic structures of water resources management and development;

(iii) Water resources law and legislation;

(*c*) Planning and management techniques, including:

(i) The assignment of water quality standards;

(ii) The implementation of appropriate technology;

(iii) More efficient use and re-use of limited water supplies;

(*d*) Basic and applied studies and research;

(*e*) Transfer of existing knowledge;

(*f*) Continuing support of the programme of the International Hydrological Decade.

Recommendation 54

It is recommended that the Secretary-General take steps to establish a roster of experts who would be available to assist Governments, upon request, to anticipate and evaluate the environmental effects of major water development projects. Governments would have the opportunity of consulting teams of experts drawn from this roster, in the first stages of project planning. Guidelines could be prepared to assist in the review and choices of alternatives.

Recommendation 55

It is recommended that the Secretary-General take steps to conduct an exploratory programme to assess the actual and potential environmental effects of water management upon the oceans, define terms and estimate the costs for a comprehensive programme of action, and establish and maintain as far as possible:

(*a*) A world registry of major or otherwise important rivers arranged regionally and classified according to their discharge of water and pollutants;

(*b*) A world registry of clean rivers which would be defined in accordance with internationally agreed quality criteria and to which nations would contribute on a voluntary basis:

(i) The oceans are the ultimate recipient for the natural and man-made wastes discharged into the river systems of the continents;

(ii) Changes in the amount of river-flow into the oceans, as well as in its distribution in space and time, may considerably affect the physical, chemical and biological régime of the estuary regions and influence the oceanic water systems;

(iii) It would be desirable for nations to declare their intention to have admitted to the world registry of clean rivers those rivers within their jurisdiction that meet the quality criteria as defined and to declare their further intention to ensure that certain other rivers shall meet those quality criteria by some target date.

Recommendation 56

It is recommended that the Secretary-General provide the appropriate vehicle for the exchange of information on mining and mineral processing.

(*a*) Improved accessibility and dissemination of existing information is required; the body of literature and experience is already larger than one would think.

(*b*) Possibilities include the accumulation of information on: (i) the environmental conditions of mine sites; (ii) the action taken in respect of the environment; and (iii) the positive and negative environmental repercussions.

(*c*) Such a body of information could be used for prediction. Criteria for the planning and management of mineral production would emerge and would indicate where certain kinds of mining should be limited, where reclamation costs would be particularly high, or where other problems would arise.

(*d*) The appropriate United Nations bodies should make efforts to assist the developing countries by, *inter alia*, providing adequate information for each country on the technology for preventing present or future environmentally adverse effects of mining and the adverse health and safety effects associated with the mineral industry and by accepting technical trainees and sending experts.

Recommendation 57

It is recommended that the Secretary-General take steps to ensure proper collection, measurement and analysis

of data relating to the environmental effects of energy use and production within appropriate monitoring systems.

(*a*) The design and operation of such networks should include, in particular, monitoring the environmental levels resulting from emission of carbon dioxide, sulphur dioxide, oxidants, nitrogen oxides (NO_x), heat and particulates, as well as those from releases of oil and radioactivity;

(*b*) In each case the objective is to learn more about the relationships between such levels and the effects on weather, human health, plant and animal life, and amenity values.

Recommendation 58

It is recommended that the Secretary-General take steps to give special attention to providing a mechanism for the exchange of information on energy:

(*a*) The rationalization and integration of resource management for energy will clearly require a solid understanding of the complexity of the problem and of the multiplicity of alternative solutions;

(*b*) Access to the large body of existing information should be facilitated:

(i) Data on the environmental consequences of different energy systems should be provided through an exchange of national experiences, studies, seminars, and other appropriate meetings;

(ii) A continually updated register of research involving both entire systems and each of its stages should be maintained.

Recommendation 59

It is recommended that the Secretary-General take steps to ensure that a comprehensive study be promptly undertaken with the aim of submitting a first report, at the latest in 1975, on available energy sources, new technology, and consumption trends, in order to assist in providing a basis for the most effective development of the world's energy resources, with due regard to the environmental effects of energy production and use: such a study to be carried out in collaboration with appropriate international bodies such as the International Atomic Energy Agency and the Organisation for Economic Co-operation and Development.

Recommendation 60

It is recommended that the Secretary-General, in co-operation with Governments concerned and the appropriate international agencies, arrange for systematic audits of natural resource development projects in representative ecosystems of international significance to be undertaken jointly with the Governments concerned after, and where feasible before, the implementation of such projects.[3]

[3] Projects might include new agricultural settlement of sub-tropical and tropical zones, irrigation and drainage in arid zones, tropical forestry development, major hydroelectric developments, land reclamation works in tropical lowland coastal areas, and settlement of nomads in semi-arid zones. The cost of audits in developing countries should not be imputed to the costs of the resource development projects but financed from separate international sources.

Recommendation 61

It is recommended that the Secretary-General, in co-operation with Governments concerned and the appropriate international agencies, provide that pilot studies be conducted in representative ecosystems of international significance to assess the environmental impact of alternative approaches to the survey, planning and development of resource projects.

Recommendation 62

It is recommended that the Secretary-General, in co-operation with Governments concerned and the appropriate international agencies, provide that studies be conducted to find out the connexion between the distribution of natural resources and people's welfare and the reasons for possible discrepancies.

Recommendation 63

It is recommended that the Secretary-General take steps to ensure that international development assistance agencies, in co-operation with recipient Governments, intensify efforts to revise and broaden the criteria of development project analysis to incorporate environmental impact considerations.

Recommendation 64

It is recommended that the Secretary-General take steps to ensure that the United Nations agencies concerned undertake studies on the relative costs and benefits of synthetic *versus* natural products serving identical uses.

Recommendation 65

It is recommended that the Man and the Biosphere Programme be vigorously pursued by the United Nations Educational, Scientific and Cultural Organization in co-operation with other United Nations organizations and other international scientific organizations.

Recommendation 66

It is recommended that the World Meteorological Organization initiate or intensify studies on the interrelationships of resource development and meteorology.

Recommendation 67

It is recommended that the Secretary-General, in co-operation with interested Governments and United Nations specialized agencies, take the necessary steps to encourage the further development of remote-sensing techniques for resources surveys and the utilization of these techniques on the basis of proper international arrangements.

Recommendation 68

It is recommended that the Secretary-General, in co-operation with the appropriate agencies of the United Nations and other international organizations, promote jointly with interested Governments the development of methods for the integrated planning and management of natural resources, and provide, when requested, advice to Governments on such methods, in accordance with the particular environmental circumstances of each country.

Recommendation 69

It is recommended that the Food and Agriculture Organization of the United Nations expand its present programme on the stabilization of marginal lands.

IDENTIFICATION AND CONTROL OF POLLUTANTS OF BROAD INTERNATIONAL SIGNIFICANCE

A. Pollution generally

Recommendation 70

It is recommended that Governments be mindful of activities in which there is an appreciable risk of effects on climate, and to this end:

(*a*) Carefully evaluate the likelihood and magnitude of climatic effects and disseminate their findings to the maximum extent feasible before embarking on such activities;

(*b*) Consult fully other interested States when activities carrying a risk of such effects are being contemplated or implemented.

Recommendation 71

It is recommended that Governments use the best practicable means available to minimize the release to the environment of toxic or dangerous substances, especially if they are persistent substances such as heavy metals and organochlorine compounds, until it has been demonstrated that their release will not give rise to unacceptable risks or unless their use is essential to human health or food production, in which case appropriate control measures should be applied.

Recommendation 72

It is recommended that in establishing standards for pollutants of international significance, Governments take into account the relevant standards proposed by competent international organizations, and concert with other concerned Governments and the competent international organizations in planning and carrying out control programmes for pollutants distributed beyond the national jurisdiction from which they are released.

Recommendation 73

It is recommended that Governments actively support, and contribute to, international programmes to acquire knowledge for the assessment of pollutant sources, pathways, exposures and risks and that those Governments in a position to do so provide educational, technical and other forms of assistance to facilitate broad participation by countries regardless of their economic or technical advancement.

Recommendation 74

It is recommended that the Secretary-General, drawing on the resources of the entire United Nations system, and with the active support of Governments and appropriate scientific and other international bodies:

(*a*) Increase the capability of the United Nations system to provide awareness and advance warning of deleterious effects to human health and well-being from man-made pollutants;

(*b*) Provide this information in a form which is useful to policy-makers at the national level;

(*c*) Assist those Governments which desire to incorporate these and other environmental factors into national planning processes;

(*d*) Improve the international acceptability of procedures for testing pollutants and contaminants by:

(i) International division of labour in carrying out the large-scale testing programmes needed;

(ii) Development of international schedules of tests for evaluation of the environmental impact potential of specific contaminants or products. Such a schedule of tests should include consideration of both short-term and long-term effects of all kinds, and should be reviewed and brought up to date from time to time to take into account new knowledge and techniques;

(iii) Development and implementation of an international intercalibration programme for sampling and analytical techniques to permit more meaningful comparisons of national data;

(*e*) Develop plans for an International Registry of Data on Chemicals in the Environment based on a collection of available scientific data on the environmental behaviour of the most important man-made chemicals and containing production figures of the potentially most harmful chemicals, together with their pathways from factory *via* utilization to ultimate disposal or recirculation.

Recommendation 75

It is recommended that, without reducing in any way their attention to non-radioactive pollutants, Governments should:

(*a*) Explore with the International Atomic Energy Agency and the World Health Organization the feasibility of developing a registry of releases to the biosphere of significant quantities of radioactive materials;

(*b*) Support and expand, under the International Atomic Energy Agency and appropriate international organizations, international co-operation on radioactive waste problems, including problems of mining and tailings and also including co-ordination of plans for the siting of fuel-reprocessing plants in relation to the siting of the ultimate storage areas, considering also the transportation problems.

Recommendation 76

It is recommended:

(*a*) That a major effort be undertaken to develop monitoring and both epidemiological and experimental research programmes providing data for early warning and prevention of the deleterious effects of the various environmental agents, acting singly or in combination, to which man is increasingly exposed, directly or indirectly, and for the assessment of their potential risks to human health, with particular regard to the risks of mutagenicity, teratogenicity and carcinogenicity. Such programmes should be guided and co-ordinated by the World Health Organization;

(*b*) That the World Health Organization co-ordinate the development and implementation of an appropriate international collection and dissemination system to correlate medical, environmental and family-history data;

(*c*) That Governments actively support and contribute to international programmes for research and development of guidelines concerning environmental factors in the work environment.

Recommendation 77

It is recommended that the World Health Organization, in collaboration with the relevant agencies, in the context of an approved programme, and with a view to suggesting necessary action, assist Governments, particularly those of developing countries, in undertaking co-ordinated programmes of monitoring of air and water and in establishing monitoring systems in areas where there may be a risk to health from pollution.

Recommendation 78

It is recommended that internationally co-ordinated programmes of research and monitoring of food contamination by chemical and biological agent be established and developed jointly by the Food and Agriculture Organization of the United Nations and the World Health Organization, taking into account national programmes, and that the results of monitoring be expeditiously assembled, evaluated and made available so as to provide early information on rising trends of contamination and on levels that may be considered undesirable or may lead to unsafe human intakes.

Recommendation 79

It is recommended:

(*a*) That approximately 10 baseline stations be set up, with the consent of the States involved, in areas remote from all sources of pollution in order to monitor long-term global trends in atmospheric constituents and properties which may cause changes in meteorological properties, including climatic changes;

(*b*) That a much larger network of not less than 100 stations be set up, with the consent of the States involved, for monitoring properties and constituents of the atmosphere on a regional basis and especially changes in the distribution and concentration of contaminants;

(*c*) That these programmes be guided and co-ordinated by the World Meteorological Organization;

(*d*) That the World Meteorological Organization, in co-operation with the International Council of Scientific Unions (ICSU), continue to carry out the Global Atmospheric Research Programme (GARP), and if necessary establish new programmes to understand better the general circulation of the atmosphere and the causes of climatic changes whether these causes are natural or the result of man's activities.

Recommendation 80

It is recommended that the Secretary-General ensure:

(*a*) That research activities in terrestrial ecology be encouraged, supported and co-ordinated through the appropriate agencies, so as to provide adequate knowledge of the inputs, movements, residence times and ecological effects of pollutants identified as critical;

(*b*) That regional and global networks of existing and, where necessary, new research stations, research centres, and biological reserves be designated or established within the framework of the Man and the Biosphere Programme (MAB) in all major ecological regions, to facilitate intensive analysis of the structure and functioning of ecosystems under natural or managed conditions;

(*c*) That the feasibility of using stations participating in this programme for surveillance of the effects of pollutants on ecosystems be investigated;

(*d*) That programmes such as the Man and the Biosphere Programme be used to the extent possible to monitor: (i) the accumulation of hazardous compounds in biological and abiotic material at representative sites; (ii) the effect of such accumulation on the reproductive success and population size of selected species.

Recommendation 81

It is recommended that the World Health Organization, together with the international organizations concerned, continue to study, and establish, primary standards for the protection of the human organism, especially from pollutants that are common to air, water and food, as a basis for the establishment of derived working limits.

Recommendation 82

It is recommended that increased support be given to the Codex Alimentarius Commission to develop international standards for pollutants in food and a code of ethics for international food trade, and that the capabilities of the Food and Agriculture Organization of the United Nations and the World Health Organization to assist materially and to guide developing countries in the field of food control be increased.

Recommendation 83

It is recommended that the appropriate United Nations agencies develop agreed procedures for setting derived working limits for common air and water contaminants.

Recommendation 84

It is recommended that Governments make available, through the International Referral System established in pursuance of recommendation 101 of this Conference, such information as may be requested on their pollution research and pollution control activities, including legislative and administrative arrangements, research on more efficient pollution control technology, and cost-benefit methodology.

Recommendation 85

It is recommended that any mechanism for co-ordinating and stimulating the actions of the different United Nations organs in connexion with environmental problems include among its functions:

(*a*) Development of an internationally accepted procedure for the identification of pollutants of international

significance and for the definition of the degree and scope of international concern;

(*b*) Consideration of the appointment of appropriate intergovernmental, expert bodies to assess quantitatively the exposures, risks, pathways and sources of pollutants of international significance;

(*c*) Review and co-ordination of international co-operation for pollution control, ensuring in particular that needed measures shall be taken and that measures taken in regard to various media and sources shall be consistent with one another;

(*d*) Examination of the needs for technical assistance to Governments in the study of pollution problems, in particular those involving international distribution of pollutants;

(*e*) Encouragement of the establishment of consultation mechanisms for speedy implementation of concerted abatement programmes with particular emphasis on regional activities.

B. Marine pollution

Recommendation 86

It is recommended that Governments, with the assistance and guidance of appropriate United Nations bodies, in particular the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP):

(*a*) Accept and implement available instruments on the control of the maritime sources of marine pollution;

(*b*) Ensure that the provisions of such instruments are compiled with by ships flying their flags and by ships operating in areas under their jurisdiction and that adequate provisions are made for reviewing the effectiveness of, and revising, existing and proposed international measures for control of marine pollution;

(*c*) Ensure that ocean dumping by their nationals anywhere, or by any person in areas under their jurisdiction, is controlled and that Governments shall continue to work towards the completion of, and bringing into force as soon as possible of, an over-all instrument for the control of ocean dumping as well as needed regional agreements within the framework of this instrument, in particular for enclosed and semi-enclosed seas, which are more at risk from pollution;

(*d*) Refer the draft articles and annexes contained in the report of the intergovernmental meetings at Reykjavik, Iceland, in April 1972 and in London in May 1972 to the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction at its session in July/August 1972 for information and comments and to a conference of Governments to be convened by the Government of the United Kingdom of Great Britain and Northern Ireland in consultation with the Secretary-General of the United Nations before November 1972 for further consideration, with a view to opening the proposed convention for signature at a place to be decided by that Conference, preferably before the end of 1972;

(*e*) Participate fully in the 1973 Intergovernmental Maritime Consultative Organization (IMCO) Conference on Maritime Pollution and the Conference on the Law of the Sea scheduled to begin in 1973, as well as in regional efforts, with a view to bringing all significant sources of pollution within the marine environment, including radioactive pollution from nuclear surface ships and submarines, and in particular in enclosed and semi-enclosed seas, under appropriate controls and particularly to complete elimination of deliberate pollution by oil from ships, with the goal of achieving this by the middle of the present decade;

(*f*) Strengthen national controls over land-based sources of marine pollution, in particular in enclosed and semi-enclosed seas, and recognize that, in some circumstances, the discharge of residual heat from nuclear and other power-stations may constitute a potential hazard to marine ecosystems.

Recommendation 87

It is recommended that Governments:

(*a*) Support national research and monitoring efforts that contribute to agreed international programmes for research and monitoring in the marine environment, in particular the Global Investigation of Pollution in the Marine Environment (GIPME) and the Integrated Global Ocean Station System (IGOSS);

(*b*) Provide to the United Nations, the Food and Agriculture Organization of the United Nations and the United Nations Conference on Trade and Development, as appropriate to the data-gathering activities of each, statistics on the production and use of toxic or dangerous substances that are potential marine pollutants, especially if they are persistent;

(*c*) Expand their support to components of the United Nations system concerned with research and monitoring in the marine environment and adopt the measures required to improve the constitutional, financial and operational basis under which the Intergovernmental Oceanographic Commission is at present operating so as to make it an effective joint mechanism for the Governments and United Nations organizations concerned (United Nations Educational, Scientific and Cultural Organization, Food and Agriculture Organization of the United Nations, World Meteorological Organization, Inter-Governmental Maritime Consultative Organization, United Nations) and in order that it may be able to take on additional responsibilities for the promotion and co-ordination of scientific programmes and services.

Recommendation 88

It is recommended that the Secretary-General, together with the sponsoring agencies, make it possible for the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP):

(*a*) To re-examine annually, and revise as required, its "Review of Harmful Chemical Substances", with a view to elaborating further its assessment of sources, pathways and resulting risks of marine pollutants;

(*b*) To assemble, having regard to other work in progress, scientific data and to provide advice on scientific aspects of marine pollution, especially those of an interdisciplinary nature.

Chapter VII

ATTENDANCE AND ORGANIZATION OF WORK

12. The United Nations Conference on the Human Environment was held at Stockholm from 5 to 16 June 1972.

A. Participants

13. Representatives of the following 113 States invited in accordance with General Assembly resolution 2850 (XXVI) took part in the Conference: Afghanistan, Algeria, Argentina, Australia, Austria, Bahrein, Bangladesh, Belgium, Bolivia, Botswana, Brazil, Burundi, Cameroon, Canada, Central African Republic, Ceylon, Chad, Chile, China, Colombia, Congo, Costa Rica, Cyprus, Dahomey, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Federal Republic of Germany, Fiji, Finland, France, Gabon, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Holy See, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Libyan Arab Republic, Liechtenstein, Luxembourg, Madagascar, Malawi, Malaysia, Malta, Mauritania, Mauritius, Mexico, Monaco, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, San Marino, Senegal, Singapore, South Africa, Spain, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia, Zaire, Zambia.

14. The Secretary-General of the United Nations was present at the Conference. The Conference was attended also by representatives of the Secretary-General from the Department of Economic and Social Affairs, the regional economic commissions, the United Nations Economic and Social Office in Beirut, the United Nations Conference on Trade and Development, the United Nations Industrial Development Organization and the United Nations Development Programme. A representative of the United Nations Institute for Training and Research was also present.

15. The following specialized agencies were represented: International Labour Organisation, Food and Agriculture Organization of the United Nations, United Nations Educational, Scientific and Cultural Organization, International Civil Aviation Organization, World Health Organization, International Bank for Reconstruction and Development, International Monetary Fund, Universal Postal Union, International Telecommunication Union, World Meteorological Organization, and Inter-Governmental Maritime Consultative Organization. The International Atomic Energy Agency and the General Agreement on Tariffs and Trade were also represented.

16. Observers from a number of intergovernmental organizations participated in the Conference.

17. Representatives of numerous international non-governmental organizations invited to the Conference also participated.

B. Opening of the Conference

18. The Conference was opened by the Secretary-General of the United Nations.

19. At its 1st plenary meeting it also heard an address by the Secretary-General of the Conference (see chapter VIII below) and a report by the Chairman of the Preparatory Committee on pre-Conference consultations.

C. Election of the President

20. At its 1st plenary meeting, on 5 June 1972, the Conference elected Ingemund Bengtsson (Sweden) as President of the Conference. The President then addressed the Conference.

D. Rules of procedure

21. At its 1st plenary meeting, on 5 June 1972, the Conference adopted with two amendments the draft rules of procedure approved by the General Assembly (A/CONF.48/3): in rule 6 it increased the number of Vice-Presidents from 3 to 27 and it changed the title of the Rapporteur of the Conference to "Rapporteur General".

E. Election of officers other than the President

22. At its 1st plenary meeting, the Conference elected the following 26 Vice-Presidents: [1] Mohamed Khaled Kheladi (Algeria), Eduardo Bradley (Argentina), Peter Howson (Australia), Ingrid Leodolter (Austria), Jack Davis (Canada), Tang Ke (China), Mostafa Tolba

[1] At its 18th plenary meeting, on 15 June 1972, the Conference decided that the two posts of Vice-President of the Conference and Vice-Chairman of the First Committee that had been left vacant when the Conference elected its officers at its 1st plenary meeting should not be filled.

(Egypt), Robert Poujade (France), Alfredo Obiols Gómez (Guatemala), C. Subramanian (India), Eskandar Firouz (Iran), Motoo Ogiso (Japan), A. Al-Adwani (Kuwait), Francisco Vizcaino Murray (Mexico), Adebayo Adedeji (Nigeria), S. G. Bakhash Raisani (Pakistan), J. Llosa Pautrat (Peru), Florin Iorgulescu (Romania), Habib Thiam (Senegal), A. B. Gamedze (Swaziland), Peter Walker (United Kingdom of Great Britain and Northern Ireland), Russell E. Train (United States of America), S. García Pintos (Uruguay), Z. Petrinovic (Yugoslavia), B. Engulu (Zaire), S. Kalulu (Zambia).

23. It elected Keith Johnson (Jamaica) as Rapporteur General.

24. It elected the chairmen and rapporteurs of the three main committees, and the vice-chairmen of the Second and Third Committees. The officers elected were as follows:

First Committee: [1] Helena Benítez (Philippines), *Chairman*; S. Bedaya-Ngaro (Central African Republic), *Rapporteur*

Second Committee: J. Odero Jowi (Kenya), *Chairman*; Ahmed Al-Chelebi (Iraq), *Vice-Chairman*; L. J. Mosterman (Netherlands), *Rapporteur*

Third Committee: Carlos Calero Rodrigues (Brazil), *Chairman*; Yilmaz Gurer (Turkey), *Vice-Chairman*; A. M. Ali-Hassan (Sudan), *Rapporteur*

F. Adoption of the agenda

25. The Conference, at its 1st plenary meeting, adopted the following agenda (A/CONF.48/1):

1. Opening of the Conference
2. Election of the President
3. Adoption of the rules of procedure
4. Constitution of committees
5. Election of the officers other than the President
6. Credentials of representatives to the Conference:
   (*a*) Appointment of the Credentials Committee
   (*b*) Report of the Credentials Committee
7. Adoption of the agenda
8. General debate
9. Declaration on the Human Environment
10. Planning and management of human settmements for environmental quality (subject area I)
11. Environmental aspects of natural resources management (subject area II)
12. Identification and control of pollutants of broad international significance (subject area III)
13. Educational, informational, social and cultural aspects of environmental issues (subject area IV)
14. Development and environment (subject area V)
15. International organizational implications of action proposals (subject area VI)
16. Adoption of plan of action
17. Adoption of the report of the Conference

G. Constitution of subsidiary bodies

26. In accordance with rule 4 of the rules of procedure, the Conference, at its 1st plenary meeting, established a Credentials Committee, composed, in accordance with rule 5, of the following States: Australia, Colombia, France, Ireland, Liberia, Sudan, Syrian Arab Republic, United States of America and Yugoslavia.[2]

27. In accordance with rule 44 of the rules of procedure, the Conference at its 1st plenary meeting established three main committees to study the substantive items of its agenda.

28. It allocated to the First Committee the following agenda items:

Planning and management of human settlements for environmental quality (agenda item 10)

Educational, informational, social and cultural aspects of environmental quality (agenda item 13)

Draft recommendations 85, 98 (*b*) and 99 contained in document A/CONF.48/7

29. It allocated to the Second Committee the following agenda items:

Environmental aspects of natural resources management (agenda item 11)

Development and environment (agenda item 14)

30. It allocated to the Third Committee the following agenda items:

Identification and control of pollutants of broad international significance (agenda item 12)

International organizational implications of action proposals (agenda item 15)

31. The report of the Credentials Committee is given in annex I.

32. At its 7th plenary meeting, on 8 June 1972, the Conference decided to set up a Working Group on the Declaration on the Human Environment.[3] The report of the Working Group is given in annex II.

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[2] Rule 5 of the rules of procedure of the Conference provided that the composition should be the same as that of the Credentials Committee of the General Assembly at its twenty-sixth session. As Mongolia, Somalia and the Union of Soviet Socialist Republics, members of the General Assembly's Credentials Committee, were not represented at the Conference, it was agreed that their places should be taken by the Sudan, the Syrian Arab Republic and Yugoslavia.

[3] See chapter IX.

Annex 648

"Growth in United Nations membership", *United Nations*

Peace, dignity and equality on a healthy planet ()

Growth in United Nations membership

1945-1950 1950s 1960s 1970s 1980s 1990s 2000-Present

Original 51 Members (1945)

Argentina, Australia, Belgium, Bolivia (https://www.un.org/en/about-us/member-states/bolivia), Brazil, Byelorussian Soviet Socialist Republic (https://www.un.org/en/about-us/member-states/belarus), Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia (https://www.un.org/en/about-us/member-states/czechoslovakia), Denmark, Dominican Republic, Ecuador, Egypt (https://www.un.org/en/about-us/member-states/egypt), El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran (https://www.un.org/en/about-us/member-states/iran), Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic (https://www.un.org/en/about-us/member-states/philippines), Poland, Saudi Arabia, Syria (https://www.un.org/en/about-us/member-states/syrian-arab-republic), Turkey, Ukrainian Soviet Socialist Republic (https://www.un.org/en/about-us/member-states/ukraine), Union of South Africa (https://www.un.org/en/about-us/member-states/south-africa), Union of Soviet Socialist Republics (https://www.un.org/en/about-us/member-states/russian-federation), United Kingdom, United States, Uruguay, Venezuela, Yugoslavia (https://www.un.org/en/member-states/yugoslavia)

55 Members (1946)

57 Members (1947)

58 Members (1948)

59 Members (1949)

60 Members (1950)

76 Members (1955)

80 Members (1956)

82 Members (1957)

82 Members (1958)*

99 Members (1960)

104 Members (1961)*

110 Members (1962)

113 Members (1963)

115 Members (1964)*

117 Members (1965)*

122 Members (1966)*

123 Members (1967)

126 Members (1968)

127 Members (1970)

132 Members (1971)

135 Members (1973)

138 Members (1974)

144 Members (1975)

147 Members (1976)

149 Members (1977)

151 Members (1978)

152 Members (1979)

154 Members (1980)

157 Members (1981)

158 Members (1983)

159 Members (1984)

159 Members (1990)*

166 Members (1991)

179 Members (1992)

184 Members (1993)*

185 Members (1994)

188 Members (1999)

189 Members (2000)*

191 Members (2002)

192 Members (2006)

193 Members (2011)

MEMBER STATES

Membership (https://www.un.org/en/about-us/about-un-membership)

- About UN Membership (https://www.un.org/en/about-us/about-un-membership)
- List of UN Member States (https://www.un.org/en/about-us/member-states)
- Member States on the Record (https://www.un.org/en/library/unms)
- Growth in UN Membership (https://www.un.org/en/about-us/growth-in-un-membership)
- Membership of Principal UN Organs (https://www.un.org/en/about-us/membership-of-principal-un-organs)
- Contributions to UN regular budget (https://www.un.org/en/ga/contributions/budget.shtml)
- Honour Roll: Contribution Received in Full (http://www.un.org/en/ga/contributions/honourroll.shtml)
- Arrears in the Payment of Contribution (http://www.un.org/en/ga/about/art19.shtml)

Permanent Missions (https://bluebook.unmeetings.org/)

- New York (https://bluebook.unmeetings.org/)
- Geneva (http://www.unog.ch/80256EE600582E34/(httpPages)/8CEC446B720477DA80256EF8004CB68C?OpenDocument&count=10000&cntxt=D57E0&cookielang=en)
- Vienna (http://www.unodc.org/missions/index.html)

Permanent Observers (https://www.un.org/en/about-us/about-permanent-observers)

About Permanent Observers (https://www.un.org/en/about-us/about-permanent-observers)

Non-Member States (https://www.un.org/en/about-us/non-member-states)

Intergovernmental and Other Organizations (https://www.un.org/en/about-us/intergovernmental-and-other-organizations)

Specialized Agencies (https://www.un.org/en/about-us/specialized-agencies)

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Delegate (UN Intranet - iSeek for Member States) **(http://www.un.org/en/delegate)**

Blue Book **(https://bluebook.unmeetings.org/)**

Delegates' Handbook **(https://www.un.org/dgacm/en/content/protocol/delegates-handbook)**

Manual of Protocol **(https://www.un.org/dgacm/en/content/protocol/manual-of-protocol)**

MAIN BODIES

- General Assembly (http://www.un.org/en/ga/)
- Security Council (https://www.un.org/securitycouncil/)
- Economic and Social Council (http://www.un.org/en/ecosoc/)
- Trusteeship Council (https://www.un.org/en/about-us/trusteeship-council)
- International Court of Justice (http://www.icj-cij.org/en)
- Secretariat (https://www.un.org/en/about-us/secretariat)

DEPARTMENTS / OFFICES

- New York (https://www.un.org/en/about-us/secretariat)
- Geneva (http://www.unog.ch/)
- Nairobi (http://www.unon.org/)
- Vienna (http://www.unvienna.org/)

- UN System Directory (http://www.unsceb.org/directory/)
- UN System Chart (https://www.un.org/sites/un2.un.org/files/un_system_chart.pdf)
- Global Leadership (https://www.un.org/sg/en/global-leadership/home)
- UN Information Centres (https://www.un.org/en/department-of-global-communications/worldwide/united-nations-information-centres)

RESOURCES / SERVICES

- Emergency information (http://emergency.un.org/)
- Reporting Wrongdoing (https://oios.un.org/report-wrongdoing)
- UN Journal (https://journal.un.org/)
- Documents (https://www.un.org/en/our-work/documents)
- Guidelines for gender-inclusive language (http://www.un.org/en/gender-inclusive-language/)
- Databases (https://www.un.org/en/library/page/databases)
- Library (https://www.un.org/library)
- UN iLibrary (http://www.un-ilibrary.org/)
- UN Chronicle (https://www.un.org/en/chronicle)
- UN Yearbook (https://www.un.org/en/yearbook)
- Bookshop (https://shop.un.org/)
- Publications for sale (https://shop.un.org/)
- Maps (https://www.un.org/geospatial/)
- Media Accreditation (http://www.un.org/en/media/accreditation/)
- NGO accreditation at ECOSOC (http://csonet.org/index.php?menu=34)
- NGO accreditation at DGC (https://www.un.org/en/civil-society/page/application)
- Visitors' services (http://visit.un.org/)
- Exhibits (https://www.un.org/exhibits)
- Procurement (http://www.un.org/Depts/ptd/welcome-united-nations-procurement-division-unpd)
- Employment (https://careers.un.org/lbw/Home.aspx)
- Internships (https://careers.un.org/lbw/home.aspx?viewtype=IP)
- Model UN (https://www.un.org/en/mun)
- Academic Impact (/en/academicimpact)
- UN Archives (https://archives.un.org/)
- UN Audiovisual Library (http://www.unmultimedia.org/avlibrary/)
- How to donate to the UN system (https://www.un.org/en/about-us/how-to-donate-to-the-un-system)
- Information on COVID-19 (Coronavirus) (https://www.un.org/en/coronavirus)
- Africa Renewal (https://www.un.org/africarenewal/)
- Ten ways the UN makes a difference (https://www.un.org/sites/un2.un.org/files/uncard_2023_e.pdf)
- High-level summits 2023 (https://www.un.org/summits2023)

KEY DOCUMENTS

- UN Charter (https://www.un.org/en/about-us/un-charter)

- Universal Declaration of Human Rights (https://www.un.org/en/about-us/universal-declaration-of-human-rights)
- Convention on the Rights of the Child (http://www.unicef.org/crc/)
- Statute of the International Court of Justice (https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice)
- Annual Report of the Secretary-General on the Work of the Organization (https://www.un.org/annualreport/)

NEWS AND MEDIA

- News (https://news.un.org/en/)
- Press Releases (http://www.un.org/press/en/)
- Briefings (http://www.un.org/press/en/content/noon-briefings)
- Spokesperson (http://www.un.org/sg/spokesperson/)
- Photos (https://dam.media.un.org/)
- UNIfeed (http://www.unmultimedia.org/tv/unifeed/)
- UN Web TV (https://webtv.un.org/en)
- UN Video (https://www.un.org/en/video)
- Social Media (https://www.un.org/en/get-involved/social-media)
- The Essential UN (http://www.un.org/en/essential-un/)
- Awake at Night podcast (https://www.un.org/en/awake-at-night)

ISSUES / CAMPAIGNS

- Global Issues (https://www.un.org/en/global-issues/)
- Observances (https://www.un.org/en/observances)
- Sustainable Development Goals (http://www.un.org/sustainabledevelopment/)
- Our Common Agenda (https://www.un.org/en/common-agenda)
- Summit of the Future (https://www.un.org/en/summit-of-the-future)
- Climate Action (http://www.un.org/en/climatechange/)
- UN and Sustainability (https://www.un.org/en/about-us/un-and-sustainability)
- Action for Peacekeeping (A4P) (https://www.un.org/en/A4P/)
- Global Ceasefire (https://www.un.org/en/globalceasefire)
- Global Crisis Response Group (https://news.un.org/pages/global-crisis-response-group/)
- Call to Action for Human Rights (https://www.un.org/en/content/action-for-human-rights/index.shtml)
- Disability Inclusion Strategy (https://www.un.org/en/content/disabilitystrategy/)
- Fight Racism (https://www.un.org/en/fight-racism)
- Hate Speech (https://www.un.org/en/hate-speech)
- LGBTIQ+ People (https://www.un.org/lgbtiq-people)
- Safety of Journalists (https://www.un.org/en/safety-journalists)
- Rule of Law (https://www.un.org/ruleoflaw/)
- Action to Counter Terrorism (http://www.un.org/en/counterterrorism/)
- Victims of Terrorism (http://www.un.org/victimsofterrorism/en)
- Children and Armed Conflict (https://childrenandarmedconflict.un.org/)

- Violence Against Children (SRSG) (https://violenceagainstchildren.un.org/)
- Sexual Violence in Conflict (https://www.un.org/sexualviolenceinconflict/)
- Refugees and Migrants (http://refugeesmigrants.un.org/)
- Action Agenda on Internal Displacement (https://www.un.org/en/content/action-agenda-on-internal-displacement/)
- Spotlight Initiative (http://www.un.org/en/spotlight-initiative/index.shtml)
- Preventing Sexual Exploitation and Abuse (https://www.un.org/preventing-sexual-exploitation-and-abuse/)
- Prevention of Genocide and the Responsibility to Protect (http://www.un.org/en/preventgenocide/)
- The Rwanda Genocide (http://www.un.org/en/preventgenocide/rwanda/)
- The Holocaust (http://www.un.org/en/holocaustremembrance/)
- The Question of Palestine (https://www.un.org/unispal/)
- The Transatlantic Slave Trade (https://www.un.org/en/rememberslavery)
- Decolonization (https://www.un.org/dppa/decolonization/en)
- Messengers of Peace (https://www.un.org/en/mop)
- Roadmap for Digital Cooperation (https://www.un.org/en/content/digital-cooperation-roadmap/)
- Digital Financing Task Force (https://www.un.org/en/digital-financing-taskforce)
- Data Strategy (https://www.un.org/datastrategy)
- Countering Disinformation (https://www.un.org/en/countering-disinformation)
- UN75: 2020 and Beyond (https://www.un.org/en/un75)
- Women Rise for All (https://www.un.org/en/coronavirus/women-rise-for-all)
- Stop the Red Sea Catastrophe (https://www.un.org/StopRedSeaSpill)
- Black Sea Grain Initiative Joint Coordination Centre (https://www.un.org/black-sea-grain-initiative)
- Türkiye-Syria Earthquake Response (Donate) (https://www.un.org/en/turkiye-syria-earthquake-response)
- Israel-Gaza Crisis (https://www.un.org/en/situation-in-occupied-palestine-and-israel)

Annex 649

Third Report on State responsibility by James Crawford, Special Rapporteur, A/CN.4/507, *International Law Commission*, 15 March 2000, pages 47-52

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/507 and Add. 1–4*

Third report on State responsibility, by Mr. James Crawford, Special Rapporteur

[*Original: English*]
[*15 March, 15 June, 10 and 18 July and 4 August 2000*]

CONTENTS

* Incorporating A/CN.4/507/Add.1/Corr.1, A/CN.4/507/Add.2/Corr.1 and 2 and A/CN.4/507/Add.3/Corr.1.

LIST OF TABLES

3. Compensation

(a) *Existing article 44*

147. Article 44 provides:

Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

148. Despite the formal priority given to restitution by article 43, the commentary to article 44 acknowledges that "[c]ompensation is the main and central remedy resorted to following an internationally wrongful act".[282] Monetary compensation differs from payments tendered or awarded by way of satisfaction in that its function is purely compensatory; it is intended to represent, as far as may be, the damage suffered by the injured State as a result of the breach. But despite the large number of decided cases before arbitral tribunals in which issues of the assessment of compensation have been faced, the commentary declines to go into detail in article 44, on the basis that "the rules on compensation were bound to be relatively general and flexible".[283] The commentary does discuss questions of causation, including the influence of multiple causes,[284] but on the central issue of the assessment of compensation it confines itself to such general statements as "compensation is the appropriate remedy for 'economically assessable damage' that is to say damage which is susceptible of being evaluated in economic terms",[285] including for moral and material damage.[286] Compensation is thought of as confined to monetary payments,[287] although there is no reason why it could not also take the form, as agreed, of other forms of value.

149. The commentary goes on to discuss the award of interest and loss of profits. Interest is dealt with below as a separate category.[288] Loss of profits is discussed at length, but rather inconclusively. The commentary notes that:

> [C]ompensation for *lucrum cessans* is less widely accepted in the literature and in practice than is reparation for *damnum emergens*. If loss of profits is to be awarded, it would seem inappropriate to award interest on the profit-earning capital over the same period of time, simply because the capital sum cannot be earning interest *and** be notionally employed in earning profits at one and the same time … The essential aim is to avoid 'double recovery' in all forms of reparation.[289]

After a review of relevant case law (including divergent decisions of the Iran-United States Claims Tribunal in cases involving expropriation of property), the commentary concludes that:

> In view of the divergences of opinion which exist with regard to compensation for *lucrum cessans*, the Commission has come to the conclusion that it would be extremely difficult to arrive in this respect at specific rules commanding a large measure of support … The state of the law on all these questions is … not sufficiently settled and the Commission at this stage, felt unable to give precise answers to these questions or to formulate specific rules relating to them. It has therefore felt it preferable to leave it to the States involved or to any third party involved in the settlement of the dispute to determine in each case whether compensation for loss of profits should be paid.[290]

In the event, article 44, paragraph 2, says only that compensation "may include … where appropriate, loss of profits", an endorsement as lukewarm as can be imagined.

150. Government comments on article 44 raise a number of important questions. The first is whether a more detailed provision is needed. Some Governments are of the view that, given the complexity and importance of the issues involved, further guidance on the standard of compensation under customary international law would be welcome—in particular so far as concerns "the assessment of pecuniary damage", including interest and loss of profits.[291] France criticises the "overly concise" drafting of article 44 (all the more so if compared to the detailed treatment of articles 45–46) and advocates a return "to a more analytical version" based on the work done by Mr. Arangio-Ruiz in his second report on State responsibility[292] and on international practice and jurisprudence.[293] By contrast, others stress the need for some flexibility in dealing with specific cases; in their view it is sufficient to set out the general principle of compensation in article 44. They also note that "detailed and comprehensive consideration of the law on reparation and compensation would take considerable time and would delay the completion of the Commission's work".[294]

151. As to the content of that general principle, there is support for the view that in principle the amount of compensation payable is precisely the value the injured State would have received, if restitution had been provided. The United States regards the present drafting of article 44, paragraph 1, as a "long-established principle reflected in customary international law and innumerable bilateral and multilateral agreements". In its view, the fact that compensation is to be provided to the extent that restitu-

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[282] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 67, para. (1).

[283] Ibid., p. 68, para. (3).

[284] Ibid., pp. 68–70, paras. (6)–(13). See paragraphs 27–29 and 31–37 above, for discussion.

[285] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 71, para. (16).

[286] Ibid., para. (17).

[287] Ibid., para. (18), citing Grotius, *De Jure Belli ac Pacis: Libri Tres*, book II, chap. XVII, sect. XXII: "money is the common measure of valuable things".

[288] See paragraphs 195–214 below.

[289] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, para. (27).

[290] Ibid., p. 76, para. (39).

[291] *Yearbook … 1998* (footnote 35 above), p. 147, Denmark on behalf of the Nordic countries; see also A/CN.4/496, pp. 19–20, para. 125 (emphasizing the need for greater legal security) and A/CN.4/504, p. 19, para. 71 (footnote 3 above).

[292] *Yearbook … 1989* (see footnote 21 above).

[293] *Yearbook … 1998* (footnote 35 above), p. 147; see also A/CN.4/496, p. 20, para. 125, and A/CN.4/504, p. 19, para. 71 (taking as an example "the principle whereby damage suffered by a national [is] the measure of damage suffered by the State") (footnote 3 above).

[294] A/CN.4/496 (see footnote 3 above), p. 19, para. 124.

tion is not makes it clear that the amount of compensation due should be equivalent to the value of restitution.[295] By contrast, Japan is concerned by a possible interpretation of paragraph 1, according to which "the wrongdoing State would be able to reject the request made by the injured State for (financial) compensation with the excuse that restitution in kind had not been proved completely impossible". Such a reading of the provision would thus "severely restrict the freedom of the injured State to choose whatever form of full reparation it deems appropriate".[296]

152. Another issue concerns the need to refer to interest and loss of profits in article 44, paragraph 2, and the proper formulation of any such reference. Some Governments consider it unnecessary to specify as a legal obligation the payment of interest and compensation for loss of profits.[297] This is apparently the view adopted by France, which proposes reformulating the paragraph as follows:

> For the purposes of the present article, the compensable damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link.[298]

On the other hand, a number of Governments firmly assert that, "to the extent that it represents the actual loss suffered by the claimant, the payment of interest is not an optional matter but an obligation".[299] Accordingly, paragraph 2 should provide that compensation "shall" (rather than "may") include interest.[300] The United States refers to decisions of the Iran-United States Claims Tribunal and UNCC in support of its view that the present drafting of paragraph 2 "goes counter not only to the overwhelming majority of case law on the subject but also undermines the 'full reparation' principle".[301]

153. These comments raise a number of issues as to article 44. One of these, the question of interest, is dealt with separately below.[302] But the main issue raised is whether article 44 should spell out in more detail accepted principles of assessment of compensation, as well as what limitations might be expressed on the assessment of full compensation, to avoid imposing disproportionate burdens on the responsible State.

[295] *Yearbook … 1998* (footnote 35 above), pp. 147–148; the United States particularly refers to the *"Lusitania"* (see footnote 16 above) and *Letelier and Moffitt* (ILM, vol. XXXI (1992)) cases, and notices that that principle "has been applied to wrongful death cases as well".

[296] *Yearbook … 1999* (footnote 43 above), p. 108.

[297] A/CN.4/504 (footnote 3 above), p. 19, para. 71.

[298] *Yearbook … 1998* (footnote 35 above), p. 148.

[299] Ibid., United Kingdom, p. 147; see also A/CN.4/496 (footnote 3 above), p. 20, para. 125 ("the payment of interest should be the basic and general rule for compensation").

[300] *Yearbook … 1998* (footnote 35 above), p. 148, the United States, considering that article 44 would represent "a step backwards in the international law of reparation" in the absence of such a revision. See also A/CN.4/504 (footnote 3 above), p. 19, para. 71, where one Government argues that replacing "may" by "shall" would "deprive the wrongdoing State of an incentive to delay payment of compensation" while another favours the idea that "a sufficient grace period" for the payment of compensation be allowed to the wrongdoing State before fixing the provision of interest. Governments suggesting this substitution do not seem to favour the deletion of the words "where appropriate" before "loss of profits" (see Mongolia, *Yearbook … 1998* (footnote 35 above), p. 147).

[301] *Yearbook … 1998* (footnote 35 above), p. 148.

[302] See paragraphs 195–214 below.

(b) *Assessment of compensation: general principle or detailed criteria?*

154. In his second report, Mr. Arangio-Ruiz discussed "reparation by equivalent" in some detail, proposing two alternative articles, one shorter and one rather more detailed. As its commentary implies, the Commission preferred the shorter version, which became article 44.[303] In consequence, some of the issues discussed by Mr. Arangio-Ruiz in his report—the distinction between moral injury to individuals and to the State, the distinction between lawful and unlawful expropriation, methods of assessing the value of property taken, especially where this is done on a "going concern" basisare only dealt with briefly, if at all, in article 44 and its commentary.

155. There is, evidently, a need for caution in laying down more specific rules relating to compensation. Although a good deal of guidance is available in certain fields (notably diplomatic protection, especially as concerns takings of, or damage to, property), there have been relatively few recent reasoned awards dealing with the assessment of material damage as between State and State (i.e. outside the field of diplomatic protection). Damages have been sought in approximately one third of cases commenced before ICJ, but so far, the Court has only awarded damages in one case—the *Corfu Channel* case.[304] Indeed it has been argued that the Court has shown some aversion to awards of damages as compared with declaratory or other relief. For example in the *Nuclear Tests* case, it held that the case was moot following the French commitment not to conduct further atmospheric tests, notwithstanding an unfulfilled New Zealand demand for compensation.[305] In the case concerning the *Gabčíkovo-Nagymaros Project*, where both parties claimed substantial compensation against the other, the Court first affirmed the classical rules as to reparation and compensation, then went on to suggest that a "zero-sum agreement" for damages (as distinct from financial contributions to the continuing project) would be appropriate. The relevant passage reads:

> It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.
>
> Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's

[303] See Mr. Arangio-Ruiz's second report, *Yearbook … 1989* (footnote 21 above), pp. 8–30, paras. 20–105, and p. 56, for the text of his proposals. For the report of the Drafting Committee see *Yearbook … 1992*, vol. I, pp. 219–220, paras. 39–52. Since 1989, there have been further developments in jurisprudence and practice, summarized, inter alia, by Iovane, op. cit.; Decaux, loc. cit.; as well as in the sources cited below. The general comparative law experience is well summarized by Stoll, "Consequences of liability: remedies".

[304] *I.C.J. Reports 1949* (see footnote 69 above), p. 249. See Gray, op. cit., pp. 77–95, for a somewhat sceptical account of the practice.

[305] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 475–476, paras. 55–58. Cf. *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 305, para. 59.

decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.[306]

In both cases, it may be inferred, the Court did not regard issues of compensation (as distinct from a return to legality or the cessation of allegedly wrongful conduct) as being at the heart of the case. But in the *Gabčíkovo-Nagymaros Project* case, in particular, it reaffirmed the established law of reparation, including compensation, in State-to-State cases. Moreover too much should not be read into the absence of awards of compensation by the Court. In some cases States have preferred to settle claims by the payment of damages (on a without prejudice basis) rather than see a case go to judgement on the merits,[307] or even on jurisdiction.[308] In others, the parties have sought to settle questions after an award or judgement on the principle of responsibility, or the case has been discontinued for other reasons.[309] Several pending cases involve, or include, claims for reparation, as well as a number of counter-claims for reparation.[310]

156. Apart from ICJ, other established courts and tribunals are dealing with issues of reparation, including compensation.

(*a*) The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. There are substantial outstanding State-to-State claims for reparation;[311]

(*b*) Human rights courts and other bodies, in particular the European and Inter-American Court of Human Rights, have developed a body of jurisprudence dealing with what article 41 (formerly 50) of the European Convention on Human Rights refers to as "just satisfaction".[312] Hitherto, amounts of compensation or damages awarded or recommended by these bodies have generally been modest, though the practice is developing;[313]

(*c*) ICSID tribunals under the Convention on the settlement of investment disputes between States and nationals of other States have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals of other States. Some of these claims involve direct recourse to international law;[314]

(*d*) The International Tribunal on the Law of the Sea awarded substantial damages in various categories, plus interest, in its first case decided on the merits;[315]

(*e*) UNCC is a non-judicial body established by the Security Council to deal with compensation claims against Iraq arising "directly" from its invasion of Kuwait in 1990.[316] The UNCC mandate is to decide upon the liability of Iraq "under international law",[317] and UNCC has laid down guidelines for the award of compensation which are subject to the approval of the Governing Council (consisting of the members of the Security Council). These guidelines have been applied to the processing of a very large number of claims.[318]

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[306] *I.C.J. Reports 1997* (see footnote 18 above), p. 81, paras. 152–153. See also pages 168–169, para. 34 (Judge Oda).

[307] As in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, and for the Court's order of discontinuance following the settlement, ibid., *Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; case concerning *Passage through the Great Belt (Finland* v. *Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement).

[308] As in *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Order of 22 February 1996, I.C.J. Reports 1996*, p. 9 (order of discontinuance following settlement).

[309] The case concerning *Military and Paramilitary Activities in and against Nicaragua* was withdrawn after Nicaragua's written pleadings on compensation had been filed (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 26 September 1991, I.C.J. Reports 1991*, p. 47 (order of discontinuance)).

[310] Counter-claims have been held admissible in the following cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190; and *Land and Maritime Boundary between Cameroon and Nigeria, Order of 30 June 1999, I.C.J. Reports 1999*, p. 983.

[311] For reviews of the Tribunal's jurisprudence on valuation and compensation see, inter alia, Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, chaps. 5–6 and 12; Brower and Brueschke, *The Iran-United States Claims Tribunal*, chaps. 14–18; Pellonpää, "Compensable claims before the Tribunal: expropriation claims"; and Stewart, "Compensation and valuation issues".

[312] Article 41 (renumbered by Protocol No. 11) provides:

> "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."

In the practice of the Court, "satisfaction" has included elements both of compensation and satisfaction in the sense of the draft articles.

[313] See the helpful review by Shelton, op. cit., pp. 214–291. See further paragraph 157 below.

[314] See, for example, *Asian Agricultural Products Limited* v. *Republic of Sri Lanka* (1990), *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245.

[315] *M.V. "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, pp. 65–67, paras. 170–177.

[316] See paragraph 28 above. In addition to the works there cited, see Boelaert-Suominen, "Iraqi war reparations and the laws of war: a discussion of the current work of the United Nations Compensation Commission with specific reference to environmental damage during warfare"; Christenson, "State responsibility and the UN Compensation Commission: compensating victims of crimes of State"; Gattini, "La riparazione dei danni di guerra causati dall'Iraq"; Graefrath, "Iraqi reparations and the Security Council"; and Romano, "Woe to the vanquished? A comparison of the reparations process after World War I (1914–18) and the Gulf war (1990–91)".

[317] Security Council resolution 687 (1991), para. 16.

[318] The UNCC guidelines and decisions are to be found at http://www2.unog.ch/uncc/decision.htm. Of particular relevance for present purposes are the following:

Decision 3 of 18 October 1991, Personal injury and mental pain and anguish (S/AC.26/1991/3);

Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1);

(*Continued on next page.*)

157. Whenever a particular tribunal or other body is established with competence to deal with claims for State responsibility and to award compensation, the question arises whether the resulting decisions form part of a "special regime" for reparation, amounting to a *lex specialis*. There are no doubt, to a greater or lesser degree, elements of a *lex specialis* in the work of the bodies mentioned above (as well as in relation to the WTO dispute settlement mechanism, the focus of which is firmly on cessation rather than reparation[319]). In principle, States are free to establish mechanisms for the settlement of disputes which focus only on certain aspects of the consequences of responsibility, in effect waiving or leaving to one side other aspects. But there is a presumption against the creation of wholly self-contained regimes in the field of reparation, and it is the case that each of the bodies mentioned in the preceding paragraph has been influenced to a greater or lesser degree by the standard of reparation under general international law. Moreover practice in this field is notably dynamic, though it is significant that appeal is still being made to the *Chorzów Factory* principle[320] as well as to the work of this Commission. For example the leading decision of the Inter-American Court of Human Rights on the question of reparation contains the following passage:

> Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.
>
> As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity.
>
> …
>
> Article 63 (1) of the American Convention … does not refer to or limit the ability to ensure the effectiveness of the means of reparation available under the internal law of the State Party responsible for the violation, so [the Court] is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it.
>
> This implies that, in order to fix the corresponding indemnity, the Court must rely upon the American Convention and the applicable principles of international law.[321]

Similarly in the *Papamichalopoulos* case, the European Court of Human Rights noted that:

> The unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession. In this connection, international case-law, of courts or arbitration tribunals, affords the Court a precious source of inspiration; although that case-law concerns more particularly the expropriation of industrial and commercial undertakings, the principles identified in that field are valid for situations such as the one in the instant case.[322]

158. The possibility that decisions of specialist international tribunals on compensation may involve elements of a *lex specialis* is thus no reason for the Commission to resile from the principle of full compensation embodied in article 44. On the other hand, it is a reason for hesitating to spell out in more specific detail the content of that principle, since it is and is likely to continue to be applied in different ways by different bodies and in different contexts. And there are two further reasons for caution:

(*a*) In the first place, much of the controversy over quantification of damages arises in relation to expropriated property, where (except in special cases such as *Chorzów Factory* itself,[323] or *Papamichalopoulos*[324]), the question is the content of the primary obligation of compensation. It is not the Commission's function in relation to the present draft articles to develop the substantive distinction between lawful and unlawful takings, or to specify the content of any primary obligation.[325]

(*Footnote 318 continued.*)

Decision 8 of 24 January 1992, Determination of ceilings for compensation for mental pain and anguish (S/AC.26/1992/8);

Decision 9 of 6 March 1992, Propositions and conclusions on compensation for business losses: types of damages and their valuation (S/AC.26/1992/9);

Decision 11 of 26 June 1992, Eligibility for compensation of members of the Allied Coalition Armed Forces (S/AC.26/1992/11);

Decision 13 of 24 September 1992, Further measures to avoid multiple recovery of compensation by claimants (S/AC.26/1992/13);

Decision 15 of 18 December 1992, Compensation for business losses resulting from Iraq's unlawful invasion and occupation of Kuwait where the trade embargo and related measures were also a cause (S/AC.26/1992/15);

Decision 16 of 18 December 1992, Awards of interest (S/AC.26/1992/16);

Decision 19 of 24 March 1994, Military costs (S/AC.26/Dec.19 (1994));

Decision 40 of 17 December 1996, Well Blowout Control Claim (S/AC.26/Dec.40 (1996)).

[319] Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For WTO purposes, "compensation" refers to the future conduct, not past conduct (ibid., art. 22). On the distinction between cessation and reparation for WTO purposes, see, for example, WTO, "Report of the Panel, Australia: subsidies provided to producers and exporters of automotive leather" (WT/DS126/RW and Corr.1) (21 January 2000), para. 6.49.

[320] See footnote 49 above.

[321] Inter-American Court of Human Rights, *Velásquez Rodríguez* v. *Honduras*, Compensatory Damages, Judgment of 21 July 1989, Series C, No. 7, paras. 26–27 and 30–31.

[322] *Papamichalopoulos and Others* v. *Greece*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 330–B, *Judgment of 31 October 1995 (article 50)* (Council of Europe, Strasbourg, 1996), p. 59, para. 36. The Court went on to cite the *Chorzów Factory* dictum (ibid.) (see footnote 49 above). Generally on the development of standards of compensation in the field of human rights, see Shelton, op. cit.; Randelzhofer and Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*; and Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea".

[323] See footnote 49 above.

[324] See footnote 322 above.

[325] On issues of expropriation and the value of income-producing property, see, for example, Erasmus, *Compensation for Expropriation: A Comparative Study*; Norton, "A law of the future or a law of the past? Modern tribunals and the international law of expropriation"; Penrose, Joffe and Stevens, "Nationalisation of foreign-owned property for a public purpose: an economic perspective on appropriate compensation"; Lieblich, "Determinations by international tribunals of the economic value of expropriated enterprises", and "Determining the economic value of expropriated income-producing property in international arbitrations"; Friedland and Wong, "Measuring damages for the deprivation of income-producing assets: ICSID case studies"; Khalilian, "The place of discounted cash flow in international commercial arbitrations: awards by Iran-United States Claims Tribunal"; Chatterjee, "The use of the discounted cash flow method in the assessment of compensa-

(*b*) Secondly, now that the Commission has decided to deal with diplomatic protection as a separate topic (albeit a topic within the general field of responsibility), questions of quantification arising in the context of injury to aliens are more appropriately dealt with as part of that topic.

159. Despite these considerations, it can be argued that, if there do exist clear and more detailed rules in relation to the assessment of compensation that can be stated—either as a matter of pure codification or progressive development—then they should be stated. The difficulty is that it is very unclear whether there are such rules, as distinct from the general principles stated in articles 42 and 44.[326] The decisions reflect the wide variety of factual situations, the influence of particular primary obligations,[327] evaluations of the respective behaviour of the parties (both in terms of the gravity of the breach and their subsequent conduct), and, more generally, a concern to reach an equitable and acceptable outcome. As Aldrich observes, "when [international judges] are making a complex judgment such as one regarding the amount of compensation due for the expropriation of rights … equitable considerations will inevitably be taken into account, whether acknowledged or not".[328] Experience in this and other contexts shows that, while illustrations can be given of the operation of equitable considerations and of proportionality in international law, the attempt to specify them in detail is likely to fail.

160. For these reasons, the Special Rapporteur agrees with the decision taken by the Commission at its forty-fourth session in 1992 to formulate article 44 in general and flexible terms.[329] A number of specific limitations on the principle of full compensation in particular the rule against double recovery and, perhaps, the *non ultra petita* rule can be stated, although these relate more to the invocation of responsibility than to the determination of quantum at the level of principle. They will accordingly be considered below, as will the issue of mitigation of responsibility.[330]

(c) *Limitations on compensation*

161. One question that does need consideration, however, is that of limiting compensation. Legal systems are generally concerned to avoid creating liabilities in an indeterminate amount in respect of an indeterminate class, and the special context of inter-State relations if anything aggravates such concerns. There are no *general* equivalents in international law to the limitation of actions or the limitation of liability which are used in national law for this purpose. The State is not a limited liability corporation, and there is no formal mechanism for dealing with issues of State insolvency. Given the capacity of States to interfere in the life of peoples and in economic relations, and the growth of substantive international law affecting both, the potential for indeterminate liability undoubtedly existseven if it has usually not arisen in practice.[331]

162. The issue of limiting crippling compensation claims has already been discussed in the context of former article 42, paragraph 3, which provides that reparation should not result in depriving a population of its own means of subsistence.[332] For the reasons given, that provision is unnecessary so far as restitution and satisfaction are concerned, but it does merit consideration in the context of compensation, since the rules relating to directness or proximity of damage are not guaranteed to prevent very large amounts being awarded by way of compensation in certain cases.

163. A robust answer to these concerns is that they are exaggerated, that compensation is only payable where loss has actually been suffered as a result (direct, proximate, not too remote) of the internationally wrongful act of a State, and that in such cases there is no justification for requiring the victim(s) to bear the loss. Moreover if States wish to establish limitation of liability regimes in particular fields of ultrahazardous activity (e.g. oil pollution, nuclear accidents) they can always do so. In particular, the consistent outcome of orderly claims procedures (whether they involve lump-sum agreements or mixed claims commissions or tribunals) has been a significant overall reduction of compensation payable compared with amounts claimed.[333] According to this view there is no case for a general provision on the subject.

164. The Special Rapporteur is inclined to agree. It is a matter for the Commission, however, to consider whether article 42, paragraph 3, or some similar provision should be inserted in article 44 to deal with cases of catastrophic and unforeseen liabilities. In any event, the question of mitigation of responsibility and mitigation of damages by reference to the conduct of the injured State do have a place in the draft and are discussed below.[334]

(d) *Conclusion*

165. For these reasons, the Special Rapporteur proposes that article 44 read as follows:

"Compensation

"A State which has committed an internationally wrongful act is obliged to compensate for any economically assessable damage caused thereby, to the extent that such damage is not made good by restitution."

As compared with the version adopted on first reading, certain changes of wording have been made, essentially

tion: comments on the recent World Bank guidelines on the treatment of foreign direct investment"; and Dagan, *Unjust Enrichment: A Study of Private Law and Public Values*, chap. 6 (International law).

[326] As Mr. Arangio-Ruiz also concluded (*Yearbook … 1989* (see footnote 21 above), p. 11, para. 28).

[327] A matter particularly emphasized by Brownlie, op. cit., pp. 222–227.

[328] Aldrich, op. cit., p. 242. The passage quoted refers to the question of assessment of compensation for "rights to lift and sell petroleum products", but it is of more general application.

[329] *Yearbook … 1992*, vol. I, 2288th meeting, p. 220, para. 48.

[330] Paras. 215–222 below.

[331] See, for example, the Chernobyl affair, which did not, however, give rise to any actual claims of responsibility (Woodliffe, "Chernobyl: four years on", pp. 466–468).

[332] See paragraphs 38–42 above.

[333] See footnote 78 above. Similar outcomes can be observed with the earlier mixed tribunals.

[334] See paragraphs 195–214 below.

minor in character. First, consistently with other articles in this part, article 44 is expressed as an obligation of the responsible State. The invocation of that responsibility by the injured State or States will be dealt with in part two *bis*. Evidently each State would only be entitled to invoke the obligation to pay compensation to the extent that it has itself suffered damage, or to the extent that it is duly claiming for damage suffered by its nationals.[335] Secondly, the two paragraphs of former article 44 have been subsumed into a single paragraph, covering all economically assessable damage. There is no need to mention loss of profits as a separate head of damage, especially since any such mention will inevitably have to be qualified (giving rise to the "decodifying" effect which some Governments complained of in the earlier text[336]). Compensation for loss of profits is available in some circumstances and not others, but to attempt to spell these out would contradict the underlying strategy of article 44 as a general statement of principle. The commentary can deal with the different heads of compensable damage (including loss of profits) in a more substantial way. The subject of interest will be dealt with in a separate article.[337]

166. It will be a matter for the Commission to decide whether a more detailed formulation of the principle of compensation is required in the text of article 44, in which case proposals will be made in a further instalment of the present report. The Special Rapporteur would, however, prefer a more discursive treatment in the commentary of the internationally recognized body of compensation rules and principles relating to the measure of damages. Among other things, it will be possible to do this with the necessary degree of flexibility.

4. Satisfaction

(a) *Existing article 45*

167. Article 45 provides:

Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(*a*) An apology;

(*b*) Nominal damages;

(*c*) In cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(*d*) In cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

168. According to the commentary, satisfaction is intended to cover "only the non-material damage to the State", otherwise referred to as its "moral injury".[338] Earlier writers expressed this in terms such as "honour" or "dignity": the terms now have a rather archaic quality, although "dignity" survives in article 45, paragraph 3. Paragraph 1, in referring to "satisfaction for the damage, in particular moral damage, caused by that act", is intended to designate "any non-material damage suffered by a State as a result of an internationally wrongful act". This is the subject matter of satisfaction.[339]

169. The commentary notes that satisfaction is a "rather exceptional" remedy, which is not available in every case. This is conveyed by the use of the term "if and to [the] extent necessary to provide full reparation".[340] Paragraph 2 provides a list of measures by way of satisfaction. Thus an apology, which "encompasses regrets, excuses, saluting the flag, etc. ... occupies a significant place in international jurisprudence": even if some of its forms (such as saluting the flag) "seem to have disappeared in recent practice", requests for apologies have increased in frequency and importance.[341] Another form, not mentioned in paragraph 2, is "recognition by an international tribunal of the unlawfulness of the offending State's conduct".[342]

170. Damages "reflecting the gravity of the infringement" are "of an exceptional nature … given to the injured party over and above the actual loss, when the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party".[343] Thus in the "*Rainbow Warrior*" case, the Secretary-General of the United Nations decided that France should formally apologise for the breach and pay US$ 7 million to New Zealand; this far exceeded the actual damage suffered and was plainly an award by way of satisfaction.[344] The commentary does not suggest that this mode of satisfaction is limited to "international crimes" as defined in former article 19. Even in relation to "delicts", satisfaction performs a function which, whether or not "afflictive" is expressive of the seriousness of the case and of the injury done, and in this sense is an aspect of full reparation.[345]

171. The sanctioning of responsible officials is also quite frequently sought and granted, but its "extensive application … might result in undue interference in the internal affairs of States. [The Commission] has therefore limited the scope of application of subparagraph (*d*) to

[335] The extent to which a State may claim on behalf of persons or companies injured by the internationally wrongful act of a State will be dealt with in more detail in the topic of diplomatic protection.

[336] See paragraphs 149 and 152 above.

[337] See paragraphs 195–214 below.

[338] *Yearbook … 1993*, vol. II (Part Two), commentary to article 10 [present art. 45], p. 77, para. (4).

[339] Ibid., para. (5).

[340] Ibid., para. (6).

[341] Ibid., pp. 78–79, para. (9).

[342] Ibid., p. 79, para. (10).

[343] Ibid., para. (12).

[344] Ibid., pp. 79–80, para. (13).

[345] Ibid., pp. 80–81, paras. (21)–(24).

Annex 650

"Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries", Report of the Commission to the General Assembly on the work of its fifty-third session, Yearbook of the International Law Commission, A/CN.4/ SER.A/2001/Add.1 (Part 2), *International Law Commission*, 10 August 2001, pages 91-94, 124-125, 140-141

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taken.[447] But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if circumstances so require" at the end of subparagraph (*b*). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

Article 31. Reparation

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 damage, whether material or moral, caused by the internationally wrongful act of a State.

Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[448]

In this passage, which has been cited and applied on many occasions,[449] the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> 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, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. 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 by 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.[450]

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[451] In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[452] through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[453] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in *paragraph 2*, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individu-

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to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war", Martens, *op. cit.* (footnote 441 above), vol. XXIX, p. 456 at p. 486.

[447] In the *Trail Smelter* case (see footnote 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to "prevent future significant fumigations in the United States" (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez* v. *Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126, para. 19; *Lanza* v. *Uruguay*, decision of 3 April 1980, *ibid*., p. 119, para. 17; and *Dermit Barbato* v. *Uruguay*, decision of 21 October 1982, *ibid*., *Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133, para. 11.

[448] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[449] Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote 119 above), p. 485, para. 48.

[450] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[451] Cf. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", *Collected Courses ... 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

[452] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[453] For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

ally unaffected by the breach.[454] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[455]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[456] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *"Rainbow Warrior"* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that:

> Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[457]

The tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage … of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[458]

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury … caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as a proximate cause",[459] or to damage which is "too indirect, remote, and uncertain to be appraised",[460] or to "any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[461] Thus, causality in fact is a necessary

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[454] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses ... 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?", Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 1; and Brownlie, *System of the Law of Nations …* (footnote 92 above), pp. 53–88.

[455] See especially article 36 and commentary.

[456] See paragraph (9) of the commentary to article 2.

[457] *"Rainbow Warrior"* (see footnote 46 above), pp. 266–267, paras. 107 and 109.

[458] *Ibid*., p. 267, para. 110.

[459] See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

[460] See the *Trail Smelter* arbitration (footnote 253 above), p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", RGDIP, vol. 31 (1924), p. 209, citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage (footnote 87 above).

[461] Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, e.g., Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing

but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[462] in others "foreseeability"[463] or "proximity".[464] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[465] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[471] except in cases of contributory fault.[472] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.[473] Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[474]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the

Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[462] As in Security Council resolution 687 (1991), para. 16.

[463] See, e.g., the *"Naulilaa"* case (footnote 337 above), p. 1031.

[464] For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit*. (footnote 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[465] See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

[466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

[467] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para. 54.

[468] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 80.

[469] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 29–32.

[470] *Corfu Channel*, *Merits* (see footnote 35 above), pp. 17–18 and 22–23.

[471] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit*. (footnote 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (see footnote 363 above), p. 229).

[472] See article 39 and commentary.

[473] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

[474] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–33.

onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[475]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different forms of reparation.[476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

Article 32. Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Commentary

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[477]Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".[478]

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[479] In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[480] In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration".[481] In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

Article 33. Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, *paragraph 1* makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing

[475] The *Zafiro* case (see footnote 154 above), pp. 164–165.

[476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[477] See paragraphs (2) to (4) of the commentary to article 3.

[478] Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

[479] See R. L. Buell, "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

[480] See *British and Foreign State Papers, 1919* (London, HM Stationery Office, 1922), vol. 112, p. 1094.

[481] *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[707] In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case".[708]

Article 47. Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) is without prejudice to any right of recourse against the other responsible States.

Commentary

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.[709]

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions[710] and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[711] In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,[712] Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,[713] the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was "solidary" and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of "solidary" responsibility it said:

> Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This … is independent of the question whether Australia can be sued alone. 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. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.[714]

The Court was careful to add that its decision on jurisdiction "does not settle the question whether reparation

[707] Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (see footnote 382 above), p. 1432.

[708] *Reparation for Injuries* (see footnote 38 above), p. 186.

[709] See article 17 and commentary.

[710] For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

[711] See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

[712] See footnote 230 above.

[713] See footnote 286 above. See also paragraph (11) of the commentary to article 16.

[714] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), pp. 258–259, para. 48.

would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory".[715]

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.[716] A well-known example is the Convention on International Liability for Damage Caused by Space Objects. Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

> In all cases of joint and several liability referred to in paragraph 1 … the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.[717]

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.[718] At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to *paragraph 1* of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[719] Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in *paragraph 2*. *Subparagraph* (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.[720] This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in *subparagraph* (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (*b*) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

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[715] *Ibid*., p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote 232 above) and the settlement agreement (*ibid.*).

[716] A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, e.g., annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union mixed agreements", *International Law Aspects of the European Union*, M. Koskenniemi, ed. (The Hague, Kluwer, 1998), p. 125.

[717] See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

[718] See paragraph 4 of the general commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

[719] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[720] Such a principle was affirmed, for example, by PCIJ in the *Factory at Chorzów, Merits* case (see footnote 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also pp. 45 and 49.

Article 55. Lex specialis

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.

Commentary

(1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.

(2) Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the rule which is later in time.[817] In certain cases the consequences that follow from a breach of some overriding rule may themselves have a peremptory character. For example, States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law. Thus, the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be "determined" by the special rule and the principle embodied in article 55 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes as it relates to certain remedies.[818] An example of the latter is article 41 of Protocol No. 11 to the European Convention on Human Rights.[819] Both concern matters dealt with in Part Two of the articles. The same considerations apply to Part One. Thus, a particular treaty might impose obligations on a State but define the "State" for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.[820] Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For 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. Thus, the question is essentially one of interpretation. For example, in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5, paragraph 5, of the European Convention on Human Rights for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5, paragraph 5, would have led to "consequences incompatible with the aim and object of the Convention".[821] It was sufficient, in applying article 50, to take account of the specific provision.[822]

(5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. PCIJ referred to the notion of a self-contained regime in the *S.S. "Wimbledon"* case with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,[823]

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[817] See paragraph 3 of article 30 of the 1969 Vienna Convention.

[818] See Marrakesh Agreement establishing the World Trade Organization, annex 2, especially art. 3, para. 7, which provides for compensation "only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For WTO purposes, "compensation" refers to the future conduct, not past conduct, and involves a form of countermeasure. See article 22 of the Understanding. On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia–Subsidies Provided to Producers and Exporters of Automotive Leather (footnote 431 above).

[819] See paragraph (2) of the commentary to article 32.

[820] Thus, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only applies to torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. "federal" clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units (e.g. article 34 of the Convention for the Protection of the World Cultural and Natural Heritage).

[821] *Neumeister* v. *Austria, Eur. Court H.R., Series A, No. 17* (1974), paras. 28–31, especially para. 30.

[822] See also *Mavrommatis* (footnote 236 above), pp. 29–33; *Marcu Colleanu* v. *German State*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1930), vol. IX, p. 216 (1929); WTO, Report of the Panel, Turkey–Restrictions on Imports of Textile and Clothing Products (footnote 130 above), paras. 9.87–9.95; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F. 95.V.2), p. 53, at p. 100, para. 39 (1977). See further C. W. Jenks, "The conflict of law-making treaties", BYBIL, *1953*, vol. 30, p. 401; M. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, 1994), pp. 200–206; and P. Reuter, *Introduction to the Law of Treaties* (footnote 300 above), para. 201.

[823] *S.S.* "*Wimbledon"* (see footnote 34 above), pp. 23–24.

as did ICJ in the *United States Diplomatic and Consular Staff in Tehran* case with respect to remedies for abuse of diplomatic and consular privileges.[824]

(6) The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language ("the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State") which reflects the content of each of Parts One, Two and Three.

Article 56. Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Commentary

(1) The present articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the articles.

(2) As to the first of these functions, the articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example, the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in the field of responsibility.[825] In this respect, article 56 mirrors the preambular paragraph of the 1969 Vienna Convention which affirms that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". However, matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the "applicable rules of international law".

(3) A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,[826] the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,[827] or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.[828]

Article 57. Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Commentary

(1) Article 57 is a saving clause which reserves two related issues from the scope of the articles. These concern, first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression "international organization" means an "intergovernmental organization".[829] Such an organization possesses separate legal personality under international law,[830] and is responsible for its own acts, i.e. for acts which are carried out by the organization through its own organs or officials.[831] By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.

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[824] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), at p. 40, para. 86. See paragraph (15) of the commentary to article 50 and also B. Simma, "Self-contained regimes", NYIL, 1985, vol. 16, p. 111.

[825] Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of "approximate application", formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), the Court said that "even if such a principle existed, it could by definition only be employed within the limits of the treaty in question" (p. 53, para. 76). See also S. Rosenne, *Breach of Treaty* (footnote 411 above), pp. 96–101.

[826] 1969 Vienna Convention, art. 52.

[827] *Ibid*., art. 62, para. 2 (*b*).

[828] *Ibid*., art. 60, para 1.

[829] See article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention").

[830] A firm foundation for the international personality of the United Nations is laid in the advisory opinion of the Court in *Reparation for Injuries* (see footnote 38 above), at p. 179.

[831] As the Court has observed, "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts", *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above).

Annex 651

"Commentaries on the Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities", Report of the International Law Commission Fifty-eighth session, Yearbook of the International Law Commission, A/CN.4/SER.A/2006/Add.l (Part 2), *International Law Commission*, 2006, pages 64-72

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qualifies "damage" to stress the transboundary orientation of the scope of the present principles.

(12) Another important consideration which delimits the scope of application is that transboundary harm caused by State policies in trade, monetary, socio-economic or similar fields is excluded from the scope of the present principles.[327] Thus, significant transboundary harm must have been caused by the "physical consequences" of activities in question.

Principle 2. Use of terms

For the purposes of the present draft principles:

(*a*) "damage" means significant damage caused to persons, property or the environment; and includes:

(i) loss of life or personal injury;

(ii) loss of, or damage to, property, including property which forms part of the cultural heritage;

(iii) loss or damage by impairment of the environment;

(iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

(v) the costs of reasonable response measures;

(*b*) "environment" includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;

(*c*) "hazardous activity" means an activity which involves a risk of causing significant harm;

(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the hazardous activity is carried out;

(*e*) "transboundary damage" means damage caused to persons, property or the environment in the territory or in other places under the jurisdiction or control of a State other than the State of origin;

(*f*) "victim" means any natural or legal person or State that suffers damage;

(*g*) "operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

Commentary

(1) The present "Use of terms" seeks to define and set out the meaning of the terms or concepts used in the present draft principles. The definition of "damage" is crucial for the purposes of the present draft principles. The elements of damage are identified in part to set out the basis of claims for damage. Before identifying the elements of damage, it is important to note that damage, to be eligible for compensation, should reach a certain threshold. For example, the *Trail Smelter* award addressed an injury by fumes, when the case is of "serious consequences" and the injury is established by clear and convincing evidence.[328] The *Lake Lanoux* award made reference to serious injury.[329] A number of conventions have also referred to "significant", "serious" or "substantial" harm or damage as the threshold for giving rise to legal claims.[330] "Significant" has also been used in other legal instruments and domestic law.[331] The threshold is designed to prevent frivolous or vexatious claims.

(*Footnote 326 continued.*)

See also article 1, paragraph 15 of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), which defines damage to the Antarctic environment or dependent or associated ecosystems; and the Convention on the Law of the Non-Navigational Uses of International Watercourses which seeks in article 7 to "prevent the causing of significant harm". Article 2 (*b*) of Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising From Environmental Emergencies defines "environmental emergency" as "any accidental event that … results in, or imminently threatens to result in, any significant and harmful impact on the Antarctic environment".

[327] See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 151 (paragraphs (16)–(17) of the commentary to article 1 of the draft articles on prevention).

[328] *Trail Smelter* (see footnote 226 above), at p. 1965.

[329] *Lake Lanoux Arbitration (France* v. *Spain)*, UNRIAA, vol. XII (Sales No. 1963.V.3), p. 281.

[330] See, for example, article 4, paragraph 2 of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA); paragraphs 1 and 2 of article 2 of the Convention on Environmental Impact Assessment in a Transboundary Context; article 1 (*d*) of the Convention on the Transboundary Effects of Industrial Accidents; and article 7 of the Convention on the Law of the Non-Navigational Uses of International Watercourses. See also P. N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law*, Oxford University Press, 2000, p. 176; and R. Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* , The Hague, Kluwer Law International, 1996, pp. 86–89, who notes the felt need for a threshold and examines the rationale for and the possible ways of explaining the meaning of the threshold of "significant harm". See also J. G. Lammers, *Pollution of International Watercourses: a Search for Substantive Rules and Principles of Law*, The Hague, Martinus Nijhoff Publishers, 1984, pp. 346–347; and R. Wolfrum, "Purposes and principles of international environmental law", *German Yearbook of International Law*, vol. 33 (1990), pp. 308–330, at p. 311. As a general rule, noting the importance of a threshold of damage for triggering claims for restoration and compensation, while considering environmental damage, it is suggested that "the more the effects deviate from the state that would be regarded as being sustainable and the less foreseeable and limited the consequential losses are, the closer the effects come to the threshold of significance". This is to be determined against a "baseline condition", which States generally define or should define (R. Wolfrum, Ch. Langenfeld and P. Minnerop, *Environmental Liability in International Law: Towards a Coherent Conception*, Berlin, Erich Schmidt Verlag, 2005, p. 501).

[331] See, for example, article 5 of the draft convention on industrial and agricultural uses of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965 (Organization of American States, *Ríos y lagos internacionales (utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.1/VI, CIJ-75 Rev.2), Washington D.C., 1971, p. 132; Guidelines on responsibility and liability regarding transboundary water pollution, elaborated by the United Nations Economic Commission for Europe in 1990 (ENVWA/R.45, annex); article X of the Helsinki Rules on the Uses of the Waters of International Rivers (International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966*, London, 1967, p. 496); article 16 of the Berlin Rules on Equitable Use and Sustainable Development of Waters (*ibid., Report of the Seventy-First Conference, Berlin, 16–21 August 2004*, London, 2004, p. 334); paragraphs 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment; paragraph 6 of the annex to OECD Council recommendation C(74)224 of 14 November 1974 on principles concerning transfrontier pollution (OECD, *OECD*

(2) The term "significant" is understood to refer to something more than "detectable" but need not be at the level of "serious" or "substantial".[332] The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards. The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories, States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable and do not fall within the scope of the present draft principles.

(3) The determination of "significant damage" involves both factual and objective criteria, and a value determination. The latter is dependent on the circumstances of a particular case and the period in which it is made. For instance, a deprivation which is considered significant in one region may not necessarily be so in another. A certain deprivation at a particular time might not be considered "significant" because scientific knowledge or human appreciation at that specific time might have considered such deprivation tolerable. However, that view might later change and the same deprivation might then be considered "significant damage". For instance, the sensitivity of the international community to air and water pollution levels has been constantly changing.

(4) Paragraph (*a*) defines "damage" as significant damage caused to persons, property or the environment. Subparagraphs (i) and (ii) cover personal injury and property damage, including some aspects of consequential economic loss, as well as property, which forms part of the national cultural heritage, which may be State property.

(5) Damage does not occur in isolation or in a vacuum. It occurs to somebody or something; it may be to a person or property. In subparagraph (i), damage to persons includes loss of life or personal injury. There are examples in domestic law[333] and treaty practice.[334] Even those liability regimes that exclude application of injury to persons recognize that other rules would apply.[335] Those regimes that are silent on the matter do not seem to entirely exclude the possible submission of a claim under this heading of damage.[336]

(6) In subparagraph (ii) damage to property includes loss of or damage to property. Property includes movable and immovable property. There are examples in domestic law[337] and in treaty practice.[338] Some liability regimes exclude claims concerning damage to property of the person liable on the policy consideration which seeks to deny a tortfeasor the opportunity to benefit from one's own wrongs. Article 2, paragraph 2 (*c*) (ii) of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, article 2, paragraph 7(*b*) of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment and article 2, paragraph 2 (*d*) (ii) of the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters contain provisions to this effect.

(7) Traditionally, proprietary rights have been more closely related to the private rights of the individual rather than rights of the public. An individual would face

and the Environment, Paris, 1986, p. 142, reprinted in ILM, vol. 14, No. 1 (January 1975), p. 246); the Memorandum of Intent constituting an agreement concerning transboundary air pollution, between the Government of the United States and the Government of Canada, of 5 August 1980 (United Nations, *Treaty Series*, vol. 1274, No. 21009, p. 235); and article 7 of the Agreement between Mexico and the United States of America on co-operation for the protection and improvement of the environment in the border area, signed on 14 August 1983 (*ibid*., vol. 1352, No. 22805, p. 71, reproduced in ILM, vol. 22, No. 5 (September 1983), p. 1025). The United States has also used the word "significant" in its domestic law dealing with environmental issues. See American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States*, vol. 2, St. Paul (Minnesota), American Law Institute Publishers, 1987, pp. 111–112.

[332] See *Yearbook ...2001*, vol. II (Part Two) and corrigendum, p. 152 (paragraphs (4)–(5) of the commentary to article 2 of the draft articles on prevention).

[333] Germany's Environmental Liability Act, for example, covers anyone who suffers death or personal injury. Finland's Act on Compensation for Environmental Damage, the Swedish Environmental Code, and Denmark's Act on Compensation for Environmental Damage all cover personal injury. See generally P. Wetterstein, "Environmental damage in the legal systems of the Nordic countries and Germany", in M. Bowman and A. Boyle (eds.), *Environmental Damage in International Law and Comparative Law: Problems of Definition and Valuation*, Oxford University Press, 2002, pp. 223–242.

[334] Some liability regimes provide as follows: article I, paragraph 1 (*k*) of the Vienna Convention on civil liability for nuclear damage defines nuclear damage to include "(i) loss of life, any personal injury or any loss of, or damage to, property …"; article I, paragraph 1(*k*) of the Protocol to amend the Vienna Convention on civil liability for nuclear damage also refers to "(i) loss of life or personal injury; (ii) loss of or damage to property"; article I.B.vii) of the Protocol to amend the Convention on Third Party Liability in the field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, defines nuclear damage to include "1. loss of life or personal injury …; 2. loss of or damage to property …"; the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) defines the concept of "damage" in paragraph 10 of article 1 as "(a) loss of life or personal injury ...; (b) loss of or damage to property ..."; the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal defines "damage", in article 2, paragraph 2 (*c*), as: "(i) Loss of life or personal injury; (ii) Loss of or damage to property other than property held by the person liable in accordance with the present Protocol"; the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters defines damage in article 2 paragraph 2 (*d*), as: "(i) Loss of life or personal injury; (ii) Loss of, or damage to, property other than property held by the person liable in accordance with the Protocol"; and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment defines damage in article 2, paragraph 7 as: "a. loss of life or personal injury; b. loss or damage to property other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity".

[335] Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (see footnote 316 above) does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any rights regarding such types of damages.

[336] Pollution damage is defined in article 1, paragraph 6 of the International Convention on Civil Liability for Oil Pollution Damage and in article 2, paragraph 3 of the 1992 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage.

[337] For example, Finland's Act on Compensation for Environmental Damage covers damage to property, chapter 32 of the Swedish Environmental Code also provides for compensation for damage to property and Denmark's Act on Compensation for Environmental Damage covers damage to property.

[338] See the examples in footnote 334 above.

no difficulty to pursue a claim concerning his personal or proprietary rights. These are claims concerning possessory or proprietary interests which are involved in loss of life or personal injury or loss of or damage to property. Furthermore, tort law has also tended to cover damage that may relate to economic losses. In this connection, a distinction is often made between consequential and pure economic losses.[339]

(8) For the purposes of the present draft principles, consequential economic losses are covered under subparagraphs (i) and (ii). Such losses are the result of a loss of life or personal injury or damage to property. These would include loss of earnings due to personal injury. Such damage is supported in treaty practice[340] and under domestic law although different approaches are followed, including in respect of compensation for loss of income.[341] Other economic loss may arise that is not linked to personal injury or damage to property. In the absence of a specific legal provision for claims covering loss of income, it would be reasonable to expect that if an incident involving a hazardous activity directly causes loss of income, efforts would be made to ensure the victim is not left uncompensated.

(9) Subparagraph (ii) also covers property which forms part of cultural heritage. State property may be included in the national cultural heritage. It embraces a wide range of aspects, including monuments, buildings and sites, while natural heritage denotes natural features and sites and geological and physical formations. Their value cannot easily be quantifiable in monetary terms but lies in their historical, artistic, scientific, aesthetic, ethnological or anthropological importance or in their conservation or natural beauty. The 1972 Convention for the protection of world cultural and natural heritage has a comprehensive definition of "cultural heritage".[342] Not all civil liability regimes include aspects concerning cultural heritage under this head. For example, the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment includes in its definition of "environment", property which forms part of the cultural heritage and, to that extent, cultural heritage may also be embraced by the broader definition of "environment".[343]

(10) Respecting and safeguarding cultural property are primary considerations in times of peace as they are in times of armed conflict. This principle is asserted in the Convention for the Protection of Cultural Property in the Event of Armed Conflict. Moreover, international humanitarian law prohibits commission of hostilities directed against historical monuments and works of art which constitute the cultural heritage of peoples.[344]

(11) Subparagraphs (iii) to (v) deal with claims that are usually associated with damage to the environment. They may all be treated as parts of one whole concept. Together, they constitute the essential elements inclusive in a definition of damage to the environment. These subparagraphs are concerned with questions concerning damage to the

[339] See B. Sandvik and S. Suikkari, "Harm and reparation in international treaty regimes: an overview", in P. Wetterstein (ed.), *op. cit.* (footnote 323 above), p. 57. See generally E. H. P. Brans, *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment*, The Hague, Kluwer Law International, 2001, pp. 9–63. See also the eleventh report on international liability for injurious consequences arising out of acts not prohibited by international law of Special Rapporteur Julio Barboza (footnote 285 above).

[340] See, for example, article I (1) (*k*) of the Vienna Convention on civil liability for nuclear damage as modified by article 2, paragraph 2 of the Protocol to amend the Convention, which defines "nuclear damage" as including "each of the following to the extent determined by the law of the competent court– (iii) economic loss arising from loss or damage referred to in sub-paragraph (i) or (ii), insofar as not included in those sub-paragraphs, if incurred by a person entitled to claim in respect of such loss or damage; … (vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court …". See also article 1 (*f*) of the Convention on Supplementary Compensation for Nuclear Damage, which covers each of the following to the extent determined by the law of the competent court: "(iii) economic loss arising from loss or damage referred to in sub-paragraph (i) or (ii), insofar as not included in those sub-paragraphs, if incurred by a person entitled to claim in respect of such loss or damage; … (vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court". Article I.B.vii) of the Protocol to amend the Convention on Third Party Liability in the field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, defines "nuclear damage" as including "each of the following to the extent determined by the law of the competent court, (3) economic loss arising from loss or damage referred to in sub-paragraph 1 or 2 above insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage".

[341] For example, under subsection 2702 (*b*) of the United States Oil Pollution Act any person may recover damages for injury to, or economic losses resulting from, the destruction of real or personal property which shall be recoverable by a claimant who owns or leases such property. The subsection also provides that any person may recover "damages equal to the *loss of profits or impairment of earning capacity** due to the injury, destruction, or loss of real property, personal property …" (*United States Code 2000 Edition containing the general and permanent laws of the United States, in force on January 2, 2001*, vol. 18, Washington D.C., United States Government Printing Office, 2001, p. 694). Similarly, section 252 of the German Civil Code provides that any loss of profit is to be compensated.

[342] Article 1 defines "cultural heritage" for purposes of the Convention as:

"— monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

— groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

— sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view."

See also the definition of "cultural property" in article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, which essentially covers movable and immovable property of great importance to the cultural heritage of peoples. See also the Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property; and the Convention for the Safeguarding of the Intangible Cultural Heritage.

[343] See also article 1, paragraph 2 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

[344] See article 53 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts and article 16 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. See also the Hague Conventions respecting the Laws and Customs of War on Land, particularly Convention IV (articles 27 and 56 of the Regulations concerning the Laws and Customs of War on Land, in annex to Conventions II and IV of 1899 and 1907) and Convention IX concerning Bombardment by Naval Forces in Time of War (article 5).

environment *per se*. This is damage caused by the hazardous activity to the environment itself with or without simultaneously causing damage to persons or property, and hence is independent of any damage to such persons and property. The broader reference to claims concerning the environment incorporated in subparagraphs (iii)–(v) thus not only builds upon trends that have already become prominent as part of recently concluded international liability regimes,[345] but opens up possibilities for further developments of the law for the protection of the environment *per se*.[346]

(12) An oil spill off a seacoast may immediately lead to lost business for the tourism and fishing industry within the precincts of the incident. Such claims have led to claims of pure economic loss in the past without much success. However, some liability regimes now recognize this head of compensable damage.[347] Article 2 (*d*) (iii) of the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters and article 2, paragraph 2 (*d*) (iii) of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal cover loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs.[348] In the case of the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, such interest should be a "legally protected interest". Examples also exist at the domestic level.[349]

(13) Subparagraph (iii) relates to the form that damage to the environment would take. This would include "loss or damage by impairment". Impairment includes injury to, modification, alteration, deterioration, destruction or loss. This entails diminution of quality, value or excellence in an injurious fashion. Claims concerning loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, may fall under this heading.

(14) In other instances of damage to the environment *per se*, it is not easy to establish standing. Some aspects of the environment do not belong to anyone, and are generally considered to be common property (*res communis omnium*) not open to private possession, as opposed

[345] For an analysis of these developments, see L. de la Fayette, "The concept of environmental damage in international liability regimes", in Bowman and Boyle (eds.), *op. cit.* (footnote 333 above) pp. 149–189. See also Brans, *op. cit.* (footnote 339 above), chap. 7, concerning international civil liability for damage to natural resources.

[346] Italian law, for example, appears to go further in recognizing damage to the environment *per se* and Italy is also a signatory to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment. In the *Patmos* case, Italy lodged a claim for 5,000 million lire before the court of Messina, Italy, for ecological damage caused to its territorial waters as a result of 1,000 tonnes of oil spilled into the sea following a collision between the Greek oil tanker Patmos and the Spanish tanker Castillo de Monte Aragon on 21 March 1985. While the lower Court rejected its claim, the higher Court on appeal upheld its claim in *Patmos II*. According to the Court,

"although the notion of environmental damage cannot be grasped by resorting to any mathematical or accounting method, it can be evaluated in the light of the economic relevance that the destruction, deterioration, or alteration of the environment has *per se* and for the community, which benefits from environmental resources and, in particular, from marine resources in a variety of ways (food, health, tourism, research, biological studies)" (A Bianchi, "Harm to the environment in Italian practice: the interaction of international law and domestic law", in P. Wetterstein (ed.), *op. cit.* (see footnote 323 above), p. 116).

Noting that these benefits are the object of protection of the State, it was held that the State can claim, as a trustee of the community, compensation for the diminished economic value of the environment. The Court also observed that the loss involved not being assignable any market value, compensation can only be provided on the basis of an equitable appraisal. The Court, after rejecting the report received from experts on the quantification of damages, which attempted to quantify the damage on the basis of the nekton (fish) which the biomass could have produced had it not been polluted, resorted to an equitable appraisal and awarded 2,100 million lire. Incidentally, this award fell within the limits of liability of the owner, as set by the IOPC Fund, and was not appealed or contested, see generally Bianchi, *loc. cit.* (above), pp. 113–129, at p. 103. See also M. C. Maffei, "The compensation for ecological damage in the '*Patmos*' case", in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm*, London, Graham and Trotman, 1991.

[347] See Wetterstein, "A proprietary or possessory interest ... ", *loc. cit.* (footnote 323 above), p. 37. On the need to limit the concept of "directly related" "pure economic loss" with a view not to open floodgates or enter "damages lottery" encouraging indeterminate liability which will then be a disincentive to get proper insurance or economic perspective, see L. Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, The Hague, Kluwer, 2001, pp. 346–350. It is also suggested that such an unlimited approach may limit "the acceptance of the definition of damage and thus, it has to be solved on the national level" (Wolfrum, Langenfeld and Minnerop, *op. cit.* (footnote 330 above) p. 503).

Directive 2004/35/CE of the European Parliament and of the Council covers environmental damage in article 2 (see footnote 316 above).

[348] See also article 1, paragraph 1 (*k*) of the Vienna Convention on civil liability for nuclear damage as modified by article 2, paragraph 2 of the Protocol to amend the Convention, which states that nuclear damage includes each of the following damages "to the extent determined by the law of the competent court: … (v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in sub-paragraph (ii)". See also the Convention on Supplementary Compensation for Nuclear Damage, article 1 (*f*): "(v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii)". Article I.B.vii) of the Protocol to amend the Convention on Third Party Liability in the field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 defines nuclear damage as "each of the following to the extent determined by the law of the competent court: … 5. loss of income deriving from a direct economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph 2". See also, for example, article 2, paragraph 7 *d* of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; the Convention on the Transboundary Effects of Industrial Accidents (article 1 (*c*)); the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (articles 1–2); the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) (article 8, paragraph 2 (*a*), (*b*) and (*d*)); and the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (article 10 (*c*)).

[349] Subsection 2702 (*b*) of the United States Oil Pollution Act provides that any person may recover "[d]amages equal to the *loss of profits or impairment of earning capacity** due to the injury, destruction, or loss of … natural resources" (see footnote 341 above). Finland's Act on Compensation for Environmental Damage includes pure economic loss, except where such losses are insignificant. Chapter 32 of the Swedish Environmental Code also provides for pure economic loss. Pure economic loss not caused by criminal behaviour is compensable only to the extent that it is significant. Denmark's Act on Compensation for Environmental Damage covers economic loss and reasonable costs for preventive measures or for the restoration of the environment. See generally Wetterstein, "Environmental damage in the legal systems … ", *loc. cit. (*footnote 333 above*),* pp. 222–242.

to *res nullius*, that is, property not belonging to anyone but open to private possession. A person does not have an individual right to such common property and would not ordinarily have standing to pursue a claim in respect of damage to such property.[350] Moreover, it is not always easy to appreciate who may suffer loss of ecological or aesthetic values or be injured as a consequence for purposes of establishing a claim. States instead may hold such property in trust, and usually public authorities and more recently, public interest groups, have been given standing to pursue claims.[351]

(15) It may be noted that the references to "costs of reasonable measures of reinstatement" in subparagraph (iv) and reasonable costs of clean-up associated with the "costs of reasonable response measures" in subparagraph (v) are recent concepts. These elements of damage have gained recognition because, as noted by one commentator, "there is a clear shift towards a greater focus on damage to the environment *per se*, rather than primarily on damage to persons and to property".[352] Subparagraph (iv) includes in the concept of damage an element of the type of compensation that is available, namely reasonable costs of measures of reinstatement. Recent treaty practice[353] and domestic law[354] has tended to acknowledge the importance of such measures, but has left it to domestic law to indicate who may be entitled to take such measures. Such measures have been described as any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment or where this is not possible, to introduce, where appropriate, the equivalent of these components into the environment.[355]

(16) The reference to "reasonable" is intended to indicate that the costs of such measures should not be excessively disproportionate to the usefulness resulting from the measure. In the *Zoe Colocotroni case*, the United States First Circuit Court of Appeals stated:

> [Recoverable costs are costs] reasonably to be incurred ... to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is possible without grossly disproportionate expenditures. The focus in determining such a remedy should be [on] the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive.[356]

(17) Subparagraph (v) includes costs of reasonable response measures in the concept of damage as an element of available compensation. Recent treaty practice has tended to acknowledge the importance of such measures, but has left it to domestic law to indicate who may be entitled to take such measures.[357] Such measures include

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[350] In *Burgess* v. *M/V Tamano*, the court noted that "[i]t is also uncontroverted that the right to finish or to harvest clams … is not the private right of any individual, but is a public right held by the State 'in trust for the common benefit of the people'" (opinion of 27 July 1973, United States District Court, Maine, *Federal Supplement*, vol. 370 (1973), p. 247).

[351] Under the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), United States Code Annotated, title 42, chapter 103, sections 9601 *et seq.*; the Clean Water Act of 1977, *ibid.*, title 33, chapter 26, section 1251; the Oil Pollution Act of 1990 (see footnote 341 above), sections 2701 *et seq.*, the United States "Congress empowered government agencies with management jurisdiction over natural resources to act as trustees to assess and recover damages ... [t]he public trust is defined broadly to encompass 'natural resources' ... belonging to, managed by, held in trust by, appertaining to or otherwise controlled by Federal, state or local governments or Indian tribes".

[352] De la Fayette, *loc. cit.* (footnote 345 above), at pp. 166–167.

[353] See, for example, article 1, paragraph 1 (*k*) (iv) of the Vienna Convention on civil liability for nuclear damage as modified by article 2, paragraph 2 of the Protocol to amend the Convention: "the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in sub-paragraph (ii)"; and article I.B.vii of the Protocol to amend the Convention on Third Party Liability in the field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982: "the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in sub-paragraph 2". Article 1, paragraph 6 of the International Convention on Civil Liability for Oil Pollution Damage refers to "impairment of the environment other than loss of profit from such impairment", and specifies that compensation for such impairment "shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken". See also article 2, paragraph 2 (*c*) (iv) and (*d*) of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal; articles 2, 7 (*c*) and 8 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; and article 2, paragraph 2 (*d*) (iv) and (*g*) of the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

[354] German law allows for reimbursement of reasonable costs of reinstatement and restoration of environmental damage through making good the loss suffered by individuals but that may also involve restoring the environment to its *status quo*. Section 16 of Germany's Environmental Liability Act and section 32 of the German Genetic Engineering Act provide that in the event of impairment of a natural complex, section 251 (2) of the German Civil Code is to be applied with the proviso that the expenses of restoring the *status quo* shall not be deemed unreasonable merely because it exceeds the value of the object concerned. See Wolfrum, Langenfeld and Minnerop, *op. cit.* (footnote 330 above), pp. 223–303 ("Part 5: Environmental liability law in Germany (Grote/Renke)"), at p. 278.

[355] It may be noted that in the context of the work of the UNCC, a recent decision sanctioned compensation in respect of three projects: for loss of rangeland and habitats, Jordan received $160 million; for shoreline preserves, Kuwait got $8 million; and Saudi Arabia was awarded $46 million by way of replacing ecological services that were irreversibly lost in the wake of the 1991 Gulf War. See the report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims (S/AC.26/2005/10), technical annexes I–III, See also P. H. Sand, "Compensation for environmental damage from the 1991 Gulf War", *Environmental Policy and Law*, vol. 35, No. 6 (December 2005), pp. 244–249, at p. 247.

[356] *Commonwealth of Puerto Rico,* et al. v. *Zoe Colocotroni*, et al., 628 F.2d, p. 652, United States Court of Appeals, First Circuit, 1980, cited in C. de la Rue, "Environmental damage assessment", in R. P. Kröner (ed.), *Transnational Environmental Liability and Insurance*, London, Graham and Trotman, 1993, p. 72.

[357] See, for example, article I, paragraph 1 (*k*) (vi) of the Vienna Convention on civil liability for nuclear damage as modified by article 2, paragraph 2 of the Protocol to amend the Convention: "the costs of preventive measures, and further loss or damage caused by such measures"; the Convention on Supplementary Compensation for Nuclear Damage, article 1 (*f*) (vi): "the costs of preventive measures, and further loss or damage caused by such measures"; and the Protocol to amend the Convention on Third Party Liability in the field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, article I.B.vii): "the costs of preventive measures, and further loss or damage caused by such measures, in the case of subparagraphs 1 to 5 above, to the extent that the loss or damage arises out of or results from ionising radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste". Article 1, paragraph 6 of the 1992 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage refers to costs of preventive measures and further loss or damage caused by preventive measures.

any reasonable measures taken by any person including public authorities, following the occurrence of the transboundary damage, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. The response measures must be reasonable.

(18) Recent trends are also encouraging in allowing compensation for loss of "non-use value" of the environment. There is some support for this claim from the Commission itself when it adopted its draft articles on State responsibility for internationally wrongful acts, even though it is admitted that such damage is difficult to quantify.[358] The recent decisions of the United Nations Compensation Commission (UNCC) in opting for a broad interpretation of the term "environmental damage" is a pointer of developments to come. In the case of the "F4" category of environmental and public health claims, the F4 Panel of the UNCC allowed claims for compensation for damage to natural resources without commercial value (so-called "pure" environmental damage) and also claims where there was only a temporary loss of resource use during the period prior to full restoration.[359]

(19) Paragraph (*b*) defines "environment". Environment could be defined in different ways for different purposes and it is appropriate to bear in mind that there is no universally accepted definition. It is considered useful, however, to offer a working definition for the purposes of the present draft principles. It helps to put into perspective the scope of the remedial action required in respect of environmental damage.[360]

(20) "Environment" could be defined in a restricted way, limiting it exclusively to natural resources, such as air, soil, water, fauna and flora, and their interaction. A broader definition could embrace environmental values also. The Commission has opted to include in the definition the latter, also encompassing non-service values such as aesthetic aspects of the landscape.[361] This includes the enjoyment of nature because of its natural beauty and its recreational attributes and opportunities associated with it. This broader approach is justified by the general and residual character of the present draft principles.[362]

(21) Moreover, the Commission in taking such a holistic approach is, in the words of the ICJ in the *Gabčíkovo–Nagymaros Project* case:

> mindful 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.[363]

(22) Furthermore, a broader definition would attenuate any limitation imposed by the remedial responses acceptable in the various liability regimes and as reflected in commentary in respect of subparagraphs (iv) and (v) above.

(23) Thus, the reference in paragraph (*b*) to "natural resources … and the interaction" of its factors embraces the idea of a restricted concept of environment within a protected ecosystem,[364] while the reference to "the characteristic aspects of the landscape" denotes an acknowledgement of a broader concept of environment.[365] The

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See also article 2, paragraph 2 (*c*) (v) and (*d*) of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal; article 2, paragraphs 7 (*d*) and 9 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment; and article 2, paragraph 2 (*d*) (v) and (*h*) of the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters. Article 2 (*f*) of Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising From Environmental Emergencies defines response action as "reasonable measures taken after an environmental emergency has occurred to avoid, minimise or contain the impact of that environmental emergency, which to that end may include clean-up in appropriate circumstances, and includes determining the extent of that emergency and its impact".

[358] "[E]nvironmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs and property devaluation. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify" (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 101 (para. (15) of the commentary to article 36)).

[359] See the report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims (footnote 355 above). See also Sand, "Compensation for environmental damage …", *loc. cit.* (*ibid.*), p. 247. Elaborated in five instalment reports, the awards recommended by the F4 Panel and approved without change by the Governing Council amount to $5.26 billion, "the largest … in the history of international environmental law" (Sand, "Compensation for environmental damage…", *loc. cit.* (*ibid.*), p. 245). See also the *Guidelines for the Follow-up Programme for Environmental Awards* of the UNCC (*ibid.*), pp. 276–281.

[360] See the Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on remedying environmental damage, COM (93) 47 final, of 14 May 1993, p. 10.

[361] For a philosophical analysis underpinning a regime for damage to biodiversity, see M. Bowman, "Biodiversity, intrinsic value and the definition and valuation of environmental harm", in Bowman and Boyle (eds.), *op. cit.* (footnote 333 above), pp. 41–61. Article 2 of the Convention for the protection of the world cultural and natural heritage defines "natural heritage" as "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty".

[362] For a concise discussion of the differing approaches on the definition of environmental damage, see Ph. Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press, 2003, pp. 876–878.

[363] *Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 78, para. 140. The Court in this connection also alluded to the need to keep in view the inter-generational and intra-generational interests and the contemporary demand to promote the concept of sustainable development.

[364] Under article 2 of the Convention on Biological Diversity, "'[e]cosystem' means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit". Under article 1, paragraph 15 of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA),

> "'[d]amage to the Antarctic environment or dependent or associated ecosystems' means any impact on the living or non-living components of that environment or those ecosystems, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to this Convention".

[365] Article 2, paragraph 10 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment contains a non-exhaustive list of components of the environment which includes: "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic

(*Continued on next page.*)

definition of "natural resources" covers living and non-living natural resources, including their ecosystems.

(24) Paragraph (*c*) defines "hazardous activity" by reference to any activity which has a risk of causing transboundary harm. It is understood that such risk of harm should be through its physical consequences, thereby excluding such impacts as may be caused by trade, monetary, socio-economic or fiscal policies. The commentary concerning the scope of application of these draft principles above has explained the meaning and significance of the terms involved.

(25) Paragraph (*d*) defines the State of origin. This means the State in the territory or otherwise under jurisdiction or control of which the hazardous activity is carried out. The term "territory", "jurisdiction", or "control" is understood in the same way as in the draft articles on prevention.[366] Other terms are also used for the purpose of the present principles. They include, as defined under the draft articles on prevention, the "State likely to be affected" (a State on whose territory or in other places under whose jurisdiction or control there is the risk of significant transboundary harm) and there may be more than one such State likely to be affected in relation to any given situation of transboundary damage. The draft principles also use the term "States concerned" (the State of origin, any State affected and any State likely to be affected). "State affected" is not defined by the draft articles on prevention. For the purposes of the present draft principles it would be the States in whose territory, or in places under jurisdiction or control of which, damage occurs as a result of an incident concerning a hazardous activity in the State of origin. More than one State may be so affected. These terms have not been defined in the "Use of terms" for reasons of balance and economy.

(26) Paragraph (*e*) defines "transboundary damage". It refers to damage occurring in one State because of an accident or incident involving a hazardous activity with effect in another State. This concept is based on the well-accepted notions of territory, jurisdiction or control by a State. In that sense, it refers to damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the hazardous activities are carried out. It does not matter whether or not the States in question share a common border. This definition includes, for example, activities conducted under the jurisdiction or control of a State such as on its ships or platforms on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. However, it goes without stating that some other possibilities could also be involved, which may not be readily contemplated.

(27) The definition is intended to clearly identify and distinguish a State under whose jurisdiction or control an activity covered by these principles is conducted, from a State which has suffered the injurious impact.

(28) As is often the case with incidents falling within the scope of the present draft principles, there may be victims both within the State of origin and within the other States where damage is suffered. In the disbursement of compensation, particularly in terms of the funds expected to be made available to victims as envisaged in draft principle 4 below, some funds may also be made available for damage suffered in the State of origin. Article XI of the Convention on Supplementary Compensation for Nuclear Damage envisages such a system.

(29) Paragraph (*f*) defines "victim". The definition includes natural and legal persons, and includes the State as custodian of public property.[367] This definition is linked to and may be deduced from the definition of damage in paragraph (*a*) which includes damage to persons, property or the environment.[368] A person who suffers personal injury or damage or loss of property would be a victim for the purposes of the draft principles. A group of persons or a municipality ("*commune*") could also be a victim. In the *People of Enewetek* case, the Marshall Islands Nuclear Claims Tribunal, established under the 1987 Marshall Islands Nuclear Claims Tribunal Act, considered questions of compensation in respect of the people of Enewetek for past and future loss of use of the Enewetak Atoll; for restoration of Enewetak to a safe and productive state; and for the hardships suffered by the people of Enewetak as a result of their relocation attendant to their loss of use occasioned by the nuclear tests conducted on the atoll.[369] In the *Amoco Cadiz* litigation, following the Amoco Cadiz supertanker disaster off Brittany, the French administrative *départements* of Côtes du Nord and Finistère and numerous "*communes*", and various French individuals, businesses and associations sued the owner of the Amoco Cadiz, and its parent company in the United States. The claims involved lost business. The French

(*Footnote 365 continued.*)

aspects of the landscape"; article 1 (*c*) of the Convention on the Transboundary Effects of Industrial Accidents refers to the adverse consequences of industrial accidents on "(i) [h]uman beings, flora and fauna; (ii) [s]oil, water, air and landscape; (iii) [t]he interaction between the factors in (i) and (ii); (iv) [m]aterial assets and cultural heritage, including historical monuments"; article 1, paragraph 2 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes says that "effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".

[366] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 150–151 (paras. (7)–(10) of the commentary to draft article 1).

[367] On the contribution of Edith Brown Weiss to the development of the concept of "stewardship" or "trusteeship" as striking "a deep chord with Islamic, Judeo-Christian, African, and other traditions", and for the view that "[s]ome forms of public trusteeships are incorporated in most legal systems" including the United Kingdom and India, see R. Mushkat, *International Environmental Law and Asian Values: Legal Norms and Cultural Influences*, Vancouver, UBC Press, 2004, p. 18. See also J. Razzaque, *Public Interest Environmental Litigation in India,Pakistan and Bangladesh*, The Hague, Kluwer Law International, 2004, p. 424, for the role of public trust doctrine in Bangladesh, India and Pakistan.

[368] In respect of international criminal law, see the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985. See also the Rome Statute of the International Criminal Court (article 79).

[369] *In the Matter of the People of Enewetak*, ILM, vol. 39, No. 5 (September 2000), pp. 1214 *et seq*. In December 1947, the population of Enewetak was moved from Enewetak Atoll to Ujelang Atoll. At the time of the move, the acreage of the Enewetek Atoll was 1,919.49 acres. Upon their return on 1 October 1980, 43 tests of atomic devices had been conducted, at which time 815.33 acres were returned for use, another 949.8 acres were not available for use and an additional 154.36 acres had been vaporized (*ibid.*, p. 1214).

Government itself laid claims for recovery of pollution damages and clean-up costs.[370]

(30) The definition of "victim" is thus linked to the question of standing. Some liability regimes, such as the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment and the Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, provide standing for NGOs.[371] The 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters also gives standing to NGOs to act on behalf of public environmental interests. Victims may also be those designated under national laws to act as public trustees to safeguard those resources and hence may have the legal standing to sue. The concept of "public trust" in many jurisdictions provides proper standing to different designated persons to lay claims for restoration and clean-up in case of any transboundary damage.[372] For example, under the United States Oil Pollution Act, such a right is given to the United States Government, a state, an Indian tribe and a foreign Government. Under the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended in 1986 by the Superfund Amendments and Reauthorization Act, *locus standi* has been given only to the federal Government, authorized representatives of states, as trustees of natural resources, or by designated trustees of Indian tribes. In some other jurisdictions, public authorities have been given a similar right of recourse. Thus, Norwegian law provides standing to private organizations and societies to claim restoration costs. In France, some environmental associations have been given the right to claim compensation in criminal cases involving violation of certain environmental statutes. The Supreme Court of India has entertained petitions from individuals or groups of individuals under its well-developed public interest litigation cases or class action suits to protect the environment from damage and has awarded compensation to victims of industrial and chemical pollution.[373]

(31) Paragraph (*g*) defines "operator". There is no general definition of "operator" under international law, although the term is employed in domestic law[374] and in treaty practice. In the latter, the nuclear damage regimes impose liability on the operator.[375] The definition of "operator" would vary, however, depending upon the nature of the activity. The channelling of liability onto one single entity, whether owner or operator, is the hallmark of strict liability regimes. Thus, some person other than the operator may be specifically identified as liable depending on the interests involved in respect of a particular hazardous activity. For example, at the 1969 Conference leading to the adoption of the 1969 International Convention on Civil Liability for Pollution Damage, the possibility existed of imposing liability on the shipowner or the cargo owner or both.[376] Under an agreed compromise, the shipowner was made strictly liable.[377]

(32) The draft principles envisage the definition of "operator" in functional terms and it is based on a factual determination as to who has use, control and direction of the object at the relevant time. Such a definition

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[370] See *In the Matter of: Oil Spill by the Amoco Cadiz off the coast of France on March 16, 1978*, United States Court of Appeals for the Seventh Circuit, 954 F.2d 1279. See also M. C. Maffei, *loc. cit.* (footnote 346 above), p. 381.

[371] See article 18 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment and article 12 of Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (footnote 316 above).

[372] P. Wetterstein, "A proprietary or possessory interest ...", *loc. cit.* (footnote 323 above), pp. 50–51.

[373] See Law Commission of India, *One Hundred Eighty Sixth Report on Proposal to Constitute Environmental Courts*, September 2003, p. 31 (available at http://lawcommissionofindia.nic.in/reports.htm). Articles 32 and 226 of the Indian Constitution provide for writ jurisdiction of the Supreme Court and the High Courts of India in this regard. The Courts have also used article 21 of the Indian Constitution and expanded the meaning of "life" to include the "right to a healthy environment". See also Razzaque, *op. cit.* (footnote 367 above), pp. 314–315, 429 and 443, where the author refers to arguments that the liberal standing provided before the courts of Bangladesh, India and Pakistan to bring environmental causes of action have led to the immobility and inefficiency in administration as well as the clogging of cases before the courts. This contribution is noteworthy for the overall assessment of progress made and reforms needed in the subcontinent to promote protection of the environment.

[374] For domestic law, see, for example, the 1990 Oil Pollution Act (footnote 341 above), in which the following individuals may be held liable: (*a*) a responsible party such as the owner or operator of a vessel, onshore and offshore facility, deepwater port and pipeline; (*b*) the "guarantor", the "person other than the responsible party, who provides evidence of financial responsibility for a responsible party"; and (*c*) third parties (individuals other than those mentioned in the first two categories, their agents or employees or their independent contractors, whose conduct is the sole cause of injury). See also the United States Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (footnote 351 above).

[375] See, for example, the Convention on third party liability in the field of nuclear energy and the Protocol to amend the Convention on Third Party Liability in the field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982: "'operator' in relation to a nuclear installation means to the person designated or recognised by the competent public authority as the operator of that installation" (common article 1 (vi)). See also the Vienna Convention on civil liability for nuclear damage (operator) (article IV); the Protocol to amend the Vienna Convention on civil liability for nuclear damage ("operator") (article 1 (*c*)); and the Convention on the Liability of Operators of Nuclear Ships ("operator of nuclear ships") (article II).

[376] See *Official Records of the International Legal Conference on Marine Pollution Damage, 1969*, Inter-Governmental Maritime Consultative Organization, 1973 (LEG/CONF/C.2/SR.2–13), cited in D. W. Abecassis and R. L. Jarashow, *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice*, 2nd ed., London, Stevens and Sons, 1985, p. 253. Some regimes that attach liability to the shipowner are the 1992 Protocol to amend the International Convention on Civil Liability for Pollution Damage (art. III, para. 1); the International Convention on Civil Liability for Bunker Oil Pollution Damage (art. 3); and the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) (art. 7, para. 1).

[377] See also the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD), which defines "carrier" with respect to inland navigation vessels as "the person who at the time of the incident controls the use of the vehicle on board which the dangerous goods are carried" (art. 1, para. 8); the International Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources defines the operator of a continental shelf installation to include, in the absence of a designation by a Contracting Party, "the person who is in overall control of the activities carried on at the installation" (art. 1, para. 3); and under the EU Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (footnote 316 above), which attaches liability to the operator, the term "operator" includes any natural or legal, private or public person who operates or controls the occupational activity.

is generally in conformity with notions prevailing in civil law.[378] More generally, while no basic definition of "operator" has been developed, "recognition has been gained for the notion that by operator is meant one in actual, legal or economic control of the polluting activity".[379]

(33) The term "command" connotes an ability to use or control some instrumentality. Thus it may include the person making use of an aircraft at the time of the damage, or the owner of the aircraft if he retained the rights of navigation.[380] It should be clear, however, that the term "operator" would not include employees who work or are in control of the activity at the relevant time.[381] The term "control" denotes power or authority to manage, direct, regulate, administer or oversee.[382] This could cover the person to whom decisive power over the technical functioning of an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity.[383] It may also include a parent company or other related entity, whether corporate or not, particularly if that entity has actual control of the operation.[384] An operator may be a public or private entity. It is envisaged that a State could be an operator for purposes of the present definition.

(34) The phrase "at the time of the incident" is intended to establish a connection between the operator and the transboundary harm. The looser and less concrete the link between the incident in question and the property claimed to have been damaged, the less certain the right to get compensation.

[378] See E. Reid, "Liability for dangerous activities: a comparative analysis", *International and Comparative Law Quarterly*, vol. 48 (October 1999), pp. 731–756, at p. 755.

[379] M.-L. Larsson, *The Law of Environmental Damage: Liability and Reparation*, The Hague, Kluwer Law International, 1999, p. 401.

[380] See the Convention on damage caused by foreign aircraft to third parties on the surface (article 12).

[381] See article 2 (*c*) of Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising From Environmental Emergencies: " 'operator' means any natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic Treaty area. An operator does not include a natural person who is an employee, contractor, subcontractor, or agent of, or who is in the service of, a natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic Treaty area, and does not include a juridical person that is a contractor or subcontractor acting on behalf of a State operator".

[382] The definition of "ship owner" in the International Convention on Civil Liability for Bunker Oil Pollution is broad. It includes "the registered owner, bareboat charterer, manager and operator of the ship" (art. 1, para. 3).

[383] See Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (footnote 316 above), article 2, para. 6.

[384] Under article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), the primary liability lies with the *operator*, which is defined in article 1, paragraph 11 as "a Party; or an agency or instrumentality of a Party; or a juridical person established under the law of a Party; or a joint venture consisting exclusively of any combination of the foregoing". Pursuant to section 16.1 of the Standard clauses for exploration contract annexed to the Regulations on the Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the International Seabed Authority on 13 July 2000, the *contractor* is "liable for the actual amount of any damage, including damage to the marine environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them" (ISBA/6/A/18, Annex 4, Clause 16).

Principle 3. Purposes

The purposes of the present draft principles are:

(*a*) to ensure prompt and adequate compensation to victims of transboundary damage; and

(*b*) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.

Commentary

(1) The two-fold purpose of the present draft principles is to ensure protection to victims suffering damage from transboundary harm and to preserve and protect the environment *per se* as common resource of the community.

(2) The purpose of ensuring protection to victims suffering damage from transboundary harm has been an essential element from the inception of the study of the topic by the Commission. In his schematic outline, Robert Q. Quentin-Baxter focused on the need to protect victims, which required "measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation", so that "an innocent victim should not be left to bear his loss or injury".[385] The former consideration is already addressed by the draft articles on prevention.[386]

(3) The notion of prompt and adequate compensation in paragraph (*a*) reflects the understanding and the desire that victims of transboundary damage should not have to wait long in order to be compensated. The importance of ensuring prompt and adequate compensation to victims of transboundary damage has its underlying premise in the *Trail Smelter* arbitration[387] and the *Corfu Channel* case,[388] as further elaborated and encapsulated in principle 21 of the Stockholm Declaration, namely:

> 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.[389]

(4) The notion of liability and compensation for victims is also reflected in principle 22 of the Stockholm Declaration, wherein a common conviction is expressed that:

[385] *Yearbook ... 1982,* vol. II (Part One), document A/CN.4/360, p. 63, para. 53 (schematic outline, section 5, paras. 2–3).

[386] See footnote 292 above.

[387] "[U]nder the principles of international law, … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence" (*Trail Smelter* (see footnote 226 above), p. 1965).

[388] In this case, the Court stated that it was "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu Channel* (see footnote 197 above), at p. 22).

[389] See footnote 312 above.

Annex 652

"Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, finalised by Mr Martti Koskenniemi, A/CN.4/L.682 and Add.1, 13 April 2006, pages 17-20, 104-106

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

[Agenda item 11]

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Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi**

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* Incorporating document A/CN.4/L.682/Corr.1.

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cedures Governing the Settlement of Disputes limits jurisdiction only to claims that arise under agreements covered by WTO, there is no explicit provision identifying the scope of applicable law.[44] By contrast, for example, Article 38 of the Statute of the International Court of Justice, by listing the sources that the Court should have recourse to in deciding cases, does identify the law to be applied by the Court.[45] Similarly, the United Nations Convention on the Law of the Sea provides that the International Tribunal on the Law of the Sea has "jurisdiction over any dispute concerning the interpretation or application of this Convention" and that, when deciding cases, it "shall apply this Convention and other rules of international law not incompatible with this Convention".[46] As no such explicit provision exists in the Understanding on Rules and Procedures Governing the Settlement of Disputes, the question of the scope of applicable law has seemed problematic. However, WTO is certainly not the only context in which a treaty body has been set up without any express mention that it should apply international law. As will be argued at length, especially in chapters II and V below, treaties covered by WTO are creations of, and constantly interact with, other norms of international law.[47] As the WTO Appellate Body stated in its very first case, "the General Agreement [on Tariffs and Trade of 1994] is not to be read in clinical isolation from public international law".[48] What this means in practice is by no means straightforward, but it states what has never been seriously doubted by any international tribunal or treaty-body: that, even as the jurisdiction of a body is limited (as it always—even in the case of the International Court of Justice—is), its exercise of that jurisdiction is controlled by the normative environment.

rights", EJIL, vol. 13, No. 4 (2002), p. 753, at pp. 757–779; A. Lindroos and M. Mehling, "Dispelling the chimera of 'self-contained regimes' international law and the WTO", EJIL, vol. 16, No. 5 (2005), p. 857, at pp. 860–866.

[44] Articles 1, para. 1; 3, para. 2; 7; 11 and 19, para. 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes have been used to argue both in favour of and against a more extensive scope of applicable law in WTO dispute settlement. See, for example, Bartels, "Applicable law…" (footnote 43 above), pp. 502–509, and Lindroos and Mehling, "Dispelling the chimera of 'self-contained regimes'…" (footnote 43 above), pp. 873–875; see also WTO Panel report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, para. 7.101, footnote 755.

[45] See, for example, Bartels, "Applicable law…" (footnote 43 above), pp. 501–502, and Palmeter and Mavroidis (footnote 43 above), pp. 398–399.

[46] Articles 288, para. 1, and 293, para. 1, of the United Nations Convention on the Law of the Sea.

[47] For instance, Palmeter and Mavroidis (see footnote 43 above), pp. 398–399; J. P. Trachtman, "The domain of WTO dispute resolution", *Harvard International Law Journal*, vol. 40, No. 2 (spring 1999), p. 333; Bartels, "Applicable law…" (footnote 43 above), pp. 501–502; Pauwelyn, "The role of public international law in the WTO…" (footnote 43 above), pp. 554–566; Pauwelyn, *Conflict of Norms…* (footnote 21 above); Marceau, "WTO dispute settlement and human rights" (footnote 43 above), pp. 757–779; Lindroos and Mehling, "Dispelling the chimera of 'self-contained regimes'…" (footnote 43 above), pp. 860–866.

[48] *United States—Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body report, WT/DS2/AB/R, adopted 20 May 1996, p. 17. Similarly, for example, in *Korea—Measures Affecting Government Procurement* (see footnote 44 above), the Panel stated in paragraph 7.96 that "[c]ustomary international law applies generally to the economic relations between the WTO [m]embers. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it."

Chapter II

Conflicts between special law and general law

46. This chapter deals with the case where a normative conflict is characterized by a relationship of "speciality" *versus* "generality" between the conflicting norms. The chapter is in five parts. Section A provides a framework for the discussion of conflicts where the speciality or generality of conflicting norms becomes an issue. Section B outlines the role and nature of the *lex specialis* rule as a pragmatic mechanism for dealing with situations where two rules of international law that are both valid and applicable deal with the same subject matter differently.[49] Section C gives an overview of the case law and academic discussion on "self-contained regimes". Section D is a brief discussion of regionalism in international law. Section E presents conclusions on conflicts between special law and general law.

A. Introduction

47. One of the most well-known techniques for analysing normative conflicts focuses on the generality *versus* the particularity of the conflicting norms. In this regard, it is possible to distinguish three types of conflict:

(*a*) Conflicts between general law and a particular, unorthodox interpretation of general law;

(*b*) Conflicts between general law and a particular rule that claims to exist as an exception to it; and

(*c*) Conflicts between two types of special law.

48. Fragmentation appears differently in each of these three types of conflict. While the first type is really about the effects of differing legal interpretations in a complex institutional environment, and therefore falls strictly speaking outside the scope of the Commission's study, the latter two denote genuine types of conflict where the law itself (in contrast to some putative interpretation of it) appears differently depending on which normative framework is used to examine it.[50] Each of the three types of conflict is illustrated briefly below.

1. Fragmentation through conflicting interpretations of general law

49. In the *Tadić* case in 1999, the Appeals Chamber of the International Tribunal for the Former Yugoslavia

[49] To say that a rule is "valid" is to point to its being a part of the ("valid") legal order. To say it is applicable means that it provides rights, obligations or powers to a legal subject in a particular situation.

[50] See discussion of the dependence of normative conflict of different conceptual frameworks in Koskenniemi and Leino, "Fragmentation of international law? …" (footnote 14 above), pp. 553–579.

considered the responsibility of Serbia and Montenegro for the acts of the Bosnian Serb militia in the conflict in the former Yugoslavia. For this purpose it examined the jurisprudence of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case of 1986. In the latter case, the United States was not held responsible for the acts of the Nicaraguan *contras* despite organizing, financing, training and equipping them. Such involvement failed to meet the test of "effective control".[51] The International Tribunal for the Former Yugoslavia, for its part, concluded that "effective control" set too high a threshold for holding an outside power legally accountable for domestic unrest. It was sufficient for the power to have "a role in organising, coordinating or planning the military actions of the military group"—*i.e.* to exercise "overall control" over them—for the conflict to be an "international armed conflict".[52]

50. The contrast between *Military and Paramilitary Activities in and against Nicaragua* and *Tadić* is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law.[53] *Tadić* does not suggest that "overall control" exists alongside "effective control", either as an exception to the general law or as a special (local) regime governing the conflict in the former Yugoslavia. It seeks to *replace* that standard altogether.

51. The point is not to take a stand in favour of either *Tadić* or *Military and Paramilitary Activities in and against Nicaragua*, only to illustrate the type of normative conflict where two institutions faced with analogous facts interpret the law in differing ways. This is a common occurrence in any legal system, but its consequences for the international legal system, which lacks a proper institutional hierarchy, might seem particularly problematic. Imagine, for example, a case where two institutions interpret the general (and largely uncodified) law concerning title to territory differently. For one institution, State A has validly acquired title to a piece of territory that another institution regards as part of State B. In the absence of a superior institution that could decide such a conflict, States A and B could not undertake official acts with regard to the territory in question with confidence that those acts would be given legal effect by outside powers or institutions. Similar problems would emerge in regard to any conflicting interpretations concerning a general law granting legal status.

52. Differing views about the content of general law create two types of problem. First, they diminish legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly. Second, they place legal subjects in an unequal position *vis-à-vis* each other. The rights they enjoy depend on which jurisdiction is seized to enforce them. Most domestic laws deal with these problems by means of appeals. An authority (usually a court) at a higher hierarchical level will provide a formally authoritative ruling.[54] Such authority is not normally present in international law. To the extent that such conflicts emerge and are considered a problem (which need not always be the case), they can only be dealt with by legislative or administrative means. Either States adopt a *new law* that settles the conflict, or the institutions will seek to coordinate their jurisprudence in the future.

2. Fragmentation through the emergence of special law as an exception to general law

53. A different case is one where an institution makes a decision that deviates from how situations of a similar type have been decided in the past because the new case is held not to come under the general rule, but to form an *exception* to it. This may be illustrated by how human rights organs have dealt with reservations. In the *Belilos v. Switzerland* case (1988), the European Court of Human Rights viewed a declaration made by Switzerland in its instrument of ratification as in fact a reservation, struck it down as incompatible with the object and purpose of the European Convention on Human Rights, and held Switzerland bound by the Convention "irrespective of the validity of the declaration".[55] In subsequent cases, the European Court has pointed out that the normal rules on reservations to treaties do not as such apply to human rights law. In the Court's view:

> a fundamental difference in the role and purpose of the respective tribunals [*i.e.* of the International Court of Justice and the European Court of Human Rights], coupled with the existence of a practice of unconditional acceptance … , provides a compelling basis for distinguishing Convention practice from that of the International Court.[56]

54. Again, the point is neither to endorse nor to criticize the European Court of Human Rights but to point to a phenomenon which, whatever one may think about it, has to do with the emergence of exceptions or patterns of exception in regard to some subject matter that deviate from the general law and that are justified because of the special properties of that subject matter.

3. Fragmentation as differentiation between types of special law

55. Finally, a third case is a conflict between different types of special law. This may be illustrated by reference to debates on trade and the environment. In the 1998 *EC—Hormones* case, the WTO Appellate Body considered the

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[51] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, at pp. 64–65, para. 115.

[52] *Prosecutor v. Duško Tadić*, Appeals Chamber, International Tribunal for the Former Yugoslavia, case No. IT-94-1-A, judgment of 15 July 1999, *Judicial Reports 1999*, p. 3, at pp. 47–62, paras. 115, 116–145; ILM, vol. 38, No. 6 (November 1999), pp. 1540–1546.

[53] This need not be the only—nor indeed the correct—interpretation of the contrast between the two cases. As some commentators have suggested, the cases can also be distinguished from each other on the basis of their facts. In this case, there would be no normative conflict. Whichever view seems better founded, the point of principle remains: it cannot be excluded that two tribunals faced with similar facts may interpret the applicable law differently.

[54] From a theoretical perspective, the position of courts is absolutely central in managing the functional differentiation—*i.e.* fragmentation—within the law. Coherence here is based on the duty to decide even "hard cases". See, in this regard, especially N. Luhmann, *Law as a Social System,* (trans. K. A. Zeigert, ed. F. Kastner and others), Oxford, Oxford University Press, 2004, in particular pp. 284–296.

[55] *Belilos v. Switzerland*, judgment of 29 April 1988, European Court of Human Rights, Series A, No. 132, p. 28, para. 60.

[56] *Loizidou v. Turkey*, preliminary objections, judgment of 23 March 1995, European Court of Human Rights, Series A, No. 310, p. 29, para. 85.

status of the so-called "precautionary principle" under treaties covered by WTO, especially the Agreement on the Application of Sanitary and Phytosanitary Measures. It concluded that, whatever the status of that principle in "international environmental law", it had not become binding for the WTO.[57] This approach suggests that "environmental law" and "trade law" might be governed by different principles. Which rule to apply would then depend on how a case would be qualified in this regard. This might seem problematic, as denominations such as "trade law" or "environmental law" have no clear boundaries. For example, maritime transport of oil has links to both trade and the environment, as well as to rules on the law of the sea. Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity? The responses are bound to vary depending on which is chosen as the relevant frame of legal interpretation.

B. The function and scope of the *lex specialis* maxim

1. *Lex specialis* in international law

(a) *Legal doctrine*

56. The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.[58] It suggests that, if a matter is regulated by a general standard as well as by a more specific rule, then the latter should take precedence over the former. The relationship between the general standard and the specific rule may, however, be conceived in two ways. One is the case where the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or technical specification thereof.[59] The specific and the general both point, as it were, in the same direction.

57. Sometimes *lex specialis* is, however, understood more narrowly to cover the case where two legal provisions, both of which are 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 a conflict resolution technique. It suggests that, instead of the (general) rule, one should apply the (specific) exception.[60] In both cases, however, priority falls on the provision that is "special", *i.e.* the rule with a more precisely delimited scope of application.[61]

58. Nonetheless, the maxim does not admit of automatic application. In particular, two sets of difficulties may be highlighted. First, it is often hard to distinguish what is "general" and what is "particular", and, by focusing on the substantive coverage of a provision or the number of legal subjects to whom it is directed, one may arrive at different conclusions. An example would be provided by the relationship between a territorially limited general regime and a universal treaty on some specific subject.[62] Second, the principle also has an unclear relationship to other maxims of interpretation or conflict resolution techniques, such as the principle *lex posterior derogat legi priori* (later law overrides prior law), and may be offset by normative hierarchies or informal views about "relevance" or "importance".[63]

59. The idea that special enjoys priority over general has a long pedigree in international jurisprudence as well. Its rationale was already being clearly expressed by Grotius:

> *What rules ought to be observed in such cases* [*i.e.* where parts of a document are in conflict]. … Among agreements which are equal … that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general.[64]

60. This passage refers to two reasons why the *lex specialis* rule is so widely accepted. A special rule is more to the point ("approaches most nearly to the subject in hand") than a general one and it regulates the matter more effectively ("are ordinarily more effective") than general rules. This could also be expressed by saying that special rules are better able to take account of particular circumstances. The need to comply with them is felt more acutely than is the case with general rules.[65] They have greater clarity and definiteness and are thus often felt to be

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[57] *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Appellate Body report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 123–125.

[58] The principle *lex specialis derogat legi generali* has a long history; the principle was included in the *Corpus Iuris Civilis*. See Papinian, Dig. 48, 19, 41 and Dig. 50, 17, 80. The latter states: "*In toto iure generi per speciem derogatur et illud potissimum habetur, quod ad speciem derectum est"* ("In the whole of law, species takes precedence over genus, and anything that relates to species is regarded as most the important") (*The Digest of Justinian*, vol. IV, Philadelphia, University of Pennsylvania Press, 1985, Latin text ed. T. Mommsen and P. Krueger, trans. ed. A. Watson). Some of its alternative formulations are "*generalibus specialia derogant*", "*generi per speciem derogatur*" and "*specialia generalibus, non generalia specialibus*". This report does not deal with another close variant, namely the *ejusdem generis* rule, *i.e.* the rule of interpretation according to which special words control the meaning of general ones. For a discussion, see A. D. McNair, *The Law of Treaties,* Oxford, Clarendon Press, 1961, pp. 393–399.

[59] This understanding appears, for example, in Mus (see footnote 21 above), at p. 218. Fitzmaurice, too, thinks there is *lex specialis* when "a matter governed by a specific provision … is thereby taken out of the scope of a general provision" (G. Fitzmaurice, "The law and procedure of the International Court of Justice 1951–4: treaty interpretation and other treaty points", *British Year Book of International Law 1957*, vol. 33, p. 203, at p. 236).

[60] A. Peczenik, *Juridikens metodproblem,* Stockholm, Gebers, 1980, p. 106.

[61] That is, when the description of the scope of application in one provision contains at least one quality that is not singled out in the other. K. Larenz, *Methodenlehre der Rechtswissenschaft,* Berlin, Springer, 1975, pp. 251–252.

[62] Such conflicts, Jenks suggests, can only be decided on their merits. See Jenks (footnote 8 above), p. 447.

[63] For different possibilities, see H. T. Klami, "Legal heuristics: a theoretical skeleton", *Oikeustiede–Jurisprudentia* XV (1982), pp. 46–53. See also Sadat-Akhavi (footnote 21 above), pp. 189–191. For examples of cases where a more general treaty overrides a more specific one because of its "relevance" or "overriding character", see *ibid.,* pp. 114–125 and 125–131 and *passim*. Ian Sinclair speaks of a mixture of techniques and maxims in *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester, Manchester University Press, 1984, pp. 95–98.

[64] H. Grotius, *De Jure Belli ac Pacis: Libri Tres*, J. Brown Scott (ed.), *The Classics of International Law*, Oxford, Clarendon Press, 1925, book II, chap. XVI, sect. XXIX, p. 428.

[65] For the reasoning behind the need to prefer "special" over "general", see also Dupuy, "L'unité de l'ordre juridique international…" (footnote 14 above), pp. 428–429.

"harder" or "more binding" than general rules, which may stay in the background and be applied only rarely. Moreover, *lex specialis* may also seem useful as it may provide better access to what the parties may have willed.[66]

61. It is therefore no wonder that the literature generally accepts *lex specialis* as a valid maxim of interpretation or conflict resolution technique in public international law, too, though it is seldom given lengthy treatment. The classical writers (Pufendorf, de Vattel) accepted it among other techniques as a matter of course.[67] Anzilotti gave it a rather absolute formulation: "*in toto iure genus per speciem derogatur; la norme de droit particulier l'emporte sur la norme générale*". As was consistent with his voluntarism, a treaty between two States would prevail over a multilateral treaty just as the latter would have priority over customary law.[68] For him, as, for example, for Charles Rousseau, the power of the *lex specialis* maxim lay in the way in which it seemed to realize party will.[69] For Georges Scelle, by contrast, a special rule would only rarely be allowed to override what he called "*l'économie d'ensemble*" of the general law. It followed from his sociological anti-voluntarism that general regulation, expressive of an objective sociological interest, would always prevent contracting out by individual States.[70]

62. It seems clear, however, that both approaches are too absolute—either too respectful of the wills of individual States or not respectful enough of the need to deviate from abstract maxims. Later lawyers have stressed the relativity of the *lex specialis* principle, the need to balance it with *lex posterior,* and the hierarchical status that the more general provision may enjoy.[71]

63. The Commission has outlined its application at some length in the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts:

Article 55. Lex specialis

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.

64. This provision establishes normative priority for any special rules in its field of application. Or, as the Commission explains in the commentary, it means "that the present articles operate in a residual way".[72] The provision clearly expresses the wish of the Commission to allow States to develop, apply and derogate from the general rules of State responsibility by agreement between themselves. Yet, of course, such power cannot be unlimited: rules that derogate must have at least the same rank as those they derogate from. It is hard to see how States could, for example, derogate from those aspects of the general law on State responsibility that define the conditions of operation of "serious breaches of obligations under peremptory norms of general international law".[73]

65. In doctrine, *lex specialis* is usually discussed as one factor among others in treaty interpretation (arts. 31–33 of the 1969 Vienna Convention) or in dealing with the question of successive treaties (art. 30 of the 1969 Vienna Convention, especially in relation to the principle of *lex posterior*).[74] Although the principle did not find its way into the text of the Convention, it was still observed during the drafting process that, among techniques for resolving conflicts between treaties, it was useful to pay attention to the extent to which a treaty might be "special" in relation to another treaty.[75]

66. But there is no reason to limit the operation of *lex specialis* to relationships between treaties. Jennings and Watts, for instance, indicate that the principle "has sometimes been applied in order to resolve apparent conflicts between two differing and potentially applicable

[66] See also Pauwelyn, *Conflict of Norms…* (footnote 21 above), p. 388. For the voluntarist understanding of *lex specialis*, rebuttable in view of other evidence, see N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law,* Oxford, Clarendon Press, 1994, p. 142 and references.

[67] S. Pufendorf, *Le droit de la nature et des gens, ou Système général des principes les plus importants de la morale, de la jurisprudence, et de la politique* (trans. J. Barbeyrac), Basel, Thourneisen, 1732, book V, chap. XII, pp. 138–140; E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (London, 1758), Washington, D.C., Carnegie Institution, 1916, vol. I, book II, chap. XVII, para. 316.

[68] D. Anzilotti, *Cours de droit international*, vol. I (trans. G. Gidel), Paris, Sirey, 1929, p. 103.

[69] Rousseau, "De la compatibilité des normes juridiques contradictoires…" (see footnote 36 above), p. 177.

[70] G. Scelle, *Manuel de droit international public*, Paris, Domat-Montchrestien, 1948, p. 642.

[71] See, for example, A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1929-I,* vol. 26, p. 334; G. E. do Nascimento e Silva, "Le facteur temps et les traités", *Recueil des cours de l'Académie de droit international de La Haye, 1977-I*, vol. 154, p. 246.

[72] Para. (2) of the commentary to article 55 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 140.

[73] Commentaries to arts. 40–41 and 48, *ibid.*, pp. 112–116, 126–128.

[74] In addition to sources already cited, see, for example, Rousseau, "De la compatibilité des normes juridiques contradictoires…" (footnote 36 above), pp. 133–192, especially pp. 177–178, 188–189; Jenks (footnote 8 above), pp. 401–453, especially pp. 446–447; M. Zuleeg, "Vertragskonkurrenz im Völkerrecht. Teil I: Verträge zwischen souveränen Staaten", *German Yearbook of International Law*, vol. 20 (1977), pp. 247, especially pp. 256–259; W. Czapliński and G. Danilenko, "Conflicts of norms in international law", *Netherlands Yearbook of International Law*, vol. XXI (1990), p. 3, at pp. 20–21; Kontou (footnote 66 above), pp. 141–144; M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties*, Utrecht, Eleven International Publishing, 2005, especially pp. 314–348. See also M. S. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure,* New Haven/Dordrecht, New Haven Press/Martinus Nijhoff, 1994, pp. 199–206; Sinclair (footnote 63 above), p. 98; A. Aust, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, p. 201. See also P. Daillier and A. Pellet, *Droit international public*, 7th ed., Paris, LGDJ, 2002, p. 271 (discussing *lex specialis* in the context of art. 30, para. 3, of the 1969 Vienna Convention). Very few commentators expressly reject the principle. See, however, U. Linderfalk, *Om tolkningen av traktater,* Lund, Lunds Universitet, 2001, pp. 353–354 (viewing it as covered by some techniques but overridden by others).

[75] Statement by the Expert Consultant (Waldock), *Official Records of the United Nations Conference on the Law of Treaties, second session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.68.V.7), 91st meeting of the Committee of the Whole, 16 April 1969, p. 253. See also P. Reuter, *Introduction au droit des traités*, 2nd rev. ed., Paris, Presses Universitaires de France, 1985, p. 112.

ANNEX

DRAFT CONCLUSIONS OF THE WORK OF THE STUDY GROUP, FINALIZED BY MR. MARTTI KOSKENNIEMI

A. Introduction

1. At its fifty-fourth session (2002), the International Law Commission established a Study Group to examine the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[1] At its fifty-fifth session (2003), the Commission adopted a tentative schedule for work to be carried out during the remaining part of the quinquennium (2003–2006) and allocated to five of its members the task of preparing outlines on the following topics:

(*a*) The function and scope of the *lex specialis* rule and the question of self-contained regimes (Mr. Martti Koskenniemi);

(*b*) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31, para. 3 (*c*), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community (Mr. William Mansfield);

(*c*) The application of successive treaties relating to the same subject matter (art. 30 of the 1969 Vienna Convention) (Mr. Teodor Melescanu);

(*d*) The modification of multilateral treaties between certain of the parties only (art. 41 of the 1969 Vienna Convention) (Mr. Riad Daoudi); and

(*e*) Hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules (Mr. Zdzislaw Galicki).[2]

2. During its fifty-sixth (2004) and fifty-seventh (2005) sessions, the Study Group received a number of outlines and studies on these topics. It affirmed that it was its intention to prepare, as the substantive outcome of its work, a single collective document consisting of two parts. One would be a "relatively large analytical study" that would summarize the content of the various individual reports and the discussions of the Study Group. This forms the bulk of the report prepared by the Chairperson of the Study Group in 2006. The other part would be "a condensed set of conclusions, guidelines or principles emerging from the studies and the discussions in the Study Group".[3] As the Study Group itself held, and the Commission endorsed, these should be "a concrete, practice-oriented set of brief statements that would work, on the one hand, as the summary and conclusions of the Study Group's work and, on the other hand, as a set of practical guidelines to help in thinking about and dealing with the issue of fragmentation in legal practice".[4]

3. This annex sets out a draft for those "conclusions, guidelines or principles". The draft reproduces the result of the extensive deliberations the Study Group had undertaken in 2004 and 2005. They are a collective product by the members of the Study Group.

4. It should be noted, however, that:

(*a*) Only the formulation of conclusions 1 to 23, based on the studies referred to in paragraphs 1 (*a*)–(*c*) above, have so far been provisionally agreed to by the Study Group;

(*b*) Draft conclusions 24 to 32, dealing with the topic referred to in paragraph 1 (*d*) above under the general title of "Conflicts between successive norms", have been neither presented to nor discussed in the Study Group. They have been formulated by the Chairperson of the Study Group as a proposal to be discussed during the fifty-eighth session (2006);

(*c*) Draft conclusions 33 to 43 are based on the report referred to in paragraph 1 (*e*) above. They were distributed to the Study Group in 2005 but have not been subjected to in-depth discussion. It is proposed that they be discussed and adopted in the course of the finalization of the Study Group's work during the Commission's fifty-eighth session in 2006.

5. The Chairperson of the Study Group wishes to reproduce all the draft conclusions below. The suggestion is that the conclusions would be adopted by the Study Group and submitted to the Commission for appropriate action.

B. Draft conclusions of the work of the Study Group on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law"

(a) *General*

(1) *International law as a legal system*. International law is a legal system. Its rules and principles (*i.e.* its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity, and their validity may date back to earlier or later moments in time.

(2) In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.[5] For that purpose, the relevant relationships fall into two general types:

[1] *Yearbook … 2002*, vol. II (Part Two), paras. 492–494.

[2] *Yearbook … 2003*, vol. II (Part Two), paras. 424–428.

[3] *Yearbook … 2005*, vol. II (Part Two), para. 448.

[4] *Ibid*.

[5] That two norms are valid in regard to a situation means that they each cover the facts of which the situation consists. That two norms are applicable in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation.

– *Relationships of interpretation*. This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating or modification of the latter. In such situation, both norms are applied in conjunction.

– *Relationships of conflict*. This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the 1969 Vienna Convention.

(3) *The Vienna Convention on the Law of Treaties*. When seeking to determine the relationship of two of more norms to each other, the norms should be interpreted in accordance with or analogously to the 1969 Vienna Convention and especially the provisions in its articles 31 to 33 having to do with the interpretation of treaties.

(4) *The principle of harmonization*. It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as giving rise to a single set of compatible obligations.

(b) *The maxim "*lex specialis derogat legi generali*"*

(5) *General principle*. The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that, whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable in several contexts: between provisions within a single treaty, between provisions within two or more treaties, between a treaty and a non-treaty standard, as well as between two non-treaty standards. The source of the norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard. However, in practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles.

(6) *Contextual appreciation*. The relationship between the *lex specialis* maxim and other norms of interpretation or conflict solution cannot be determined in a general way. Which consideration should be predominant—*i.e.* whether it is the speciality or the time of emergence of the norm—should be decided contextually.

(7) *Rationale for the principle*. That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.

(8) *Dispositive nature of most international law*. Most international law is dispositive. This means both that it may be applied, clarified, updated or modified as well as be set aside by special law.

(9) *The effect of* lex specialis *on general law*. The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization under paragraph (4) above, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.

(10) *Non-derogability*. Certain types of general law[6] may not, however, be derogated from by special law. *Jus cogens* is expressly non-derogable. Other considerations that may provide a reason for concluding that a general law is non-derogable include the following:

– Whether the general law was intended to be non-derogable;

– Whether non-derogability may be inferred from the form or the nature of the general law;

– Whether derogation might frustrate the *purpose* of the general law;

– Whether third party beneficiaries may be negatively affected by derogation; and

– Whether the balance of rights and obligations established in the general law would be negatively affected by derogation.

A norm that purports to set aside or derogate from a norm that is non-derogable will be invalid.

(c) *Special ("self-contained") regimes*

(11) *Special ("self-contained") regimes as* lex specialis. A group of rules and principles concerned with a particular subject matter may form a special regime ("self-contained regime") and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules.

(12) Three types of special regime may be distinguished:

– Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the Commission's draft articles on responsibility of States for internationally wrongful acts.[7]

– Sometimes, however, a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (*e.g.* a treaty on the protection of a particular river) or some substantive matter (*e.g.* a treaty on the regulation of the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties, or treaty and treaties plus non-treaty developments (subsequent practice or customary law).

[6] [The notion of "general law" may yet need to be clarified.]

[7] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 140–141.

– Finally, sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", *etc.*, give expression to some such regimes. For interpretative purposes, such regimes may often be considered as wholes.

(13) *Effect of the "speciality" of a regime*. The significance of a special regime lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose.

(14) *The relationship between special regimes and general international law*. A special regime may derogate from general law under the same conditions as *lex specialis* generally (see paras. (6) and (8) above).

(15) *The role of general law in special regimes I: gap-filling*. The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will be applicable.

(16) *The role of general law in special regimes II: failure of special regimes*. Special regimes or the institutions set up by them may fail to operate as intended. In such case, the relevant general law becomes applicable. Failure should be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted. It could be manifested, for example, by the failure of the regime's institutions to fulfil the purposes allotted to them, endemic non-compliance by one or several of the parties, desuetude, withdrawal by parties instrumental for the regime, among other causes. Whether a regime has "failed" in this sense, however, needs to be decided above all by an interpretation of its constitutional instruments.

(d) *Article 31, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties*

(17) *Systemic integration*. Article 31, paragraph 3 (*c*), of the 1969 Vienna Convention provides one means, within the framework of the Convention, through which relationships of interpretation (referred to in para. (2) above) may be applied. It requires the interpreter of a treaty to take into account "[a]ny relevant rules of international law applicable in the relations between the parties". The article gives expression to the objective of "systemic integration", according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.

(18) *Interpretation as integration in the system*. Systemic integration governs all treaty interpretation, the other relevant aspects of which are set out in the other paragraphs of articles 31 and 32 of the 1969 Vienna Convention. These paragraphs describe a process of legal reasoning, in which particular elements will have greater or less relevance depending upon the nature of the treaty provisions in the context of interpretation. In many cases, the issue of interpretation will be capable of resolution within the framework of the treaty itself. Article 31, paragraph 3 (*c*), deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law.

(19) *Application of systemic integration*. Where a treaty functions in the context of other agreements, the objective of systemic integration will apply as a presumption with both positive and negative aspects:

(*a*) *Positive presumption*: The parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms.

(*b*) *Negative presumption*: In entering into treaty obligations, the parties do not intend to act inconsistently with [generally recognized] principles of international law.

Of course, if any other result is indicated by ordinary methods of treaty interpretation, that should be given effect, unless the relevant principle were part of *jus cogens.*

(20) *Application of custom and general principles of law*. Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31, paragraph 3 (*c*), especially where:

(*a*) The treaty rule is unclear or open-textured;

(*b*) The terms used in the treaty have a recognized meaning in customary international law or under general principles of law;

(*c*) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the positive presumption in paragraph (19) (*b*) above, to look for rules developed in another part of international law to resolve the point.

(21) *Application of other treaty rules*. Article 31, paragraph 3 (*c*), also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.

(22) *Inter-temporality*. International law is a dynamic legal system. Whether in applying article 31, paragraph 3 (*c*), the interpreter should refer to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law depends generally on the meaning of the treaty, as ascertained on the basis of articles 31 and 32 of the 1969 Vienna Convention. However, the meaning of a treaty provision may also be affected by subsequent developments irrespective of the original will of the parties, especially where these subsequent developments are reflected in customary law and general principles of law.

Annex 653

Report of the 27th Session of the Indian Ocean Tuna Commission,
IOTC-2023-S27-R[E], 8-12 May 2023, pages 9-10

Food and Agriculture Organization of the United Nations

Indian Ocean Tuna Commission
Commission des Thons de l'Ocean Indien
iotc ctoi

IOTC–2023–S27–R[E]

Report of the 27th Session of the Indian Ocean Tuna Commission

Mauritius, 8-12 May 2023

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IOTC 2023. Report of the 27th Session of the Indian Ocean Tuna Commission. Held in Mauritius 8-12 May 2023. *IOTC–2023–S27–R[E] :43pp.*

TABLE OF CONTENTS

1. Opening of the session

1. The 27th Session of the Indian Ocean Tuna Commission (IOTC) was opened and chaired by the IOTC Chairperson Ms Jung-re Riley Kim (Rep. of Korea).
2. The Honourable Sudheer Maudhoo, Minister of Blue Economy, Marine Resources, Fisheries and Shipping and the Honourable Alan Ganoo Minister of Land Transport and Light Rail, and Minister of Foreign Affairs, Regional Integration and International Trade, made opening addresses.
3. The 27th Session of the Commission was held in a hybrid format, with delegations present physically in the meeting room, and other participants attending by videoconference.

2. Letters of credentials

4. Letters of Credentials were received from 29 Contracting Parties and 1 Cooperating Non-contracting Party (Liberia). Yemen participated virtually, while Sudan did not participate. The list of CPC participants is provided in Appendix 1.
5. The Executive Secretary reminded members that the content of the letters of credentials should be in accordance with the template provided in Appendix I of the IOTC Rules of Procedure.

3. Admission of Observers

6. Pursuant to Article VII of the Agreement establishing the IOTC, the Commission admitted 29 Observers (including the invited experts), in accordance with Rule XIV of the IOTC Rules of Procedure (2014).
7. The list of participants, as listed in the letters of credentials, is provided in Appendix 1.

4. Adoption of the agenda and arrangements for the session

8. The adopted agenda (IOTC-2023-S27-01c) is provided in Appendix 2. The documents presented to the Commission are listed in Appendix 3.

5. On the recruitment of the new IOTC Executive Secretary

9. The Commission recalled that the Executive Secretary, Dr Chris O'Brien will retire on 30 June 2023, and given S27 was his last Commission meeting, **EXPRESSED** its appreciation to Dr O'Brien for his work over the past six years.
10. Following the recruitment process that started in May 2022, and in accordance with the IOTC Rules of Procedure, the Commission unanimously **APPROVED** the appointment of Dr Paul de Bruyn as the next IOTC Executive Secretary, and **REQUESTED** the Director, Fisheries and Aquaculture Division FAO to make this outcome known to the Director General of FAO.

6. Determination of the status of the membership of United Kingdom "BIOT" in the IOTC

11. The Commission **NOTED** the following statement from the United Kingdom:

    "The United Kingdom takes note that the last IOTC Session agreed that its consultations with the United Kingdom had started and that a final determination, in accordance with Article IV of the IOTC Agreement will be made at Session 27. The United Kingdom delegation wishes to point out that, in its view, there has not been adequate consultation between the United Kingdom and the IOTC. It expresses its willingness to engage fully in these consultations and commits to clarify the status of its membership before the end of the year."

12. The Commission **NOTED** the following statement from Mauritius:

    "The Mauritius delegation takes note of the statement just made by the United Kingdom delegation expressing its commitment to clarify, before the end of this year, the status of its membership in IOTC in accordance with Article IV of the IOTC Agreement. Since the United Kingdom has pointed out that, in its view, there has not been adequate consultation with the Commission, the Mauritius delegation urges the Secretariat to conclude these consultations as soon as possible. In view of the commitment given by the United Kingdom to clarify the status

of its membership before the end of the year, Mauritius, in a spirit of flexibility, has no objection to the Commission agreeing to this arrangement."

13. The Commission **NOTED** the United Kingdom's commitment to clarify the status of its IOTC Membership before the end of the year and requested the Secretariat to notify CPCs as soon as a communication on this matter is received.

7. Update on the implementation of decisions of the Commission in 2022 (S26)

14. The Commission **NOTED** paper IOTC-2023-S27-02 which provided the Commission with information on the progress made during the inter-sessional period on the requests for action made at its 26th Session in 2022.

8. Report of the Scientific Committee

15. The Commission **NOTED** the report of the 25th Session of the Scientific Committee (SC) (IOTC–2022–SC25–R) which was presented by the SC Chair, Prof. Toshihide Kitakado (Japan). A total of 130 delegates and other participants, comprising 104 delegates from 25 Contracting Parties and 25 delegates from 11 observer organisations, including Invited Experts participated in SC25.

16. The Commission **NOTED** that all scientific working group and working party meetings had been successfully held in 2022, utilising videoconference platforms and a shortened format. The Commission also **NOTED** that the Scientific Committee meeting had been held in the Seychelles using a hybrid format and that the MPF was used to support the attendance of participants to that meeting.

17. The Commission **NOTED** that 26 National Reports were submitted to the IOTC Secretariat in 2022 by CPCs and that this was an increase when compared with the 21 reports provided by CPCs in 2021.

18. The Commission **NOTED** the concern expressed by several members that the lack of basic data for some species has resulted in their stock status being assessed as uncertain. The Commission **URGED** all members to submit data to improve the assessments for species under the IOTC mandate.

19. The Commission **NOTED** the request from several members to provide capacity building to improve participation in the IOTC stock assessment processes. Although this is particularly relevant for the discussions regarding Management Strategy Evaluation (MSE) it is also an issue for the complex stock assessments currently being conducted by the SC.

20. The Commission **NOTED** a request by a member to provide information on stock status on the high seas and separately for within EEZs. The SC Chair explained that the current understanding of the stock structure of most IOTC species does not allow for this kind of separation, as the stocks are commonly highly migratory and cross these management boundaries. In addition, the data provided by most members is not sufficiently spatially stratified to be able to separate the catch between these regions accurately.

The status of tropical and temperate tunas

21. The Commission **NOTED** that the current status of tropical and temperate tunas are as follows:

Bigeye tuna In 2022 a new stock assessment was carried out for bigeye tuna in the IOTC area of competence to update the stock assessment undertaken in 2019. On the weight-of-evidence available in 2022, the bigeye tuna stock is determined to be **overfished** and **subject to overfishing**. As IOTC agreed on a bigeye Management Procedure (Res. 22/03) it should be noted that the stock assessment is not used to provide a recommendation on the TAC.
Yellowfin tuna No new stock assessment was carried out for yellowfin tuna in 2022 and so the advice is based on the 2021 assessment. On the weight-of-evidence available since 2018, the yellowfin tuna stock is determined to remain **overfished** and **subject to overfishing**.
Skipjack tuna

Annex 654

"History of the European Union 1970-79", *European Union*

European Union

History of the European Union 1970-79

A growing Community – the first new members join

Denmark, Ireland and the United Kingdom join the European Communities on 1 January 1973, raising the number of member countries to 9. The Arab-Israeli war of October 1973 triggers an energy crisis and economic problems in Europe.

Democracy spreads in Europe with the overthrow of the dictatorships in Greece, Portugal and Spain. Regional policy starts to transfer huge sums of money to create jobs and infrastructure in poorer areas. The first direct elections by citizens of members of the European Parliament take place in 1979.

1970s – Environmental protection on the agenda

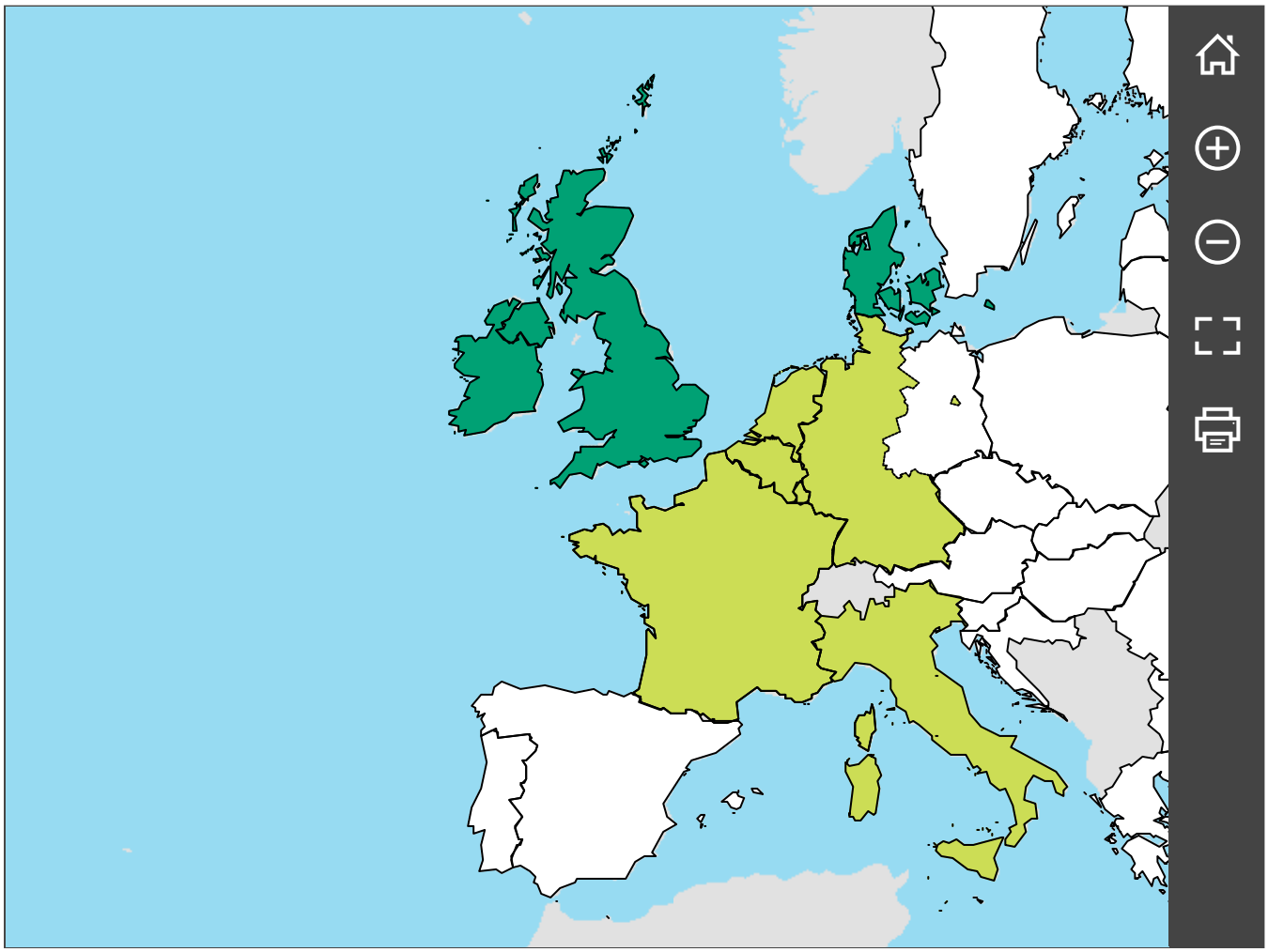
The European communities adopt laws to protect the environment, introducing the notion of 'the polluter pays'. Many environmental NGOs are founded.

1 January 1973 – From 6 to 9 member countries

The 6 members become 9 when Denmark, Ireland and the United Kingdom formally join the European Communities.

Member countries: Federal Republic of Germany, France, Italy, Netherlands, Belgium, Luxembourg

New Member countries: Denmark, Ireland, United Kingdom



All EU member countries and when they joined

1973 – Oil crisis hits Europe

Following an Arab-Israeli war in October, Middle East oil-producing nations impose big price increases and restrict sales to certain European countries. This creates economic problems throughout the EEC.

10 December 1974 – Reducing disparities

between the regions

To show their solidarity, leaders of the EEC agree to set up a major new fund under European regional policy *(https://ec.europa.eu/regional_policy/policy/what/history_en)*. Its purpose is to transfer money from rich to poor regions – to improve infrastructure, attract investment and create jobs. The European Regional Development Fund *(https://ec.europa.eu/regional_policy/funding/erdf_en)* is created the following year.

1974-75 – New democracies in Portugal, Greece and Spain

The overthrow of the Salazar regime in Portugal and the collapse of military rule in Greece in 1974, together with the death of General Franco of Spain in 1975, mark the end of these dictatorships in Europe. The 3 countries commit themselves to democratic government — an important step towards qualifying for future membership of the European Communities.

June 1979 – First direct elections to the European Parliament

European citizens directly elect the members of the European Parliament *(https://www.europarl.europa.eu/news/en)* for the first time. Previously members were delegated by national parliaments. Members sit in pan-European political groups *(https://www.europarl.europa.eu/meps/en/home)*, not in national delegations.

Further information

Historical archives of EU institutions *(/principles-countries-history/history-eu/historical-archives-eu-institutions_en)*

Annex 655

"UPU Adopts UN Resolution on Chagos Archipelago", *Universal Postal Union Press Release*, 27 August 2021

Press release: UPU adopts UN resolution on Chagos Archipelago

Published: 27.08.2021

Abidjan/Berne. The Universal Postal Union (UPU) – the UN specialized agency for postal matters – has formally acknowledged the Chagos Archipelago as an integral part of the territory of Mauritius.

The decision was made by member countries participating in the UPU's 27th Universal Postal Congress in Abidjan, Côte d'Ivoire, and passed with 77 votes. There were six votes against the decision and 41 abstentions.

As a result of the decision, the UPU will no longer register, distribute or forward postage stamps issued by the "British Indian Ocean Territory". The Chagos Archipelago was previously recognized as part of the Overseas Territories of the United Kingdom.

In May 2019, following advice from the International Court of Justice, the UN General Assembly instructed the UN and its specialized agencies to recognize Mauritius' sovereignty over the Chagos Archipelago and refrain from recognizing or implementing any measure taken by or on behalf of, the "British Indian Ocean Territory".

As a UN specialized agency, the UPU is required to cooperate with and assist the UN and its principal and subsidiary organs and therefore brought the matter to its primary governing body, the Congress, for decision.

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Congress | Press release

Annex 656

C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours de l'Académie de droit international de La Haye*, 1966, pp. 99-200, pages 105-110, 193-196

LIABILITY FOR ULTRA-HAZARDOUS ACTIVITIES IN INTERNATIONAL LAW

by

C. WILFRED JENKS

CHAPTER I

THE SCOPE AND NATURE OF ULTRA-HAZARDOUS LIABILITY IN INTERNATIONAL LAW

It has been argued by leading authorities, among them Sir Gerald Fitzmaurice,[1] that the theory of objective risk for ultra-hazardous activities increasingly accepted in certain municipal legal systems cannot be held to extend to international law. If by this it is meant that there is no comprehensive and clearly thought out theory or principle of ultra-hazardous liability, based on authoritative international decisions or widely ratified conventions and generally accepted, the proposition is a valid one. If the argument were to be carried a stage further, and to become a contention that there is no place in international law for the principle of liability for the objective risks arising from ultra-hazardous activities, it would, apart from the cogent objections of policy to such a view, be confronted at once with some awkward facts.

Important international conventions specify that civil liability for aviation hazards is not dependent on proof of fault or negligence; carriers' liability is presumed unless disproved on one of certain specified grounds by the carrier: liability to third parties on the surface attaches on proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom. The principle of international liability for air and water pollution without proof of fault has been a matter of controversy but is commanding increasing acceptance. Important international conventions relating to nuclear damage provide in terms that the civil liability of the operator is "absolute", or attaches "upon proof that such damage or loss was caused by a nuclear incident", or that the operator is absolutely liable for any nuclear damage upon proof that such damage has been caused by a nuclear incident; they also specify that these

1. *Yearbook of the International Law Commission*, 1957, Vol. I, p. 164.

rules applying the theory of objective risk for ultra-hazardous activities to civil liability do not affect the possible international liability of the State for nuclear damage. Responsible proposals by governments concerning liability for space vehicle accidents provide that States shall be liable to each other for damage resulting from such accidents without proof of fault. In brief, the principle of liability for the objective risk arising from an ultra-hazardous activity has been fully accepted in special cases defined by international agreement, though the precise nature and extent of such liability, and the relationship of the civil and international elements therein, may still be subject to debate.

There are therefore, stating the matter in the most guarded terms, a growing number of significant exceptions to the alleged principle that liability in international law rests exclusively upon fault (including negligence); are they to be regarded as anomalous exceptions, or are they an anticipation of a major qualification of the principle, not yet fully realised or clearly stated, but increasingly necessary and apparent?

Seen in this light, the question is not whether international law can or should recognize ultra-hazardous liability but how far it recognizes such liability, whether such liability exists only in specific cases for which special provision has been made or whether it rests on some more general principle which we may expect to have a widening range of new applications, whether the liability is "absolute", "strict", or "without proof of fault", or constitutes some other variant of these possibilities, and how the elements of civil and international liability are related to each other. On either view of the scope of liability some difficult issues arise; on neither can we avoid the general questions whither the law is moving in the matter and how fast and how far it should be developed. On the view that such liability exists only in specific cases, it becomes necessary to consider, *de lege ferenda,* how many further scientific and technological developments will call for special action analogous to that which has been, or is being, taken in respect of aviation, nuclear energy and space. On the view that such liability rests on a general principle, it is necessary to consider the potential range of applications of the principle. On either view important questions concerning

the events giving rise to liability, security for liability, the limitation of the amount of liability, joint liability, the extinction of rights, jurisdiction and execution call for solution. On either view the question arises how far the State is liable in respect of ultra-hazardous occurrences within, or originating within, its jurisdiction.

The expression ultra-hazardous activities is not a term of art and calls for some definition if it is to serve as the basis of our discussion. It does not imply that the activity is ultra-hazardous in the sense that there is a high degree of probability that the hazard will materialize, but rather that the consequences in the exceptional and perhaps quite improbable event of the hazard materializing may be so far-reaching that special rules concerning the liability for such consequences are necessary if serious injustice and hardship are to be avoided. Liability is shifted from fault (including negligence) to risk with a view to spreading more fairly the possible consequences of improbable but potentially disastrous misadventure, making the burden of insurance or the provision of other security for compensation in the event of misadventure a cost of the adventure, and eliminating a burden of proof which, in view of the nature of the risk, the victim cannot reasonably be expected to discharge and, in many cases, could never discharge; he can prove legal causation, in the sense of showing a required relationship between the fact of certain activities having been undertaken and the fact of damage, but he cannot prove what actually happened or hope to prove fault or negligence.

So conceived, liability for ultra-hazardous activities is essentially a practical problem rather than a question of principle and is increasingly so treated in negotiations among States and the deliberations of international organisations; the practical solutions adopted are unlikely to be viable unless they can be expressed in coherent and acceptable principles but practical considerations rather than general principles must be taken as the starting point; this is equally true of the civil and international aspects of such liability.

We can therefore afford to pass lightly over the varying fortunes of the concepts of fault and strict liability in the historical development of municipal law. It is true that at one stage the natural evolution of a maturing legal system appeared to be from absolute liability

to fault, much as it also appeared to be from status to contract; it is no less true that in a later stage of development strict liability in an increasingly important range of cases, no less than status, has again become a marked characteristic of developed legal systems. With the modern development of statutory offences this has been true not only in tort but in crime; in social legislation, it has been the basis of employment injury schemes; and in tort the concept of strict liability has widened from dangers escaping from the land to embrace the more varied hazards of an industrialized society, including what are sometimes described as operational and product liability.

Nor should we attach any excessive importance to the consideration that there has been a similar evolution from absolute liability to fault (including negligence) in the course of the historical development of international law. It is, of course, both true and important that whereas Anzilotti and other positivist writers, rejecting the position of Grotius, expounded the view that the State, being incapable of a culpable intention, was responsible not for fault but for a fact contrary to international law, it is now accepted that fault (including negligence) is, in general, the basis of State responsibility in international law, especially in respect of occurrences not directly attributable to the acts or omissions of the State or its agents acting in the exercise of public authority. But the concept of ultra-hazardous liability does not involve any challenge to the principle that fault is, in general, the basis of State responsibility in international law or any attempt to revert to the principle of absolute liability as the general basis of responsibility; it represents a necessary and increasingly important but nevertheless limited exception to the principle of fault in cases in which that principle is inapplicable and impracticable.

The importance of the matter derives from the scientific and technological developments of our time.

The central and dominating fact is that scientific and technological progress has completely changed man's relationship to his environment. He can now soar into the air and descend into the sea; he can venture beyond the atmosphere of the earth and hopes to pierce the mantle which encloses its core; his mastery of chemical processes, unaccompanied by any corresponding social control, has resulted in

widespread and increasingly dangerous pollution of the air and water on which he depends for life; his mastery of physical processes, likewise unaccompanied by any corresponding social control, has enabled him to release the explosive energies of the atomic nucleus in ways which may affect the fundamental constitution of matter in a manner beyond further human control and imperil the processes of biological reproduction; he is now, without having yet evolved an appropriate social control for such endeavours, seeking a mastery of weather and climate which could change profoundly, sometimes for better and sometimes for worse, natural environment, and the conditions of life dependent thereon, throughout the world; he is placing increasing reliance on electronic and cybernetic devices, likewise not yet subject to any appropriate social control, any error by which might produce far-reaching natural or political consequences of an irrevocable nature; molecular biologists, no longer content with the mutation of plants and animals, and also working outside any accepted social control, are now seeking a mastery of biological processes which envisages the biological and psychological reshaping of man.

These developments all transcend and bestride frontiers. As a minimum they call for common international rules; they may involve international liability.

There is, in the nature of things, nothing concerning most of these matters, all of them developments of the present century and most of them developments of the last twenty-five years, in the traditional textbooks of international law. Are they to be regarded as extra-legal phenomena which lawyers can hardly hope to understand and will be wise to leave to the scientists and technologists, if not permanently at least for some time to come? Or do they pose immediate problems for the law? The question is a fundamental one for it poses starkly the issue whether international law has or should have anything significant to say concerning these manifold developments which have completely transformed human life in our time and profoundly modified the basic elements of international relations.

Before venturing any answer to the question we will be wise to consider, with special reference to the question of liability for the objective risk of ultra-hazardous activities, how far these developments

have been reflected in the emergence of new legal instruments, precedents and rules of law. On some of these matters, notably aviation, pollution, nuclear energy and space, there are already accepted principles translated with varying degrees of authority and precision into positive law in the form of custom, judicial decision, authoritative declaratory pronouncement or treaty; as regards others the lawyers have barely begun to grapple with matters which are now the object of daily debate among the scientists. In seeking an overall view of the position we must be content with a general picture of some of the leading developments in each of the fields in which we already have at least embryonic rules of law and a general indication of some of the questions which may arise in other fields. In the light of such a survey we can attempt to define some of the questions of principle which require fuller consideration and to sketch some possible lines of development. What is now called for is a general view of the subject as a whole. There is already a copious and highly specialized literature on such matters as the liability of the operators of aircraft, liability for pollution, and nuclear liability, much of it by writers with great practical experience, and there is an extensive though more speculative literature concerning space liability. What is still lacking is a sustained attempt to view these and related matters as parts of a wider problem.

CHAPTER XII

A DECLARATION OF LEGAL PRINCIPLES CONCERNING ULTRA-HAZARDOUS LIABILITY?

Ultra-hazardous liability is clearly a matter with which international lawyers may expect to be increasingly concerned over a considerable period of time. It is one of the crucial problems which the progress of science and technology has posed for the law. The legal elements in the problem, which must be considered in a broader political and social context, include both large questions of principle and complex technicalities. Both the large questions of principle and the technicalities will require much further study; negotiations for international agreements concerning these matters may be protracted over a period of years; on some matters there may in the course of time be important international and national judicial decisions. Meanwhile the question arises whether any major step can be taken towards dealing with the problem as a whole in a responsible and authoritative manner corresponding to its importance.

The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, unanimously adopted by the General Assembly of the United Nations on 13 December 1963, affords a highly suggestive precedent. A Declaration of Legal Principles Governing Ultra-Hazardous Activities Generally, adopted in the same authoritative manner, would be a comparable growing point for the future development of the law. It is not premature to envisage the possibility and possible content of such a declaration.

One of the difficulties of the matter is that the scope of the problem, and the degree of uncertainty concerning future scientific and technological developments, will create a natural reluctance to formulate principles, and even more markedly to enter into firm obligations, not yet tested by practical experience. Any such declaration must therefore be in general terms.

It might nevertheless enunciate certain general principles which might conceivably be stated somewhat as follows:

1. The common interest of mankind in ensuring that the hazards of scientific and technological innovation and of continuing ultra-hazardous activities are equitably borne and do not fall upon their chance victim, and that such innovations and activities do not destroy, disrupt, disintegrate or pollute the natural environment on which human life and welfare depend or release forces having such a tendency which are liable to escape from human control, is a matter of public policy of general, profound and continuing international concern.
2. Every State has an obligation to co-operate in preventive measures for the avoidance of known and foreseeable hazards from ultra-hazardous activities in accordance with appropriate international conventions and regulations.
3. Every State has an obligation to participate in procedures of consultation and inquiry for the avoidance of unforeseen hazards before authorizing within its jurisdiction or under its authority scientific or technological innovations or continuing ultra-hazardous activities which may have a substantial influence on natural environment to the detriment of the world community or of other States or their nationals.
4. Every State has an obligation to avoid injury to the world community or to other States or their nationals from ultra-hazardous activities occurring or originating within its jurisdiction or undertaken on its behalf or with its authority.
5. Every State is liable for injury to the world community or to other States or their nationals from ultra-hazardous activities occurring or originating within its jurisdiction or undertaken on its behalf or with its authority.
6. Liability for injury from ultra-hazardous activities exists without proof of fault.
7. Every State is responsible for ensuring the provision of adequate financial security for the discharge of liability for injury from ultra-hazardous activities occurring or originating within its jurisdiction or undertaken on its behalf or on its authority; where the

potential liability exceeds the available resources international co-operation in the provision of such security is desirable.

8. Liability for injury from ultra-hazardous activities is limited in principle to a prescribed amount to be fixed in respect of particular hazards by international agreement or in default of such agreement by the law of the jurisdiction where the matter arises.
9. No State may plead jurisdictional immunity in a matter arising from an ultra-hazardous activity.
10. Disputes between States concerning ultra-hazardous liability not settled by agreement between the parties shall, unless the parties otherwise provide, be referred for decision to the International Court of Justice.
11. Injury from ultra-hazardous activities includes loss of life or personal injury and the destruction or loss of, or damage to, property or economic interests.
12. Ultra-hazardous activities comprise all activities which involve a risk of serious harm on an international scale which cannot be eliminated by the exercise of the utmost care; subject to any exception accepted by common usage as not involving such a risk they include all activities which involve or may occasion a substantial change in the natural environment of the earth or another State, significant pollution of air or water, the release of nuclear or other sources of energy liable to escape from human control, disturbance of the equilibrium of geophysical forces and pressures, the modification of biological processes, the creation of automata a major error of which may be irreparable, and impact damage from such sources as aircraft in flight and spacecraft.

Thirty years ago international law was described by a great scholar with deep insight into the political foundations of the world community, Alfred Zimmern, as an amalgam of survivals from past conditions, rules of etiquette, and anticipations of things to come, rather than a body of rules governing the life of the international community, an expression of the life of a true society commanding obedience because it commands respect as a necessary element in the life and progress of the society. The criticism was harsh, as those of us among his students, colleagues and admirers who were train-

ed in the law insisted at the time, but not wholly misplaced. It is much less applicable to the law as it has now evolved. How far it will have any continuing application to the law of tomorrow will depend in large measure on the progress made in bringing within a new world of law the impact of advanced science and technology upon contemporary society. A new synthesis of law, science and society is an essential condition of developing successfully a generally accepted and effective common law of mankind. A Declaration of Legal Principles concerning Ultra-hazardous Activities would be a useful element in the gradual development of such a synthesis.

Annex 657

A. Boyle, "State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?", *International and Comparative Law Quarterly*, 1990, pp. 1-26, pages 6-8

STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW: A NECESSARY DISTINCTION?

ALAN E. BOYLE*

I. INTRODUCTION

THE topic "International Liability for the Injurious Consequences of Acts Not Prohibited by International Law" has been on the agenda of the International Law Commission since 1978.[1] Despite adopting an ever narrower focus, it remains a difficult and controversial one. There are two major reasons for this.

First, at a theoretical level, it is not clear that the conceptual basis on which it is distinguished from State responsibility is either sound or necessary. Second, at a more practical level, it is questionable whether it represents a useful basis for codification and development of existing law and practice relating to environmental harm, the field in which the Commission has mainly located the topic.

From either perspective, it is liable to seem at best a questionable exercise in reconceptualising an existing body of law, or at worst, a dangerously retrograde step which may seriously weaken international efforts to secure agreement on effective principles of international environmental law. The purpose of this article is to explore the arguments for the new topic and to examine briefly the Commission's main proposals.

II. STATUS, ORIGINS AND SCOPE OF THE TOPIC

A. Present Status

The first special rapporteur presented his preliminary report to the Commission in 1980.[2] Four more reports,[3] a schematic outline[4] and five

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1. (1978) II–2 Y.B.I.L.C. 149 *et seq*.
2. (1980) II–1 Y.B.I.L.C. 247.
3. (1981) II–1 Y.B.I.L.C. 103; *idem* (1982) II–1 51; *idem* (1983) II–1 201; *idem* (1984) II–1 155.
4. *Idem* (1982), p.62; *idem* (1983 am.) II–1 223.

equality of States precluded claims of absolute freedom of conduct and absolute freedom from harm, and that the burdens of socially desirable activities had to be shared equitably.[46]

B. The Second Rapporteur's Approach and Draft Articles

The second rapporteur has retained the topic's basic conceptual framework, and the original schematic outline,[47] but his approach indicates significant changes in emphasis. The effect of these is:

(1) to focus more clearly on strict liability for transboundary harm as a primary duty, stronger than a negotiable expectation;[48] and
(2) to acknowledge the co-existing responsibility of States for breach of obligations of notification, negotiation and prevention of harm.[49]

Both changes further narrow the topic and its divergence from the regime of State responsibility for environmental obligations; they also make it easier to relate to State practice.[50]

These points are reflected in the new draft articles, which are based on three guiding principles similar to those of the first rapporteur:[51]

(1) every State must have the maximum freedom of action within its territory compatible with respect for the sovereign equality of other States;
(2) the protection of the rights and interests of other States requires the adoption of measures of prevention and reparation for injury;
(3) the innocent victim should not be left to bear his own loss.

Thus the articles themselves continue to acknowledge the concept of sovereign equality, and they oblige States to take all reasonable measures to prevent or minimise transboundary injury and to co-oper-

46. (1983) II–1 Y.B.I.L.C. 203: "the starting point is the exclusive authority that States enjoy in respect of national territory and the correlative duty they owe to other members of the international community . . . they discharge this duty by reaching agreements which accommodate their control or respective interests". See also *Island of Palmas Arbitration* (1928) II R.I.A.A. 839, and (1980) II–1 Y.B.I.L.C. 260, paras.45–46.
47. (1986) II–1 Y.B.I.L.C. 148, para.12.
48. *Idem*, pp.154–161, paras.42–69; (1987) UN Doc.A/CN.4/405, paras.67–69. See *infra* section IV.D.
49. Y.B.I.L.C. *idem*, pp.152–160, paras.34–41, 63–64. See *infra* section IV.B; (1989) draft Art.5 and (1989) UN Doc.A/CN.4/423, para.48.
50. Y.B.I.L.C. *idem*, paras.12, 41, 63.
51. (1988) UN Doc.A/CN.4/413, paras.85–86.

ate with other States for this purpose.[52] The 1989 draft introduces new articles dealing with assessment, notification, information and negotiation.[53]

Where injury does occur, reparation must be negotiated according to criteria partly indicated in the commentary.[54] Two points are clear. Liability will be strict, in the sense that it is founded on cause, not on lack of due diligence or breach of obligation.[55] The source State will not be liable in full, so the victim will have to bear the resulting injury to some extent,[56] a view consistent with existing strict liability conventions on oil pollution and nuclear risks.[57]

The new draft articles also redefine their general scope by introducing thresholds of risk, which must be "appreciable", and injury, which must be "appreciably detrimental".[58] Thus, some degree of probability and seriousness of harm is now implied, albeit imprecisely. On the one hand, the rapporteur has not confined himself to those activities which are "ultra-hazardous" in the sense that very serious harm on a large scale may occur; indeed his use of the term "appreciable injury" is drawn from the Commission's work on international watercourses, where it was thought to mean merely harm that was more than perceptible but less than "serious" or "substantial".[59]

On the other hand, after initially confining the topic to risks involving only a greater than normal likelihood of injury,[60] the rapporteur has now responded to criticism by including both "the low probability of very considerable (disastrous) transboundary injury and the high probability of minor appreciable injury" arising from "the use of things" whose physical properties, location or use make injury likely.[61]

The implications of this redefinition of risk are important. The draft will now apply both to recurring discharges of moderate pollution, from a smelter, for example, where the risk may be high, and to large-scale but one-off accidents such as Chernobyl or Bhopal. In these cases the risk was probably not high, but the likelihood of serious harm if it did occur was very great. This looks like one sort of risk the rapporteur should be dealing with; it is certainly covered by existing oil pollution

52. Arts.6–8 (1989) UN Doc.A/CN.4/423.
53. *Idem*, Arts.10–17.
54. *Idem*, Art.9, paras.69–71.
55. (1987) UN Doc.A/CN.4/405, para.60; (1988) UN Doc.A/CN.4/413, para.113; (1989) UN Doc.A/CN.4/423, paras.44, 48.
56. *Idem* (1988), para.112.
57. See *supra* n.26.
58. Draft Arts.1, 2 (1989) UN Doc.A/CN.4/423, and para.23.
59. (1988) UN Doc.A/CN.4/413, para.42; (1982) II–1 Y.B.I.L.C. 98–99, paras.130–141.
60. UN Doc. *idem*, para.30.
61. (1989) UN Doc.A/CN.4/423, Art.2. The 1988 draft of Art.2 had referred to the use of "substances".

and nuclear liability conventions,[62] and its earlier apparent exclusion from the topic was remarkable.

One further limitation is introduced by the new draft articles. The source State will be liable only if it knew or had the means of knowing that an activity involving risk was being or would be carried on in its territory or under its protection or control.[63] In itself this mirrors existing case law, notably the *Corfu Channel Case*.[64] But it amplifies a point implicit in draft Articles 1 and 2, that substances or activities involving no foreseeable risk of harm carry no liability under these articles.[65] This will absolve States from liability where, say, a chemical is used whose toxic properties are not at first appreciated and could not have been until the harm itself appeared, or where accidents occur in respect of a process not initially thought to be dangerous.[66] Liability it seems might arise in such cases only once the risk is appreciated.[67]

To summarise briefly, the present draft deals with a category of foreseeable environmental risks associated with activities which cause or may cause "appreciable" but not necessarily serious harm through the use of "things" whose properties or use make transboundary injury likely to occur, notwithstanding any precautions that have been taken. Compared with earlier drafts, this is now a prescription for dealing with a broader range of environmental injury; as we shall see, however, it remains open to question how far it represents an adequate basis for codification or development of new or existing law.

IV. THE TOPIC'S CONCEPTUAL VIABILITY: RELATIONS WITH STATE RESPONSIBILITY

THROUGHOUT the Commission's work, references abound to the conceptual distinctions between State responsibility and international liability.[68] It is worth summarising these, before considering the validity of separating the two topics.

A. "Responsibility" and "Liability"

Initially the Commission used these terms interchangeably, but it eventually adopted the view that "responsibility" was appropriate in cases

62. See *supra* n.26.
63. 1989 draft Arts.1, 3. The 1989 articles introduce a presumption of knowledge where there is no evidence to the contrary.
64. [1949] I.C.J. Rep. 3; see (1988) UN Doc.A/CN.4/413, paras.56 *et seq*.
65. UN Doc. *idem*, paras.24–27, 82–84.
66. *Idem*, para.27.
67. *Ibid*, and see 1987 Report, UN Doc.A/CN.4/405, para.14.
68. See especially (1969) II Y.B.I.L.C. 229; *idem* (1973) I 7–14; *idem* (1981) II–1 104–107; *idem* (1986) II–1 145–154.

Annex 658

J. Cavender & J. Jager, "The History of Germany's Response to Climate Change", *International Environmental Affairs*, 1993, pp. 3-18, pages 6-9

ARTICLES

The History of Germany's Response to Climate Change

JEANNINE CAVENDER AND
JILL JÄGER

ABSTRACT. *The Federal Republic of Germany committed itself in June 1990 to reduce its carbon dioxide emissions by 25 percent of the 1987 level by the year 2005, as a measure of slowing down the increase in the greenhouse effect. The issue of a human-caused climate change, however, did not surface in Germany for the first time just a few years ago. The potential threat was recognized a half a century ago. This article traces the history of the German climate change debate in the last 50 years and discusses the forces and events that shaped it. The way in which various societal actors—among them scientists, the government, industry, non-governmental organizations (NGOs) and the media—entered into and influenced the debate is also examined. Unfolding the history of the global warming debate in Germany reveals how the country's current policy stance evolved.*

Introduction

In June 1990, the German Cabinet agreed to take internationally unprecedented action to reduce its carbon dioxide (CO_2) emissions.[1] This policy is based on what has emerged as a distinctly German environmental strategy called the Vorsorgeprinzip (the precautionary principle), which demands that action to prevent environmental damage be taken even before scientific certainty is achieved.

Germany's decision to approach global warming with long-term considerations is surprising in light of its recent history: Until the last decade, Germany was Western Europe's greatest polluter.[2] Twenty years ago, only a few specialists in the country seriously considered that human activity could influence climate on a global scale. Today, German scientists and politicians alike are convinced of the need to avert a potentially catastrophic warming of the

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fears within German society about the possibility of human-induced climate change surfaced long before the greenhouse effect became a household word.

Throughout the 1960s, there was little concern within Germany about a changing climate. The media occasionally presented warnings that fossil-fuel combustion could affect the global climate, but the research that generated these articles always came from the United States or elsewhere abroad.[8] Until the mid-1970s, German scientists learned about the potential for anthropogenic climate change primarily from their interactions with the international scientific community.

International initiatives in climate studies also formed at this time, including the creation of a worldwide satellite network to gather climate data and the development of a monitoring system to observe increases in carbon dioxide. These initiatives began to draw broader interest in climate change within the German scientific community. Finally, at the beginning of the 1970s, German researchers demonstrated their concern and became more outspoken about the issues, bringing the Federal Republic into the developing international debate about human impact in the global climate.

Part II

1970–1980: Foundation for change

AN INCREASE IN CLIMATE RESEARCH. The number of scientists involved in climate research increased dramatically in the 1970s, as did the amount of funding allocated for such research. Hamburg and Mainz formed the nuclei for the expansion of climate studies in Germany.[9] As climate research intensified in Germany, scientists organized a series of conferences about human impact on the climate, including the 1976 Dahlem Conference on Global Chemical Cycles and Their Alterations by Man (held in Berlin)[10] and a meeting on the global carbon cycle in Hamburg sponsored by the Scientific Committee on Problems of the Environment (SCOPE) in the spring of 1977.[11]

The media also paid more attention to climate change. Scientists began publishing articles on the greenhouse effect, arousing public awareness about the possibility of global warming.[12] A feature article in *Bild der Wissenschaft*, written by Hermann Flohn in 1975, presented a catastrophic scenario of a greenhouse world.[13] A newspaper that same year quoted him as saying, "The climatologists are now playing the role of Cassandra before the fall of Troy: had they believed her, Troy would have been saved."[14] Several years later, Wilfred Bach published the popular book, *Gefahr für unser Klima* (Our Threatened Climate), the first book of its kind to present to the public the threat of human-induced global warming and how it could be avoided.[15]

At the same time, however, scientists were debating whether the earth was warming or cooling.[16] Although a consensus could not be reached about

whether palm trees or penguins would soon flourish in Germany, the notion of a climate catastrophe dominated both scenarios. Such debate within Germany mirrored the controversy within the international scientific community; the suspicion that humans could alter the climate was gaining potency.[17]

One episode in the mid-1970s regarding the intentional manipulation of the weather helped instill in the German people an understanding of how powerful humans had become in influencing the climate. Initial concern was precipitated by leaks to the press at the end of the Vietnam War that the United States had flown thousands of cloud-seeding sorties in an attempt to gain an advantage in fighting guerrilla warfare.[18] Fears erupted in Europe about the possibility of "weather wars" between the United States and the Soviet Union, since both superpowers were developing technology to manipulate the weather.[19] By the end of 1977, 21 nations signed the Geneva Treaty to Prohibit the Hostile Use of Weather Modification.[20]

RISING ENVIRONMENTALISM AND THE BIRTH OF VORSORGE. Even before the Germans began to debate climate change seriously, important events were taking place in the environmental arena. In the 1960s, the German public became sensitized to environmental problems through the publication of popular books such as Rachel Carson's *Silent Spring*. To a certain extent the environmental movement in the United States was exported to Germany. In addition, some measures had already been taken at both the state and federal levels for nature protection, air quality, water quality, waste removal, and noise pollution. Nonetheless, environmental protection was not yet a separate item on the national political agenda.[21]

The change began in October of 1969 with a speech given to Parliament by Chancellor Willy Brandt. The speech mentioned the need to address environmental problems.[22] Underlying this speech was the pressure the government felt to develop an environmental program before the 1972 Stockholm Conference on Humans and the Environment. By September 1971 the Cabinet had agreed to Germany's first Environment Program, which included basic declarations that have become part of the environmental policy of all parties, industrial organizations, and other social sectors. Based on three principles—Vorsorge (precautionary measures), Polluter Pays, and Industry-Government Cooperation—the program provided the philosophical underpinnings that have guided all subsequent environmental policies. Vorsorge has been the most important of these principles for the global warming debate. It declares that, in the face of an environmental threat, the risks of inaction are too great to delay preventive measures, even if scientific certainty has not yet been achieved. This declaration became pivotal in Germany's response to the greenhouse effect in the late 1980s.

THE ENTRANCE OF GLOBAL WARMING INTO ENERGY POLICY. The energy crises of 1973/1974 and 1978/1979 forced both of the major parties in Germany to back away from dependence on foreign oil.[23] One response of the government was to encourage greater reliance on domestic coal. A second

response was to support and subsidize the expansion of nuclear power throughout the decade.

Despite the demand for greater coal consumption at that time, the coal industry foresaw the potential implications the greenhouse effect could have on this demand and, consequently, began to confront the issue early. After reading publications of the late 1970s by Hermann Flohn about the effects of fossil-fuel combustion on the earth's temperature, Gunter Zimmermeyer, the environmental director of Germany's hard coal mining association, began to include consideration of the CO_2 question in his recommendations for Germany's energy policies. In a paper Zimmermeyer co-authored for the 1980 World Energy Conference in Munich, for example, he proposed a plan that would increase the use of domestic coal and nuclear power while reducing CO_2.[24]

The nuclear energy industry, seeking to contribute a much larger share to Germany's energy supply despite burgeoning public opposition, began to broadcast its knowledge about the greenhouse effect. Since nuclear energy conversion does not involve the emission of greenhouse gases, the industry was able to use the greenhouse effect as an argument for greater use of nuclear power. Although used only as a secondary argument in the 1970s, by 1986 global warming was used as a major justification for the nuclear power industry's continued existence.[25]

Bitter disputes about the future of German energy policy arose in Parliament in the 1970s, splintering the solidarity of the Social Democratic Party (SPD), which was in power at the time. Evidence of this intra-party friction appeared as early as 1975. The *Frankfurter Allgemeine Zeitung*, a widely read national newspaper, ran an article that year quoting members of the SPD as supporting nuclear power, ostensibly because fossil fuels were known to emit CO_2 and might cause global warming.[26] SPD politicians began to use this argument at the same time the anti-nuclear movement was taking to the streets to protest the government's policy of supporting nuclear expansion. In 1976 and 1977, the CDU also began to make the connection between energy policy and carbon dioxide emissions. During this time, the party invited scientists to discuss the role of CO_2 with regard to climate change. By the end of the 1970s, however, the government had only just begun to grasp the implications of the global warming debate on German energy policy.[27]

It was not until the end of the decade, during preparations for the first World Climate Conference, that the government began to view climate change as more than a peripheral issue. The Federal Environment Agency had taken the lead as the first governmental body to research the issue,[28] yet its effort had little effect on national policy.[29] The government's first major initiative on the issue began in September of 1979 when the Federal Cabinet agreed to launch a nationally coordinated climate research program. This step was taken by the German government concurrently with the formation of a Europe-wide climate research program called the European Climate Action Plan.[30] Due to

a lag in interest after the World Climate Conference in 1979 and to squabbles among the different ministries about which one should coordinate the program, however, the German Climate Research Program was not actually implemented until 1984.[31]

Part III

1980–1990: From research to action

By the end of the 1980s, disparate forces generated by increasing scientific research on climate change, by the environmental movement, by the debate about energy policy, and by concern about stratospheric ozone depletion converged, forming a consensus within the political arena to address global warming. With the establishment in 1987 of the highly influential Enquete Commission's "Vorsorge zum Schutz der Erdatmosphäre" (Precautionary Measures for the Protection of the Earth's Atmosphere) and the ensuing ministerial decision to reduce carbon dioxide emissions by 25 percent, Germany demonstrated the seriousness with which it approached the issue.

The forces that culminated in this decision developed abroad, but they had distinct impacts within Germany once they took root there. First, evidence of a significant increase in global carbon dioxide emissions caused scientific concern to arise abroad. This concern gained momentum within Germany in the 1970s and especially in the 1980s as prominent German scientists like Wilfred Bach, Egon Degens, and Hartmut Graßl continued to bring their increasing knowledge about global warming to the press. The trend created pressure on the German government to address global warming. Establishment of a government-sponsored research program on climate change in 1984 manifested the country's growing readiness to confront the issue. It also showed the importance the scientific debate had gained within the government.

Second, environmentalism began to rise in Germany. The movement, which had its origin across the Atlantic, increased the potency of environmental issues within Germany's political arena. This phenomenon made it politically attractive by the 1980s for politicians to take on the issue of global warming. Germany's environmental movement received a dramatic boost in 1981, when scientists concluded that more than half of the country's trees were dead or dying. The unexpected crisis jolted the German people, whose culture and folklore grew out of rich forests like the Odenwald and the Schwarzwald. The shock left behind the growing suspicion that this time the country had waited too long before heeding warnings of environmental danger. Despite the dearth of scientific evidence, a consensus emerged rapidly within the media, the public, environmental groups, and the government; they all indicted air pollution as the primary cause of this phenomenon they called Waldsterben ("forest dieback").[32] A dramatic scene depicting a forest choked by industrial

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Y. Fumikazu, “Itai-Itai disease and the countermeasures against cadmium pollution by the Kamioka mine”, *Environmental Economics and Policy Studies*, 1999, pp. 215-229

Environmental Economics and Policy Studies (1999) 2:

Itai-Itai disease and the countermeasures against cadmium pollution by the Kamioka mine

Fumikazu Yoshida/ Akio Hata/ and Haruo Tonegawa

Abstract. The Itai-Itai disease case is one of four major pollution-related lawsuits occurring in Japan after World War H. This paper, which is based on investigations of the pollution source, the Kamioka mine, considers (1) the history of the disturbances to the environment caused by the Kamioka mine; (2) the Itai-Itai disease suit; (3) the pollution nprevention measures and methods of the Kamioka mine and refinery; (4) the reduction of cadmium pollution in the Jinzu River; and (5) the actual application of the "polluter pays principle". The authors conclude that the court decision and the agreements between the victims and Mitsui Mining made it possible to control and reduce the damage caused by cadmium pollution and four additional, contributory factors.

Key words: Itai-Itai disease, Cadmium pollution, Kamioka mine, Countermeasures, Polluter pays principle (PPP)

1 Introduction

Osteomalacia, softening of the bones as a result of renal tubular dysfunction, is now commonly known as Itai-Itai disease. It attacks women who have borne several children; during its final stages, when patients can neither stand, walk, nor talk, all they say is "itai-itai" (Japanese for "It hurts! It hurts!")-hence its common name. In one of the worst cases, a patient lost 30 cm as a result of pressure fractures of the vertebrae; and another patient suffered many fractures, 28 in the ribs alone.

The issue was recognized as serious when cases of Itai-Itai disease and renal tubular dysfunction were found among residents in a number of cadmium polluted areas throughout Japan, most seriously in the district of Toyama near the Jintsu River but also in Tsushima, Nagasaki Prefecture, the Kakehashi River basin in Ishikawa Prefecture, and the !chi River basin in Hyogo Prefecture.

The Japanese people have higher levels of daily cadmium intake and a higher concentration of cadmium in the renal cortex than any other group of people in the world. Because high cadmium levels have been found in rice grains, it is reasonable to suppose that this is the route by which cadmium enters the human body, from which it follows that the problem of toxic

pollution by cadmium is not confined to the locality in which the cadmium was originally dispersed into the soil.

In 1972 victims of Itai-Itai disease living in the Toyama district brought a case against the main polluters (the Mitsui Mining and Smelting Co.). After the court had reached a decision and made a judgment against Mitsui, the victims and the corporation held negotiations and agreed on three points: (1) that compensation should be paid to the sufferers of Itai-Itai disease; (2) that compensation should be paid to those whose fields and crops had been polluted, as well as . compensating them for the detoxification of contaminated farm soil; and (3) that pollution prevention systems should be installed at the Kamioka mine and refinery. This last requirement has proved to be the most effective of the measures taken, as the company agreed to allow the victims, their lawyers, and interested scientists to survey and inspect the facilities without hindrance and at the company's expense.

Subsequently, sufferers, lawyers, and scientists, every year from 1972, have carried out an annual inspection of the Kamioka mine and refinery. In particular, the unhampered on-site inspections, the collection of data and disclosure of information about the types of material involved in the process, updated reports on the quality of process water and the conditions of drainage and emission, and the state of the soil, groundwater, and by-products have been powerful measures in preventing further pollution.

This paper, which is based on the reports of those inspections, considers the following issues: (1) the history of the disturbances to the environment caused by the Kamioka mine; (2) the Itai-Itai disease suit; (3) the pollution prevention measures and methods operated by the Kamioka mine and refinery; (4) the reduction of cadmium pollution in the Jinzu River; and (5) application of the polluter pays principle.

2 History of environmental damage caused by the Kamioka mine

In general, a mining operation consists of three stages: (1) the mining process; (2) the ore dressing process; and (3) the refinery process. All three stages have an effect on the environment. Although the metal-mining industry has played an important role in the modernization of Japan, the extensive development of the industry has also been responsible for many instances of environmental disturbance and damage.

In 1874 the Mitsui Corporation bought the Kamioka mine; in 1886 it introduced modern technology; and in 1889 it brought all the Kamioka mine operations under the umbrella of one administration. Within a year (in 1890), the local air was sufficiently polluted by White's rotary furnaces for the residents of Kamioka Town to lodge a complaint: This was the first instance of a formal protest by residents.

Since 1905 the main work of the pit has been the mining of zinc ore, which from the beginning

required the development of technology to treat the poorer quality ore and to refine its dressing process. In 1909 Mitsui Corporation installed Potter's preferential flotation system to cope with its ore-dressing process. As means to treat the poor zinc ore were developed, the amount of ore increased, and the preferential system resulted in finer particles of tailing. The tailing slurry was thrown into the Jinzu River and was then precipitated in the rice paddies of the Toyama district. At the same time, the first cases of people suffering from Itai-Itai disease were reported.

After 1931 the organization representing the farmers, peasants, and fishermen of the Jinzu River basin repeatedly asked the Mitsui Mining Corporation to furnish proper facilities to prevent pollution; in response, Mitsui built its first tailing dam in the Shikamadani Valley (1931). The period of war, 1930-1945, saw a fourfold increase in the production not only of zinc but of zinc waste, which meant that more extensive areas of land in the Toyama district in and around the Jinzu River basin became contaminated.

Although the main aims of the "innovations" introduced after World War 11 (mass production and the saving of manpower) were designed to effect speedy restoration of the Kamioka mine and stimulate high economic growth, it took nearly 10 years for the Kamioka mine to reach prewar production levels.

As time went on, further innovations were introduced. In 1966 a significant change was made in the method of dressing ore: Instead of the direct bulk differential flotation process it had employed until then, the company adopted integrated bulk differential flotation. This process markedly increased the amount of ore-dressing treatment undertaken, which in turn led to a massive increase in tailing waste, with particles far finer than before. Because insufficient measures had been taken to prevent the random disposal of tailing waste (an earlier example of which was the collapse of the tailing dam at Wasabo in 1956), this inevitably led to a severe increase in pollution emanating from the Kamioka mine.

Although installation in 1944 of a German zinc electrolysis plant was intended to assist the recovery of cadmium, the period of high economic growth during the 1960s saw the production of vastly increased amounts of treated ore. The total loss of cadmium from the main processes of the Kamioka mine and refinery reached its highest recorded levels in 1970 (Kurachi et al. 1979).

3 Itai-Itai disease suit

When, after the end of World War 11, Dr. Noboru Ragino, a physician of Fuchu Town, Toyama Prefecture, reopened his private clinic in the town, he was alarmed by the number of patients who came to see him suffering from particularly severe, painful attacks of osteomalacia. It was not until 1955, however, that he and Dr. Minoru Kohno alerted the general public to the nature of Itai-Itai disease.

Although over the next 2 years a number of reports were published insisting that the osteomalacia was simply the result of vitamin deficiency, Dr. Hagino continued to investigate the possibility that other causes were responsible. He strongly suspected that the hazardous outflow from the Kamioka mine was a likely source of the disease because the area of agricultural land contaminated by the Kamioka mine perfectly overlapped the area from which the afflicted patients came.

In 1961, after Dr. Jun Kobayashi had published his data on the cadmium content of rice obtained from the contaminated land, Dr. Hagino and Dr. Kin-ichi Yoshioka published a report that set out to show that cadmium played an etiological role in the development of Itai-Itai disease. Two years later, in 1963, the Ministry of Health and Welfare instituted a study group to inquire into the disease. The group published its report in 1966, concluding that, in conjunction with other factors such as nutritional deficiencies, cadmium was one of the causes of Itai-Itai disease.

The victims were not happy with this report, and that same year they set up an organization (Task Force on Itai-Itai Disease) to ensure that the real culprit, cadmium, should be publicly acknowledged. In 1967 the task force entered into negotiations with the Mitsui Mining and Smelting Co., but nothing fruitful emerged from the discussions.

It appeared to the task force that the political and administrative approaches were likely to remain closed, so it decided, as a last resort, to take legal action. Supported by local residents and local government (town), more than 300 lawyers from all over Japan were organized to present the suit, which they filed against the Mitsui Corporation, basing it on Article 109 of the Mining Law, which covers a polluter's strict liability (Gresser and Morishima 1981). Soon after the appeal was brought to court, the Ministry of Health and Welfare declared that "Itai-Itai disease is caused by chronic cadmium poisoning during times of pregnancy, lactation, or when there is an imbalance of internal secretion, aging, a lack of calcium, etc."

In 1971, the Toyama district court handed down a decision that accepted the victims' claims as proven. Although Mitsui Mining and Smelting Co. appealed the decision to the Nagoya High Court and disputed the causality, the verdict for the victims was upheld. On the basis of this decision, Mitsui Corporation made reparations to more than 200 individuals suffering from the disease (Lawyers for Itai-Itai Disease Sufferers 1971-1974).

4 Pollution prevention after the "Itai-Itai disease suit"

Since 1972 the sufferers, lawyers, and interested scientific parties have carried out inspections of the Kamioka mine and refinery. The first two inspections revealed that: (1) the total amount of cadmium being discharged into the Jinzu-Takahara River was 35 kg/month (1972); (2) the

total amount of cadmium being discharged into the air was 5kg/month (1972); (3) although both Mitsui and the agents for the victims checked the same samples, the data did not always coincide, so it could not be accepted as an accurate measurement; (4) discharge from abandoned mines had extensively polluted the Jinzu-Takahara River (Coalition of Sufferers by Cadmium along the Jinzu River Basin and Investigation Committees 1978).

Five working groups were organized to carry out remedial measures, which included the following.

1 Controlling the effluent from the Kamioka mine and refinery (Kyoto University)

2 Controlling smoke emissions from the Kamioka refinery (Nagoya University)

3 Monitoring the balance of materials at the Kamioka refinery (Tokyo University)

4 Monitoring the sedimentation and outflow of heavy metal into the Jinzu-Takahara River system (Toyama University)

5 Monitoring the structural stability of the tailing dams at the Kamioka mine (Kanazawa University)

The Kamioka mine, the largest zinc mine in Japan, is located midway along the northwest coast of Japan's crescent-shaped main island, Honshu (Fig. 1). Two plants employ a bulk-differential flotation process to refine the crude ore from the mine to lead, zinc, copper, and graphite concentrates. The lead concentrates are roasted and sintered, after which the coarse sinter is fed into a blast furnace. The crude lead is refined in electrolysis cells. The by-products of the lead refinery are gold, silver, and bismuth. The zinc concentrates are roasted into zinc calcine, which is then leached and refined in electrolysis cells. The by-products of the zinc refinery are sulfuric acid and cadmium.

As a result of closure of its Mozumi mine, the Kamioka Mine and Smelting Co. has recently changed the material used in its lead refinery processes from lead to lead batteries, and it has begun to import zinc ore from the Huanzala mine in Peru.

The effluent from kamioka mine is managed as follows: The average amount of water drawn from the mine is about 100000m^3/day. The mine water is divided into two grades: clear water and muddy water. The tailing slurry from the ore dressing mills is pumped out to the dam; and about half of the polluted water is recycled at the mills. After the tailing slurry has been separated into slime and sand, it is dumped onto the river bank or into standing water; about half of the effluent from the tailing slurry is reused.

Drainage of effluent and waste water from the kamioka mine and refinery is monitored at eight authorized checkpoints: (1) the Wasabo tailing dam; (2) the Rokuro zinc plant; (3) the Shikama ore dressing, lead, and sulfuric acid plant; (4) the Shikamadani tailing dam; (5) the Atotsu audit mouth; (6) the Otsuyama audit mouth; (7) the Masutani tailing dam; and (8) the Mozumi ore dressing plant (Fig. 2).

The total amount of effluent water is 110000m^3/day. Thanks to the separation of clear from

muddy water, the recycling of process water at the ore dressing plant and the electrolysis cells, and an improvement in the process of the wastewater, the total amount of cadmium discharged has been reduced from 35 kg/month (1972) to 5kg/month (1997) (Fig. 3). At the same time, recycling the process water has brought about a savings of both materials and reagents; and OAkg/month in 1997. Apart from any unpredictable consequences that might result from a strong earthquake, scientists have ensured the stability and structural safety of the tailing dam.

5 Reduction of cadmium pollution in the Jinzu River

The Jinzu River, called the Takahara River at its source, arises in the Hida Mountains, an area affected by heavy winter snow. The river flows northward toward the Japan Sea (Fig. 1). The background cadmium level of the upper eaches of the Jinzu-Takahara River, unpolluted by the

Kamioka mine, is never more than 0.1 ppb. The cadmium level downstream of the Kamioka mine, on the other hand, can be as high as 10ppb

The total amount of known cadmium discharge from the eight authorized drainage points is about 5mg/s, and it is 1-3mg/s from the abandoned mines. At the Shin-Inotani Dam, however, which is located downstream of the Kamioka mine, the cadmium discharge into the river water can be as high as several tens of milligrams per second.

Attention was therefore paid to locating other likely, although at that time that runs underneath the zinc electrolysis plant from a nearby power station. unconfirmed, sources of pollution. The chief suspect was an underground tunnel that runs underneath the zinc electrolysis plant from a nearby power station. Measurements taken in 1977 revealed that the cadmium discharged from this channel accounted for as much as 70% of the pollutants from all outlets. At the same time, the quality of the groundwater from the drilling wells at the Rokuro electrolysis plant suggested that the plant might be an even more serious source of contaminants. Thorough investigation into the cause of the pollution linked to the underground tunnel and measures taken to counteract groundwater pollution have been both the most important and the most difficult items on the agenda for 20 years.

When the underground channel was inspected, it was found that groundwater with a high cadmium content issued from (1) an open sewer at Rokuro, (2) the drainage pond of the Higashimachi power station, and (3) the Rokuro dumping yard (Fig. 4). The Kamioka Mining and Smelting Co. therefore agreed to take action to protect the groundwater system from pollution to: (1) prevent leakage of contaminated groundwater into the channel; (2) pump up the contaminated groundwater through a recovery well; (3) cut off the infiltration of Rokuro Valley water into the ground; (4) analyze the quality of the groundwater at the site of the Rokuro electrolysis plant; and (5) repair or renew the floor and tanks of the Rokuro plant (Fig. 4).

Although as a result of these measures cadmium discharge from the channel fell from 21 kg/month in 1977 to 7 kg/month by 1980, during the period 1980-1990 the cadmium discharge did not change (Fig. 3). Hence in 1990 the Itai-Itai disease sufferers requested that the old electrolysis plant be rebuilt. The following year, 1991, the company spent ¥6 million to reconstruct the electrolysis plant with the aid of Belgium technology.

During the reconstruction it was discovered that the soil under the new plant, which was built alongside the old plant, was also severely contaminated with cadmium and zinc. The company therefore drilled cores at 15 sites to survey the contaminated soil and groundwater. On the basis of this survey, they have extended the recovery tunnel, which, for the purpose of pumping up the groundwater, was excavated along the eastern margin of the polluted area.

Use of the tunnel and the operation of the new plant have brought about a reduction of around 2-3 kg/month in the cadmium discharge. After 1995 the company spent ¥90 million to pump up the contaminated groundwater in the Hokuriku Electric Power Company channel. As a result of these measures, the cadmium discharge from the Hokuriku Electric Power Company channel dropped 0.3 kg/month after 1996 (Fig. 3). The mean concentration of cadmium in the river water at the Jinzu third dam fell from 1.5ppb in 1968 to 0.16ppb in 1977. After 1980 the mean concentrations of cadmium in river water at the Jinzu first dam and the Ushigakubi irrigation canal have been 0.1-0.2ppb, which is approaching the background level of cadmium found in the nonpolluted area since 1988.

Because the cadmium discharge from the Hokuriku Electric Power Company channel fell to about 0kg/month after 1996, the mean concentration of cadmium in river water anywhere along the Jinzu River was 0.1 ppb level (Fig. 5). The mean concentration of cadmium found in sediment at the Jinzu first dam fell from 16-18 ppm in 1968 to 1.39 ppm in 1976. Although since 1986 the level has been less than 1ppm, this figure is slightly higher than that found in the nonpolluted area (less than 0.5 ppm).

6 Situation of the "polluter pays principle"

During the summer of 1972, the Itai-Itai disease case was finally settled, and the victims came to an agreement with Mitsui Mining and Smelting Co. As a result of the agreement soil prevention measures were put into operation; but things did not go as smoothly as had been expected. This was because the assessors were obliged to designate an area and make a plan to begin soil pollution prevention as a public works measure. As a result, between 1974 and 1977 more than four attempts were initiated to designate land as soil pollution prevention areas, progressing from the first attempt when 1500ha was designated to the third attempt when more than 1000 ha was stipulated for soil dressing. There was, however, a "rollback" against the view of the Ministry of Health and Welfare on the cause of Itai-Itai disease, and consequently the

local government of Toyama Prefecture, which had planned the land use project, drastically changed its plans for paddy fields contaminated by cadmium. The result was a delay in the public works project. As for the cause of Itai-Itai disease itself, the International Symposium on Itai-Itai Disease, Environmental Cadmium Pollution and Countermeasures, held at Toyama in May 1998, reconfirmed that Itai-Itai disease is indeed caused by cadmium poisoning (Abstracts of communications, international symposium on Itai-Itai disease, environmental cadmium pollution and countermeasures 1998).

At this point we need to clarify the roles played in this affair by the local governments, and we must therefore distinguish between the town or city government and the prefectural government. Because they have different allegiances, they sometimes act at cross purposes. The town or city governments, being closer to their constituencies, tend to support the victims by both political and financial means. The prefectural governments, on the other hand, are more sensitive to (and more easily swayed by) powerful pressure from industry and from the guidelines laid down by the central governments; hence their policies do not always favor the victims.

The first pilot scheme (Table 1), which was undertaken from the fiscal year 1979 to the fiscal year 1984, covered a small area of only 90ha, amounting to approximately ¥2.4 billion in business expenses, with the share to be borne by the industry fixed at a rate of 35.15%, equal approximately to ¥0.88 billion. From fiscal year 1983 to fiscal year 1994, more public works projects covering 441 ha with expenses of ¥12.4 billion were planned; but owing to the revision and reduction of the project in the middle of its operation, the project was cut to cover 356 ha, and the cost was cut to approximately ¥10 billion; the proportion of the cost to be borne by the industry rose slightly to 39.39%, equivalent to ¥4 billion (Table 1).

A third area of the 437 ha was next designated for treatment from the fiscal year 1992 to the fiscal year 2004, at a cost of ¥25.5 billion, with the entrepreneur bearing 39.39% of the burden (Table 1), equivalent to approximately ¥10 billion, although the converted land excluding agricultural land eventually extended to 563ha.

The reason for the increase in the land area to be converted in the third district selected for reclamation was the result of an increase in the area of land the local authorities planned to sell as a site for a housing complex and industrial plants. This decision, however, led to the question that had been previously overlooked: Who would take over and utilize the decontaminated land because once the land

Now, although more than 30 years have passed since the Itai-Itai disease case was brought before the court, the Toyama prefectural government and Mitsui Mining and Smelting have succeeded in postponing any further measures to prevent soil pollution and have also succeeded in reducing both the area designated for soil restoration and the ratio of expenses to be borne by the entrepreneur.

With regard to the polluter pays principle, the situation as it relates to Mitsui Mining and Smelting is this: On August 10, 1972 Mitsui Mining and Smelting made an agreement with the victims' organization with regard to the following items: (1) compensation for Itai-Itai disease victims; (2) clean-up of soil pollution; and (3) prevention of further pollution. Compensation paid by Mitsui Mining and Smelting based on item (1) was ¥3.7 billion overall, equivalent to ¥8.9 billion in 1996; ¥1.5 billion for nursing allowances, equivalent to ¥2A billion in 1996; ¥2.6 billion for medical expenses, equivalent to ¥3.2 billion in 1996; and ¥7.5 billion in total equivalent to ¥14.6 billion in 1996. Expenses for soil pollution prevention measures under item (2) were, as we have already seen, approximately ¥0.9 billion for the first project, equivalent to approximately ¥1.1 billion in 1996; approximately ¥4 billion for the second project, equivalent to approximately ¥4.6 billion in 1996; and ¥4.9 billion altogether, equivalent to ¥5.7 billion in 1996. Although approximately ¥10 billion has been estimated for the third project, this figure is likely to be lowered before the project is completed. In addition, compensation for the suspension of planting and the reduction of rice production in paddy fields contaminated by cadmium by more than 1ppm amounted to ¥11.8 billion altogether, equal to ¥14.1 billion in 1996. The total amount of compensation originally promised still exceeds the amount of money Mitsui Mining and Smelting has so far paid for soil pollution clean-up measures.

The accumulative total of expenses for the source measures based on the pollution prevention agreement came to ¥8.3 billion for drainage (¥11.8 billion in 1996), ¥3.2 billion for smoke treatment (¥5.0 billion in 1996), and ¥0.5 billion for treatment of closed and abandoned mines (¥0.8 in 1996), for a grand total of¥12.0 billion (¥17.6 billion in 1996) from 1970 to 1996 (Fig. 6). Additional expenses of an on-the-spot inspection came to approximately ¥0.2 billion.

Many other issues that need to be considered-such as death and damaged health due to Itai-Itai and kidney disease caused by cadmium poisoningare hardly calculated here. For instance, the question of the amount of compensation to be paid to those with Itai-Itai disease mentioned in item (1) faces the difficult problem of how to estimate an amount that can compensate adequately for irreparable damage to health. As for the soil pollution prevention measures under item (2), the principle in the agreement that "the polluter pays the total amount of expenses necessary for the measures [to be] undertaken" has not been adhered to. As a result of the reduction in the area designated for restoration from 1500ha to 1000ha and reducing the entrepreneur's burden-bearing ratio to 35% or 39%, Mitsui Mining and Smelting has been able to escape with an overall burden-bearing ratio of approximately 26%-27%. In addition, although Mitsui Mining and Smelting compensated farmers for suspending their planting and for their reduced income, ¥11.8 billion in total (Table 2), rice contaminated by cadmium to levels of 0.4-1.0ppm was purchased by the government.

Because the special law for mining pollution control enabled the company to include

investments intended for the treatment of closed and abandoned mines within its calculations for expenses to prevent pollution, the expenses allocated as measures to contain pollution at the source (item 3) were overcalculated to finance the company's compensatory undertakings (and obligations). Consequently, we should discount the expenses incurred by the Mitsui Mining and Smelting Co. as being truly burden-bearing. From 1972 to 1997, the monies paid out by Mitsui Company to compensate for the injuries incurred by Itai-Itai disease totaled ¥36.5 billion, which was 66% of the company's ordinary incomes (¥55 billion) and 15% of its operating profit (¥245 billion) (Yoshida 1998).

If we consider the conditions of the original agreement between Mitsui Mining and the victims-compensation for damages to health, soil restoration, and means to prevent pollution at the source-we note that in regard to soil restoration the Mitsui Company (abetted by the prefectural government) has not honored its obligations under the polluter pays principle, as its burden-bearing share has been greatly reduced owing to the cutback in the size of the area to be restored and in the burden-bearing ratio itself. This is because Mitsui Mining was able to apply the agricultural land soil prevention law and the law concerning the entrepreneur's bearing of the cost of public pollution control works to suit itself. Because the two laws merely draw a distinction between "natural" and "other source of pollution," the company was able to persuade the authorities to substitute public money for their own costs: that is, the central government and the local authorities (both town and prefecture) have provided a subsidy.

When it comes to measures to prevent pollution at the source, the company was successful in limiting expenses Although not, historically, being quite the same as the OECD's (Organization for Economic Cooperation and Development's) polluter pays principle (PPP), Japan's **PPP** nonetheless has the character of a legal liability, and it is therefore easy to combine this principle with the principle of causation and responsibility as it is embodied in the clause of the law concerning the entrepreneur's bearing of the cost of public pollution control works, which sets out "the degree of recognition as a case of pollution." By interpreting and applying this principle rather flexibly, however, the Japanese government has been able to use it as a tool to reduce the burden on the polluters.

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7 Conclusions

If we consider that the restoration of land to its original condition entails, as a corollary, that the same pollution damage should never occur again, source prevention measures and soil pollution prevention measures are two of the main pillars supporting the recovery of land damaged by pollution. **In** this regard, Kamioka Mining and Smelting Co. source prevention measures, based on the pollution prevention agreement, have achieved a remarkable success by obtaining a natural background level of 0.1 ppb of cadmium outflow to the downstream area. These efforts should be highly valued.

Although we have sought to make it clear that Mitsui Mining and Smelting Co. has, to a certain extent, managed to evade some of its obligations, the court decision and the agreements made between the victims and the company have nevertheless made it possible to control and subsequently reduce the physical and economic damage caused by cadmium pollution emanating from the Mitsui Kamioka mine. We draw attention to four contributory factors: (1) the geographical and administrative separation of the mine area and the homes and farms of the sufferers, which has meant that "company town" problems have been avoided (as when powerful companies "lean on" their employees to conform or risk losing their jobs and their homes); (2) a firm tie-up between the victims, who typically are rice farmers, and the local (town) government to assist the sufferers; (3) a more serious undertaking over the last 25 years by Mitsui Mining and Smelting Co. to listen to the victims and their lawyers and to pay attention to their requests; and (4) an improvement in Mitsui Kamioka Mining Co.'s attitude to the environment and an increased willingness to look after it (because the company's size gives it the technical means to do what it has a moral obligation to undertake), and to carry out the necessary "downsizing and restructuring" of its own plant. The outlook is therefore not entirely black.

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Annex 660

B. Simma & D. Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", *European Journal of International Law*, 2006, pp. 483-529, pages 490-493

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Of Planets and the Universe: Self-contained Regimes in International Law

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Abstract

Contemporary legal practice requires the allocation of authority within a complex system of legal prescriptions. As international law has extended to areas as diverse as trade, environmental regulation and human rights, the consequences of breach of international legal obligations become more difficult to assess. The authors probe the role of the lex specialis *maxim as a tool for the effective placing of special secondary rules within the general international law of state responsibility. The central question is: Are the general rules on state responsibility to apply residually? The authors answer in the affirmative. 'Conceptual' arguments for so-called self-contained regimes are unconvincing. Scholars who perceive international law as a unified legal order might be led to apply a presumption in favour of the applicability of the general international law of state responsibility. Scholars who regard international law as no more than the sum total of loosely interrelated subsystems tend to advocate a presumption in favour of the normative closure of a particular regime. In the authors' view, neither presumption is helpful, since both tend to obfuscate the value judgments that legal decision-making inevitably involves. Instead, the authors propose that a fallback on general international law, including resort to countermeasures, may be justified on normative grounds. A closer analysis of four subsystems that have often been associated with the notion of self-contained regimes – diplomatic law, European Community law, the WTO and human rights – concludes the discussion.*

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we look at how legal decisions are made, this assumption appears doubtful. Lawyers make use of various (and sometimes contradictory) 'tools' of interpretation, including the *lex specialis* principle, to reconcile competing rationalities expressed in different rules of law. As Koskenniemi has noted,

> [i]nterpretation refers to contested and conflicting principles, none of which can be held superior to the others in a general way. There are no rules on when to apply a literal and when a dynamic interpretation; when to have recourse to party will and when to the instrument's object and purpose. . . . The arbitrator can resolve the dispute only by leaving the ground of legal interpretation altogether.[22]

From a realist perspective, Schwarzenberger thus referred to the principles of treaty interpretation as merely 'tool[s] in aid of the *jus aequum* rule'.[23] In that sense, their function may resemble what Vaughan Lowe labelled as interstitial norms: 'The choice is made by the judge not on the basis of the internal logic of the primary norms, but on the basis of extraneous factors'.[24] The application of principles of treaty interpretation quite generally is not merely an exercise in legal logic. Nor is the characterization *vel non* of two norms, identified as dealing with the same subject matter, in terms of a special law/general law distinction, a schematic exercise. Whether a prescription is too general to govern a particular case is equally 'a matter of harmony with what, for want of a better word, one might term experience and common sense [: . . .] an unsystematized complex of moral, cultural, aesthetic, and other values and experiences.'[25] The true function of the *lex specialis* principle lies precisely in its capacity to give articulation to such values and experiences of the international decision-maker.

B *From* leges speciales *to So-called Self-contained Regimes*

1 *Self-contained Regimes: A Definition*

If we imagine a sliding scale of specialness, one could conceive a rule at one end that is only designed to replace a single provision of the set of rules on state responsibility, while leaving the application of this framework otherwise untouched. At the other end of the scale, a strong form of *lex specialis* could exclude the application of the general regime of state responsibility altogether, either by explicit provision or by implication, that is, by virtue of a regime's particular structure or its object and purpose. This latter concept of a strong *lex specialis* designed to exclude completely the general international law of state responsibility is what we denote as a 'self-contained regime'. ILC Article 55 is meant to cover all kinds of special rules, from weaker forms of specialness that only modify the general regime on a specific point to strong forms

[22] Koskenniemi, 'Hierarchy in International Law: A Sketch', 8 *EJIL* (1997) 566, at 575–576.
[23] Schwarzenberger, *supra* note 10, at 496.
[24] Lowe, 'The Role of Law in International Politics', in M Byers (ed.), *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?* (2000) 216.
[25] *Ibid.*, at 220.

such as self-contained regimes that attempt to exclude the application of the general rules of state responsibility altogether.[26]

The phrase 'self-contained regime' was coined by the Permanent Court of International Justice in the *S.S. Wimbledon* case. There, the Court was faced with the question whether the provisions of the Treaty of Versailles relating generally to German waterways also applied to the Kiel Canal. The Court pointed out that the drafters of the Treaty had devoted a special section to the Kiel Canal, which differed substantially from the rules relating to other watercourses.[27] The Court concluded that

> [t]he provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their 'raison d'être' . . . The idea which underlies [the specific provisions regarding the Kiel Canal] is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them.[28]

In the *Wimbledon* case, the Court applied the concept of self-containment to resolve a question of treaty interpretation concerning the relationship between two sets of primary international obligations.

More recently, the International Court of Justice in its *Tehran Hostages* judgment transposed the concept of self-contained regimes to the level of secondary norms. The Court asserted that the regime of specific legal consequences contained in the Vienna Convention on Diplomatic Relations was self-contained *vis-à-vis* the customary international law of state responsibility. Consequently, in the event of violations of the Vienna Convention, no resort may be had to any of the remedies provided for by general international law, because 'diplomatic law by itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'.[29] After exploring in detail the sanctions contemplated by the Vienna Convention (such as the option of declaring a diplomat *persona non grata*) the Court concluded:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to the diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious.[30]

The concept of self-contained regimes attracted scholarly attention only after the *Tehran Hostages* ruling. Lack of uniform terminology has probably contributed a good deal to the controversial character of the discussion addressing the alleged self-containment of legal sub-systems. Various levels of autonomy have been associated with the term 'self-contained regimes'.

[26] ILC, *supra* note 9, at, 359 para 5.
[27] *S.S. Wimbledon*, PCIJ, Ser. A, No. 1, at 23.
[28] *Ibid.* at 24.
[29] *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980), at 38.
[30] *Ibid.*, at 40.

First, the notion of 'self-contained regimes' has been misconceived as an argument in favour of entirely autonomous legal subsystems. Social systems cannot exist in splendid isolation from their environment. This point is conceded even by ardent proponents of regime specialization. According to Niklas Luhmann's *Systemtheorie*, for example, all systems are to some extent interlinked by structural coupling.[31] Similarly, legal subsystems coexisting in isolation from the remaining bulk of international law are inconceivable. There will always be some degree of interaction, at least at the level of interpretation. In the words of the Chairman of the International Law Commission's Study Group on 'Fragmentation of International Law':

> No treaty, however special its subject-matter or limited the number of its parties, applies in a normative vacuum but refers back to a number of general, often unwritten principles of customary law concerning its entry into force and its interpretation and application. Moreover, this normative environment includes principles that determine the legal subjects, their basic rights and duties, and the forms through which those rights and duties are modified or extinguished.[32]

Without the 'omnipresence of "general law"'[33] a special legal subsystem may, as Georges Abi-Saab put it, mutate into 'a legal Frankenstein' that 'no longer partakes in the same basis of legitimacy and formal standards of pertinence'.[34] Even the European Court of Justice has asserted that principles of general international law are applicable residually within the context of EC law, and has indicated its willingness to defer to the interpretation of an international agreement by a court established under such an agreement.[35] In the case of the WTO, the Appellate Body has acknowledged that the GATT remains firmly imbedded in general international law, stating that the Agreement 'is not to be read in clinical isolation from public international law'.[36] Thus, to avoid confusion, the term 'self-contained regime' should not be used to circumscribe the hypothesis of a fully autonomous legal subsystem.

Nor should the term be used to describe *leges speciales* at the level of primary rules, although it is precisely in the context of primary rules that the Permanent Court of International Justice had originally introduced the concept. In its original meaning, the concept denoted a set of treaty provisions that cannot be complemented through the application of other rules by way of analogy. After *Tehran Hostages*, however, scholarly debate on self-contained regimes has narrowed down to the specific question of the 'completeness' of a subsystem's secondary rules. Hence, we reserve the term 'self-contained regimes' to designate a particular category of

[31] N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997), at 170, 776, 779. Cf. *infra* for a discussion of fragmentation from the perspective of *Systemtheorie*.

[32] Koskenniemi, *supra* note 8, at 7.

[33] *Ibid.*

[34] Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', 31 *NYU J Int'l L Pol* (1999) 919, at 926.

[35] Opinion 1/91, *EEA I*, 14 Dec. 1991, [1991] ECR, I-6079, at paras 39 and 40.

[36] *US – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 Apr. 1996, WT/DS2/AB/R at 17; cf. also: *US – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 6 Nov. 1998, WT/DS58/AB/R, at 154–157.

subsystems, namely those that embrace a full, exhaustive and definitive, set of secondary rules. Thus, the principal characteristic of a self-contained regime is its intention to totally exclude the application of the general legal consequences of wrongful acts as codified by the ILC, in particular the application of countermeasures by an injured state.[37]

2 *Approaches to Self-contained Regimes by the International Law Commission*

The International Law Commission's stand with regard to the existence of so-called self-contained regimes concerning state responsibility has varied with each special rapporteur taking up the subject of legal consequences of internationally wrongful acts. In a nutshell, the ILC first appeared to embrace the concept of self-contained subsystems (Riphagen), then became highly critical of the systematic feasibility of such isolation from state responsibility (Arangio-Ruiz), and finally adopted the position of a pragmatic 'maybe' (Crawford).

Special Rapporteur Willem Riphagen's approach was characterized by considerable ambiguity.[38] On the one hand, Riphagen charted the international legal system as an order modelled on a variety of distinct subsystems, within each of which primary rules and secondary rules are closely interlinked.[39] The regime of state responsibility was perceived as merely part of one such subsystem. Consequently, in the Rapporteur's view, '[t]he idea that there is some kind of least common denominator in the regime of international responsibility must be discarded'.[40] On the other hand, Riphagen presented scenarios in which 'the subsystem itself as a whole may fail, in which case a fallback on another subsystem may be unavoidable'.[41]

In the era of Special Rapporteur Gaetano Arangio-Ruiz, debate concentrated on one, particularly contentious, aspect of self-contained regimes, namely the question whether such a 'so-called self contained regime affect[s], and if so in what way, the rights of the participating States to resort to the countermeasures provided for under general international law'.[42] Focusing on the admissibility of countermeasures, Arangio-Ruiz concluded that none of the systems envisaged as self-contained regimes[43] excluded the application of the rules of state responsibility *in concreto*. The Rapporteur added that, in any event, the very concept of closed legal circuits of

Cf. Simma, *supra* note 6, at 117. We thus adopt an autonomous 'international law' definition, which is not identical with Krasner's classical definition of international regimes as 'a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in S. D. Krasner (ed.), *International Regimes* (1983) 2.

38 For a more extensive critique of Riphagen's theoretical approach, cf. Simma, *supra* note 6, at 115–117.

39 Riphagen, 'Third Report on State Responsibility', in *ILC Yearbook* (1982), Vol. II, Part One, at 24 para 16; cf. also Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations', in R. St. J. Macdonald, D. M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 600.

40 *ILC Yearbook* (1982), Vol. I, at 201, para. 8.

41 Riphagen, 'Third Report', *supra* note 39, at 30 para. 54.

42 Arangio-Ruiz, *supra* note 11, at 35. Cf. also *ILC Yearbook* (1992), Vol. I, at 76.

43 Among them the European Communities, the GATT, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and diplomatic law.

Annex 661

M. Hinteregger, *Comparison*, in ENVIRONMENTAL LIABILITY AND ECOLOGICAL DAMAGE IN EUROPEAN LAW, ed. Monika Hinteregger (Cambridge, 2008), pages 581-583

Environmental Liability and Ecological Damage in European Law

Edited by

Monika Hinteregger

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level of care or can impose an obligation on the operator to guarantee the absence of nuisance.

In the common law countries of England and Ireland, as well as in Scotland, the plaintiff will be entitled to a cause of action in negligence. The plaintiff must, however, show that the defendant owed him a duty of care, that the defendant breached this duty of care, and that the occurrence and type of the damage was foreseeable. Courts may facilitate the burden of proof (i) by heightening the duty of care corresponding to the dangers inherent in the defendant's activity, a method that is also employed in all the other jurisdictions that have been analysed, and (ii) by applying the rule of *res ipsa loquitur*, which can be invoked when the only logical explanation for the damage was negligence by the defendant. This legal device comes close to the *prima facie* evidence rule, commonly accepted in the civil law countries.

B. Laws of the neighbourhood

In most countries, the laws of the neighbourhood play an important role in the compensation of damage caused by a polluting interference, as they do not require fault on the part of the defendant to be established. In Austria, this is explicitly provided by § 364a ABGB, as well as in Finland by the Act on Civil Liability for Environmental Damage 1994 which also covers negative interference and sudden incidents, and the Adjoining Properties Act 1920, with regard to continuous interference. Other countries that provide for this are Germany (§ 906(2) BGB, § 14 BimSchG), Greece (Articles 1003 and 1108 Astikos Kodikas), Italy (Article 844 Codice Civile) and Portugal (Article 1347 Código Civil). Section 364a of the Austrian ABGB, Article 1003 of the Greek Astikos Kodikas, Article 844 of the Italian Codice Civile and Article 1347 of the Portuguese Código Civil were originally inspired by the German law of the neighbourhood. Yet subsequent legal developments in these countries, as well as in Germany, have led to important differences in the wording and application of these provisions. In Spain, only the region of Catalonia provides for specific regulation on neighbourhood law on the lines of the German model.

In France, a similar result is reached through case law ('*troubles de voisinage*'), which covers excessive interference by noise, smoke or wastewater. As in Belgium, courts base neighbourhood liability on the definition of ownership.

In the common law countries (England, Ireland), the corresponding remedy is the action of private nuisance. Like the laws of the

neighbourhood in Austria, Germany, Greece, Italy and Portugal, the private nuisance cause of action requires a continuous, unlawful and indirect interference with the use or enjoyment of land. It only covers damage to land or to chattels on the land. Although the rules of remoteness and foreseeability of damage (legal doctrines originally developed in cases concerning negligence) also apply to private nuisance, a finding of fault in creating the nuisance is not necessary. The English reporters, though, point out that, with regard to nuisance, the prerequisite of foreseeability of damage still needs further clarification. According to existing case law, a certain awareness on behalf of the defendant that his or her activity poses a threat to the rights of another appears to be necessary. In Scotland, the cause of action for a private nuisance will also apply, but, contrary to the position in England and Ireland, fault needs to be established. This is also the case in the Netherlands, where Article 5:37 Burgerlijk Wetboek provides for fault-based neighbourhood liability.

The right to claim damages requires that the interference exceed a certain threshold of tolerance. The methods of determining the threshold standard are quite different. In Austria, Greece, Italy, Portugal and Germany, the interference must be unusual and must lead to a substantial impairment of the enjoyment of the land, which itself must be customary under local conditions. In Finland, the decisive criterion is whether the damage is acceptable for the plaintiff, which is determined according to its usualness and overall impact on the environment. That the polluting activity was prior in time may be important for this assessment, but will not excuse the polluter from liability. Damage to persons and considerable property damage need not be tolerated.

In England and Ireland, an interference with the beneficial use of the injured party's land must be unreasonable to be actionable. The notion of unreasonableness is a rather flexible concept, and, as the Irish reporter notes, its application will often end up in a balance of interest. This is also the Swedish method of determining the illegality of the interference.

In all jurisdictions, the location of the polluting activity and the location of the polluted area are taken into consideration. All the reporters stress the fact that the threshold of tolerance is lower in residential areas than in industrial areas; although, in some countries, the location of the land would be irrelevant when contemplating actual and physical damage to land (England) or damage to health (Austria, Italy). In several countries, damage due to the unusual sensitivity of the

claimant will not be actionable (Austria, Belgium, Germany, Greece, Scotland: unless perpretrated maliciously). This, however, does not apply to Finland.

A damages claim arising out of the laws of the neighbourhood or nuisance is only available to persons who have a close relationship to the affected land, such as the owner or otherwise-authorised occupant (e.g. atenant). A person who is only affected as to his ownership over movable property does not have the right to claim damages (Austria, Belgium, Germany, Sweden). In several countries, this action covers only real property damage, such as the costs of repairs or a diminution in the value of the property (Austria, Germany, Portugal, the Netherlands, England, Ireland). While loss of profit is awarded under Austrian, Greek, Dutch and Swedish law, this is not the case in England. In Ireland, a person whose interest in the land has been established can also sue for damages due to personal injury. Nevertheless, as the Irish reporter stresses, courts would rather decide on the basis of negligence. In England, although it is theoretically possible to recover for personal injuries, these must be shown to flow directly from the interference with the land. However, there has been no case specifically on this point for fifty years. Like in Ireland, English judges would seek to apply the law of negligence on this point. In Belgium, France, Greece, Italy and Sweden, neighbourhood liability also covers damages arising out of personal injury and death.

The Austrian, German, English and Portuguese reporters stress the importance of the laws of the neighbourhood as a remedy for environmenta damage cases. In Finland, neighbourhood law, which served as a model for the Environmental Damages Act 1994, will only be applied if the environmental impact does not amount to environmental damage.

C. Strict liability regimes

Hazardous installations or risky activities may also be under a regime of strict liability. In some countries, jurisdiction provides for a *comprehensive strict liability rule* with regard to environmental damage. In Finland, a comprehensive strict liability regime, comprising property damage as well as personal injury, has been established by the Environmental Damages Act of 1994. Although neither fault nor unlawfulness constitutes a prerequisite for liability, the fact that the damage was caused with intent or through a criminal act broadens the scope of compensation.

Annex 662

J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2009), pages 240-244

Conflict of Norms in Public International Law

How WTO Law Relates to other Rules of International Law

Joost Pauwelyn

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this process than regimes or norms which do not impose direct costs on non-compliance (such as most MEA regimes).[6]

In the remaining sections of this chapter we assume that the conflict prevention techniques just mentioned – both at the negotiation stage and at the enforcement/reliance stage – did not work and led to a situation of apparent conflict that has been submitted to an international adjudicator. We examine, more particularly, the techniques to which an international adjudicator may resort in order to avoid a finding of conflict. This is where the distinction referred to above between 'apparent' and 'genuine' conflicts comes into play. If the conflict-avoidance technique works successfully, the alleged conflict will only be apparent. If it does not work, the conflict becomes a genuine one.

The presumption against conflict

The presumption and its consequences

The wide definition of conflict suggested in chapter 4 must be tempered by the generally accepted presumption against conflict.[7] Every new norm of international law is created within the context of pre-existing international law and the presumption is that this new norm, much like new legislation enacted by the same legislator, builds upon and further develops existing law.

This 'presumption' has three major consequences:

(i) For a new norm to deviate from existing law explicit language must be found. It cannot, in other words, be presumed that states 'changed their minds'. Evidence in support that this actually happened must be submitted in order to rebut the presumption of continuity, inherent in any legal system (see the discussion on 'contracting out' in chapter 4 above, pp. 212–18).

(ii) As a result, the state relying on a conflict of norms will have the burden of proving it.

(iii) When faced with two possible interpretations, one of which harmonises the meaning of the two norms in question, the meaning

[6] *Ibid*., 701 ff.

[7] See, for example, Jenks, 'Conflict', 427 ('It seems reasonable to start from a general presumption against conflict'); and Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1974–5) 47 BYIL 273 at 275 ('just as there is a presumption against the establishment of new customary rules which conflict with pre-existing customary rules, so there is a presumption against the replacement of customary rules by treaties and vice versa'). See also the panel report on *Indonesia – Autos*, para. 14.28 ('in public international law there is a presumption against conflict') and footnote 649.

> that allows for harmonisation of the two norms – and hence avoids conflict – ought to be preferred.[8] As the ICJ noted in the *Right of Passage* case: '[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'.[9]

The presumption that new law is consistent with pre-existing law, that is, the presumption against conflict, is of the same nature as the presumption that any state conduct – not just the conclusion of new law – complies with the law.[10] In *EC – Hormones*, for example, WTO arbitrators made it clear that 'WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency.'[11] The same presumption of legality exists in respect of acts of international organisations. As the ICJ noted in the *Certain Expenses* case: 'when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization'.[12]

[8] As noted by Max Srenson, *Les Sources du Droit International* (Copenhagen: E. Munksgaard, 1946), 226–7: 'Le texte est considéré comme partie du système global du droit international et l'interprétation se propose de la mettre en harmonie avec la réglementation générale de celui-ci. La présomption sur laquelle se base cette méthode d'interprétation est que les contractants, en rédigeant le traité, sont partis de certaines données qu'il n'était pas besoin de reproduire dans le texte, et auxquelles ils se sont référés tacitement.'

[9] *Right of Passage over Indian Territory* (Preliminary Objections), ICJ Reports 1957, 142.

[10] See Jacques-Michel Grossen, *Les Présomptions en Droit International Public*, thesis (Neuchâtel, 1954), 60–3 (referring to the 'présomption de respect par les Etats, du droit en général, et du droit international en particulier', also expressed in the form of the Latin adage *omnia rite praesumuntur esse acta*); 114–17 ('les parties sont présumées n'avoir pas voulu adopter des dispositions contraires aux traités conclu par elles avec des Etats Tiers'); and 115–17 ('les traités sont présumés ne pas déroger au droit coutumier').

[11] Decision of the arbitrators under DSU Art. 22 in *EC – Hormones* (*US request for suspension*), para. 9.

[12] ICJ Reports 1962, 168, continuing as follows: 'If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".' See, in the same sense, *Lockerbie* case (Provisional Measures), ICJ Reports 1992, para. 42 (presuming the validity of Security Council resolution 748).

The limits of the presumption against conflict

At the same time, the effects of this presumption against conflict must not be exaggerated. First, it does not say anything about how conflict should be defined. Whatever conflict means, there is an initial presumption against it. But this presumption should not form an excuse to *define* conflict narrowly, the way Jenks and Karl have done, in much the same way that the presumption that state conduct is consistent with international law (until proved to the contrary) does not mean that breach of international law ought to be construed narrowly.

Second, in many cases, a new norm will be enacted with the very purpose of changing existing law. If this is the case, the presumption against conflict cannot stand in the way of this happening. The presumption against conflict is a presumption in favour of continuity, not a prohibition of change. It ought not to lead to a restrictive interpretation of the new, allegedly conflicting, norm (the same way the presumption of consistency of state conduct should not lead to a restrictive interpretation of the international law obligation allegedly breached).[13]

To put it differently, the presumption against conflict – and in favour of stability – must be balanced carefully with the need for change and evolution of the law. Or, as the Institute of International Law put it in the limited context of the problem of intertemporal law: 'it is necessary to promote the development of the international legal system whilst preserving the principle of legal stability which is an essential part of any judicial system . . . any solution of an intertemporal problem in the international field must take account of the dual requirement of development and stability'.[14]

Third, the presumption against conflict requires that an effort be made to interpret the new norm in a harmonious manner with existing law. If the new norm, as well as the potentially conflicting norm already in existence, is ambiguous enough, such harmonious interpretation may well be possible. But if reconciliation between the two norms is not feasible, that is where the presumption ends. The presumption is one against the *existence* of conflict, it is not a presumption *in favour of the earlier rule* in the event there is a real conflict. To put it differently, the presumption against conflict may show that an *apparent* conflict is

[13] As pointed out before, the principle *in dubio mitius* is of very questionable value. See chapter 4 above. *Contra* (confirming the principle): Appellate Body report on *EC – Hormones*, footnote 154.

[14] '1975 Resolution of the Institute of International Law', *Yearbook of the Institute of International Law* (1975), 537, preambles 2 and 3.

not real. It cannot, however, *solve* a real conflict once such conflict has been established. It may be possible to interpret the terms of norm 1 in a way that avoids conflict with norm 2 (or vice versa). *But once norm 1 and norm 2 are found to be in conflict, an interpretation of either norm cannot solve the conflict*. As Jenks put it, the presumption against conflict 'will not suffice to reconcile clearly unreconcilable provisions . . . [it] may eliminate certain potential conflicts; it cannot eliminate the problem of conflict'.[15] The conflict must then be resolved by a third norm (such as a conflict clause in either treaty or a rule of general international law, such as Art. 30 of the Vienna Convention).

Finally, with Grossen, one could question whether this so-called 'presumption against conflict' is a genuine presumption.[16] The typical example of a presumption provided by Grossen is the English law rule that when one has no news from a person for more than seven years, that person is presumed dead. In other words, on the basis of one fact (seven years no news), one presumes the existence of another fact (death).[17] Or, as Art. 1349 of the French Civil Code states: 'Les présomptions sont des conséquences que la loi ou le magistrat tire d'un fait connu à un fait inconnu.'[18] As a result, genuine presumptions are of a positive nature. They do not constitute simple *evidence* (or 'mode de preuve'), but amount to conclusive *proof* (or 'dispense de preuve') unless the presumption can and has been rebutted. Establishing a presumption *positively* discharges one's burden of proof: for someone to prove under English law that a person is dead, it will suffice to prove that no news has been received from that person for more than seven years. This proven fact (seven years no news) will then be positively accepted as sufficient proof of an unknown fact (namely, that the person is, indeed, dead).

The presumption against conflict, in contrast, is of a negative nature only. This is so because it amounts essentially to a restatement of the basic rule on burden of proof: it is for the party invoking something to prove it (*ei qui dicit incumbit probatio*). In other words, it is for the party relying on the conflict of norms to prove that there is such conflict. The starting point is that there is no conflict, and this will remain so up to the point that proof to the contrary can be provided. The consequence of this presumption against conflict is purely negative: if the party invoking

[15] Jenks, 'Conflict', 429.

[16] Grossen, *Présomptions*, 63 and 117. In the same sense, see: J.-A. Salmon, 'Les Antinomies en Droit International Public', in Chaim Perelman (ed.), *Les Antinomies en Droit* (Brussels: Bruylant, 1965), 285 at 299.

[17] Grossen, *Présomptions*, 16. [18] *Ibid*., 18.

conflict does not succeed in establishing its existence (including in situations of doubt), that party will lose. The presumption against conflict cannot produce the positive effects normally linked to a presumption. It will, for example, not be enough to rely on this presumption to counter a *prima facie* case raised by the opposing party that there *is* conflict.[19]

In sum, the presumption against conflict exists, but its importance ought not to be overstated. In essence, it means that the starting point is that new law is consistent with existing law and it is for the party claiming the opposite to prove it. Without this rule as to who bears the burden of proof, one could, indeed, imagine a situation where one party invokes the old law (claiming that it remains unaffected), whereas the other party relies on the new law (claiming that there is conflict and that the new law ought to prevail). In theory, each party must prove what it alleges (continuing existence of the old law versus prominence of the new law). Without the presumption against conflict, the party relying on the conflict could then argue that the other party relying on the old law must prove its continuing existence (and that it is not up to it to prove conflict and prevalence of the new law). The presumption against conflict solves this impasse *in favour of the party relying on the old law*.

Treaty interpretation as a conflict-avoidance tool

The inherent limits of treaty interpretation

Before examining the role of treaty interpretation as a conflict-avoidance technique[20] – that is, the extent to which interpreting one norm in the

[19] Grossen stated the following on the alleged presumption of consistency of state acts with international law: 'il n'y avait pas véritablement déplacement du fardeau de la preuve. En fait le juge, en "présumant" la licéité des actes étatiques, ne faisait que décider que la partie invoquant l'illicéité ne l'avait pas démontrée à suffisance. Cet aspect négatif de la règle ne se double d'aucun aspect positif susceptible d'en faire une présomption, c'est-à-dire que devant un commencement de preuve de l'illicéité, l'Etat poursuivi en responsabilité ne saurait se contenter d'invoquer à sa décharge la présomption de licéité des actes étatiques. Il faut donc conclure à l'inexistence d'une présomption de conformité des actes étatiques au droit international' (*ibid*., 63). In that sense, the presumption or *prima facie* case referred to in WTO jurisprudence under rules on burden of proof (i.e., the 'commencement de preuve' established by the complainant) is a genuine presumption: if the opposing party does not submit anything in response, the complainant wins. See Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden?' (1998) 1 JIEL 227.

[20] For an excellent overview of the interpretative methods used in the WTO, see Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 JIEL 17,

Annex 663

A. Orakhelashvili, *Division of Reparation between Responsible Entities*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, eds. James Crawford et al. (Oxford University Press, 2010), pages 656-661

Part IV The Content of International Responsibility, Ch.44 Division of Reparation between Responsible Entities

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4 Practical aspects of the division of reparation

(a) Responsibility of States

It has been said that any mature system of law must contemplate multiple party responsibility for wrongs.[32] As for the plurality of responsible or injured States, the crucial question is 'what difference does it make to the responsibility of one State, if another State (or indeed several other States) is also responsible for the very same conduct, or also injured by it'.[33]

The ILC Articles attempt to resolve these issues. According to article 46:

> Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Thus the entitlement of each State to invoke reparation is independent from the similar entitlements of other States. In the *Wimbledon* case, there were several claimants asserting the freedom of passage in the Kiel Canal, but only one of them claimed monetary compensation and the Permanent Court acted accordingly.[34] At the same time, as Special Rapporteur Crawford pointed out, 'there may be a potential entitlement of the claimant State to full reparation, which has to be qualified at the level of invocation in order to avoid double recovery'.[35]

The special case of plurality of claimants is presented by ILC article 48 which provides for the standing of every State to vindicate the breaches of *erga omnes* obligations. This case is cognate to article 46, but whether the relevant claimant States are injured States (p. 657) in the technical sense is not material for their entitlement to demand reparation under article 48. At the same time, article 48 allows a claim reparation not for claimant States themselves but for the injured State(s) or non-State actors; third States can in particular claim restitution.[36]

The ILC commentary on article 46 considers the cases in which:

> one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[37]

While the award of compensation runs the risk of double damages, certain other remedies can be awarded to individual injured States or non-State actors without any risk of duplication. This includes restitution, some forms of satisfaction such as the expression of regret, apology, nominal damages, as well as guarantees of non-repetition.

Generally, issues of the division of reparation are bilateral. The responsible States can arrange among themselves the modalities of reparation to the injured State as they wish. Such an arrangement was made, though in rather different circumstances, by the Persian Government which undertook to compensate a United States national, appointed as Treasurer to the Persian Government but then dismissed at Russian insistence. Persia's agreement to assume liability foreclosed the possibility of a claim against Russia,[38] even though Persia would not have dismissed the Treasurer but for Russian compulsion. The matter was bilateral both as between Russia and Persia and between Persia and the United States.

But in other contexts there may be limits on the power of States to dispose of claims of reparation, especially where the norms violated are peremptory in character. As Special Rapporteur Crawford noted, in certain cases the injured State is not entitled to waive restitution and prefer compensation, such as in case of forcible invasion and annexation of a

State's territory and illegal detention of persons.[39] This perspective imposes limits on the choice of injured parties.

The issue of plurality of responsible States is dealt with by ILC article 47, which provides that:

> Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

As the Commentary specifies, this provision requires that the responsibility of the State for the wrongful act shall not be reduced even if another State is also involved in the perpetration of the same wrongful act.[40] Such a concept of joint and several responsibility seems to be accepted in international law, as explained, for instance in the separate opinion of Judge Shahabuddeen in *Nauru*.[41] The Court's judgment did not contradict that line of reasoning but did not follow it either, because of procedural obstacles to Nauru suing all three States.

As the ILC specified, if the two States combine their efforts in committing the wrongful act, the injured State can hold each responsible State to account for the wrongful act as a whole. Article 47 is also relevant in cases where two States act through a joint organ or (p. 658) where one State directs the other State in committing the wrongful act.[42] In some contexts, such as that of joint occupation and administration of territory, the presumption operates in favour of affirming the joint responsibility of occupying or administering States.[43] The issue of whether one responsible State, such as Australia, had to provide the whole reparation or only part of it was not resolved in *Nauru* because the Court pronounced only on the issue of jurisdiction and admissibility. However, the Court pointed out that had the case proceeded to the merits, regard might have been had to the special role played by Australia in the administration of Nauru.[44] The two other States involved in the process— UK and New Zealand— subsequently agreed to contribute to the payment made by Australia, which may be viewed as a *de facto* acknowledgment of this joint and several responsibility, but not on such clear terms as an examination of the question by the Court could have provided.[45]

Even if the commentary does not say so, article 47 is relevant also in the case of aid or assistance to the State in committing the wrongful act. The *Corfu Channel* case, for instance, related to the context where the United Kingdom could under international law have demanded reparation for the damage caused to its vessels both from Yugoslavia which had actually laid the mines and Albania which failed to warn the United Kingdom about the danger its vessels faced in the Albanian territorial waters. Given the limitations on the judicial process that made it possible to sue Albania only, the United Kingdom demanded the entire reparation from Albania, which was awarded by the Court.[46]

As for the nature of the collusion between Albania and Yugoslavia in laying mines, this can be characterized as a joint action which the ILC commentary expressly mentions. But given the distinct roles of Albania and Yugoslavia in this process, this could also be a case of aid or assistance in the commission of the wrongful act: the mine-laying by Yugoslavia did not in isolation cause the injury to British vessels; what caused it was the decision of Albania, which according to the Court knew or ought to have known about the mines, not to warn the United Kingdom about them. It is thus arguable that the principle of plurality of responsible States was applied by the Court to the case of aid or assistance to the State in committing the wrongful act.

That cases of aid or assistance call for the joint responsibility of the involved States is due to the fact that:

> the whole conception of ‘aid or assistance’ as an autonomous wrong is in principle misconceived … In simple terms many strong cases of ‘aid or assistance’ will be primarily classifiable as instances of joint responsibility and it is only in the marginal cases that a separate category of delicts is called for.[47]

As for the assessment of damages, it is suggested that tribunals would assess damages against the complicit State at a level lower than those it might assess against the principal State.[48] But again, no *a priori* answer can be given to this question, as everything depends (p. 659) on the level of complicity and participation, the causal link, the capacity of individual States to pay, and the availability of judicial venues.

The International Court’s jurisprudence generally admits the possibility of holding States responsible jointly and severally. The European Court of Human Rights has also pronounced on this issue, albeit in circumstances that cast doubt on the credibility of its findings. The Court in the *Ilaşcu* case[49] found that the breaches of the applicants’ rights under article 3 (freedom from torture and inhuman treatment) and article 5 (freedom from arbitrary detention) of the European Convention of Human Rights were attributable to both defendant States—Moldova and Russia. The applicants came, according to the Court, within jurisdiction in terms of article 1 of the Convention in respect of both Moldova and Russia.

The relevant part of the Moldovan territory on which the ‘Moldavian Republic of Transdniestria’ is based came, according to the Court, under Russia’s ‘jurisdiction’ as the MRT existed because it was supported by Russia militarily, politically, and economically.[50] As the violations of articles 3 and 5 took place on that territory, they engaged Russia’s responsibility. While the Court accepted that the Moldovan Government did not exercise authority over part of its territory which was under the effective control of the ‘Moldavian Republic of Transdniestria’, it still asserted that even in the absence of effective control over the Transdniestrian region, Moldova had a positive obligation under article 1 of the Convention to take diplomatic, economic, judicial or other measures that were in its power to take and were in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[51] Given all that, the Court awarded just satisfaction under article 41, ordering that both Moldova and Russia separately pay compensation to the three victims, as well as their costs and expenses.

While the finding of joint and several responsibility and the ensuing compensation for the combined action of States contributes to the effectiveness of human rights, the way the Court arrived at this decision casts doubt on its credibility. The reasoning that, as Moldova had positive obligations to secure the relevant rights of the applicants, the situation came within its jurisdiction under article 1 is strange. The Convention predicates State obligations, whether positive or negative, only where the situation comes within article 1.

The Court’s reasoning affirming the responsibility of Moldova even in the absence of its effective control on the relevant territory contradicts its previous jurisprudence. For instance, the Court held in *Banković* that the 10 NATO member States could not be held accountable under the Convention because they exercised no effective control over the area where they conducted their military campaign.[52] If *Banković* is right, then *Ilasçu* should have been decided otherwise; if *Banković* is wrong, the Court should have said so. Furthermore, the Court’s finding of responsibility for conduct in the absence of effective control also contradicts the jurisprudence on the matter of Northern Cyprus. For example, in *An v Cyprus*, claims originating from Northern Cyprus were rejected because Cyprus (p. 660) had no effective control there,[53] and in a series of decisions regarding Northern Cyprus the responsibility of Turkey was established for the very same reason.[54] The Court’s

reasoning in *Ilaşcu* involves a substantial degree of arbitrariness which also undermines the credibility of its finding that each of the defendants had to pay compensation individually.

In *Banković*, States which in the Court's view had no effective control over the territory of FRY were not obliged under article 1 of the Convention to abstain from the forcible action that has directly caused deaths and injuries, while in *Ilaşcu*, Moldova, although never having done anything to violate the applicants' rights, was considered bound to take positive measures, possibly diplomatic demarches and protests, to secure Convention rights to applicants. While *Banković* was killed off at the jurisdictional stage, *Ilaşcu* which had much less justification under article 1, was taken to the merits and pursued to the end. Such divergent treatment of different States is possible if one adopts, as the European Court did, mutually exclusive interpretations of article 1 on different occasions.

Apart from endorsing double standards in the law of the European Convention, *Ilaşcu* is at divergence with the general international law standard that States are not under an obligation to provide their nationals with diplomatic protection, which outcome prevailed in the *Abbasi* case before the English Court of Appeal.[55]

The issue of joint and several responsibility was also addressed within the framework of the UN Compensation Commission dealing with damage to States, natural and juridical persons during the Iraq's invasion of Kuwait in 1990–1991. In Decision 15 the Commission's Governing Council determined two criteria for granting compensation for losses suffered: (a) the loss must be the result of Iraq's unlawful invasion and occupation of Kuwait; (b) the causal link must be direct. The Commission has established that Iraq need not compensate those losses and damages which arose as a consequence of the trade embargo. Compensation was only to be paid to the extent that the losses were caused by the invasion and occupation and would have been caused irrespective of the introduction of the trade embargo. At the same time, the responsibility of Iraq was not excluded if the loss or damage was caused simultaneously by invasion by Iraq and the trade embargo.[56] Also, under the Compensation Commission scheme, Iraq had to pay for losses which resulted from the Coalition's military operations,[57] instead of the relevant damages being allocated among the responsible States in terms of the causal link between the action and the injury. Holding the State liable beyond what it had done has no legal justification—this principle underlies the law of joint and several responsibility.

(b) Responsibility to and of international organizations

When an international organization is injured by an internationally wrongful act, it can lodge a complaint against the responsible State even if the very same wrongful act has injured other State(s). This position appears to be recognized in the law of diplomatic protection. As the International Court emphasized in the *Reparations* Advisory (p. 661) Opinion, the organization must be able to present claims on behalf of its injured agents in order to ensure that in performance of their functions they are not dependent on their national States.[58] As the Court stated, there is no rule of law which assigns priority to the claim of the State or that of the organization and the outcome may be the 'competition between the State's right of diplomatic protection and the Organisation's right of functional protection.'[59]

In line with this, the ILC Special Rapporteur on Diplomatic Protection, John Dugard, proposed a draft article according to which the right of States to exercise diplomatic protection for their nationals shall not preclude the exercise of functional protection of the very same persons by an international organization whose agents they are.[60] On the other hand, the State of nationality can exercise its right of diplomatic protection even if the relevant national is also the agent of an international organization and functional protection is also a possibility.[61] Such a legal position enables both injured entities to demand the reparation for the same wrongful act. This enhances the position of the individual in

and predictable standards in certain fields of joint and several responsibility, and the procedural principles as developed and applied by international tribunals severely (p. 665) undermine the effective implementation of State responsibility for actions of multiple States and the award of remedies.

Further reading

C Amerasinghe, 'Liability to Third Parties of Member States of International Organisations: Practice, Principle and Judicial Precedent' (1991) 85 *AJIL* 259

L Bouve, 'Russia's Liability in Tort for Persia's Breach of Contract' (1912) 6 *AJIL* 389

B Graefrath, 'Complicity in the Law of International Responsibility' (1966/2) *RBDI* 370

V Lowe, 'Responsibility for the Conduct of Other States' (2002) *Japanese Annual of International Law* 1

J Noyes & B Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale JIL* 225

A Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organisations' (2005) *International Organisations Law Review* 57

J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) *BYIL* 77

M Shaw & K Wellens, *ILA Final Report on Accountability of International Organisations* (2004)

M Terwiesche, 'International Responsibility arising from the Implementation of a Security Council Resolution: The 2nd Gulf War and the Rule of Proportionality' (1995–1996) 22 *Polish YIL* 81(p. 666)

Footnotes:

1 *Factory at Chorzów, Merits, 1928, PCIJ, Series A, No 17*, p 4, 49, 58–59.

2 *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p 149, 185–186.

3 G Gaja, First Report on Responsibility of International Organisations, 2003, A/CN.4/532, 8–9, 18–19; see also G Gaja, Second Report on Responsibility of International Organisations, 2004, A/CN.4/541, 3; see also C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 401.

4 M Shaw & K Wellens, *ILA Final Report on Accountability of International Organisations* (2004), 27.

5 The US made a claim of joint and several responsibility against USSR and Hungary in the case of the *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v Union of Soviet Socialist Republic, Hungary), Order of 12 July 1954, ICJ Reports 1954*, p 103; however, findings as to responsibility were never made because the respondents refused to accept the Court's jurisdiction. See also the discontinuance order in the *Lockerbie* cases, *Order of 10 September 2003*, *ICJ Reports 2003*, p 1. In *Banković*, where the European Court was asked to determine the responsibility of 10 NATO member States for the bombing of the Belgrade television station which claimed the life of several persons, the Court refused to adjudicate because the matter was allegedly beyond the Convention's *espace juridique*, see *Banković v Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom* (App No 52207/99), Decision on admissibility, *ECHR Reports 2001-XII* [GC]; for an analysis see A Orakhelashvili, 'Restrictive

Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* 529, 538–551.

6 Commentary to art 6, paras 2 and 3.

7 *Drozd and Janousek v France and Spain* (App No 12747/87), *ECHR, Series A, No 240* (1992), paras 91–96.

8 Commentary, Chapter IV of Part I, para 8.

9 Commentary to art 16, para 4.

10 Commentary to art 16, para 5; see also the observations on the US financial assistance to Israel which contributes to the expansion of settlements in the West Bank, J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 *BYIL* 77, 113.

11 V Lowe, 'Responsibility for the Conduct of Other States' (2002) *Japanese Annual of International Law* 1, 6.

12 Commentary to art 16, para 5.

13 Commentary to art 16, para 5.

14 B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *RBDI* 375.

15 Commentary to art 17, para 5.

16 Commentary to art 16, para 6.

17 Commentary to art 17, para 8.

18 Commentary to art 16, para 10.

19 G Gaja, Second Report on Responsibility of International Organisations, 2004, A/CN. 4/541, 15–18; see also C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 403–404.

20 M Terwiesche, 'International Responsibility arising from the Implementation of a Security Council Resolution: The 2nd Gulf War and the Rule of Proportionality' (1995–1996) 22 *Polish YIL* 83.

21 G Gaja, Third Report on Responsibility of International Organisations, 2004, A/CN. 4/553, 17.

22 G Gaja, Second Report on Responsibility of International Organisations, 2004, A/CN. 4/541, 4.

23 G Gaja, Third Report on Responsibility of International Organisations, 2005, A/CN. 4/553, 11.

24 For the details of this process see A Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organisations' (2005) *International Organisations Law Review* 57.

25 G Gaja, Third Report on Responsibility of International Organisations, 2005, A/CN. 4/553, 12.

26 Concluding Observations of the Committee on Economic, Social and Cultural Rights: France, 30 November 2001, E/C.12/1/Add.72, para 32; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium, 01 December 2000 E/C.12/1/Add.54, para 31; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany, 24 September 2001 E/C.12/1/Add.68 para 31; Concluding

Observations of the Committee on Economic, Social and Cultural Rights: Japan, 24 September 2001 E/C.12/1/Add.67 para 37.

27 G Gaja, Third Report on Responsibility of International Organisations, 2005, A/CN. 4/553, 12.

28 *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257, 311.

29 *JH Rayner Ltd v Dept of Trade* [1990] 2 AC 468, 513–516.

30 Ibid, 482.

31 As advanced in G Gaja, Third Report on Responsibility of International Organisations, 2005, A/CN.4/553, 16–18. For concerns arising out of such a requirement see also P Sands & P Klein, *Bowett's Law of International Institutions* (5th edn, London, Stevens, 2001), 520.

32 J Noyes & B Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale JIL* 258, 266.

33 J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507.Add.2, 20; see in general, J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge, CUP, 2002), 45–46.

34 *SS Wimbledon, 1923, PCIJ Reports, Series A, No 1*, p 4, 30–33.

35 J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507.Add.2, 12

36 Commentary to art 48, paras 8–10, 13.

37 Commentary to art 46, para 4.

38 L Bouvé, 'Russia's Liability in Tort for Persia's Breach of Contract' (1912) 6 *AJIL* 389, 392–393.

39 J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507/Add.1, 5.

40 Commentary to art 47, para 11.

41 Separate Opinion of Judge Shahabuddeen, *Certain Phosphate Lands in Nauru (Nauru v Australia), ICJ Reports 1992*, p 240, 283–285.

42 Commentary to art 47, para 2.

43 I Brownlie, *System of the Law of Nations. State Responsibility* (Oxford, OUP, 1983), 188.

44 *Certain Phosphate Lands in Nauru (Nauru v Australia), ICJ Reports 1992*, p 240, 258–259.

45 The settlement agreement between Nauru and Australia referred to Australia's denial of responsibility, art 1, 23 *ILM* 1475. Such denial is not conclusive in terms of whether responsibility can actually be established in law.

46 *Corfu Channel, Merits, ICJ Reports 1949*, p 4; *Corfu Channel, Assessment of the Amount of Compensation, ICJ Reports 1949*, p 244.

47 I Brownlie, *System of the Law of Nations. State Responsibility* (Oxford, OUP, 1983), 191.

48 J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 *BYIL* 77, 129.

49 *Ilaşcu and others v Moldova and Russia* (App No 48787/99), *ECHR Reports 2004-VII* [GC].

50 Ibid, para 392.

51 Ibid, paras 330–331, 333–335; the Court added that Moldova had not been sufficiently attentive to this issue in its bilateral relations with the Russian Federation.

52 *Banković v Belgium, The Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (App No 52207/99), Decision on Admissibility, *ECHR Reports 2001-XII* [GC].

53 *An v Cyprus*, 13 *HRLJ* 44.

54 *Cyprus v Turkey* (App Nos 6780/74 & 6950/75), 2 *DR* 125; *Cyprus v Turkey* (App No 8007/77), 13 *DR* 145; *Chrysostomos v Turkey*, 12 *HRLJ* (1991); *Loizidou v Turkey (Preliminary Objections)* (1995) 103 *ILR* 622; *(Merits)* (1996) 108 *ILR* 443; *Cyprus v Turkey, Merits* (2001) 120 *ILR* 10.

55 *Abbasi v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] ECWA Civ 1598; 126 *ILR* 685.

56 UNCC Governing Council, Decision 15, 18 December 1992, 109 *ILR* 615, para 3.

57 *Criteria for Expedited Processing of Urgent Claims*, S/AC.26/1991/1 para 18; S/AC. 26/1991/7/Rev.1, paras 6, 21, 34.

58 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, 174, 183.

59 Ibid, 185.

60 J Dugard, Fifth Report on Diplomatic Protection, 2004, A/CN.4/538, 8–9.

61 Ibid, 11, 13.

62 For the overview see C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 421–425; for Amerasinghe's own approach see ibid, 440; see also CF Amerasinghe, 'Liability to Third Parties of Member States of International Organisations: Practice, Principle and Judicial Precedent' (1991) 85 *AJIL* 259.

63 *Attorney-General v Nissan* [1970] AC 179; 44 *ILR* 360, 375–376.

64 *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257, 295–307 (Kerr LJ).

65 Ibid, 333–334.

66 *JH Rayner Ltd v Dept of Trade* [1990] 2 AC 468, 479.

67 *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257, 333.

68 *Certain Expenses of the United Nations, Advisory Opinion, ICJ Reports 1962*, p 151, 172–179.

69 Cf C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 440.

70 *M & Co v Federal Republic of Germany* (App No. 13258/87), ECHR, Decision on Admissibility, 9 February 1990, 33 *YB ECHR* 1990; *Waite & Kennedy v Germany* (App No 26083/94), *ECHR Reports 1999-I*; *Matthews v United Kingdom* (App No 24833/94), *ECHR Reports 1999-I*; *Bosphorus Hava Yollari Turizm v Ireland* (App 45036/98), *ECHR Reports 2005-VI*.

71 *Monetary Gold Removed from Rome in 1943, ICJ Reports 1954*, p 19, 31–32.

72 *Certain Phosphate Lands in Nauru (Nauru v Australia), ICJ Reports 1992*, p 240, 259–260.

73 Ibid, 261.

74 *East Timor (Portugal v Australia), ICJ Reports 1995*, p 90, 104.

Annex 664

R. S. J. Martha, *The Financial Obligation in International Law* (Oxford University Press, 2015), pages 402-412

The Financial Obligation in International Law

RUTSEL SILVESTRE J. MARTHA

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I. THE INTERNATIONAL ARBITRAL TRIBUNALS

[1] Websites: <http://www.un.org/law/riaa/>, <http://www.pca-cpa.org/>, <http://www.icj-cij.org/docket>, <http://www.world-bank.org/icsid>, <http://curia.europa.eu>, <http://hudoc.echr.coe.int/>, <http://www.worldcourts.com>, <http://www.corteidh.or.cr/>, <http://italaw.com>, <http://untreaty.un.org/unat/>, <www.ilo.org/tribunal>, <www.oas.org/tribadm/default_en.asp>.

44

Compensation for Damages Caused by Lawful Acts

As illustrated by the *Diverted Cargoes* case,[1] which involved the determination of the amount due by the UK to Greece for the diversion of certain cargo destined to Greece during the Second World War, compensation for damages for lawful acts is not alien to international law. Under the law of prize taking, during time of war private enemy ships and neutral merchantmen carrying contraband are subject to seizure.[2] Title to such vessels and their cargoes does not immediately pass to the captor State but, under international law, must be adjudicated by the captor State's prize court, which may condemn them as lawful prizes.[3] That was not the situation in this case. The two States were allies fighting a common enemy, and both countries deemed the diversion of the cargoes necessary. The compensation to which Greece was entitled was thus not tied to a liability for unlawful act. There are many other situations in which international law requires compensation to the injured party for damages caused by lawful conduct of the author. International courts and tribunals recognize that even where international responsibility cannot be admitted, compensation would still be given to injured parties when it can be established that the injury has been caused by the lawful conduct.[4] The following sections will describe a selection of these situations.

44.1 Ultra-hazardous Liability

44.1.1 The principle

Activities with extraterritorial injurious impact have always been topical in international relations and of concern to international law. International practice[5] and jurisprudence appear to have recognized that, in the exercise of their exclusive authority within or beyond their territories, over their ships and aircraft, for example, States are expected to have due regard for the interests of other States that may adversely be affected.[6] The *Trail Smelter* arbitration[7] laid the foundations for the discussions

[1] *The Diverted Cargoes Case (Greece, United Kingdom of Great Britain and Northern Ireland)*, XII UNRIAA, 53–81.

[2] See generally JHW Verzijl, WP Heere, and JPS Offerhaus, *International Law in Historical Perspective, Vol VII (The Law of Maritime Prize)* (AW Sijthoff, 1992).

[3] See also CJ Colombos, *A Treatise on the Law of Prize* (3rd edn, David McKay Co, 1949).

[4] *Mexico City Bombardment Claims (Great Britain v Mexico)*, 15 February 1930, V UNRIAA, 76 at 82.

[5] See A/CN.4/384, Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, prepared by the Secretariat, *ILC Yearbook* 1985, Vol II(1), Add 1.

[6] See generally J Barboza, 'International Liability for Injurious Consequences for Acts Not Prohibited by International Law and Protection of the Environment' (1994) *RdC* 247: 293.

[7] *Trail Smelter Case (United States, Canada)*, 16 April 1938 and 11 March 1941, III UNRIAA, 1905.

in international law about the idea that, although a party may make use of its rights in the way it sees fit, its conduct is subject to the qualification implied in the maxim *sic utere tuo ut alienum non laedas*. In that case, the tribunal examined the decisions of the US Supreme Court as well as other sources of law and reached the conclusion that 'under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another'. Under the doctrine expressed in this maxim, the entitlement to exercise one's right remains unquestioned; but the exercise of any right entails by definition an obligation to undertake all that is necessary for the protection of those who the right holder knows might be expected to suffer any harm, what a prudent and reasonable man would regard as requisite, or usually sufficient, to prevent or compensate the harm. More generally, the tribunal did not clarify whether a right holder is liable only for intentional, reckless, or negligent behaviour (fault-based conduct) or whether it is strictly liable for all injurious conduct.

In subsequent developments, international law has come to distinguish responsibility, which arises upon breach of an international obligation, and liability for the injurious consequences of lawful activities.[8] Significantly, in *Corfu Channel* the ICJ stated that it was 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[9] This statement may be taken to include the maxim: *sic utere tuo ut alienum non laedas*.[10] In *Legality of the Threat or Use of Nuclear Weapons*, the ICJ opined that '[t]he 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'.[11] Supplementing sovereign equality as the normative basis of the liability for lawful conduct with an inherent duty to respect the environment in the interest of mankind, the Court reiterated this statement in *Gabčíkovo-Nagymaros Project*, holding that it has 'recently had occasion to stress... the great significance that it attaches to respect for the environment, not only for States but for the whole of mankind'.[12]

This formulation of the norm raises the question whether the duty to repair the damages caused is a consequence of a breach of an obligation not to cause harm to third parties or whether it is a condition for the lawful engagement in

[8] NLJT Horbach, 'The Confusion About State Responsibility and International Liability' (1991) *Leiden Journal of International Law* 4: 47 and NLJT Horbach, *Liability Versus Responsibility Under International Law: Defending Strict State Responsibility for Transboundary Damage* (Diss Leiden, 1996); AE Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?' (1990) *ICLQ* 39: 1. See also S Sucharitkul, 'State Responsibility and International Liability Under International Law' (1996) *Loyola of Los Angeles International and Comparative Law Review* 18: 821; X Hanqin, *Transboundary Damage in International Law* (Cambridge University Press, 2003).

[9] *Corfu Channel Case (UK v Albania) (Merits)*, 9 April 1949, ICJ Reports 1949, 4 at 22.

[10] Cf ILC,' Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with Commentaries 2006', *ILC Yearbook* 2006, Vol II, Part Two, 141 ff.

[11] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, ICJ Reports 1996, 226, para 29.

[12] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997, 7.

ultra-hazardous activities. In other words, is liability for lawful conduct established by primary rules or by secondary rules? There are, of course, authors who approach the issue of damages caused by ultra-hazardous activities in terms of responsibility for wrongful acts. For these authors, the causation of damages entails a breach of obligation requiring reparation.[13] According to the alternative view, which is the view adopted by the ILC,[14] States and other relevant international persons are not restricted in the use of natural resources within their territory as long as they do not interfere with the interests of other States enjoying the same right. This implies that the duty to respect the environment of other States or of areas beyond national control entails that when, despite all care undertaken, damage is caused to others, that will not render the activity unlawful provided such damage is repaired or due compensation is paid.[15]

It is thus recognized that a duty to make reparations may exist even where the party concerned takes all the necessary measures to prevent damage to others, but the damage nonetheless occurs.[16] For example, in 1981 Canada agreed to a lump-sum payment of Can$3 million from the Soviet Union in full and final settlement of all matters connected with the disintegration of the Soviet satellite Cosmos-954 in Canada. In that case, Canada referred to the general principle of the law of absolute liability for injury resulting from activities with a high degree of risk:

> The standard of absolute liability for space activities, in particular activities involving the use of nuclear energy, is considered to have become a general principle of international law. A large number of states, including Canada and the Union of Soviet Socialist Republics, have adhered to this principle as contained in the 1972 Convention on International Liability for Damage caused by Space Objects. The principle of absolute liability applies to fields of activities having in common a high degree of risk. It is repeated in numerous international agreements and is one of 'the general principles of law recognized by civilized nations' (Article 38 of the Statute of The International Court of Justice). Accordingly, this principle has been accepted as a general principle of international law. In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty.[17]

[13] See eg A Kiss, 'State Responsibility and Liability for Nuclear Damage' (2006) *Denver Journal of International Law and Policy* 35: 67.

[14] T Gehring and M Jachtenfuchs, 'Liability for Transboundary Environmental Damage Towards a General Liability Regime?' (1993) *EJIL* 4: 92.

[15] Sucharitkul (n 8), 821–39; also G Handl, 'Liability as an Obligation Established by a Primary Rule of International Law' (1985) *Netherlands Yearbook of International Law* XVI: 49.

[16] CW Jenks, 'Liability for Ultra-hazardous Activities in International Law' (1996) *RdC* 117: 105 at 105–10 and 195.

[17] *Protocol Between the Government of Canada and the Government of the Union of Soviet Socialist Republics Done on April 2, 1981, With Statement of the Canadian Claim*, available at: <http://www.jaxa.jp/library/space_law/chapter_3/3-2-2-1_e.html>. On this case, see EG Lee and DW Sproule, 'Liability for Damage Caused by Space Debris: The Cosmos 954 Claim' (1988) *Canadian Yearbook of International Law* 26: 273.

In many instances, such a basis for liability can be applied only by virtue of treaty provisions, but is also reflected in other forms of international practice.[18] Nevertheless, except where the parties concerned partake in a conventional regime which answers that question, the legal issues involved in the determination of the ensuing financial obligation remain largely unsettled.[19]

Jenks is more specific by suggesting that the following three arguments cumulatively establish the reasonable case for a limitation of the maximum amount of liability: (1) strict liability, being independent from fault, should in fairness always be qualified by a limitation of its amount; (2) the burden of a strict liability that is unlimited in amount is an excessive deterrent to initiatives in the development of new types of ultra-hazardous activity; and (3) strict liability for potentially large amounts is often accompanied by an obligation to provide security, and such security cannot readily be provided for an undefined and unlimited amount.[20] These arguments are actually the drivers behind the conventional limited liability regimes, including the financial security for liability.

The ILC does not seem to have accepted this idea of a maximum amount. In order to codify and develop the principles that cover such situations where damage results from non-wrongful conduct, it undertook to study the '*International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*',[21] which resulted in the *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*.[22] It is evident from this work that, unlike with respect to responsibility for international unlawful acts, the scope of the liability for hazardous conduct is far from crystalized. It is therefore difficult to state at this stage whether the obligations require only reasonable compensation or *restitutio in integrum*.[23] In its endeavour to codify and progressively develop the law in this area, the ILC proffered the concept of 'prompt and adequate compensation',[24] and discerned the following factors which will determine the terms or heads against which precise sums of compensation would be payable: (a) financially assessable damage, that is, damage quantifiable in monetary terms is compensable; (b) this includes damage suffered by the State to its property, or personnel, or in respect of expenditures reasonably incurred to remedy or mitigate damage, as well as damage suffered by natural or legal persons, both nationals and those who are resident and suffered injury

[18] See Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising Out of Hazardous Activities), Prepared by the Secretariat. International Law Commission, Fifty-sixth session, Geneva, 3 May–4 June and 5 July–6 August 2004, available at: <http://legal.un.org/ilc/documentation/english/a_cn4_543.pdf>.

[19] Cf A Cassese, *International Law* (2nd edn, Oxford University Press, 2005), 497–9.

[20] Jenks (n 16), 184–6.

[21] B Graefrath, 'Responsibility and Damage Caused: Relationship Between Responsibility and Damages' (1985) *RdC 15*: 9 at 104–19.

[22] UNGA 61/36. Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 18 December 2006.

[23] Note similar comments made by scholars with a time difference of almost five decades: H Lauterpacht, *The Development of International Law by the International Court* (1958; repr. Grotius Publications, 1982), 316 and Cassese (n 19), 497–9.

[24] Principle 3, Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, Adopted at the 58th session of the ILC (2006), *ILC Yearbook* 2006, Vol II, Part Two.

on its territory; (c) the particular circumstances of the case, the content of the obligation breached, the assessment of reasonableness of measures undertaken by parties in respect of the damage caused, and finally, consideration of equity and mutual accommodation. From these the ILC derives the following guidelines on the basis of awards rendered by international courts and tribunals: compensation is payable in respect of personal injury, for directly associated material loss such as loss of earnings and earning capacity, medical expenses including costs for achieving full rehabilitation; compensation is also payable for non-material damage suffered as, for example, for 'loss of loved ones, pain and suffering as well as the affront to sensibilities associated with the intrusion on the person, home or private life'.[25]

It would seem to stand to reason that if an act that is not wrongful causes damage despite all the reasonable precautions undertaken by the author, any resulting obligation to compensate the injured party cannot be the same as in the case of responsibility for wrongful conduct. Going by Lauterpacht's analysis of *Chorzow Factory*, it is probably correct to say that in case of liability for hazardous activities only 'reasonable compensation' will be required rather than full reparation.[26] Still, it remains easier to state the principle that liability for ultra-hazardous activities is different from *restitutio in integrum*, but for a third party to set the amount in the absence of an agreed framework is immensely difficult,[27] which may explain the preference of parties for lump-sum settlements in such situations.[28] The payment of such a lump-sum amount of compensation agreed upon as a result of negotiations extinguishes the obligation of the liable party.

44.2 Liability for Harmful Exercise of Jurisdiction?

Because financial markets worldwide have become so intertwined, from the perspective of the concept of *sic utere tuo ut alienum non laedas*, the question whether a State should bear some financial consequences for the exercise of its (banking regulatory) jurisdiction is lawful but risky. This question needs not to be answered here, but it shows that the principle underlying central ruling in the *Trail Smelter* case has a much wider import than is usually ascribed to it. It would seem that for the time being the international community's response to the issue has been to develop prudential standards for the regulation of financial institutions. In the context of European integration, this includes the international obligation to provide depositors a certain guarantee. The EFTA Court's ruling in the *Icesave* case, which was discussed earlier in the context of *negotiorum gestio*,[29] also bears on the general question of the nature of the attendant obligations of States to ensure compensation for injury caused by hazardous

[25] ILC: Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with commentaries 2006, *ILC Yearbook* 2006, Vol II, Part Two, 149–50.

[26] P Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer, 2007), 125; TS Hardman Reis, *Compensation for Environmental Damages Under International Law: The Role of the International Judge* (Kluwer Law International, 2011), 105.

[27] On this difficulty in relation to the *Amoco Cadiz* case, see Cassese (n 19), 499.

[28] Cf N Horbach and R Lefeber, 'Staatsaansprakelijkheid', in N Horbach, R Lefeber, and O Ribbelink, *Handboek Internationaal Recht* (TMC Asser Press, 2007), 309 at 344.

[29] See Chapter 43 in this volume.

activities or other harmful activities. Without going into the debate about whether providing banking services should be regarded as an ultra-hazardous activity, for the sake of the legal issue to be considered here it suffices to say that the risks for the public involved in banking services and the government's stake in the healthy functioning of the financial system justify the prudential and macro-economic governmental interventions in the financial markets. Nowadays, it is accepted that the government should also bear some of the risks inherent to the provision of financial services and should have a mechanism in place to ensure the pay-out of a minimum guaranteed amount to depositors in the case of a bank failure. Especially in the European region, this has been converted into conventional obligations for the States partaking in regional economic integration. In ruling in favour of Iceland in the *Icesave* case, the EFTA Court emphasized first that it was important to look at the specific provisions of the relevant directive in order to assess whether it imposed an obligation of result, that is an obligation on Iceland to ensure that all deposit holders were repaid following the failure of Icesave. In light of the fact that European directives generally left the choice of means to the Member State concerned, prescribing only a certain result, in this case establishing and supervising a deposit insurance scheme, it emphasized that deposit insurance was subject only to minimum harmonization. It also emphasized that the question of Iceland's potential State liability for loss and damage *to individuals* was a separate one, and outside the scope of its judgement. It can be inferred from this that for the time being the question whether under contemporary international law States are obliged to underwrite deposit liabilities of private banks must be answered in the negative.

44.3 Liability for Lawful Dispossessions

There is an on-going debate as to whether the payment of compensation is a condition for the lawfulness of a dispossession or whether the question of compensation is a matter that arises after a determination has been made regarding the lawfulness of a State's intervention.[30]

The first view can be said to be the approach principally adopted by the Iran–United States Claims Tribunal and in some investor-State arbitration cases, which recognize the payment of prompt compensation to be a consideration relevant to the lawfulness of a taking under customary international law.[31] It cannot be denied that the first view is somewhat circular, which may explain why some question whether the distinction between lawful and unlawful expropriation is really meaningful.[32]

[30] See S Ripinsky and K Williams, *Damages in International Investment Law* (BIICL, 2008), 71–83.

[31] CN Brower and JD Brueschke, *The Iran–United States Claims Tribunal* (Kluwer Law International, 1998), 499.

[32] Some investor-State tribunals have ignored the distinction between lawful and unlawful dispossessions, eg *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award of 8 December 2000; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award of 12 April 2002; *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award of 30 August 2000; *Mr Franz Sedelmayer v The Russian Federation*, SCC, Award of 7 July 1998, available at: <http://www.italaw.com/sites/default/files/case-documents/ita0757.pdf>.

The second view holds that non-payment does not necessarily make an otherwise lawful taking unlawful because, for instance, some takings may not require compensation or because the compensation paid is commensurate to the lawfulness of the taking.[33] In the case of the law of the ECHR, an even more far-reaching position is assumed, namely that an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the affected party's fundamental rights.[34] The implication of this is that there must be a reasonable relationship between the objective of the dispossessing measure and the means employed to achieve this aim, and that by consequence there may be instances where deprivation of property without compensation does not *per se* render the measure unlawful.[35] The tribunal in the *BIS Shares Repurchase* case took what could be called a neutral position by not choosing sides in this controversy on account of the fact that in the final analysis the issue boils down to one of valuation:

> A central issue in this case is the adequacy of the amount which the Bank paid for the recalled shares. Whether this question is characterized as one of 'reparations,' implying that the recall was unlawful, or as 'compensation,' implying that the recall was expropriatory and that its lawfulness is contingent upon the Bank's paying international law's measure of compensation, or as one of 'fair' price, implying, in a more neutral fashion, that the gravamen is simply one of determining the proper value of the recalled shares, all the Claimants and the Bank have agreed that the issue is one of valuation.[36]

In this sense, the question is thus the adequacy of the compensation paid. Inadequate compensation would render the dispossession unlawful and require a higher compensation involving a valuation to cover the loss suffered between the moment of taking and the date of award. Indeed, as already noted in Chapter 42 of this volume, according to the ruling in *Chorzow Factory* a distinction must be made between the secondary financial obligations in case of a lawful dispossession and an unlawful

[33] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press, 2004), 345.

[34] *Sporrong and Lönnroth v Sweden*, Judgment of 23 September 1982, ECHR Series A, No 52, §69.

[35] *Jahn and Others v Germany*, Judgment of 30 June 2005 (App nos 46720/99, 72203/01, and 72552/01), §86 ECHR 2005-VI, §89; *James and Others v The United Kingdom*, Judgment of 21 February 1986, ECHR Series A, No 98, §54; *The Former King of Greece v Greece*, Judgment of 23 November 2000 (App no 25701/94), ECHR 2000-XII, §89. See U Deutsch, 'Expropriation Without Compensation—The European Court of Human Rights Sanctions German Legislation Expropriating the Heirs of "New Farmers"' (2005) *German Law Journal* 6: 1367. But see differently *Bank of International Settlement—Partial Award*, 22 November 2002, XXIII UNRIAA, 183 at para 165: 'International law also requires that, in order to be lawful, an expropriation should be against payment of compensation. Indeed, the Bank recognized that the recall had the consequence for the private shareholders that they lost their rights. The Bank accepted from the beginning that such a deprivation of property could only be lawful against payment of compensation. The issues concerning the amount of compensation will be addressed separately. However, the Tribunal would underline that a decision by the BIS which has the effect of depriving the private shareholders of their property rights, *i.e.* their shares, cannot be considered lawful without the payment of compensation. This follows from the rules of general international law protecting private property as well as from general principles of law concerning share companies, a point which the Parties did not dispute.'

[36] *Bank of International Settlement—Partial Award* (n 35), 183, para 160.

expropriation. That ruling holds that the extent of the duty to pay compensation varies according to whether the intervention is lawful or not. Whereas in the case of a lawful expropriation the ensuing financial obligation is limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment (*damnum emergens*), in cases of unlawful expropriation compensation of the loss sustained as the result of the seizure must be added to that obligation (*lucrum cessans*).[37]

This being the default situation under general international law, it is of course possible for parties to establish different standards that apply to their bilateral relations or in specialized treaty regimes, even to the extent of developing a special branch in which the first view discussed above emerges as the prevalent state of the law. In the *BIS Shares Repurchase* case, the tribunal found that a *lex specialis* standard applied comprising 'a proportionate share of net asset value' method applied in that specific case.[38] The international practice in respect of investment protection is of more systemic consequence in this matter. The UNCTAD counts that between 1989 and 2003 the number of bilateral treaties for the promotion and protection of foreign investments rose from 385 to a total of 2,265 involving 176 countries. The pattern under these bilateral investment treaties is that neither party shall take any measure depriving, directly or indirectly, investors of the other contracting party of their investments unless such measure satisfies certain specified criteria, including that it is accompanied by provision for payment of just compensation, and that such compensation shall represent the genuine value of the investment. Against this background, the tribunal in *CME BV v Czech Republic* described the current situation in international law in the following terms:

> The requirement of compensation to be 'just' and representative of the 'genuine value of the investment affected' evokes the famous Hull Formula, which provided for the payment of prompt, adequate and effective compensation for taking of foreign owned property. This formula was controversial. Capital exporting countries viewed it as an expression of customary international law. Developing countries and Communist States maintained that the foreign investor was entitled to no more compensation than provided by the law of the host government however and whenever amended and applied. The controversy came to a head with the adoption by the General Assembly of the United Nations of the 'Charter of Economic Rights and Duties of States'. The major capital exporting States voted against the Charter. But in the end, the international community put aside this controversy, surmounting it by the conclusion of more than 2200 bilateral investment treaties. Today these treaties are truly universal in their reach and essential provisions. They concordantly provide for payment of 'just compensation', representing the 'genuine' or 'fair market' value of the property taken. Some treaties provide for prompt, adequate and effective compensation amounting to the market value of the investment expropriated immediately before the intention to embark thereon become public knowledge. Others provide that compensation shall represent the equivalent of the investment affected. These concordant

[37] *Factory at Chorzów (Merits)*, 1928, PCIJ Series A, No 17 at 47–8.

[38] *Bank of International Settlement—Partial Award* (n 35), 183, paras 160, 170, 175, and 195.

provisions are variations on an agreed, essential theme, namely that, when a State takes foreign property, full compensation must be paid.[39]

It may be inferred from this that, as the PCIJ stated in *Chorzow Factory*, if the dispossession meets the other criteria for its legality and is accompanied by a payment of compensation at the fair market value as it stood immediately before the intention of the taking became known to the public, including interest until the date of payment, that would render the measure lawful. Failure to do so would entail an unlawful dispossession, which would require compensation for loss of profits between the date of the taking and the date of the award/settlement, in addition to compensation of the value on the date of the taking.[40]

44.4 Damages Caused Under Circumstances Precluding Wrongfulness

As can be concluded from the annulment decision in *CMS v Argentina*, in any situation where there is an alleged breach of an international obligation, four basic issues need to be addressed. In the first place, it must be determined whether there has been non-performance or default in fact. This involves establishing the facts, interpreting the relevant international legal instrument, and answering questions such as what was required under the primary obligation. In the second place, if there has been non-performance or default in fact, it becomes necessary to determine whether such non-performance constitutes a breach of an international obligation, that is, whether there was any excuse or justification recognized by international law for non-performance. Third, in the absence of such an excuse or justification, if the breach is established, the question becomes what remedy or remedies are available to the aggrieved party. Finally, if damages have been caused under circumstances precluding wrongfulness, the question becomes whether and to what extent the author is nonetheless required to compensate the injured party.[41]

The ILC's articles codifying the law on State responsibility and the responsibility of international organizations contain six circumstances which, when invoked, justify or excuse the commission of acts that are otherwise unlawful. Subject to the limitation concerning *ius cogens*,[42] these circumstances are: consent, self-defence, countermeasures, *force majeure*, distress, and necessity.[43] The codified law of international

[39] *CME Czech Republic BV v The Czech Republic*, Award of 14 March 2003 at §497, available at: <http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf>.

[40] See, in this sense *ADC Affiliate Ltd and ADC and ADMC Management Ltd v Hungary*, ICSID Case No ARB/03/16 IIC 1 (2006).

[41] *CMS Gas Transmission Co v Argentina*, ICSID Case No ARB/01/8, Decision on Annulment, paras 129 and 136.

[42] Article 26 of the Articles on State Responsibility states that '[n]othing in this Chapter precludes the wrongfulness of a State which is not in conformity with an obligation arising under a peremptory norm of general international law'.

[43] S Szurek, 'The Notion of Circumstances Precluding Wrongfulness', in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010), 427 and A Ben Mansour, M Ménard, J-M Thouvenin, H Lesaffre, S Szurek, and S Heathcote, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility', in Crawford, Pellet and Olleson (eds), *The Law of international Responsibility*, 439 ff.

responsibility characterizes wrongful conduct in respect of which there exist exculpatory circumstances as 'non-wrongful', thus excluding international responsibility when one of these circumstances is successfully invoked.[44] Thus these circumstances remove responsibility entirely. However, it is made clear by the ILC that the invocation of a circumstance precluding wrongfulness is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question.[45] Thus, in essence the ILC made a reservation as to questions of possible compensation for damage in cases covered caused under circumstances precluding wrongfulness.[46] It pointed out in this regard that although the article uses the term 'compensation', it is not concerned with compensation within the framework of reparation for wrongful conduct. Rather, it is concerned with the question whether a party relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. For the same reason, according to the ILC, the reference to 'material loss' is narrower than the concept of damage under the law of responsibility for wrongful acts and thus concerns only the adjustment of losses that may occur when a party relies on a circumstance that precludes wrongfulness. This position follows logically from the ILC's characterization of conduct in respect of which there exists exculpatory circumstances as 'non-wrongful'; it can have no other meaning than that the issue of compensation resides outside the domain of the law of international responsibility for wrongful acts. Consequently, the answer to the question whether and to what extent pecuniary compensation is due to the injured party must be sought in the principles concerning liability for injurious consequences of conduct not prohibited by international law.[47]

As commented in section 44.2, the application of the principles of liability for acts not prohibited by international law in respect of ultra-hazardous activities and trans-boundary environmental harm is mainly captured in the ILC's *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*.[48] Beyond these areas, not much consensus exists regarding the application of these principles and practice has varied, especially in the area of international

[44] See, critically, V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) *EJIL* 10: 405 and C Farhang, 'Mapping the Approaches to the Question of Exemption from International Responsibility' (2013) *Netherlands International Law Review* 60: 93.

[45] See M Forteau, 'Reparation in the Event of a Circumstance Precluding Wrongfulness', in Crawford, Pellet, and Olleson (n 43), 887; S Ripinsky, 'State of Necessity: Effect on Compensation', 15 October 2007, available at: <http://ssrn.com/abstract=1546991> or <http://dx.doi.org/10.2139/ssrn.1546991>; J Crawford, *State Responsibility—The General Part* (Cambridge University Press, 2013), 318–20.

[46] That was indeed the title of draft Article 35 (current Article 27), which was adopted by the ILC, *ILC Yearbook* 1980, Vol II, Part Two, 61–2. See, in this sense *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, paras 260–1.

[47] Cf SP Jagota, 'State Responsibility: Circumstances Precluding Wrongfulness' (1985) *Netherlands Yearbook of International Law* XVI: 249 at 274; V Lowe, 'Precluding Wrongfulness: A Plea for Excuses' (1999) *European Journal of International Law* 10: 405 at 410–11. This explanation is better than the contradiction that the present author saw in the ILC stance in 1994; see RSJ Martha, 'Inability to Pay Under International Law and Under the Fund Agreement' (1994) *NILR* XLI: 85 at 105.

[48] UNGA 61/36. Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 18 December 2006.

investment law. What is undisputable however, is that treaty regimes involving circumstances excusing the breaches or exculpating a conduct that would otherwise constitute a breach of a primary obligation ought to be treated as *lex specialis* relative to the regime codified by the ILC. The dispositive nature of the rules of general international law on this point was emphasized in the annulment decision in *Sempra Energy v Argentina*. The Annulment Committee in that case expressly rejected the notion invoked by the tribunal because international law is not a fragmented body of law as far as basic principles are concerned; parties are free to adopt special rules to regulate their bilateral relations. The Committee rightly pointed out that while there may be certain norms of international law, including customary law, which would render it unlawful under international law for parties to agree to adopt a provision inconsistent with those norms, this is not the case with the liability for injurious consequences of damages caused under circumstances precluding lawfulness.[49] A previous annulment decision in *CMS v Argentina* states in this respect:

> However the Committee finds it necessary to observe that here again the Tribunal made a manifest error of law. Article 27 concerns, *inter alia*, the consequences of the existence of the state of necessity in customary international law, but before considering this Article, even by way of *obiter dicta*, the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI. The answer to that question is clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.[50]

This holding stands for the proposition that an international legal instrument can have the effect of excluding or limiting the liability for damages caused under circumstances precluding wrongfulness, which would otherwise apply under the regime of liability for injurious consequences of conduct not prohibited by international law.[51] Where, as is the case with most of the loan documentations of the multilateral financial institutions, the regime under a particular legal instrument does not purport to establish a special rule or dispense with the relevant rule under general international law, compensation may nevertheless be due in accordance with the principles of the latter regime. According to the ILC, the preferred way to effectuate this is through agreement between the relevant parties. In the absence of a negotiated settlement between parties, the determination of compensation may become the responsibility of an international court or tribunal. In those instances, the question of the extent of the liability will be the main issue.

[49] *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on Annulment, 10 June 2010.

[50] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8 (Annulment Proceeding), 25 September 2007.

[51] *LG&E Energy Corp LG&E Capital Corp, and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, paras 260–1.

45

Reparation for Damages Caused by Wrongful Acts

Under international law, legal consequences are entailed whenever there is an internationally wrongful act, which are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached.[1] It follows logically from this that the delinquent party has an immediate obligation of cessation and assurances or guarantees of non-repetition and to wipe out the consequences of the unlawful conduct.[2] As stated in the words of Judge Cançado Trindade: 'breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former'.[3] This is indeed how the ICJ and its predecessor understand it, as witnessed by *Chorzów Factory*, where it was considered that '[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation' and that therefore reparation is the indispensable complement of a failure to comply with an international obligation, which needs not to be stated in the governing legal instrument.[4] To which Fitzmaurice adds: '[t]he notion of international responsibility would be devoid of content if it did not involve a liability to "make reparation in an adequate form".'[5] More importantly, the latter author underlines that '[w]hile these statements were made specifically with reference to breaches of international engagements, they would appear to be applicable to all forms of international wrongs, since treaties and other contractual engagements are merely a particular form of international obligation, and there is in principle no reason why breaches of them should entail general consequences that breaches of other international obligations... do not'.[6]

Resolving issues over the nature or extent of the reparation to be made for the breach of an international obligation is, in fact, one of the functions of international courts

[1] Article 29, Articles on State Responsibility; Article 29, Articles on the Responsibility of International Organizations; see the discussion in D Shelton, 'Righting Wrongs: Reparations in Articles on State Responsibility' (2002) *AJIL* 96: 833 and J Crawford, *State Responsibility—The General Part* (Cambridge University Press, 2013), 461.

[2] According to the ICJ, 'refusal to fulfil a treaty obligation involves international responsibility'. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, ICJ Reports 1950, 65 at 228.

[3] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), (Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea), Separate Opinion Cançado Trindade*, 19 June 2012, 12, available at: <http://www.icj-cij.org/docket/files/103/17046.pdf>.

[4] *Factory at Chorzów (Germany/Poland)*, 1928, PCIJ Series A, No 17, 29.

[5] G Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol I (Grotius Publications, 1986), 6.

[6] Fitzmaurice (n 5), 6.

Annex 665

J. Crawford, *Brownlie's Principles of Public International Law* (Oxford, 9ed., 2019), page 537

Part IX The law of responsibility, 25 The conditions for international responsibility

James Crawford SC, FBA

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> treatment in the matter of protection or compensation, if any, as its own nationals (the plea of *diligentia quam in suis*). [81]

Victorious rebel movements are responsible—*qua* new government of the state—for unlawful acts or omissions by their forces occurring during the course of the conflict.[82] The state also remains responsible for the unlawful conduct of the previous government.

(p. 537) (E) Joint responsibility

The principles relating to joint responsibility of states[83] remain indistinct, and municipal analogies are unhelpful.[84] A rule of joint and several responsibility in delict should certainly exist as a matter of principle, but practice is scarce.[85] Practice in the matter of reparation payments for unlawful invasion and occupation in the immediate postwar period rested on the assumption that Axis countries were liable on the basis of individual causal contribution to damage and loss, unaffected by the existence of co-belligerency.[86] However, if there is joint participation in specific actions, for example where state A supplies planes and other material to state B for unlawful dropping of guerrillas and state B operates the aircraft, what is to be the position?

In *Certain Phosphate Lands in Nauru (Nauru v Australia)*, the International Court held that the possibility of the existence of joint and several responsibility of three states responsible for the administration of the trust territory at the material time did not render inadmissible a claim brought against only one of them.[87] The question of substance was reserved for the merits. In fact, a negotiated settlement was reached[88] and, subsequently, the UK and New Zealand, the other states involved, agreed to pay contributions to Australia on an *ex gratia* basis.[89]

ARSIWA Article 47 incorporates this reasoning, providing that the responsibility of each state may be invoked in the case of a plurality of responsible states, as long as total compensation does not exceed the damage suffered by the injured state. In other words, each state is separately responsible and that responsibility is not reduced by the fact that one or more other states are also responsible for the same act.

(F) Complicity

In *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, an issue arose concerning Serbia's alleged complicity for genocide within the meaning of Article III(e) of the Genocide Convention.[90] The Court said:

> [A]lthough 'complicity', as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the 'aid or assistance' furnished by one State for the commission of a wrongful act by another State … to ascertain whether the Respondent is responsible for 'complicity in genocide' within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether (p. 538) organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished 'aid or assistance' in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.[91]

The Court thereby endorsed ARSIWA Article 16, which provides:

> *Aid or assistance in the commission of an internationally wrongful act*

85 Brownlie (1983) 189–92.

86 But see *Anglo-Chinese Shipping Co Ltd v US* (1955) 22 ILR 982, 986.

87 ICJ Reports 1992 p 240, 258–9; ibid, 301 (President Jennings, diss).

88 Australia–Nauru Settlement, 10 August 1993, 32 ILM 1471.

89 UK Agreement, 24 March 1994, in UKMIL (1994) 65 *BY* 625.

90 On complicity: Ago, ILC *Ybk* 1978/II(1), 52–60; ILC *Ybk* 1978/II(2), 98–105; ILC *Ybk* 1979/II(2), 94–106; Quigley (1986) 57 *BY* 77; Aust, *Complicity and the Law of State Responsibility* (2011); Crawford (2013) ch 12; Jackson, *Complicity in International Law* (2015).

91 ICJ Reports 2007 p 43, 217.

92 ARSIWA, commentary to Art 16, paras 3–6.

93 Brownlie (1983) 157–8; ARSIWA, Art 11 and commentary; Crawford (2013) 181–8.

94 ICJ Reports 1980 p 3, 29–30, 33–6.

95 ARSIWA, commentary to Art 11, para 6.

96 Oppenheim 501. Further: Kelsen, *Principles of International Law* (2nd edn, 1952) 199–201.

97 *Corfu Channel*, ICJ Reports 1949 p 4, 85–6 (Judge Azevedo). For 'circumstances precluding wrongfulness', see ARSIWA, Part 1, ch V.

98 *The Jessie* (1921) 6 RIAA 57; *The Wanderer* (1921) 6 RIAA 68; *The Kate* (1921) 6 RIAA 77; *The Favourite* (1921) 6 RIAA 82.

99 Borchard (1929) 1 *ZaöRV* 223, 225; Schachter (1982) 178 Hague *Recueil* 1, 189; Gattini (1992) 3 *EJIL* 253; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1994) 218–32; Pellet in Crawford, Pellet, & Olleson (2010) 3, 8–11; Crawford (2013) 60–2.

100 *Neer* (1926) 6 RIAA 60, 61.

101 *Roberts* (1926) 6 RIAA 77, 80.

102 *Caire* (1929) 5 RIAA 516.

103 Ibid, 529.

104 Reports by García-Amador, ILC *Ybk* 1956/II, 186; ILC *Ybk* 1957/II, 106. This was the approach ultimately adopted in ARSIWA, commentary to Art 2, paras 1–4. But see Gattini (1999) 10 *EJIL* 397.

105 Eagleton (1928) 209; Lauterpacht (1937) 62 Hague *Recueil* 95, 359; Ago (1939) 68 Hague *Recueil* 415, 498; Accioly (1959) 96 Hague *Recueil* 349, 364.

106 *Casablanca* (1909) 11 RIAA 119; *Cadenhead* (1914) 11 ILR 177; *Iloilo* (1925) 6 RIAA 158, 160; *Pugh* (1933) 3 RIAA 1439; *Wal-Wal Incident* (1935) 3 RIAA 1657. Also: *Davis* (1903) 9 RIAA 460, 463; *Salas* (1903) 10 RIAA 720.

107 *Home Missionary Society* (1920) 6 RIAA 42, 44.

108 *Chattin* (1927) 4 ILR 248, 250. Also *Spanish Zone of Morocco* (1925) 2 RIAA 615, 644.

109 *Prats* (1868) in Moore, 3 *Int Arb* 2886, 2895; *Russian Indemnity* (1912) 11 RIAA 421, 440. Further: Cheng (1994) 218–32.

Annex 666

E. Sthoeger, "How do States React to Advisory Opinions? Rejection, Implementation, and what Lies in Between", *American Journal of International Law*, 2023, pp. 292-297

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SYMPOSIUM ON THE CONTOURS AND LIMITS OF ADVISORY OPINIONS

HOW DO STATES REACT TO ADVISORY OPINIONS? REJECTION, IMPLEMENTATION, AND WHAT LIES IN BETWEEN

*Eran Sthoeger**

Advisory opinions of the International Court of Justice (ICJ) are non-binding and lack operative clauses requiring compliance. At the same time, they reflect the ICJ's views as to rights and obligations of states under international law. In that sense they are not different from binding judgments and generate expectations of implementation of the Court's determinations. Although some states may reject an opinion, others have pursued implementation through the requesting organ, or through alternative political and legal means. And although it is not always easy to ascertain the effect of an opinion on states' behavior, advisory opinions often have practical ramifications, even if they are not implemented.

The Legal Status of Advisory Opinions

Advisory opinions do not qualify as "decisions" under Article 59 of the ICJ Statute: they do not have parties and do not bind states. They do not have *dispositifs* (operative clauses). They contain "replies" to the questions asked. Whereas non-compliance with contentious cases may be brought before the Security Council under Article 94 of the United Nations Charter,[1] advisory opinions do not constitute decisions in the context of Article 94, as there is no party to the case required to comply with them. Therefore, there is also no party against whom the reply of an advisory opinion would be enforced. But that does not mean that they are void of legal significance.

Already in 1972, Judge Gros of the ICJ questioned whether the distinction between advisory opinions and binding judgments was overstated. Like judgments, advisory opinions are "judicial decisions"—subsidiary means for the determination of rules of law—within the meaning of Article 38 of the Statute of the ICJ.[2] Judge Gros argued that, aside from *dispositifs*, the Court's reasoning "in both cases, represents the Court's legal conclusions concerning the situation which is being dealt with, and its weight is the same in both cases: there are no two ways of declaring the law."[3] In other words, though advisory opinions do not, formally speaking, alter a pre-existing legal situation, an advisory opinion contains the Court's analysis of rights and obligations of states under international law.

Furthermore, as seen below, an advisory opinion addressed to the requesting organ normally generates a post-opinion phase within that organ, which in turn can lead to further legal and political action by actors seeking

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[1] Although this has been a rarity, for such an instance see UN Doc. S/18428 (Oct. 28, 1986).

[2] André Gros, *Concerning the Advisory Role of the International Court of Justice*, *in* TRANSITIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 315 (Wolfgang Friedman, Louis Henkin & Oliver Lissitzyn eds., 1972).

[3] *Id.* at 314–15.

implementation, internationally and domestically. In some situations, this can create political and legal pressure on states that have rejected the opinion, notwithstanding the fact that there is no formal "post-judgment" phase.

Though formally addressed to the requesting organs, advisory opinions may in reality primarily address the rights and obligations of particular states and other entities—recent examples include the *Wall* advisory opinion and the pending proceedings in the request concerning the policies and practices of Israel in the Occupied Palestinian Territory, the *Kosovo* case, and the *Chago*s advisory opinion. In such circumstances, there may be a greater expectation that the relevant states implement or comply with the opinion. Furthermore, implementation may also be easier to assess in situations requiring action from a limited number of states. Additionally, such expectations may reflect the rise in the prominence of principles such as the rule of law. Expectations may be even higher of states that regularly voice support for such principles.

State Acceptance or Rejection of Advisory Opinions

States' reception of the advisory opinions of the Court has been inconsistent from the very beginning. Pursuant to the ICJ's opinion in the *Reparations* case, Israel paid the United Nations compensation for the assassination of mediator Count Folke Bernadotte, and the secretary-general considered the matter settled.[4] On the other hand, some member states continued to use admission to the United Nations as a political tool, ignoring the ICJ's opinion in *Conditions for Admission*, that admissions should be considered solely on the basis of the criteria of Article 4 of the UN Charter.[5] This resulted in another request for an advisory opinion from the General Assembly, asking if it could admit new members without a Security Council recommendation. The Court answered in the negative.[6]

In more recent examples, Israel rejected the Court's advisory opinion regarding the illegality of its wall in the Occupied Palestinian Territories. The Supreme Court of Israel had occasion to consider the opinion shortly after it was delivered. Noting the non-binding nature of the opinion, the Supreme Court stated that, as the "highest judicial body in international law," the "ICJ's interpretation of international law should be given its full appropriate weight."[7] The Supreme Court, however, rejected the advisory opinion's implications for its established methodology of examining the legality of each segment of the wall separately.[8]

In response to the *Chagos* advisory opinion, the United Kingdom reaffirmed its position on its sovereignty over the Archipelago, and its commitment to the obligations identified by the Tribunal in the binding award in the *Chagos Arbitration*, mainly to return the Archipelago to Mauritius once it is no longer needed for defense purposes.[9] It further stressed the non-binding nature of the advisory opinion and that the status of the Archipelago "as a United Kingdom territory" is "essential" for the U.S. naval base Diego Garcia.[10] The United Kingdom remains committed to this position, though as will be explained below, the United Kingdom and Mauritius have since commenced negotiations. An unsuccessful attempt to rely on the opinion was also made before the English Court of

[4] UN Doc. S/1506 (June 14, 1950).

[5] Conditions of Admission of a State to Memberships in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 ICJ Rep. 57 (May 28).

[6] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 ICJ Rep. 4 (Mar. 3).

[7] Mara'abe v. Prime Minister of Israel [2009] HCJ 7957/04, para. 56 (Sup. Ct. Isr.) (Isr.).

[8] *Id.*, para. 74.

[9] Philippa Webb, *The United Kingdom and the* Chagos Archipelago *Advisory Opinion: Engagement and Resistance*, 21 Melb. J. Int'l L. 1, pt. V (2021).

[10] Statement of UK in the General Assembly, at 11, UN Doc. A/73/PV.83 (May 22, 2019); Webb, *supra* note 9, at 12–16.

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Appeal. The Court of Appeal found that the opinion "is not a judgment in the traditional sense of determining a dispute as between parties where the judgment has binding effect."[11]

Seeking Implementation Through the Requesting Organ

As ICJ advisory opinions are directed to the requesting organ, one can expect that states seeking implementation initiate action within that organ. The success of such attempts has varied.

Recent examples in the General Assembly show this varying impact. For instance, after *the Wall* advisory opinion, the Assembly adopted a resolution which "considered" that "respect for the Court and its functions is essential to the rule of law."[12] It demanded that Israel and all United Nations member states comply with their legal obligations, as mentioned in the opinion. The Assembly also took active steps and requested the secretary-general to establish a register of damage caused to all natural or legal persons resulting from Israel's construction of the wall.[13] Such a register was established in a later Assembly resolution, on which the secretary-general reports regularly to the General Assembly.[14] The advisory opinion continues to be referred to in the Assembly's resolutions,[15] and Security Council Resolution 2334 on Israeli settlements recalled "the advisory opinion rendered" by the ICJ.[16]

In contrast, the General Assembly has not taken any concrete action in the aftermath of the *Kosovo* advisory opinion. After "having studied with great care the advisory opinion," it merely acknowledged it and welcomed the EU facilitation process between the parties.[17]

With respect to *Chagos*, the General Assembly welcomed the opinion and demanded that the United Kingdom withdraw from the Archipelago "unconditionally within a period of *no more than six months* from the adoption of the present resolution."[18] The resolution furthermore called on the United Nations and its specialized agencies to recognize the Archipelago as "an integral part of the territory of Mauritius."[19]

The Security Council's only request for an advisory opinion concerned the legal consequences of South African presence in Namibia in 1970.[20] The Court found that that presence was illegal and that South Africa was obliged to withdraw its administration from Namibia immediately. Member states were obligated to refrain from any action that implied recognition of the legality of, or lent assistance to, such presence and administration. A Council resolution took note with appreciation of the opinion, agreed with its operative conclusions, and called upon all states to conduct themselves accordingly. Nevertheless, the United Kingdom, joined at times by France and the United States, continued to veto draft resolutions in the Security Council on the Namibia issue.[21]

[11] R (Hoareau) v. Secretary of State for Foreign and Commonwealth Affairs [2020] EWCA Civ. 1010, para. 116 (Royal Cts. Just. July 30, 2020) (UK).

[12] GA Res. 10/15 (Aug. 2, 2004).

[13]

[14] GA Res. 10/17 (Jan. 24, 2007).

[15] GA Res. 72/14 (Dec. 7, 2017).

[16] SC Res. 2334, pmbl. (Dec. 23, 2016).

[17] GA Res. 64/298 (Sept. 9, 2010).

[18] GA Res. 73/295, para. 3 (May 22, 2019) (emphasis added).

[19] *Id.*, paras. 6–7.

[20] SC Res. 284 (July 29, 1970).

[21] *See, e.g.*, SC Res. 10489 (Dec. 30, 1971) (draft); SC Res. 11716 (June 6, 1975) (draft).

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Id.

Seeking Implementation by Other Legal and Political Means

Beyond the requesting organ, states (and other interested parties) may pursue other avenues, both political and legal—including further litigation—in an attempt to implement an advisory opinion.

A recent example is the *Chagos* opinion, where Mauritius has sought to utilize the opinion in other fora to bring to bear various forms of political pressure on the United Kingdom. In August 2021, the Universal Postal Union, a United Nations specialized agency, decided to no longer recognize stamps issued by the British Indian Ocean Territory, which it would from then on consider to be part of Mauritius.[22] Mauritius has also raised the issue in the Indian Ocean Tuna Commission (IOTC), an intergovernmental organization established under the auspices of the Food and Agriculture Organization (FAO). A 2022 legal opinion from the FAO took the view that the IOTC should treat Chagos as part of Mauritius.[23] The matter is, as of October 2023, still pending: as part of a consultative process with the IOTC, during the 2023 IOTC annual meeting, the United Kingdom committed to clarifying "the status of its [IOTC] membership before the end of the year," and Mauritius raised no objection.

Perhaps most notable, however, has been Mauritius' initiation of legal proceedings against the Maldives for delimitation of the maritime boundary between Maldives and the Chagos Archipelago, heard before a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS). In its judgment on preliminary objections on January 28, 2021, the Special Chamber rejected the Maldives' arguments that the United Kingdom was an indispensable third party to the proceedings due to the sovereignty dispute over Chagos. The Special Chamber held that the ICJ's advisory opinion, while not binding, was "authoritative" and made "determinations" with "legal effect and clear implications for the legal status of the Chagos Archipelago," such that "Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of the decolonization of Mauritius is completed."[24] In contrast to the approach taken by the courts of Israel and the United Kingdom, which stressed the non-binding nature of advisory opinions, the Special Chamber treated the opinion not just as a subsidiary means of determining the law, but as a judgment that essentially settled the sovereignty dispute.

Post-Opinion Negotiations

Notwithstanding their non-binding character, advisory opinions may factor into efforts to settle disputes via negotiations. The recent *Chagos* example is demonstrative. While there has been no change in the United Kingdom's official position, on November 3, 2022, Mauritius and the United Kingdom announced the start of negotiations "on the exercise of sovereignty" over the Archipelago. The Parties stated their intention "to secure an agreement on the basis of international law to resolve all outstanding issues," taking into account "*relevant legal proceedings*."[25]

The statement conveyed the intention to conclude the talks by early 2023, yet no outcome has been made public as of October 2023. Finding an agreed solution on sovereignty is undoubtedly complicated by other factors. These include the UK–U.S. agreement on the continued operation of the U.S. naval base on Diego Garcia in the archipelago, compounded by the fact that the United States is not a party to the negotiations. Mauritius has publicly

[22] Universal Postal Union Press Release, UPU Adopts UN Resolution on Chagos Archipelago (Aug. 27, 2021).

[23] Report of the 27th Session of the Indian Ocean Tuna Commission, IOTC-2023-S27-R, paras. 12–13 (July 26, 2023).

[24] Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Case No. 28, paras. 246–50 (ITLOS Jan. 28, 2021).

[25] British Indian Ocean Territory/Chagos Archipelago, Statement Made on November 3, 2022, UIN HCWS354.

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stated its commitment to retain the base. However, some British parliamentarians, as well as possibly some in the United States and India, are wary of the possibility that Mauritius, which is financially indebted to China, might allow China to erect a base in the Archipelago.[26] Other sensitivities, such as the status of the UK's Sovereign Bases in Cyprus[27] or its dispute with Argentina over the Falklands/Malvinas may be another complicating factor.[28] These demonstrate that the question of Chagos cannot be viewed in isolation from domestic sensitivities concerning other territorial disputes over British Overseas Territories.

A Nuanced Response

States often refer to the non-bindingness of advisory opinions when disagreeing with their content. The *Wall* opinion remains unimplemented almost twenty years later. Almost five years since the *Chagos* opinion, the United Kingdom has not ended its administration of the archipelago. In itself, the expectation that one particular state should comply with an opinion may also give the impression that advisory opinions are used as a guise to bypass the consent necessary for bringing contentious cases before the Court.[29]

At the same time, it should be noted that, despite its views being rejected by the ICJ, the United Kingdom has stated that it will continue to be supportive of the Court as an institution and to engage with international courts generally.[30] The Supreme Court of Israel, despite rejecting the *Wall* opinion, mainly on factual grounds, sought to find common ground with the legal analysis of the ICJ. This has historically not always been the case, as there are examples of states that have shied away completely from engaging with international courts and tribunals in the wake of an unfavorable judicial or arbitral decision.[31]

The decision by Mauritius and the United Kingdom to enter into negotiations over the Archipelago was, furthermore, not taken in a vacuum: it is linked to the Court's opinion and the subsequent events described above. Whatever the results of these negotiations, the opinion has already influenced the decision making of both states. It may be too soon to evaluate the precise effect of the *Chagos* opinion and what contribution it will make toward resolving the dispute, but the mere fact that the parties are negotiating is more than can be said of states' reactions to other advisory opinions.

The Judgment of the ITLOS Special Chamber in *Mauritius/Maldives* has not been free of criticism, especially for the legal conclusions it drew from the *Chagos* opinion and the General Assembly resolution.[32] Nevertheless, it demonstrates the potential of advisory opinions to produce effects similar to that of binding judgments and alter the legal situation of states. The Judgment allowed the case to progress to the merits phase and for the Special Chamber to delimit the maritime boundary of the UK-administered archipelago.

[26] Abhinandan Mishra, *China Looking for Naval Bases Near Diego Garcia*, Sunday Guardian (Dec. 10, 2022); Parul Chandra, *India in the*

E.g., the pleadings of Cyprus in Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, CR 2018/23, 48–49, 53–60 (Sept. 4, 2018).

[28] Falkland Islands Government Press Release, Legislative Assembly Reaffirms Islanders Rights to Self-Determination (Nov. 3, 2022).

[29] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95 (Feb. 25) (dec., Tomka, J.).

[30] Webb, *supra* note 9, at 22–23.

[31] *Id.* at 20–21.

[32] Natalie Klein, *Chagos: A Boundary Dispute Tips Over a Sovereignty Ruling*, Interpreter (Feb. 8, 2021); Karen N. Scott, *Legal Acts and Legal Facts: The Mauritius/Maldives Maritime Boundary Dispute in the Chagos Archipelago*, ANZSIL Perspec. (Feb 23. 2021).

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Crossfire Over Strategic Chagos Islands, DECCAN HERALD (Nov. 3, 2022).

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Conclusion

Judge Gros aptly said that "there are no two ways of declaring the law." In keeping with the principle of self-appreciation,[33] whether or not an advisory opinion is considered as correctly reflecting the law—and how or whether to act upon it—is a matter for states' consideration. And as seen above, different opinions have been received differently by states. And while the role advisory opinions play in the decision making of states may be hard to ascertain, the opinion of the World Court can provide support and validation for a particular understanding of the law and may induce states and other actors to adopt the position articulated by the Court.

[33] Prosper Weil, *"The Court Cannot Conclude Definitively . . ."* Non Liquet *Revisited*, 34 COLUM. J. TRANSNAT'L L. 109, 119 (1998).

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Annex 667

"Academician Israel Yuri Antonievich is 80 years old!", *Russian Academy of Sciences*, 15 May 2010 (Russian original and English translation)

Academician Israel Yuri Antonievich is 80 years old!

05/15/2010

Anniversary of Academician Izrael Yuri Antonievich

ACADEMICIAN

Israel Yuri Antonievich

Yuri Antonievich Israel was born on May 15, 1930 in Tashkent.

He graduated from Central Asian State University in 1953 with a degree in physics and was sent to work in Moscow at the Geophysical Institute of the USSR Academy of Sciences, where he worked as an engineer and researcher under the leadership of Academician E. K. Fedorov. At the Institute of Applied Geophysics Yu.A. Israel went from an ordinary researcher to the director of the institute, which he headed from 1969 to 1973. Since 1974, he has been the head of the Main Directorate of the Hydrometeorological Service under the Council of Ministers of the USSR. Since 1978 - Chairman of the State Committee for Hydrometeorology and Environmental Control.

In 1978 Yu.A. Israel created the Laboratory for Monitoring the Natural Environment and Climate, and in 1990, on its basis, the Institute of Global Climate and Ecology (IGCE), which he heads.

Corresponding member since 1974, academician since 1994 - Department of Earth Sciences.

Specialist in the field of atmospheric physics, climatology, ecology, oceanology and geography.

Yu.A. Israel worked on the meteorological aspects of radioactive and chemical contamination of natural environments. He became one of the first scientists who personally received and analyzed extensive experimental material on the spread of radioactive products after nuclear weapons tests, since 1954 - at the country's nuclear test sites and beyond, after accidents at nuclear enterprises, including the accident at Chernobyl nuclear power plant, and data on the distribution of chemical products during the operation of various enterprises. He proposed a system for limiting emissions of pollutants and harmful effects on the biosphere.

He was the head of a major scientific direction in the field of hydrometeorology and climatology and actively promoted the introduction of the achievements of hydrometeorology and environmental sciences into the national economy. In addition to meteorological satellites, he developed and launched a series of Meteor-Nature satellites. His work on active influence on hydrometeorological processes received great development.

Under the leadership of Yu.A. Israel and with his direct participation, the National Service for Monitoring and Control of the Level of Environmental Pollution, primarily the atmosphere, the World Ocean and other natural environments, including background monitoring, was created and is functioning.

In 1978, Yu. A. Israel participated in the creation of a new concept of the World Climate Program, which for the first time included the block "Studying the impact of climate change." These works contributed to the formulation and adoption of the United Nations Framework Convention on Climate Change.

In April 1986, Yu.A. Israel was tasked with leading a large-scale effort to measure and study radioactive contamination of natural environments across vast areas following the Chernobyl accident. From the first days

after the accident, for several months, he carried out this work highly professionally, daily presenting to government authorities pollution data obtained by a large team of employees from 10 helicopters and aircraft equipped with X-ray and gamma spectrometric instruments, as well as as a result of the analysis of huge quantities ground samples. (The effectiveness of these data was due to the extensive experience gained at the country's nuclear test sites.) Based on these data, the most important decisions were made - on the evacuation and temporary partial resettlement of people from contaminated areas, on the alienation of territories, on management of the economy in less contaminated areas.

He is the author and co-author of more than 250 scientific works, including 23 monographs on the most important problems of modern science.

He created a scientific school and has many students.

From 1979 to 1988 Yu.A. Israel was elected as a deputy of the Supreme Soviet of the USSR.

Yu.A. Israel is a member of the International Academy of Astronautics.

Chairman of the Scientific Council of the Russian Academy of Sciences on the problems of the World Ocean. Chairman of the Scientific Council "Global Environmental Problems and Monitoring". Vice-Chairman of the IPCC.

Laureate of the USSR State Prize.

He was awarded two Orders of the Red Banner of Labor, the Order of Lenin, the Order of the October Revolution and the Order of Merit for the Fatherland, III and IV degrees.

Three times winner of the E.K. Fedorov Prize for the best work in the field of environmental protection.

Awarded the gold medal named after V.N. Sukachev of the USSR Academy of Sciences in the field of ecology.

Honored Scientist of the Russian Federation.

Yu.A. Israel is the first Russian laureate of the Prize. Sasakawa (1992), the most prestigious UN - UNEP award in the field of environmental protection.

Академику Израэлю Юрию Антониевичу - 80 лет!

15.05.2010

Юбилей академика Израэля Юрия Антониевича

АКАДЕМИК

Израэль Юрий Антониевич

Юрий Антониевич Израэль родился 15 мая 1930 года в Ташкенте.

Окончил Среднеазиатский государственный университет в 1953 г. по специальности физика и был направлен на работу в Москву в Геофизический институт Академии наук СССР, где работал в должности инженера и научного сотрудника под руководством академика Е. К. Федорова. В Институте прикладной геофизики Ю.А. Израэль прошел путь от рядового научного сотрудника до директора института, который возглавлял с 1969 по 1973 г. С 1974 г. – начальник Главного Управления Гидрометеослужбы при Совете Министров СССР. С 1978 г. – председатель Государственного комитета по гидрометеорологии и контролю природной среды.

В 1978 г. Ю.А. Израэль создал Лабораторию мониторинга природной среды и климата, а в 1990 г. на её базе – Институт глобального климата и экологии (ИГКЭ), который он и возглавляет.

Член-корреспондент с 1974 г., академик с 1994 г.- Отделение наук о Земле.

Специалист в области физики атмосферы, климатологии, экологии, океанологии и географии.

Ю.А. Израэль занимался метеорологическими аспектами радиоактивного и химического загрязнения природных сред. Он стал одним из первых ученых, лично получивших и проанализировавших обширный экспериментальный материал о распространении радиоактивных продуктов после испытаний ядерного оружия, с 1954 г. – на атомных полигонах страны и за их пределами, после аварий на атомных предприятиях, в том числе и аварии на Чернобыльской атомной электростанции, и данные о распространении химических продуктов при работе различных предприятий. Им предложена система ограничения выбросов загрязняющих веществ и вредных воздействий на биосферу.

Он был руководителем крупного научного направления в области гидрометеорологии и климатологии и активно содействовал внедрению достижений гидрометеорологии и наук о природной среде в народное хозяйство. Им была разработана и запущена, кроме метеорологических спутников, серия спутников «Метеор-природа». Большое развитие получили его работы по активному воздействию на гидрометеорологические процессы.

Под руководством Ю.А. Израэля и при его непосредственном участии была создана и функционирует Общегосударственная служба наблюдения и контроля за уровнем загрязнения окружающей среды, в первую очередь атмосферы, Мирового океана и других природных сред, в том числе фонового мониторинга.

В 1978 г. Ю. А. Израэль участвовал в создании новой концепции Всемирной климатической программы, в которую впервые вошел блок «Изучение влияния изменений климата». Эти работы способствовали формулировке и принятию Рамочной конвенции ООН по изменению климата.

В апреле 1986 г. Ю.А. Израэлю было поручено возглавить широкомасштабную работу по измерению и исследованию радиоактивного загрязнения природных сред на обширных территориях после аварии на Чернобыльской АЭС. Начиная с первых дней после аварии в течение нескольких месяцев он высокопрофессионально выполнял эту работу, ежедневно представлял в правительственные органы данные о загрязнении, получаемые большой группой сотрудников с 10 вертолетов и самолетов, оборудованных рентгенометрическими и гамма-спектрометрическими приборами, а также в результате анализа огромного количества наземных проб. (Эффективность этих данных была обусловлена большим опытом, полученным на атомных полигонах страны.) На основании этих данных принимались самые ответственные решения – об эвакуации и временном частичном отселении людей из загрязненных зон, об отчуждении территорий, о ведении хозяйства на менее загрязненных территориях.

Он автор и соавтор более 250 научных работ, включая 23 монографии по важнейшим проблемам современной науки.

Создал научную школу и имеет много учеников.

С 1979 по 1988 г. Ю.А. Израэль избирался депутатом Верховного Совета СССР.

Ю.А. Израэль – член Международной академии астронавтики.

Председатель научного совета РАН по проблемам Мирового океана. Председатель научного совета "Глобальные экологические проблемы и мониторинг". Вице-председатель МГЭИК.

Лауреат Государственной премии СССР.

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Удостоен золотой медали имени В. Н. Сукачева АН СССР в области экологии.

Заслуженный деятель науки РФ.

Ю.А. Израэль – первый российский лауреат премии им. Сасакавы (1992 г.), наиболее престижной премии ООН – ЮНЕП в области охраны окружающей среды.