

# **Compendium of Global Environmental Constitutionalism**

**Selected Cases and Materials  
Second Edition 2019**

**United Nations Environment Programme (UNE)**

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**"[A] judge today must be conscious and alive to the beauty and magnificence of nature, the interconnectedness of life systems on this planet and the interdependence of ecosystems. "**

***Syed Mansoor Ali Shah, CJ  
Asghar Leghari v. Federation of Pakistan, 2018***

## Case Summaries<sup>1</sup>

### Asia Pacific

**\* 1. Juan Antonio, Anna Rosario and Jose Alfonso Oposa & Others v. The Honorable Fulgencio S. Factoran, Jr., (Supreme Court of the Philippines, 1993).** *The court recognized the principle of intergenerational justice and granted standing to petitioners, who represented their generation and generations of unborn Filipinos in a petition opposing timber license agreements.*

**Virender Gaur and Ors. v State of Haryana and Ors (Supreme Court of India, 1995).** *The appellant surrendered 25% of her land to her municipality, which was a condition for her to construct a building. The law required that the surrendered land be reserved for open space for better sanitation and environment. The government granted a 99-year lease and a building was constructed on the site. The court held that the environment had within its ambit hygienic atmosphere and ecological balance. The court found it was the duty of the State to shed its unbridled sovereign power and to forge an ecological balance and hygienic environment. The court observed that article 21 of the constitution protected the right to live as a fundamental right, encompassing the protection and preservation of environment, ecological balance, and freedom from pollution of air and water, sanitation. Therefore, any action causing environmental, ecological, air, or water pollution, etc. violated the right to life.*

**\* 2. Vellore Citizens' Welfare Forum v. Union Of India (Supreme Court of India, 1996).** *This is a public interest case that held, inter alia, that the government's allowance or acquiescence in the decades-long discharge of toxic chemicals into surface and drinking water systems from more than 900 tanneries in the five districts of Tamil Nadu, India, amounted to a violation of constitutional rights to life, among others. The Court issued a wide-ranging remedial plan to install pollution control equipment, close facilities, issue and collect fines, restore affected areas, and exercise administrative and judicial oversight.*

**Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor (Supreme Court of Malaysia, 1996).** *The case related to procedural fairness and the constitutional rights of a civil servant facing dismissal. The court noted that "life" in the constitution does not refer to mere existence. The court interpreted the "right to life and liberty" under art. 5 of the constitution as "incorporating all those facets that are an integral part of life itself and those matters which go to form the quality of life. It includes the right to live in a reasonably healthy and pollution free environment."*

**\* 3. Dr. Mohiuddin Farooque and another v. Bangladesh (Supreme Court of Bangladesh, 1997).** *In this case, the Supreme Court of Bangladesh upheld the government's implementation of a wide-ranging and controversial flood control plan that displaced more than a million people. In so doing, however, and to reflect various constitutional protections – including the "right to life," – the court directed agencies to "strictly comply" with measures to ensure access to water, protection of ecological and historical resources, and provide just compensation, and to comply with other environmental and land use requirements.*

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<sup>1</sup> An asterisk indicates that an edited version of the case is included in this Compendium. Throughout the Compendium, omitted material is indicated with ellipses (...) or with brackets [ ].

**Bulankulama v Secretary, Ministry of Industrial Development (Supreme Court of Sri Lanka, 2000).** *Petitioners challenged a mining project that had not yet obtained a feasibility study or development plan. Once obtained, the feasibility study and development plan would be confidential and the Secretary of the Ministry of Industrial Development was required to approve them without unreasonable delay. Mining operations would exhaust all known phosphate reserves. The court held that the government is the trustee of natural resources in Sri Lanka and that the organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. The court considered the agreement must be considered in light of the principles contained in the Rio Declaration, which provides that human beings are at the center of concerns for sustainable development. The court concluded that there was an imminent infringement of the petitioners' constitutional rights to equal protection before the law (art. 12(1)) and constitutional freedoms to (a) engage in association with others in any lawful occupation, profession, trade, business or enterprise (art. 14(1)(g), and (b) move and choose their residence within Sri Lanka (art. 14(1)(h)).*

**KM Chinnappa and TN Godavarman v Union of India (Supreme Court of India, 2002).** *The lead case dealt with the adverse environmental impact of mining activities on the flora and fauna of the Kudremukh National Park. However, this matter arose from an Interlocutory Application filed by the Amicus Curiae in the main matter. The Amicus submitted that certain laws passed by the State of Karnataka and Uttar Pradesh violated the Wildlife Protection Act, 1972. The Amicus further submitted that despite the court's orders, mining activities continued in and around the Kudremukh National Park by the Kudremukh Iron Ore Company Ltd. The court held that "intergenerational equity" is part of the constitutional right to life.*

**Prakash Mani Sharma v. His Majesty's Government Cabinet Secretary and Other (Supreme Court of Nepal, 2003).** *The petitioner sought to quash a government decision to allow importation and operation of diesel taxis in the Katmandu Valley. The petitioner further sought mandamus orders to protect the environment on the grounds that unfettered importation of diesel vehicles and unrestricted importation of leaded petrol would negatively impact human health as well as Katmandu Valley's historical, cultural, and archaeological life. The court held that the constitutional right to freedom of personal liberty may only be protected by a healthy environment and that the state has primary responsibility for protecting the right to personal liberty by mitigating environmental pollution as much as possible.*

**\* 4. M.C. Mehta v. Union of India & Others (Supreme Court of India 2004).** *In a previous opinion, the Court came to the conclusion that the mining activities in the vicinity of protected wildlife sanctuaries and tourist resorts are bound to cast serious impact on the local ecology. The Court applied the precautionary principle and principles of sustainable development and ordered a series of remedies including the establishment of a monitoring committee to oversee compliance with administrative orders on a mine to mine basis.*

**\* 5. Santosh Mittal vs State Of Rajasthan And Ors. (The High Court of Judicature for Rajasthan 2004).** *Relying on data from an NGO, the Court found that drinks made locally by PepsiCo and Coca-Cola contained pesticides and other carcinogenic chemicals that were not found in similar drinks made elsewhere. The Court held that plaintiffs' constitutional right to free expression included the right to receive information and therefore ordered the makers of carbonated beverages to indicate clearly on the package the details of its composition & nature and quantity of pesticides and chemicals, if any, present therein.*

**\* 6. Advisory Opinion: Whether the Supervision of and Assistance to Public and Private Waste Cleanup and Disposal Organs is Unconstitutional? (Taiwan Constitutional Court 2006).** *This advisory opinion concludes that a law that permits federal authorities to suspend the licensure of non-complying waste disposal companies does not exceed constitutional constraints on legislative power, or unduly infringe upon constitutionally guaranteed rights to work.*

**\* 7. Naewonsa Temple v. Korea Rail Network Authority (Supreme Court of Korea 2006).** *The temple and 3 other plaintiffs challenged the construction of a railroad in an area with historic, spiritual, and ecological significance. The Court summarily rejected the argument that the salamanders whose habitat would presumably be threatened had standing to sue. Interpreting the constitutional right to live in a healthy and sound environment in conjunction with the Framework Act on Environment Policy, the Court found that the environmental impact assessments indicated that there was insufficient possibility that the construction of the tunnel in this case would infringe the environmental benefits of the above appellants.*

**Watte Gedera Wijebanda v. Conservator General of Forest (Supreme Court of Sri Lanka, 2007).** *The petitioner challenged the government's decision to refuse his application to mine silica quartz. The court held that the right to a clean environment and the principle of inter-generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of the equal protection provisions contained in the Constitution of Sri Lanka. Article 12(1) of the constitution provides, "All persons are equal before the law and are entitled to the equal protection of the law."*

**Glanrock Estate (P) Ltd. v. The State of Tamil Nadu, (Supreme Court of India, 2010).** *This case related to land ownership rights and the vesting of forests in the state. The court held that the doctrine of sustainable development also forms part of article 21 of the constitution. Further, the "precautionary principle" and the "polluter pays principle" flow from the core value in article 21.*

**\* 8. Arnold v Minister Administering the Water Management Act 2000 (High Court of Australia 2010).** *In this case, the High Court rejected a constitutional challenge to the federal government's increased regulation of groundwater extraction, which affected landowners and farmers claimed contravened a constitutional prohibition against the Commonwealth abridging "the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation." Based on reasoning in the Tasmanian Dam and other cases, the High Court held that groundwater does not constitute "waters of rivers" under the constitution.*

**\* 9. Mendaing v. Ramu Nico Management (National Court of Justice for Papua New Guinea, 2011).** *In this case, the National Court of Justice of PNG found that the plaintiffs proved that the defendant's method of disposing of tailings from the Ramu Nickel Mining Project via deep-sea injection near the Basamuk, Madang Province violated National Goal No 4 of the national constitution, which provides that "Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations." The court also held that the plaintiffs had standing to pursue their claims.*

**Animal Welfare Board v. A Nagaraja, (Supreme Court of India 2014).** *The appeal challenged the legality of bullock cart racing, alleging that it violated the Prevention of Cruelty to Animals Act. The court found that every species has a right to life and security and therefore expanded the meaning of "life" under the constitutional right to life to cover animals. It concluded that all animals have the right to dignity and fair treatment.*



***Resident Marine Mammals v. Reyes (Supreme Court of the Philippines, 2015).*** The court permitted standing to petitioners, being stewards of the marine mammals of the Tañon Strait. Standing was granted in accordance with the Rules of Procedure for Environmental Cases (A.M. No. 09-6-8-SC, effective 29 April 2010), which clarify that any Filipino may commence a citizen suit in representation of others, including minors or generations yet unborn, to enforce rights or obligations under environmental laws. The Court cited annotations to the rules, which provide that the rule on standing “collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature.”

**\* 10. Pro Public v Godavari Marble Industries Pvt. Ltd. and Others (Supreme Court of Nepal 2015).** In this case, the Court considered whether continued marble mining in an area protected both by the government and by UNESCO because of its ecological, historic, and spiritual significance was consistent with the constitutional commitment to a healthy environment. The Court reviewed the history of international environmental protection, as well as Nepal’s constitutional environmental jurisprudence and found a strong constitutional commitment to environmental justice. It held that the anticipated economic benefits of continued mining were outweighed by the harm it would do to the environment and to the people whose right to live with dignity and freedom required a healthy environment.

**\* 11. Teitiota v Ministry of Business Innovation and Employment (Supreme Court of New Zealand 2015).** Application for refugee status for native of Kiribati which is facing steadily rising sea water levels as a result of climate change which, over time, may force the inhabitants of Kiribati to leave their islands. However, the Court found that on the facts of this case, the applicant did not face “serious harm” and that there was no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can.

**\* 12. Raub Australian Gold Mining v. Hue Shieh Lee (Court of Appeal, Malaysia 2016).** This is a SLAPP suit, in which a gold mining company sued a community activist for defamation because of statements she had made describing the results of surveys which had indicated a higher than normal prevalence of illness in areas near the gold mining operations. Recognizing the value to society of activists, the Court held that the statements were not defamatory.

**\* 13. Salim v. State of Uttarakhand (High Court of Uttarakhand at Nainital 2017).** Following the precedent that a Hindu idol is a juristic entity, the Court in this case held that the Rivers Ganges and Yamuna, worshipped by Hindus, was a juristic person. The Court discussed Hindu practice and belief systems at length and examined the distinction between juristic and natural persons, finding that recognition of an entity as juristic person is for subserving the needs and faith of society which required the rivers be declared legal persons/living person under Articles 48-A and 51A(g) of the Constitution of India. The Court further declared that certain government representatives were to act in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries and also to promote the health and well being of these rivers.

**\* 14. Miglani v. State of Uttarakhand & others (High Court of Uttarakhand at Nainital 2017).** Ten days after the Salim case, and under continuous mandamus in this PIL, the Court declared, in its parens patriae jurisdiction, that Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system and have the status of legal persons with all corresponding rights. The Court focused on the importance of nature for the planet and for human development, citing a wide variety of literary, spiritual, ecological, as well as domestic and foreign legal sources, and held that the fundamental human rights on which human survival depends are

*Nature's rights. Skeptical of traditional principles of environmental law (including sustainable development, greening economies, polluter pays, and the precautionary principle), the Court identified certain individuals to act in loco parentis as the human face to protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand.*

**Muhammad Ayaz v Government of Punjab through its Chief Secretary & Ors (High Court of Lahore, 2017).** *The court upheld the Punjab Environmental Protection Agency's decision to seal a steelworks factory that was non-compliant with an environmental protection order (EPO) and was causing air and noise pollution. The court noted that the EPA's legislative authority to take this action was based on the precautionary principle. Cognizant of the growth of jurisprudence on the establishment of environmental justice in Pakistan, the Court considered it necessary to ensure that enforcement mechanism responded swiftly, especially where public safety, public health and the environment must be protected from irreparable harm.*

**Ridhima Pandey v Union of India. (Writ Petition in the Supreme Court of India, 2017.)** *Applicant seeks directions that the government act to reduce the adverse impacts of climate change in India. The applicant invokes the principle of sustainable development and precautionary principle, as well as inter-generational equity principle and the public trust doctrine.*

**\* 15. Ashgar Leghari v. Federation of Pakistan (Lahore High Court, Pakistan, 2018).** *This case was brought under the Lahore High Court's continuing mandamus jurisdiction, assessing the work of the Climate Change Commission it had established in 2015. The Court reviewed at some length the threats of climate change in Pakistan, considering its effects on water resources as well as forestry, agriculture, among other things but found that the Commission had been the driving force in sensitizing the Governments and other stakeholders regarding gravity and importance of climate change and had accomplished 66% of the goals assigned to it. The Court then dissolved the CCC and established a Standing Committee to act as a link between the Court and the Executive and to render assistance to the government to further implementation.*

### Central and South America

**\* 1. Pablo Miguel Fabián Martínez Y Otros (Tribunal Constitucional de Peru, 2006) (La Oroya).** *Plaintiffs living in one of the most polluted cities in the world argued that nearby smelters were contaminating their air and giving them lead poisoning; they sought information about health risks and remedial measures to improve the health of members of the community as well as ongoing monitoring of epidemiological and environmental conditions. The court emphasized the indivisibility and interdependence of all rights including especially rights to health, education, dignified quality of life, and social equality, as well as rights of citizenship and political participation to ensure respect for human dignity, which is the purpose of all human rights. Relying on constitutional law and general principles of international environmental law, the Court ordered a series of remedial measures including the establishment of a medical emergency response system for lead poisoning, the identification of baseline levels of ambient air quality, the conduct of epidemiological and environmental surveys, and provisions for providing the community with adequate access to information about the health and environmental health effects of nearby industries.*

**\* 2. Beatriz Silvia Mendoza and others v. National State of Argentina (Supreme Court of Argentina 2008).** *In a landmark ruling against 44 companies and several governmental agencies at the national,*

provincial, and municipal levels, the Supreme Court of Argentina developed a multi-pronged action plan to assure the clean up of the Matanza/Riachuelo basin, one of the most polluted urban rivers in the world. The action plan included the provision of information, the control of further industrial pollution, cleaning up existing waste dumps, expanding the water and sanitation infrastructure, providing a federal court with ongoing oversight jurisdiction. The case is particularly important for the fusion of environmental and human rights, and for the elaborate remedial measures ordered by the Court.

**\* 3. Padilla Gutierrez, Clara Emilia y otros, todos en su condición de vecinos de lugares aledaños al Parque Nacional Marino Las Baulas de Guanacaste c/ SETENA, Secretaria Técnica Nacional Ambiental (Corte Suprema de Justicia de Costa Rica, Sala Constitucional 2008).** *Neighbors near a national park established for the protection of leatherback turtles (as well as many other species, including some protected under international law (CITES, RAMSAR) sought an order requiring the national government to assess the impact of tourism (including construction) on the flora and fauna of the park in an integrated and strategic way that accounts for the cumulative effects on the entire ecosystem, instead of on an individualized basis. Sensitive to the ecological interests, the court canceled all the licenses that had already been issued and suspended all work on the project pending the completion of an appropriate study coordinated with all relevant authorities.*

**\* 4. Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro y de la Viceministra del Medio Ambiente y Recursos Naturales, (Sala de lo Constitucional de la Corte Suprema de Justicia, El Salvador, 2010).** *When the environmental ministry failed to respond to a petition requesting information about the technical studies on the basis of which a state of environmental emergency was declared due to heightened levels of lead in the petitioner's district, the Court held that the petitioner had established a violation of her constitutional rights to information and petition, and ordered the government to, within 15 days, issue the issued certification of a biochemical study and within 30 days, issue respond to the request with regard to the evaluation of water pollution and gases in the sewage, rainwater, and building pipes. The court also ordered the government to provide damages for failing to respond in a timely manner to petitioner's request.*

**\* 5. Expediente sobre permisos de mineras a cielo abierto en los sitios de la UNESCO (Superior Tribunal de Justicia de Argentina, 2010).** *Plaintiffs brought an amparo action to seek reversal of a lower court order to grant a permit to allow mining exploration and extraction in an open mine in a UNESCO natural heritage site. Relying on the precautionary principle and other general principles of international environmental law, and with heightened awareness of the historical and natural value of the site, the Court put aside traditional procedural rules, holding that when there is the danger of grave or irreversible "generational harms," the absence of information or scientific certainty can't be used as a reason to delay the adoption of effective means to protect the environment. Moreover, the Court imposed on the defendant the obligation to supply the positive proof that the UNESCO environment was protected. In environmental matters, the court insisted, it is the undeniable role of the judge to participate actively with a view toward vindicating the right to a healthy and uncontaminated environment, as a Fundamental Human Right.*

**\* 6. La Camaronera en la Reserva Ecológica (Corte Constitucional del Ecuador, 2015).** *This was the first major constitutional court case interpreting the rights of nature provision, unique to Ecuador's constitution. The Court held that a judgment below violated due process because it unreasonably ruled in favor of a shrimp farmer's property rights, while ignoring the constitutionally protected rights of nature at the expense of the mangroves. The Court held that the latter provision effected a transformation of the juridical order from one in which humans were at the center, to one in which humans live harmoniously*

*in an ecosystem. The rights of nature entail the right to restoration, which implicates recuperation and the rehabilitation of nature's functions, of her vital cycles, her structure, and her evolutionary processes. The court also referred to the human right to live in a healthy and ecologically balanced environment.*

**T-622 of 2016 (Corte Constitucional de Colombia 2016).** *In this tutela action brought by the social justice organization Tierra Digna, the Court held that Colombia's ecological constitution gave the Rio Atrato – the nation's largest river and one of its most important ecosystems integral to the indigenous communities -- juridically cognizable rights. Ordering the government to create a national mining and energy policy that would protect the river and riverine inhabitants, the Court explained that "The importance of the biological and cultural diversity of the nation for future generations and the survival of our natural and cultural wealth imposes on the state the obligation to adopt public policies for the conservation, preservation and compensation that take into account the interdependence of biological and cultural diversity." This, the Court said, means that "justice must go beyond human beings to permit nature to be the subject of rights." The Court explained the necessity of taking "a further step in its jurisprudence toward the constitutional protection of one of our most important sources of biodiversity: the Atrato River" – resting on constitutional environmental provisions and the Court's own ample constitutional environmental jurisprudence.*

### **Africa**

**\* 1. Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (Federal High Court, Nigeria 2005).** *An intermediate level court held that the petroleum developers' flaring of 'waste' natural gas in the Niger Delta without the preparation of an environmental impact statement abridged the community plaintiffs' constitutionally guaranteed right to dignity. In observing that flaring activities contributes to climate change, the court held: "the inherent jurisdiction to grant leave to the applicants to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and moreover, that these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment." Accordingly, the court issued an injunction, which, unfortunately, was not enforced.*

**\* 2. Earthlife Africa Johannesburg v Minister of Environmental Affairs (High Court of South Africa, Gauteng Division 2017).** *An ENGO appealed the issuance of a permit to build a large coal-fired power station without having considered the climate change impacts. The Court considered the regulations and the environmental management act in light of the constitutional environmental provision and under international law. The Court held that even in the absence of an express obligation to consider climate change, the ministry is nonetheless required to consider all the relevant issues and this includes climate change and to do so before, and not after, the permit is issued.*

### **Europe**

**S v. France, (1990) 65 DR 250.** *The Court rejected a claim by a resident that the construction of a nuclear generating station less than 300 metres from her home at P. (Lair-et-Cher) on the banks of the Loire dating back to the 18<sup>th</sup> Century resulted in a nuisance and loss of property value in contravention of Article 8. The Court found that the government had taken sufficient measures to mitigate adverse effects.*

**\* 1. Lopez Ostra v. Spain (European Court of Human Rights, Chamber 1995).** *Health effects of air and water pollution suffered by residents due to waste treatment plant built in response to nearby*



concentration of tanneries. The Court held that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. It further found that the State did not succeed in striking a fair balance between the interest of the town's economic well-being—that of having a waste-treatment plant—and the applicant's effective enjoyment of her right to respect for her home and her private and family life and therefore that there had been a violation of Article 8.

**\* 2. Guerra and Others v Italy (European Court of Human Rights, Grand Chamber 1998).**

Residents near an agricultural chemical company object to air pollution caused by toxic releases from ordinary production cycles as well as occasional accidents, alleging violations of Articles 2, 8, and 10 of the Convention. The Court held that while Article 10 prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him, it does not impose on the government any positive obligations to collect and disseminate information on its own motion. However, the Court held that, because severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, Article 8 may impose positive obligations inherent in effective respect for private or family life, following *Lopez Ostra*, in part by failing to provide essential information in a timely manner.

**\* 3. In the case of Hatton and Others v. the United Kingdom (European Court of Human Rights Grand Chamber 2003).** There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8. The State's responsibility in environmental cases may arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention and broadly similar principles apply whether a case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority with Article 8 rights to be justified in accordance with paragraph 2 of this provision. In the circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.

**\* 4. Kyrtatos v. Greece (European Court of Human Rights, First Section 2003).** The Court rejected the applicants' claim that that urban development in the southeastern part of Tinos near the applicants' seasonal home on the Ayia Kiriaki-Apokofto Peninsula by the coast of Ayios Yianni, resulted in loss of wetland habitat and species sufficient to violate Article 8 of the Convention, which provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."

**Taskin and Others v. Turkey (European Court of Human Rights, Third Section, 2004).** Ten local landowners alleged that the operating permits issued for a gold mine using cyanide (allowed by the Supreme Administrative Court and the Ministry of Health and the Ministry of Environment and Forests and encouraged by the then Prime-Minister) and the related decision-making process had violated Articles 2 and 8 of the Convention. After surveying international texts on the right to a healthy environment, the Court reiterated that the state must be given a wide margin of appreciation in environmental cases. Nonetheless, the Court found a violation of Article 8 in the government's failure to enforce the administrative court's judgment that the permits had been wrongfully issued.

**\* 5. Fadeyeva v. Russia (European Court of Human Rights, First Section 2005).** *The European Court of Human Rights found that the Russian Federation's operation of a steel plant near the complainant's home endangered her health and well-being in violation of Article 8 of the European Convention on Human Rights, which provides: "Everyone has the right to respect for his private and family life, his home, and his correspondence [except in] accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Accordingly, the court ordered the Russian Federation to pay plaintiff for damages.*

**\* 6. Hamer v. Belgium (European Court of Human Rights, Second Section, 2007).** *A homeowner who had inherited property that had been built in a forested area and without a permit and who had subsequently renovated it, was ordered to demolish the house in order to restore the site to its original condition. This was deemed a civil penalty and therefore consistent with a simple finding of guilt. There was no violation of Article 1 of Protocol No. 1 even though the home was a "possession," because a fair balance (ie a reasonable relationship of proportionality) was struck between the demands of the general interest (protection of the forest area) and the requirements of the protection of the individual's fundamental rights and no other remedy was appropriate. The Court awards damages of EUR 5,000, because of the violation of Article 6 § 1 of the Convention in that the investigation period lasted more than 5 years between the initial police report of the violation and the enforcement proceeding.*

**\* 7. Borysiewicz v. Poland (European Court of Human Rights, Fourth Section 2008).** *Resident complained of state's failure to respond to noise and other nuisances from the adjoining workshop. After reviewing the relevant caselaw, the Court held that in the circumstances of the case, it had not been established that the noise levels complained of were so serious as to reach the high threshold established in cases dealing with environmental issues and that the complaint was manifestly ill-founded.*

**Tătar v. Romania (European Court of Human Rights, Chamber 2009).** *The following is excerpted from the Court's Press Release issued by the Registrar 27.1.2009). "The Court held unanimously that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, on account of the Romanian authorities' failure to protect the right of the applicants, who lived in the vicinity of a gold mine, to enjoy a healthy and protected environment. The Court awarded the applicants 6,266 euros (EUR) for costs and expenses. It dismissed, by five votes to two, their claim for just satisfaction."*

**Budayeva and Others v. Russia (European Court of Human Rights, Chamber 2008).** *The Court held unanimously that there had been a violation of Article 2 (right to life) of the European Convention on Human Rights on account of Russia's failure to protect the life of Vladimir Budayev, and, the applicants and the residents of Tyrnauz from mudslides which devastated their town in July 2000; a violation of Article 2 of the Convention on account of the lack of an adequate judicial enquiry into the disaster; no violation of Article 1 of Protocol No. 1 (protection of property); and no violation of Article 13 (right to an effective remedy) in conjunction with Article 1 of Protocol No. 1. Under Article 41 (just satisfaction), the Court awarded in respect of non-pecuniary damage 30,000 euros (EUR) to Khalimat Budayeva, EUR 15,000 to Fatima Atmurzayeva and EUR 10,000 to each of the other applicants." (Press Release issued by the Registrar, 20.2.2008).*

**Di Sarno v. Italy, (European Court of Human Rights, Second Section 2012).** *Rejecting a claim of force majeure, the Court held that the government's failure to avert and address a "waste crisis" in the*

*municipality of Somma Vesuviana and the State of Campania for more than 15 years amounted to a violation of Article 8, which provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.” The Court found that “[t]he collection, treatment and disposal of waste are without a doubt dangerous activities .... That being so, the State was under a positive obligation to take reasonable and adequate steps to protect the right of the people concerned to respect for their homes and their private life and, more generally, to live in a safe and healthy environment.”*

**\* 8. International Federation for Human Rights v. Greece (European Committee of Social Rights, 2013).** *After an extensive review of the applicable environmental law at the international, regional (European), and national level, and after applying the precautionary principle, the Committee held that the Greek State has failed to take appropriate measures to remove as far as possible the causes of ill-health and to prevent as far as possible diseases and that these deficiencies constitute a violation of Article 11§§1 and 3 of the Charter. The Committee further held that the public information initiatives were not only initiated too late, but also, in most cases, sporadic and insufficiently co-ordinated, in violation of Article 11§2 of the Charter. In the follow-up assessment, the Committee found that efforts at providing public information brought Greece into compliance with Article 11§2 of the Charter.*

**\* 9. Jugheli and Others v. Georgia (European Court of Human Rights Fifth Section, 2017).** *The Court found a violation of Article 8 where the government had operated a power plant only metres from the residential housing block where applicants lived for decades. The Court summarizes its environmental jurisprudence under Article 8 and finds that the virtual absence of a regulatory framework applicable to the plant’s dangerous activities before and after its privatisation and the failure to address the resultant air pollution that negatively affected the applicants’ rights under Article 8 of the Convention. Notably, the Court reiterated that the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community. However, the Court issued an award in respect of non pecuniary damage only for the period between accession to the EU and the termination of the plant’s operations.*

**\* 10. O’Sullivan McCarthy Mussel Development Ltd v. Ireland (European Court of Human Rights, Chamber 2018).** *The Court rejected applicants’ claim that Ireland’s imposition of a moratorium on mussel seed fishing in Castlemaine Harbour in County Kerry resulted in uncompensated economic loss in violation of rights under Article 1 of Protocol No. 1 of the Law of the European Union, which provides: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” The Court determined that Ireland’s decision to engage in environmentally protective practices “were due a wide margin of appreciation” even though one type of activity (mussel seed fishing) was prohibited while another similar activity (the harvesting of mature mussels) was not.*

**\* 11. Bursa Barosu Başkanlığı and Others v. Turkey (European Court of Human Rights, Chamber, 2018).** *The summary is excerpted from the Press Release, issued by the Registrar of the Court, ECHR 221 (2018) 19.06.2018. The Chamber held, unanimously, that there had been a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights. The case concerned the failure to enforce numerous judicial rulings setting aside administrative decisions authorising the construction and operation of a starch factory on farmland in Orhangazi (a district of Bursa) by a US company (Cargill). The Court declared the application admissible for only six of the applicants. The Court found in particular that, by refraining for several years from taking the necessary measures to comply with a number of final and*

*enforceable judicial decisions, the national authorities had deprived the applicants of effective judicial protection.*

**\* 12. Netherlands v. Urgenda Foundation, (The Hague Court of Appeal, 2018).** *The Court upheld a lower court judgment ordering the State to achieve a level of reduction of greenhouse gas emissions by end-2020 that is more ambitious than envisioned by the State in its policy. The Court provides a useful overview of legal efforts made at the national, regional, and international levels to mitigate and/or adapt to climate change. The Court concluded that the State had failed to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end-2020 and that, given the clear indications that the current measures will be insufficient to prevent a dangerous climate change, even leaving aside the question whether the current policy will actually be implemented, measures have to be chosen, also based on the precautionary principle, that are safe, or at least as safe as possible. The Court held that although the State did not enjoy a margin of appreciation on the question of whether to adopt a policy of emissions reductions of at least 25% by end-2020, it does have this margin in choosing the measures it takes to achieve the target.*

### **United States**

**\* 1. Juliana v. United States (United States Federal District Court for the District of Oregon 2016).** *In this case, the court held that the plaintiffs had a legally cognizable cause of action in to assert that the U.S. government's collective actions and inactions concerning greenhouse gas emissions deprived them of a "right to a stable climate" under the Due Process Clause of the 5<sup>th</sup> Amendment. The U.S. government found this decision so problematic that it took the extraordinary step of asking the 9<sup>th</sup> Circuit Court of Appeals take the case away from the lower court, and dismiss it without further proceedings. Oral argument occurred in December 2017. A ruling from the appellate court is pending.*

**\* 2. Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 161 A.3d 911 (Supreme Court of Pennsylvania 2017).** *In this case, the Pennsylvania Supreme Court held (4-1-1) that a state constitutional provision (The Environmental Rights Amendment of 1971) providing that "The people have a right to clean air, pure water, and ... values of the environment" is self-executing and enforceable. Moreover, the same constitutional provision impels the state government and its local agents as "trustee," to manage state lands in public trust, including use of proceeds from the leasing of lands for oil and gas development.*

**In Re Application of Maui Electric Company (Sierra Club v. Public Utility Commission of Hawai'i) (Supreme Court of Hawai'i 2017).** *In this case, the Supreme Court of Hawai'i held that the Hawai'i constitution's explicit right to a healthy environment is a protectable property interest under the Due Process Clause of the Hawai'i constitution. Accordingly, the Court held that Petitioner-Sierra Club is entitled to a due process hearing to challenge the Public Utility Commission's grant of a Power Purchase Agreement to continue to combust fossil fuels that it claims does not comport with the state's statutory goal to convert to 100 percent renewable energy by 2045. The Court also held that Sierra Club possesses constitutional standing to challenge the permit because the injury of its members is fairly traceable to greenhouse gas emissions.*

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## Section I: Judicial Opinions from Around the Globe

### A. Asia Pacific

#### **1. Juan Antonio, Anna Rosario and Jose Alfonso Oposa & Others v. The Honorable Fulgencio S. Factoran, Jr., (Supreme Court of the Philippines, 1993)**

*The court recognized the principle of intergenerational justice and granted standing to petitioners, who represented their generation and generations of unborn Filipinos in a petition opposing timber license agreements.*

... In a broader sense, this petition bears upon the right of Filipinos to a balanced and healthful ecology which the petitioners dramatically associate with the twin concepts of "inter-generational responsibility" and "inter-generational justice." Specifically, it touches on the issue of whether the said petitioners have a cause of action to "prevent the misappropriation or impairment" of Philippine rainforests and "arrest the unabated hemorrhage of the country's vital life support systems and continued rape of Mother Earth."

The controversy has its genesis in Civil Case No. 90-77 which was filed before Branch 66 (Makati, Metro Manila) of the Regional Trial Court (RTC), National Capital Judicial Region. The principal plaintiffs therein, now the principal petitioners, are all minors duly represented and joined by their respective parents. Impleaded as an additional plaintiff is the Philippine Ecological Network, Inc. (PENI), a domestic, non-stock and non-profit corporation organized for the purpose of, inter alia, engaging in concerted action geared for the protection of our environment and natural resources. The original defendant was the Honorable Fulgencio S. Factoran, Jr., then Secretary of the Department of Environment and Natural Resources (DENR). His substitution in this petition by the new Secretary, the Honorable Angel C. Alcala, was subsequently ordered upon proper motion by the petitioners. The complaint was instituted as a taxpayers' class suit and alleges that the plaintiffs "are all citizens of the Republic of the Philippines, taxpayers, and entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical forests." The same was filed for themselves and others who are equally concerned about the preservation of said resource but are "so numerous that it is impracticable to bring them all before the Court." The minors further asseverate that they "represent their generation as well as generations yet unborn." Consequently, it is prayed for that judgment be rendered:

. . . ordering defendant, his agents, representatives and other persons acting in his behalf to —

- (1) Cancel all existing timber license agreements in the country;
- (2) Cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements.

and granting the plaintiffs ". . . such other reliefs just and equitable under the premises."

The complaint starts off with the general averments that the Philippine archipelago of 7,100 islands has a land area of thirty million (30,000,000) hectares and is endowed with rich, lush and verdant rainforests in which varied, rare and unique species of flora and fauna may be found; these rainforests contain a genetic, biological and chemical pool which is irreplaceable; they are also the habitat of indigenous Philippine cultures which have existed, endured and flourished since time immemorial; scientific evidence reveals that in order to maintain a balanced and healthful ecology, the country's land area should be utilized on the basis of a ratio of fifty-four per cent (54%) for forest cover and forty-six per cent (46%) for agricultural, residential, industrial, commercial and other uses; the distortion and disturbance of this balance as a consequence of deforestation have resulted in a host of environmental tragedies, such as (a)

water shortages resulting from drying up of the water table, otherwise known as the "aquifer," as well as of rivers, brooks and streams, (b) salinization of the water table as a result of the intrusion therein of salt water, incontrovertible examples of which may be found in the island of Cebu and the Municipality of Bacoar, Cavite, (c) massive erosion and the consequential loss of soil fertility and agricultural productivity, with the volume of soil eroded estimated at one billion (1,000,000,000) cubic meters per annum — approximately the size of the entire island of Catanduanes, (d) the endangering and extinction of the country's unique, rare and varied flora and fauna, (e) the disturbance and dislocation of cultural communities, including the disappearance of the Filipino's indigenous cultures, (f) the siltation of rivers and seabeds and consequential destruction of corals and other aquatic life leading to a critical reduction in marine resource productivity, (g) recurrent spells of drought as is presently experienced by the entire country, (h) increasing velocity of typhoon winds which result from the absence of windbreakers, (i) the floodings of lowlands and agricultural plains arising from the absence of the absorbent mechanism of forests, (j) the siltation and shortening of the lifespan of multi-billion peso dams constructed and operated for the purpose of supplying water for domestic uses, irrigation and the generation of electric power, and (k) the reduction of the earth's capacity to process carbon dioxide gases which has led to perplexing and catastrophic climatic changes such as the phenomenon of global warming, otherwise known as the "greenhouse effect."

Plaintiffs further assert that the adverse and detrimental consequences of continued and deforestation are so capable of unquestionable demonstration that the same may be submitted as a matter of judicial notice. This notwithstanding, they expressed their intention to present expert witnesses as well as documentary, photographic and film evidence in the course of the trial.

As their cause of action, they specifically allege that:

#### CAUSE OF ACTION

7. Plaintiffs replead by reference the foregoing allegations.

8. Twenty-five (25) years ago, the Philippines had some sixteen (16) million hectares of rainforests constituting roughly 53% of the country's land mass.

9. Satellite images taken in 1987 reveal that there remained no more than 1.2 million hectares of said rainforests or four per cent (4.0%) of the country's land area.

10. More recent surveys reveal that a mere 850,000 hectares of virgin oldgrowth rainforests are left, barely 2.8% of the entire land mass of the Philippine archipelago and about 3.0 million hectares of immature and uneconomical secondary growth forests.

11. Public records reveal that the defendants' predecessors have granted timber license agreements ("TLA's") to various corporations to cut the aggregate area of 3.89 million hectares for commercial logging purposes. . . .

12. At the present rate of deforestation, i.e. about 200,000 hectares per annum or 25 hectares per hour — nighttime, Saturdays, Sundays and holidays included — the Philippines will be bereft of forest resources after the end of this ensuing decade, if not earlier.

13. The adverse effects, disastrous consequences, serious injury and irreparable damage of this continued trend of deforestation to the plaintiff minor's generation and to generations yet unborn are evident and incontrovertible. As a matter of fact, the environmental damages enumerated in paragraph 6 hereof are already being felt, experienced and suffered by the generation of plaintiff adults.

14. The continued allowance by defendant of TLA holders to cut and deforest the remaining forest stands will work great damage and irreparable injury to plaintiffs — especially plaintiff minors and their

successors — who may never see, use, benefit from and enjoy this rare and unique natural resource treasure.

This act of defendant constitutes a misappropriation and/or impairment of the natural resource property he holds in trust for the benefit of plaintiff minors and succeeding generations.

15. Plaintiffs have a clear and constitutional right to a balanced and healthful ecology and are entitled to protection by the State in its capacity as the *parens patriae*.

16. Plaintiff have exhausted all administrative remedies with the defendant's office. On March 2, 1990, plaintiffs served upon defendant a final demand to cancel all logging permits in the country. . . .

17. Defendant, however, fails and refuses to cancel the existing TLA's to the continuing serious damage and extreme prejudice of plaintiffs.

18. The continued failure and refusal by defendant to cancel the TLA's is an act violative of the rights of plaintiffs, especially plaintiff minors who may be left with a country that is desertified (sic), bare, barren and devoid of the wonderful flora, fauna and indigenous cultures which the Philippines had been abundantly blessed with.

19. Defendant's refusal to cancel the aforementioned TLA's is manifestly contrary to the public policy enunciated in the Philippine Environmental Policy which, in pertinent part, states that it is the policy of the State —

(a) to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other;

(b) to fulfill the social, economic and other requirements of present and future generations of Filipinos and;

(c) to ensure the attainment of an environmental quality that is conducive to a life of dignity and well-being. (P.D. 1151, 6 June 1977)

20. Furthermore, defendant's continued refusal to cancel the aforementioned TLA's is contradictory to the Constitutional policy of the State to —

a. effect "a more equitable distribution of opportunities, income and wealth" and "make full and efficient use of natural resources (sic)." (Section 1, Article XII of the Constitution);

b. "protect the nation's marine wealth." (Section 2, *ibid*);

c. "conserve and promote the nation's cultural heritage and resources (sic)" (Section 14, Article XIV, *id.*);

d. "protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." (Section 16, Article II, *id.*)

21. Finally, defendant's act is contrary to the highest law of humankind — the natural law — and violative of plaintiffs' right to self-preservation and perpetuation.

22. There is no other plain, speedy and adequate remedy in law other than the instant action to arrest the unabated hemorrhage of the country's vital life support systems and continued rape of Mother Earth.

On 22 June 1990, the original defendant, Secretary Factoran, Jr., filed a Motion to Dismiss the complaint based on two (2) grounds, namely: (1) the plaintiffs have no cause of action against him and (2) the issue raised by the plaintiffs is a political question which properly pertains to the legislative or executive branches of Government.

In their 12 July 1990 Opposition to the Motion, the petitioners maintain that (1) the complaint shows a clear and unmistakable cause of action, (2) the motion is dilatory and (3) the action presents a justiciable question as it involves the defendant's abuse of discretion.

On 18 July 1991, respondent Judge issued an order granting the aforementioned motion to dismiss. . . .

On 14 May 1992, We resolved to give due course to the petition . . . .

Petitioners contend that the complaint clearly and unmistakably states a cause of action as it contains sufficient allegations concerning their right to a sound environment based on Articles 19, 20 and 21 of the Civil Code (Human Relations), Section 4 of Executive Order (E.O.) No. 192 creating the DENR, Section 3 of Presidential Decree (P.D.) No. 1151 (Philippine Environmental Policy), Section 16, Article II of the 1987 Constitution recognizing the right of the people to a balanced and healthful ecology, the concept of generational genocide in Criminal Law and the concept of man's inalienable right to self-preservation and self-perpetuation embodied in natural law. Petitioners likewise rely on the respondent's correlative obligation per Section 4 of E.O. No. 192, to safeguard the people's right to a healthful environment.

It is further claimed that the issue of the respondent Secretary's alleged grave abuse of discretion in granting Timber License Agreements (TLAs) to cover more areas for logging than what is available involves a judicial question.

Anent the invocation by the respondent Judge of the Constitution's non-impairment clause, petitioners maintain that the same does not apply in this case because TLAs are not contracts. They likewise submit that even if TLAs may be considered protected by the said clause, it is well settled that they may still be revoked by the State when the public interest so requires.

On the other hand, the respondents aver that the petitioners failed to allege in their complaint a specific legal right violated by the respondent Secretary for which any relief is provided by law. They see nothing in the complaint but vague and nebulous allegations concerning an "environmental right" which supposedly entitles the petitioners to the "protection by the state in its capacity as *parens patriae*." Such allegations, according to them, do not reveal a valid cause of action. They then reiterate the theory that the question of whether logging should be permitted in the country is a political question which should be properly addressed to the executive or legislative branches of Government. They therefore assert that the petitioners' resources is not to file an action to court, but to lobby before Congress for the passage of a bill that would ban logging totally.

As to the matter of the cancellation of the TLAs, respondents submit that the same cannot be done by the State without due process of law. Once issued, a TLA remains effective for a certain period of time — usually for twenty-five (25) years. During its effectivity, the same can neither be revised nor cancelled unless the holder has been found, after due notice and hearing, to have violated the terms of the agreement or other forestry laws and regulations. Petitioners' proposition to have all the TLAs indiscriminately cancelled without the requisite hearing would be violative of the requirements of due process.

Before going any further, we must first focus on some procedural matters. Petitioners instituted Civil Case No. 90-777 as a class suit. The original defendant and the present respondents did not take issue with this matter. Nevertheless, We hereby rule that the said civil case is indeed a class suit. The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines.

Consequently, since the parties are so numerous, it, becomes impracticable, if not totally impossible, to bring all of them before the court. We likewise declare that the plaintiffs therein are numerous and representative enough to ensure the full protection of all concerned interests. Hence, all the requisites for

the filing of a valid class suit under Section 12, Rule 3 of the Revised Rules of Court are present both in the said civil case and in the instant petition, the latter being but an incident to the former.

This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety.

Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. 10 Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.

The locus standi of the petitioners having thus been addressed, We shall now proceed to the merits of the petition.

After a careful perusal of the complaint in question and a meticulous consideration and evaluation of the issues raised and arguments adduced by the parties, we do not hesitate to find for the petitioners and rule against the respondent Judge's challenged order for having been issued with grave abuse of discretion amounting to lack of jurisdiction. . . .

We do not agree with the trial court's conclusions that the plaintiffs failed to allege with sufficient definiteness a specific legal right involved or a specific legal wrong committed, and that the complaint is replete with vague assumptions and conclusions based on unverified data. A reading of the complaint itself belies these conclusions. The complaint focuses on one specific fundamental legal right — the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law. Section 16, Article II of the 1987 Constitution explicitly provides:

Sec. 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

This right unites with the right to health which is provided for in the preceding section of the same article:

Sec. 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself,

thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.

The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. . . .

The said right implies, among many other things, the judicious management and conservation of the country's forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted.

Conformably with the enunciated right to a balanced and healthful ecology and the right to health, as well as the other related provisions of the Constitution concerning the conservation, development and utilization of the country's natural resources, then President Corazon C. Aquino promulgated on 10 June 1987 E.O. No. 192, 14 Section 4 of which expressly mandates that the Department of Environment and Natural Resources "shall be the primary government agency responsible for the conservation, management, development and proper use of the country's environment and natural resources, specifically forest and grazing lands, mineral, resources, including those in reservation and watershed areas, and lands of the public domain, as well as the licensing and regulation of all natural resources as may be provided for by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos." Section 3 thereof makes the following statement of policy:

Sec. 3. Declaration of Policy. — It is hereby declared the policy of the State to ensure the sustainable use, development, management, renewal, and conservation of the country's forest, mineral, land, off-shore areas and other natural resources, including the protection and enhancement of the quality of the environment, and equitable access of the different segments of the population to the development and the use of the country's natural resources, not only for the present generation but for future generations as well. It is also the policy of the state to recognize and apply a true value system including social and environmental cost implications relative to their utilization, development and conservation of our natural resources.

This policy declaration is substantially re-stated in Title XIV, Book IV of the Administrative Code of 1987, 15 specifically in Section 1 thereof . . . .

Thus, the right of the petitioners (and all those they represent) to a balanced and healthful ecology is as clear as the DENR's duty — under its mandate and by virtue of its powers and functions under E.O. No. 192 and the Administrative Code of 1987 — to protect and advance the said right.

A denial or violation of that right by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action. Petitioners maintain that the granting of the TLAs, which they claim was done with grave abuse of discretion, violated their right to a balanced and healthful ecology; hence, the full protection thereof requires that no further TLAs should be renewed or granted.

A cause of action is defined as:

. . . an act or omission of one party in violation of the legal right or rights of the other; and its essential elements are legal right of the plaintiff, correlative obligation of the defendant, and act or omission of the defendant in violation of said legal right.

It is settled in this jurisdiction that in a motion to dismiss based on the ground that the complaint fails to state a cause of action, the question submitted to the court for resolution involves the sufficiency of the facts alleged in the complaint itself. No other matter should be considered; furthermore, the truth or falsity



of the said allegations is beside the point for the truth thereof is deemed hypothetically admitted. The only issue to be resolved in such a case is: admitting such alleged facts to be true, may the court render a valid judgment in accordance with the prayer in the complaint? . . .

After careful examination of the petitioners' complaint, We find the statements under the introductory affirmative allegations, as well as the specific averments under the subheading CAUSE OF ACTION, to be adequate enough to show, prima facie, the claimed violation of their rights. On the basis thereof, they may thus be granted, wholly or partly, the reliefs prayed for. It bears stressing, however, that insofar as the cancellation of the TLAs is concerned, there is the need to implead, as party defendants, the grantees thereof for they are indispensable parties. . . .

The last ground invoked by the trial court in dismissing the complaint is the nonimpairment of contracts clause found in the Constitution. The court a quo declared that:

The Court is likewise of the impression that it cannot, no matter how we stretch our jurisdiction, grant the reliefs prayed for by the plaintiffs, i.e., to cancel all existing timber license agreements in the country and to cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements. For to do otherwise would amount to "impairment of contracts" abhorred (sic) by the fundamental law.

We are not persuaded at all; on the contrary, We are amazed, if not shocked, by such a sweeping pronouncement. In the first place, the respondent Secretary did not, for obvious reasons, even invoke in his motion to dismiss the non-impairment clause. If he had done so, he would have acted with utmost infidelity to the Government by providing undue and unwarranted benefits and advantages to the timber license holders because he would have forever bound the Government to strictly respect the said licenses according to their terms and conditions regardless of changes in policy and the demands of public interest and welfare. He was aware that as correctly pointed out by the petitioners, into every timber license must be read Section 20 of the Forestry Reform Code (P.D. No. 705) which provides:

. . . Provided, That when the national interest so requires, the President may amend, modify, replace or rescind any contract, concession, permit, licenses or any other form of privilege granted herein . . .

Needless to say, all licenses may thus be revoked or rescinded by executive action. It is not a contract, property or a property right protested by the due process clause of the Constitution. . . .

WHEREFORE, being impressed with merit, the instant Petition is hereby GRANTED, and the challenged Order of respondent Judge of 18 July 1991 dismissing Civil Case No. 90-777 is hereby set aside. The petitioners may therefore amend their complaint to implead as defendants the holders or grantees of the questioned timber license agreements.

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## 2. Vellore Citizens' Welfare Forum v. Union Of India (Supreme Court of India, 1996)

*This is a public interest case that held, inter alia, that the government's allowance or acquiescence in the decades-long discharge of toxic chemicals into surface and drinking water systems from more than 900 tanneries in the five districts of Tamil Nadu, India, amounted to a violation of constitutional rights to life, among others. The Court issued a wide-ranging remedial plan to install pollution control equipment, close facilities, issue and collect fines, restore affected areas, and exercise administrative and judicial oversight.*

This petition — public interest — under article 32 of the Constitution of India has been filed by Vellore Citizens' Welfare Forum and is directed against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. It is stated that the tanneries are discharging untreated effluent into agricultural fields, roadsides, waterways and open lands. The untreated effluent is finally discharged in River Palar which is the main source of water supply to the residents of the area. According to the petitioner the entire surface and subsoil water of River Palar has been polluted resulting in non-availability of potable water to the residents of the area. It is stated that the tanneries in the State of Tamil Nadu have caused environmental degradation in the area. According to the preliminary survey made by the Tamil Nadu Agricultural University Research Centre, Vellore nearly 35,000 hectares of agricultural land in the tanneries belt has become either partially or totally unfit for cultivation. It has been further stated in the petition that the tanneries use about 170 types of chemicals in the chrome tanning processes. The said chemicals include sodium chloride, lime, sodium sulphate, chlorium (sic) sulphate, fat, liquor, ammonia and sulphuric acid besides dyes, which are used in large quantities. Nearly 35 litres of water is used for processing one kilogram of finished leather, resulting in dangerously enormous quantities of toxic effluents being let out in the open by the tanning industry. These effluents have spoiled the physico-chemical properties of the soil and have contaminated groundwater by percolation. According to the petitioner an independent survey conducted by Peace Members, a non-governmental organisation, covering 13 villages of Dindigul and Peddiar Chatram Anchayat Unions, reveals that 350 wells out of total of 467 used for drinking and irrigation purposes have been polluted. Women and children have to walk miles to get drinking water. Legal Aid and Advice Board of Tamil Nadu requested two lawyers namely, M.R Ramanan and P.S Subramaniam to visit the area and submit a report indicating the extent of pollution caused by the tanneries. Relevant part of the report is as under:

“As per the Technical Report dated 28-5-1983 of the hydrological investigations carried out in Solur village near Ambur it was noticed that 176 chemicals including acids were contained in the tannery effluents. If 40 litres of water with chemicals are required for one kilo of leather, with the production of 200 tons of leather per day at present and likely to be increased multifold in the next four to five years with the springing up of more tanneries like mushroom in and around Ambur town, the magnitude of the effluent water used with chemicals and acids let out daily can be shockingly imagined. ... The effluents are let out from the tanneries in the nearby lands, then to Goodar and Palar rivers. The lands, the rivulet and the river receive the effluents containing toxic chemicals and acids. The subsoil water is polluted ultimately affecting not only arable lands, wells used for agriculture but also drinking-water wells. The entire Ambur town and the villages situated nearby do not have good drinking water. Some of the influential and rich people are able to get drinking water from a far-off place connected by a few pipes. During rainy days and floods, the chemicals deposited into the rivers and lands spread out quickly to other lands. The effluents thus let out affect cultivation; either crops do not come up at all



or if produced the yield is reduced abnormally too low. ... The tanners have come to stay. The industry is a foreign exchange earner. But one moot point is whether at the cost of the lives of lakhs of people with increasing human population the activities of the tanneries should be encouraged on monetary considerations. We find that the tanners have absolutely no regard for the healthy environment in and around their tanneries. The effluents discharged have been stored like a pond openly in most of the places adjacent to cultivable lands with easy access for the animals and the people. The Ambur Municipality, which can exercise its powers as per the provisions of the Madras District Municipalities Act, 1920 (5 of 1920) more particularly under Sections 226 to 231, 249 to 253 and 338 to 342 seems to be a silent spectator. Probably it does not want to antagonise the highly influential and stupendously rich tanners. The powers given under section 63 of the water (prevention and control of pollution) act, 1974 (6 of 1974) have not been exercised in the case of tanneries in Ambur and the surrounding areas.”

2. Along with the affidavit dated 21-7-1992 filed by Deputy Secretary to Government, Environment and Forests Department of Tamil Nadu, a list of villages affected by the tanneries has been attached. The list mentions 59 villages in the three divisions of Thirupathur, Vellore and Ranipet. There is acute shortage of drinking water in these 59 villages and as such alternative arrangements were being made by the Government for the supply of drinking water.

3. In the affidavit dated 9-1-1992 filed by Member Secretary, Tamil Nadu Pollution Control Board (the Board), it has been stated as under:

“It is submitted that there are 584 tanneries in North Arcot Ambedkar District vide Annexures ‘A’ and ‘D’, out of which 443 tanneries have applied for consent of the Board. The Government were concerned with the treatment and disposal of effluent from tanneries. The Government gave time up to 31-7-1985 to tanneries to put up Effluent Treatment Plant (ETP). So far 33 tanneries in North Arcot Ambedkar District have put up Effluent Treatment Plants. The Board has stipulated standards for the effluent to be disposed of by the tanneries.”

4. The affidavits filed on behalf of the State of Tamil Nadu and the Board clearly indicate that the tanneries and other polluting industries in the State of Tamil Nadu are being persuaded for the last about 10 years to control the pollution generated by them. They were given option either to construct common effluent treatment plants for a cluster of industries or to set up individual pollution control devices. The Central Government agreed to give substantial subsidy for the construction of Common Effluent Treatment Plants (CETPs). It is a pity that till date most of the tanneries operating in the State of Tamil Nadu have not taken any step to control the pollution caused by the discharge of effluent. This Court on 1-5-1995 passed a detailed order. In the said order this Court noticed various earlier orders passed by this Court and finally directed as under:

“Mr R. Mohan, the learned Senior Counsel for the Tamil Nadu Pollution Control Board, has placed before us a consolidated statement dividing the 553 industries into three parts ...

So far as the 57 tanneries listed in Statement III (including 12 industries who have filed writ petition, numbers of which have been given above) are concerned, these units have not installed and commissioned the Effluent Treatment Plants despite various orders issued by this Court from time to time ...

We give opportunity to these 57 industries to approach this Court as and when any steps towards the setting up of Effluent Treatment Plants and their commissioning have been taken by these industries. If any of the industries wish to be relocated to some other area, they may come out with a proposal in that respect.”

5. On 28-7-1995 this Court suspended the closure order in respect of seven industries mentioned therein for a period of eight weeks. It was further observed as under:

“Mr G. Ramaswamy, the learned Senior Advocate appearing for some of the tanneries in Madras, states that the setting up of the Effluent Treatment Plants is progressing satisfactorily. According to him several lakhs have already been spent and in a short time it would start operating. Mr Mohan, the learned counsel for the Tamil Nadu Pollution Control Board, states that the team of the Board will inspect the project and file a report by 3-8-1995.”

6. This Court on 8-9-1995 passed the following order:

“The Tamil Nadu Pollution Control Board has filed its report. List No. I relates to about 299 industries. ... The learned counsel state that the project shall be completed in every respect within 3 months from today. ... We make it clear that in case the projects are not completed by that time, the industries shall be liable to be closed forthwith. Apart from that, these industries shall also be liable to pollution fine for the past period during which they had been operating.

We also take this opportunity to direct TALCO to take full interest in these projects and have the projects completed within the time granted by us.

Mr Kapil Sibal, the learned counsel appearing for the tanneries, stated that Council for Indian Finished Leather Manufacturers' Export Association is a body which is collecting 5 per cent on all exports. This body also helps the tanneries in various respects. We issue notice to the Association to be present in this Court and assist this Court in all the matters pertaining to the leather tanneries in Madras. Mr Sampath takes notice.

So far as List No. II is concerned, it relates to about 163 tanneries (except M/s Vibgyor Tanners & Co., Kailasagiri Road, Mittalam-635 811, Ambur (via). ... It is on the record that these tanneries are polluting the area. Even the water around the area where they are operating is not worth drinking. We give no further time to these tanneries. We direct all the following tanneries which are numbering about 162 to be closed with immediate effect.”

It may be mentioned that this Court suspended the closure orders in respect of various industries from time to time to enable the said industries to install the pollution control devices.

7. This Court by the order dated 20-10-1995 directed the National Environmental Engineering Research Institute, Nagpur (NEERI) to send a team of experts to examine, in particular, the feasibility of setting up of CETPs for cluster of tanneries situated at different places in the State of Tamil Nadu where the work of setting up of the CETPs has not started and also to inspect the existing CETPs including those where construction work was in progress. NEERI submitted its first report on 9-12-1995 and the second report on 12-2-1996. This Court examined the two reports ...

Apart from the tanneries which are connected with the above-mentioned 7 units, there are large number of other tanneries operating in the 5 districts mentioned above which have not set up any satisfactory pollution control devices. ... This Court has been monitoring these matters for the last about 4 years. There is no awakening or realisation to control the pollution which is being generated by these tanneries.

The NEERI has indicated the physico-chemical characteristics of groundwater from dug wells near tannery clusters. According to the report, water samples show that well waters around the tanneries are unfit for drinking. The report also shows that the quality of water in Palar river downstream from the

place where effluent is discharged is highly polluted. We, therefore, direct that all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R which are not connected with the seven CETPs mentioned above, shall be closed with immediate effect. None of these tanneries shall be permitted to operate till the time the CETPs are constructed to the satisfaction of the Tamil Nadu Pollution Control Board. We direct the District Magistrate and the Superintendent of Police of the area concerned, to have all these tanneries closed with immediate effect. ...

The report indicates that except the 17 units, all other units are non-complaint units in the sense that they are not complying with the BOD standards. Excepting these 17 industries, the remaining 34 tanneries listed hereunder are directed to be closed forthwith. ... We direct the District Magistrate and the Superintendent of Police of the area concerned to have all these industries mentioned above closed forthwith. The tanneries in the 5 districts of Tamil Nadu referred to in this order have been operating for a long time. Some of the tanneries are operating for a period of more than two decades. All this period, these tanneries have been polluting the area. Needless to say that the total environment in the area has been polluted. We issue show-cause notice to these industries through their learned counsel who are present in Court, why they be not subjected to heavy pollution fine. We direct the State of Tamil Nadu through the Industry Ministry, the Tamil Nadu Pollution Control Board and all other authorities concerned and also the Government of India through the Ministry of Environment and Forests, not to permit the setting up of further tanneries in the State of Tamil Nadu.

Copy of this order be communicated to the authorities concerned within three days. To come up for further consideration after the replies to the show-cause.

Matters regarding distilleries in the State of Tamil Nadu [omitted]

... 9. It is no doubt correct that the leather industry in India has become a major foreign exchange earner and at present Tamil Nadu is the leading exporter of finished leather accounting for approximately 80 per cent of the country's export. Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health-hazard. It cannot be permitted to expand or even to continue with the present production unless it tackles by itself the problem of pollution created by the said industry.

10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. [Internal discussion of sustainable development omitted.]

13. The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. Article 21 of the constitution of India guarantees protection of and personal liberty. Articles 47, 48-a and 51-a(g) of the constitution are as under:

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48-A. Protection and improvement of environment and safeguarding of forests and wildlife.—The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

51-A. (g) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.”

Apart from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislations on the subject but more relevant enactments for our purpose are: the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment (Protection) Act, 1986 (the Environment Act). The Water Act provides for the constitution of the Central Pollution Control Board by the Central Government and the constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. It also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act in the latter part of this judgment.

14. In view of the above-mentioned constitutional and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country. ...

16. The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment.

[Discussion of application of common law omitted.]

In view of what has been stated above, there is urgent need for the enactment of a general legislation on environmental protection which inter alia, should enable coordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening the environment and deterrent punishment to those who endanger human environment, safety and health.”

[Discussion of Environment Act omitted]

21. There are more than 900 tanneries operating in the five districts of Tamil Nadu. Some of them may, by now, have installed the necessary pollution control measures; they have been polluting the environment for over a decade and in some cases even for a longer period. This Court has in various orders indicated that these tanneries are liable to pay pollution fine. The polluters must compensate the affected persons and also pay the cost of restoring the damaged ecology.

22. Mr M.C Mehta, the learned counsel for the petitioner has invited our attention to the notification GOMs No. 213 dated 30-3-1989 which reads as under:

“In the government order first read above, the Government have ordered, among other things, that no industry causing serious water pollution should be permitted within one kilometre from the embankments of rivers, streams, dams, etc. and that the Tamil Nadu Pollution Control Board should furnish a list of such industries to all local bodies. It has been suggested that it is necessary to have a sharper definition for water sources so that ephemeral water collections like rainwater ponds, drains, sewerages (bio-degradable) etc. may be excluded from the purview of the above order. The Chairman, Tamil Nadu

Pollution Control Board has stated that the scope of the government order may be restricted to reservoirs, rivers and public drinking-water sources. He has also stated that there should be a complete ban on location of highly polluting industries within 1 kilometre of certain water sources.

23. The Government has carefully examined the above suggestions. The Government imposes a total ban on the setting up of the highly polluting industries mentioned in Annexure I to this order within one kilometre from the embankments of the water sources mentioned in Annexure II to this order.

24. The Government also direct that under any circumstances if any highly polluting industry is proposed to be set up within one kilometre from the embankments of the water sources other than those mentioned in Annexure II to this order, the Tamil Nadu Pollution Control Board should examine the case and obtain the approval of the Government for it.”

Annexure I to the notification includes distilleries, tanneries, fertilizer, steel plants and foundries as the highly polluting industries. We have our doubts whether the above-quoted government order is being enforced by the Tamil Nadu Government. The order has been issued to control pollution and protect the environment. We are of the view that the order should be strictly enforced and no industry listed in Annexure I to the order should be permitted to be set up in the prohibited area. ...

25. Keeping in view the scenario discussed by us in this judgment, we order and direct as under:

1. The Central Government shall constitute an authority under section 3(3) of the environment (protection) act, 1986 and shall confer on the said authority all the powers necessary to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. The authority shall be headed by a retired Judge of the High Court and it may have other members — preferably with expertise in the field of pollution control and environment protection — to be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue directions under section 5 of the environment act and for taking measures with respect to the matters referred to in clauses (v), (vi), (vii), (viii), (ix), (x) and (xii) of sub-section (2) of section 3. The Central Government shall constitute the authority before September 30, 1996.

2. The authority so constituted by the Central Government shall implement the “Precautionary Principle” and the “Polluter Pays Principle”. The authority shall, with the help of expert opinion and after giving opportunity to the polluters concerned assess the loss to the ecology/environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

3. The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collectors/District Magistrates of the area concerned. The Collector/District Magistrate shall recover the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.

4. The authority shall direct the closure of the industry owned/managed by a polluter in case he evades or refuses to pay the compensation awarded against him. This shall be in addition to the recovery from him as arrears of land revenue.
5. An industry may have set up the necessary pollution control device at present but it shall be liable to pay for the past pollution generated by the said industry which has resulted in the environmental degradation and suffering to the residents of the area.
6. We impose pollution fine of Rs 10,000 each on all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R The fine shall be paid before October 31, 1996 in the office of the Collector/District Magistrate concerned. We direct the Collectors/District Magistrates of these districts to recover the fines from the tanneries. The money shall be deposited, along with the compensation amount recovered from the polluters, under a separate head called “Environment Protection Fund” and shall be utilised for compensating the affected persons as identified by the authorities and also for restoring the damaged environment. The pollution fine is liable to be recovered as arrears of land revenue. The tanneries which fail to deposit the amount by October 31, 1996 shall be closed forthwith and shall also be liable under the Contempt of Courts Act, 1971.
7. The authority, in consultation with expert bodies like NEERI, Central Board, Board shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the State of Tamil Nadu. The scheme/schemes so framed shall be executed by the State Government under the supervision of the Central Government. The expenditure shall be met from the “Environment Protection Fund” and from other sources provided by the State Government and the Central Government.
8. We suspend the closure orders in respect of all the tanneries in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R We direct all the tanneries in the above five districts to set up CETPs or Individual Pollution Control Devices on or before November 30, 1996. Those connected with CETPs shall have to install in addition the primary devices in the tanneries. All the tanneries in the above five districts shall obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries who are refused consent or who fail to obtain the consent of the Board by December 15, 1996 shall be closed forthwith.
9. We direct the Superintendent of Police and the Collector/District Magistrate/Deputy Commissioner of the district concerned to close all those tanneries with immediate effect who fail to obtain the consent from the Board by the said date. Such tanneries shall not be reopened unless the authority permits them to do so. It would be open to the authority to close such tanneries permanently or to direct their relocation.
10. Government Order No. 213 dated March 30, 1989 shall be enforced forthwith. No new industry listed in Annexure I to the notification shall be permitted to be set up within the prohibited area. The authority shall review the cases of all the industries which are already operating in the prohibited area and it would be open to the authority to direct the relocation of any of such industries.
11. The standards stipulated by the Board regarding total dissolved solids (TDS) and approved by the NEERI shall be operative. All the tanneries and other industries in the State of Tamil Nadu shall comply with the said standards. The quality of ambient waters has to be maintained through the standards stipulated by the Board.



26. We have issued comprehensive directions for achieving the end result in this case. It is not necessary for this Court to monitor these matters any further. We are of the view that the Madras High Court would be in a better position to monitor these matters hereinafter. We, therefore, request the Chief Justice of the Madras High Court to constitute a Special Bench “Green Bench” to deal with this case and other environmental matters. We make it clear that it would be open to the Bench to pass any appropriate order/orders keeping in view the directions issued by us. We may mention that “Green Benches” are already functioning in Calcutta, Madhya Pradesh and some other High Courts. We direct the Registry of this Court to send the records to the Registry of the Madras High Court within one week. The High Court shall treat this matter as a petition under article 226 of the constitution of india and deal with it in accordance with law and also in terms of the directions issued by us. We give liberty to the parties to approach the High Court as and when necessary.

27. Mr M.C Mehta has been assisting this Court to our utmost satisfaction. We place on record our appreciation for Mr Mehta. We direct the State of Tamil Nadu to pay Rs 50,000 towards legal fees and other out of pocket expenses incurred by Mr Mehta.

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### **3. Dr. Mohiuddin Farooque and another v. Bangladesh (Supreme Court of Bangladesh, 1997)**

*In this case, the Supreme Court of Bangladesh upheld the government’s implementation of a wide-ranging and controversial flood control plan that displaced more than a million people. In so doing, however, and to reflect various constitutional protections – including the “right to life,” – the court directed agencies to “strictly comply” with measures to ensure access to water, protection of ecological and historical resources, and provide just compensation, and to comply with other environmental and land use requirements.*

#### **Judgment**

1. The two petitioners ... under Article 102 of the Constitution, called in question the activities and implementation of ‘FAP’-20’, undertaken in the District of Tangail apprehending environmental ill effect of a Flood Control Plan affecting the life, property, livelihood, vocation and environmental security of more than a million of people of the District whereupon two separate Rules were issued calling upon the respondents to show cause as to why all the activities and implementation of ‘FAP-20’, undertaken in the District of Tangail should not be declared to have been undertaken without lawful authority and of no legal effect and or such other order or further orders passed as to this Court may seem fit and proper.

2. In the two Rules, similar facts and common questions of law having been involved, those were heard analogously and are being disposed of by this single judgment.

3. In Writ Petition No.998 of 1994, the petitioner is Dr. Mohiuddin Farooque, Secretary, General, “Bangladesh Environmental Lawyers Association”, briefly, “BELA”, a group of environmental lawyers. “BELA” was registered under the Societies Registration Act, 1860. The petitioner has been authorized by a resolution of the Executive Committee of “BELA” to represent the same and move the High Court Division of the Supreme Court of Bangladesh under Article 102 of the Constitution. Petitioner claims that “BELA” has been active since the year 1991 as one of the leading organizations with documented and well recognized expertise and achievement in the field of environment, ecology and relevant matters of public interest and “BELA” has developed itself into an active and effective institution on environmental regulatory framework with widespread recognition. Writ Petition No.998 of 1994 has been initiated pro bono public. Initially, the petition was summarily rejected by the High Court Division on the ground of

locus standi. The Appellate Division has sent the matter to the High Court Division for hearing on merit after setting aside the said order of rejection holding that the petitioner has locus standi to file and maintain the writ petition.

4. In Writ Petition No.1576 of 1994, the petitioner is Sekandar Ali Mondol, a farmer, living in the village of Khaladbari under Police Station Tangail Sadar in the District of Tangail for generations and owns small piece of ancestral land, part of which he uses as homestead and part for cultivation for subsistence and cash earning of his family. The petitioner's land is under the process of acquisition under 'FAP-20' project.

5. Facts leading to the issuance of the two Rules are summarized as under:

(a) The two consecutive severe floods of 1987 and 1988 in Bangladesh aroused national and international concern on the water resources issue in particular and the question of environmental management in general for the country. Studies were made and as a result of studies, a list of 11 Guiding Principles of Flood Control has been formulated. In July, 1989 in Washington DC, a meeting of the Government of Bangladesh and some donors was held and it was agreed that an Action Plan would be undertaken as a first step for long term Flood Control Programme in Bangladesh. On 11 December, 1989, a document entitled "Bangladesh-Action Plan for Flood Control" was placed before the meeting of the foreign donors in London and 'Flood Action Plan', hereinafter referred to as 'FAP', was born. World Bank took up the responsibility to co-ordinate the activities. To manage the activities under the 'FAP', the 'Food Plan Co-ordination Organization,' hereinafter referred to as 'FPCO' was created by the respondent No.1, the Ministry of irrigation, Water Development and Flood Control, briefly, 'MIWDFC'. 'FAP' consists of 26 components of which 11 are main components consisting of regional and project oriented activities and 15 are supporting studies which includes Pilot Project. 'FAP' has been undertaken initially for 5 years, 1991-1995 but Pilot Project under it will continue beyond 1997. 'FAP-20' is one of the 15 supporting studies in which the concept of Flood Control through Compartmentalization is to be tested and hence, project is called 'Compartmentalization Pilot Project', briefly, 'CPP'.

(b) Within the first two years, the 'FAP' aroused wide attention for being an allegedly anti- environment and anti-people project. 'FAP' is being accused of not only for its discrete activities but also for defying the process and requirements of participatory governance manifested in the letter and spirit of the Constitution, the law of the land and 11 Guiding Principles of Flood Control. The 'FAP' instead of being the largest environmental management programme of the country, the same has become the most controversial programme ever undertaken in this land for committing various illegalities, violation of laws and posing ecological threats. The 'FAP-20' Project is being implemented in Tangail Sadar, Delduar and Bashail Police Stations of the District of Tangail encircling an area of 13,169 hectares including Tangail Town and encompassing 176 villages of 12 Unions, 45,252 households according to 1991 census, 32 beels and 46 canals. The project site is under the direct confluence of the rivers Dhaleswari, Lohajang, Elanjani and Pongli estuaries of the river Jamuna. 'FAP-20' is likely to adversely affect and uproot about 3 lakh people within the project area and the extent of adverse impact outside the project area may encompass more than a million human lives, the natural resources and natural habitats of men and other flora and fauna. The total impact area, although large, only 210 hectares of land, are being acquired without complying with the requirements of law. The experimental project impact area includes two mosques, namely, "the Attia Mosque" the picture of which appears on Taka 10-note and 'Khadem Hamdani Mosque" which are in the list of archaeological resources and are protected against misuse, restriction, damage, etc. under the Antiquities Act, 1968 in the spirit of Article 24 of the Constitution.



(c) There was no people's participation except some show meetings which were managed through manipulation. The local people were not at all afforded any opportunity to submit their objections and, thus, the aggrieved people have been deprived of their legal rights and legitimate compensation and also to protect their lives, professions and properties. The 'FAP-20' have been undertaken violating the laws of the land including the National Environment Policy, 1992. Scope of the so-called land acquisition matters, if lawfully applied, only relate to a small number of people and lands i.e. 210 hector compared to the total physical and ecological area to be affected due to various direct, indirect and casual impacts, of the project. The fate of the greater section of the people whose lands and other belongings, rights and legitimate interest would be adversely affected, both within and outside the project area, have been left out of any consideration. By undertaking the experimental 'FAP-20' Project, the respondents have ultimately infringed and would, further, inevitably infringe the fundamental rights to life, property and profession of lacs of people within and outside the project area.

(d) The Bangladesh Water Development Board, briefly, 'BWDB' has been vested by the Bangladesh Water and Power Development Boards Order, 1972 (Presidents Order No.59 of 1972), the statutory right of control over the flow of water in all rivers and canals of Bangladesh and the statutory responsibility to prepare a comprehensive plan for the control of flood and the development and utilization of Water Resources of Bangladesh. Since, 'FPCO' is neither under 'BWDB' nor created by it, nor created in the exercise of any authority of any law of the land, the same got not legal authority to plan, design or to undertake any project falling within the domain of the 'BWDB' or other statutory agencies and, as such, all the activities co-ordinated by and conducted under 'FPCO' are illegal and unlawful. The 'FPCO' was created by the then regime of 1989 by passing all legal and institutional framework sanctioned by the law of the land, and the 'BWDB'. The 'FPCO', therefore, illegally encroached upon the public statutory domain of other agencies responsible for sustainable Water Management Policy and Planning of Flood Control. The fate of the legal rights and interest of the people of Bangladesh is being arbitrarily decided by the respondents in total disregard of the law and the legal system. Local people's resistance and objection have been severely undermined and instead, oppressive and deceitful measures had been adopted by the respondents.

(e) The 'FAP-20' activities are contrary to the various provisions of law of the land and violative of the fundamental rights enumerated in Part-III of the Constitution. The affected people of the 'FAP-20' project area are entitled to the protection under Articles 28(1), 23, 31, 32 and 40 and 42 of the Constitution. It is emphasized that the 'FAP-20' project is being implemented in gross violation of the provisions contained in the Conservation of Fish Act, 1950, (EB Act No. XVIII of 1950), The Embankment and Drainage Act, 1952, (East Bengal Act I of 1953), The Antiquities Act, 1968, The Acquisition and Requisition of Immovable Property Ordinance, 1982 (Ordinance No.II of 1982) and The Environment Conservation Act, 1995.

6. Respondent No.1, Ministry of Irrigation, Water Development and Flood Control, Government of Bangladesh, in spite of service of notice upon it, did neither appear nor did oppose the Rule.

7. Respondent Nos. 2-4, the Chief Engineer, Flood Plan Coordination Organization, the Chairman, Bangladesh Water Development Board and the Project Director, Flood Action Plan Component-20, Compartmentalization Pilot Project, respectively entered appearance in both the Rules and opposed the Rules by filing two affidavits-in-opposition. The statements made in the two affidavits are almost common.

8. In the affidavits-in-opposition, it is stated that 'FAP' is a very ambitious programme undertaken by the Government of Bangladesh with the assistance of the foreign countries and agencies. The programme is very important for the developmental work and the same will have far reaching effect in the developmental programme of Bangladesh. 'Compartmentalization Pilot Project, 'CPP', has completed an elaborate Environmental Impact Assessment, shortly 'EIA'. 'EIA' for 'CPP' shows that project will have more positive impact compared to negative one. The only negative impacted environmental issue will be a slight loss of seasonal wet-lands and its habitats. To compensate, the project is implementing a Community Wet-land Conservation Programme in 3 Beel areas, namely, Jugini, Bara and Garindha Beels. It is stated, further, that since a long time, a good many Water Development Projects have been implemented in the country and no where there is any allegation of any damage to any ecological site due to interventions caused by the project and there is no chance of any damage on any archaeological resources in the project area due to implementation and physical interventions under the projects.

9. Further statements are that 'CPP' is not constructing new embankments except retirements at places and re-sectioning at other places. The destruction of fish by hindering their access to the swamping grounds does not hold true.

10. In the affidavits-in-opposition it is asserted that the planning, designing and implementation of physical interventions under 'FAP-20' are being done by Bangladesh Water Development Board while 'FPCO' is only acting as a monitor of the project activities on behalf of the Ministry maintaining liaison with the donors on behalf of the Government. It is pleaded that in all stages of project formulation, all groups of people concerned and affected by the project have been consulted and their participation have been ensured. There had been many meetings attended by Union Parishad Chairman, journalists, elite, professionals and concerned Government officials. Moreover, 3 seminars were held at Tangail wherein Members of the Parliament of the locality participated and expressed their views regarding the project. Views of the elected representatives from the local level upto the national level have been taken. All possible groups of people likely to be affected as a result of implementation of the project, such as, fishermen, landless people and women have been consulted before starting any sort of physical intervention in the project and their participation in many activities of the project have been ensured.

11. Further assertions made in the affidavits-in-opposition are, that the local people welcome the project. Many local newspapers published opinion of the local people concerning the project which indicates the positive attitude of the people towards the project. It is also asserted that the project is arranging to pay compensation to those land owners who lost their lands, and, in many cases, the contractors have implemented works on having consent from the affected land owners. The land acquisition procedure for 'FAP' is strictly in conformity with the existing legal procedure of the country and the project is not following anything in the matter of land acquisition which contravenes the existing legal procedure. It is pleaded that considerable propositions in the name of mitigation measure are there in the 'FAP-20' project to mitigate the needs and suffering of all people affected by the execution of 'FAP-20', be it displacement of people or any other inconvenience that may arise as a result of execution of the project.

12. Dr. Mohiuddin Farooque, learned Advocate appearing in person in Writ Petition No.998 of 1994 and on behalf of the petitioner of Writ Petition No.1576 of 1994 not, only challenges the formation and activities of 'FAP-20' and 'FPCO', adversely affecting and injuring more than a million people in the District of Tangail by way of displacement, damage to soil, destruction of natural habitat, of fishes, flora and fauna and creation of drainage problem threatening human health and worsening sanitation and drinking water supplies and causing environmental hazards and ecological imbalance but also alleges the violation of Article 23, 24, 28, 31, 32, 40 and 42 of the Constitution and the laws, such as, the Bangladesh

Water Power Development Boards Order, 1972 (President's Order No.59 of 1972), The Embankment and Drainage Act, 1952 (East Bengal Act I of 1953), the Protection and Conservation of Fish Act, 1950, The Antiquities Act, 1968 and the Acquisition and Requisition of Immovable Property Ordinance (Ordinance No.11 of 1982) and other laws.

13. Dr. Mohiuddin Farooque, first, directed his efforts to assail the formation of 'FPCO'. He submitted that 'FPCO' is neither created under the authority of Bangladesh Water and Power Development Boards Order, 1972, nor created in the exercise of any authority of any law of the land and 'FPCO' got no authority and legal status to plan, design and undertake any project falling within the domain of 'BWDB' and other statutory agencies and the same, thus, encroached upon the public statutory domain of other agencies responsible for sustainable Water Management Policy and Flood Control.

14. In repelling the said submission, Mr. Tofailur Rahman, learned Advocate for the respondents, contended that the planning, designing and physical interventions under 'FAP-20' are being done by 'BWDB' while 'FPCO' is only acting as a monitor of the project activities on behalf of the Ministry of Irrigation, Water Resources and Flood Control.

[Summary of Article 9 of Bangladesh Water and Power Development Boards Order of 1972 omitted.]

17. Sub-article (1) of the said article 9 provides that Water Board shall, for the approval of the Government, prepare comprehensive plan for the control of flood in and the development and utilization of water resources of Bangladesh. ... Sub-article (3) states that Board may frame scheme or schemes for construction of dams, barrages, reservoirs and other original works, irrigation, embankment and drainage, bulk water supply to communities, flood control including water shed management. ...

19. The next contention raised by Dr. Farooque is that the 'CPP' has been unlawfully planned and designed by the respondents without adapting appropriate institutional framework prescribed by law and the implementation of the said project undertaken in the name of 'FAP-20' is against public interest and also, undertaken in total disregard of the Guidelines of 'FAP' and 'FPCO'. It is also urged that the participation of the people within the project area have not at all been ensured in implementing the project and the Pilot Project is absolutely illegal and without lawful authority.

20. It is canvassed, further, from the side of the petitioners that the 'FAP-20' is likely to affect adversely and uproot a large number of people within the project area and the extent of adverse impact outside the project area will encompass human lives, natural resources and the natural habitats of human and other beings. Contention has also been advanced that the affected people were not afforded any opportunity of being heard and the objections and protests raised by the people have been totally ignored by the respondents who were duty bound to take into consideration the fate of the people, directly, indirectly and actually affected by the implementation of 'FAP-20' and, thus, the fundamental rights guaranteed under Articles 31, 32, 40 and 42 had been grossly violated.

21. In reply to the said contentions raised from the side of the petitioners, Mr. Tofailur Rahman, learned Advocate, submitted that the idea of 'FAP' has been conceived by people having highest degree of competence in the relevant field and suitability of that idea is being judged through 15 supporting studies and 'CPP' is one of those studies which will help in judging environmental suitability of the idea of 'FAP' and 'FAP-20' is aimed at experimenting the concept of Compartmentalization and the project will give maximum benefits to the farmers of the project area and the same will have far reaching effect in the economic development of the country. It is the further contention of Mr. Tofailur Rahman that the

people's participation in undertaking and implementing the Pilot Project has been ensured and the people of the locality welcomed the project and no fundamental right guaranteed under the Constitution has been violated.

22. Since, the violation of Fundamental Rights guaranteed under Articles 31, 32, 40 and 42 of the Constitution has been seriously alleged by the petitioners, it would be profitable to quote Article 31, 32, 40 and 42 of the Constitution.

23. Article 31 of the Constitution reads as under:

“31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.”

Article 32 runs as follows:

“32. No person shall be deprived of life or personal liberty save in accordance with law”.

... 25. Article 40 is as follows:

“40. Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be law in relation to his profession, trade or business shall have the right to enter upon any lawful profession or occupation to conduct any lawful trade or business”.

26. Article 42(1) is to the following terms:

“42. (1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law”.

27. Article 31 gives right to a citizen to enjoy the protection of law and to be treated in accordance with law. It gives the guarantee that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 32 mandates that no person shall be deprived of life or personal liberty save in accordance with law. Article 40 gives every citizen right to enter upon any lawful profession or occupation and to conduct lawful trade or business. Article 42 commands that every citizen shall have the right to acquire, hold, transfer or otherwise dispose of the property and no property shall compulsorily acquired, nationalized or requisitioned save by authority of law. The question of violation of fundamental right raised by the petitioners will be considered after deciding other points raised.

28. People's participation and their commitment in all development activities has been enshrined in the Guiding Principle of 'FAP', Bangladesh Action Plan for Flood Control published by 'FPCO' in March, 1993 and the National Environment Policy of 1992.

29. In Principle No.11 of Guiding Principle of 'FAP', maximum possible popular participation by the beneficiaries was suggested to be ensured in planning, implementation, operation, maintenance of flood protection infrastructures facilities. In the Guidelines for people's participation on Bangladesh Action Plan for Flood Control published by 'FPCO' it is stated that to ensure sustainable Flood Control, Drainage and Water Development, it is essential that local people "participate" in full range of Programme activities including needs assessment, project identification, design and construction, operation and maintenance, monitoring and evaluation. The National Environment Policy, 1992 states that in the context of environment, the Government recognizes that the active participation of all the people at all level is essential to harness and properly utilize all kinds of national resources and to attain the goal of environmental development and improvement.

30. It is the contention from the side of the petitioners that instead of people's participation, the 'FAP-20' is being implemented on the face of the people's protest without attempting to redress people's grievances. This contention was resisted by the respondents with the assertion that the people have been consulted and there has been people's participation in implementing the project. ...

31. The assertions by the petitioners as to the non-participation of the people of the locality in the implementation of project and the counter assertion by the respondents as to participation of the people in the implementation of the project, thus, have become a disputed question of fact and this Court will not embark upon an investigation of the same in writ jurisdiction. Judicial review is generally not available for ascertaining facts but for a review of law emanating from accepted facts. Moreover, Guidelines do not have the force of law and no legal right is created on the basis of Guidelines and no right, also, can be enforced on the basis of Guidelines in the Courts of law.

32. Dr. Mohiuddin Farooque next addressed us raising the contention that all activities envisaged and being carried out by the 'FPCO' through the 'FAP' are subject to the provisions of The Embankment and Drainage Act, 1952 and 'FAP-20' has not followed the prescribed provisions of law contained in the said Act. No objection was recorded, no Notification in the official gazette has been published and no compensation has been assessed as enjoined in sections 28, 30 and 31 of the said Act of 1952....

34. The East Bengal Embankment and Drainage Act, 1952 was enacted to consolidate the laws relating to embankment and drainage and to make better provision for the construction, maintenance, management, removal and control of embankments and water-courses for the better drainage of land and for their protection from floods, erosion and other damage by water....

44. The East Pakistan Water and Power Development Authority Ordinance, 1958 has been replaced by the Bangladesh Water and Power Development Boards Order, 1972 (President's Order No.59 of 1972). So, the authority as defined in section 3(a) of the Act of 1952 as it stands now is Bangladesh Water and Power Development Board.

45. From a reading of [] the Act of 1952, it appears that the prescribed laws in implementing and carrying out the activities of 'FAP-20' project have not been followed. No notice had been published, no objection had been recorded, no procedure for hearing of objection had been followed, no procedure has been made for putting forward the claim of compensation for damages for the loss of properties and deprivation of enjoyment of fishery as required under section 28 of the said Act. Procedure contained in sections 30 and 31 of Act has not been followed. ... So, it is manifestly clear that the provisions and procedure of law embodied in The Embankment and Drainage Act of 1952 had not, at all, been followed. It is worth noting

that the above provisions are aimed at assisting citizens to realize their rights, including the right to property guaranteed under the Constitution and those provisions and procedures are, as such, mandatory.

46. Referring to Article 11(1)(c) of Bangladesh Water and Power Development Boards Order, 1972, argument has been advanced that the said Article, though, requires that every scheme prepared under clause 3 of Article 9 shall be submitted for approval to the Government with a statement of proposal by the Board for the re-settlement or re-housing, if necessary, of persons likely to be displaced by the execution of the scheme, no scheme for re-settlement or re-housing of the persons likely to be displaced by the execution of the scheme has been made in 'FAP-20' project. It was argued that there is every likelihood that by the implementation of the project, people of the locality will be displaced and a scheme for re-settlement or re-housing of those persons likely to be displaced is a requirement of law.

47. In reply, it is contended from the side of the respondents that an important and considerable provisions in the name of mitigation measure has been incorporated in 'FAP-20' to mitigate the needs and sufferings of all people affected by the execution of 'FAP-20' in the event of any displacement of people or any other inconvenience that may arise as a result of execution of project....

49. The provisions embodied in Article 11, therefore, does not appear to have been followed in implementing 'FAP-20' project.

50. The petitioners next challenged the compatibility of the 'FAP-20' project. It is argued that the respondent's attempt to experiment with the people's lives and properties under 'FAP-20' without following appropriate, compulsory and mandatory provisions for adequate accountability would lead to a denial of the rights of the people. It is further urged that the respondents got no legal right to conduct experiment in the name of 'FAP-20' risking the lives and properties of large numbers of people including significant changes in the environment and ecology. ...

51. The 'FAP-20' project is an experimental project for developing controlled flooding mechanism. ... It appears that 'FAP-20' makes no use of certain aspects of modern planning and design such as risk analysis, sensitivity analysis, integration of operation and maintenance in the design and documentation system. If applications of these aspects of modern planning and design should have been impossible, it would a priori seem irresponsible to move on the implementation....

59. In this context, the Bangladesh Country Report for United Nations Conference on Environment and Development (UNCED), Brazil, 1992, published by Ministry of Environment and Forest, Government of Bangladesh in the month of October, 1991 may also be looked into. Some extracts of the Report are given below:

“Embankments have been employed as one possible solution to controlling floods, and several thousands of kilometres have been built in Bangladesh. The aim of most of these embankments is to modify the water regime to reduce crop losses, allow more intensive land use and, in recent times, the cultivation of higher yielding rice varieties which require some measure of water control.

However, these structures have adversely affected the utilization of resources in other sectors. Embankments can cause severe environmental problems such as (i) impede the reproductive cycle of many aquatic species and thus reduce productivity of inland and to some degree marine fisheries, (ii) induce water logging as tidal rivers silt up after they have been embanked, (iii) induce changes in river



morphology, such as increasing scour rates in the embanked areas and consequently increasing deposition rates downstream. Some tidal rivers and creeks in the Khulna area have silted up following construction of embankments (polders) on adjoining land leading to perennial water logging of land inside the polders. Such water logging could induce iron toxicity in soils, and, in some areas, sulphur accumulation leading to extreme soil acidity.” ...

61. Annexure-G4 is a Report of the National Conservation Strategy of Bangladesh published by Ministry of Environment and Forest, Government of Bangladesh. In the said Report, 5.9.2.2 is on “Flood Control and Drainage Projects” which are extracted below:

“i. Operation and Maintenance: Flood control and drainage projects have accounted for about half of the total funds spent on water development projects since 1960. Despite this, the benefits have been less than planned and projected. There are a number of reasons for this, including cost and time overruns (due to a number of factors eg. land acquisition) and problems in the operation and maintenance of projects. There is a tendency to see projects as being finished when the physical works are complete. Insufficient attention is paid to ensuring adequate water control. Problems in the operation and maintenance of projects have also been common. There have been few in-depth evaluations of flood control and drainage projects to assess the operational and other problems involved and to find the best ways to overcome these.”

62. From the above materials on record and also the extract of speech made by the former Finance Minister and the present Food and Agriculture Minister, it seems that the compatibility/viability/feasibility of ‘FAP-20’ is not above question. Previous experience manifested that huge structural projects in the water sector were executed and then left without adequate provisions for their maintenance and the target achievements, hence, remained too far from realization. Since 1960, a huge fund had been spent on water development project like flood control and drainage project. Despite this, the benefits have been much less than planned and projected. Embankment alignments were sometimes poorly planned leading to failure and frequent retirements. The multiple use of embankments was rarely taken into consideration at the planning stage. Drainage project suffers from severe drainage congestion due to the faulty hydrological assessments and the absence of an adequate drainage network and the lack of proper maintenance after the construction of embankments. A common symptom of drainage problem is public cut and these are often so serious that they compromise scheme viability. In this context, it should not be lost sight of that most of the period, since the later part of the year 1958, except for a short interregnum from the year 1972-75, the country was virtually under military rule, sometimes open, sometimes concealed and bureaucracy ruling supreme and the people or their representatives having no say in the planning or implementation of developmental programmes, specially those for controlling flood problem. Since, there is democratic Government from the year 1991. It is expected that people friendly developmental schemes, specially for controlling flood problem, would be undertaken and implemented in accordance with the laws of the land. To formulate policy is the affairs and business of the Government and Court cannot have any say in the matter. Court can only see whether in the matter of implementation of any scheme, the laws of the land has been violated or not.

63. It is submitted from the side of the petitioners that the natural and ecological changes that would entail due to ‘FAP-20’ project will threaten and endanger two national archaeological resources namely, the “Attia Mosque” and the “Kadim Hamdani Mosque” which are in the list of archaeological resources and protected against misuse, destruction, damage, alteration, defacement, mutilation, etc. under the Antiquities Act, 1968 in the spirit of Article 24 of the Constitution....

65. Article 24 of the Constitution enshrines that the state shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historical importance or interest. The protection guaranteed under Article 24 of the Constitution to protect the said Attia Mosque and Kadim Hamdani Mosque must be ensured and no damage, whatsoever, must be done to the said two historical Mosques.

66. It is vigorously canvassed from the side of the petitioners that 'FAP-20' project has raised severe obvious criticisms regarding its environmental and ecological soundness and also committed serious breaches of laws and the same cannot be described as a developmental project. It is further urged that 'FAP-20' activities is detrimental to the life and property of lacs of people and would deprive the affected people of their "Right to Life" by destroying the natural habitat which are protected under Articles 31 and 32 of the Constitution and the Government also got no right to conduct experiment on people's life, property and profession in the name of a project. The question is whether State has a right to conduct experiment on people's life, property and profession disregarding the existing laws of the land.

67. The right or power of a sovereign state to appropriate private property to particular use for the purpose of promoting the general welfare is called, in America, "Eminent Domain". State necessity or need for taking the particular property of a citizen is the very foundation of the exertion of the power of "Eminent Domain". ...

68. It must be borne in mind that "Eminent Domain" is restricted or limited by the constitutional fiats like Fundamental Rights guaranteed under the Constitution. 'FAP-20' is an experimental project for controlling flood. In the event of undertaking of such experimental project, payment of adequate and just compensation to all the persons affected directly or indirectly or casually, are to be ensured and risks, damages, injuries, etc. must be covered. Sufficient guarantee must be integrated with project from the initial stage and genuine people's participation of the affected people must be ensured and that must not be a public show. "Eminent Domain" does not authorize the slate to act contravention of the laws of the land in planning implementing the project. Strict adherence to the legal requirement must be ensured so that people within and outside the project area do not suffer unlawfully. No person shall be deprived of property except under the law of the land; otherwise it would be subversive of the fundamental principles of a democratic Government and also contrary to provisions and spirit of the Constitution.

69. It is significant to note here that the project called "Jamuna Multipurpose Bridge Project" has drawn detailed procedure for re-settlement of the displaced and affected persons and perceived the same as a development programme from the inception of the project. "Jamuna Multipurpose Bridge Authority" had chalked out "Revised Re-settlement Action Plain", shortly, 'RRAP'. But in 'FAP-20' project, no plan by the authority for re-settlement/re-housing of displaced and affected persons directly or indirectly or casually, appears to have been undertaken. The people under the 'FAP-20' project got the fundamental right as enshrined under Article 31 of the Constitution to enjoy the equal protection of law and to be treated in accordance with law. It need be stated again that no property can be acquired and no people can be adversely affected in the name of developmental project, here the 'FAP-20' project, without taking adequate measures against the adverse consequences as well as the environmental and ecological damage.

70. The petitioners have alleged that environmental hazard, damage and ecological imbalance will be caused by the activities of 'FAP-20'. In the case of Dr. Mohiuddin Farooque Vs. Bangladesh and others being Civil Appeal No.24 of 1995 arising out of judgment and order dated 18-8-1994 passed by the High Court Division in Writ Petition No.998 of 1994, 49 DLR (AD) 1 = 1997 BLD (AD) 1, ATM Afzal CJ has



dwelt at length on the growing concern and global commitment to protect and conserve environment irrespective of the locality where it is threatened. In the same case BR Roy Chowdhury, J observed-

“Articles 31 and 32 of our Constitution protect right to life as Fundamental Right. It encompasses within its ambit, the protection and preservation of environment, ecological balance, free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.”

71. Life cannot be sustained without its basic necessities such as food and shelter and it cannot, also be enjoyed fruitfully without all facilities of health care, education and cultural enjoyment and all the above of life cannot be had without proper means of livelihood. In that context, the question arose whether right to life includes right to livelihood. In the advanced economically developed countries known as “Welfare State”, Government provides social security benefits to the citizens who have no means of livelihood due to unemployment and other reasons. The concept of the laissez faire of the Nineteenth century arose from a philosophy that general welfare is best promoted when the intervention of the State in economic and social matters is kept to the lowest possible minimum. The rise of the “Welfare State” proceeds from the political philosophy that the greater economic and social good of the greater number requires greater interventions of the Government and the adoption of public measures aimed at general economic and social welfare.

72. Article 21 of the Constitution of India is similar to Article 32 of our Constitution. Article 21 of the Constitution of India enjoins: “No person shall be deprived of his life or personal liberty except according to procedure established by law”. The Indian Supreme Court in the case of *Olga Tellis and others Vs. Bombay Municipal Corporation and others*, AIR 1986 (SC) 180, interpreted Article 21 of the Indian Constitution in the following terms:

“The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is that right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right of life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.”

73. In our jurisdiction, this question as to the meaning of right to life was raised for the first time in the case of *Dr. Mohiuddin Farooque Vs. Bangladesh and others*, 48 DLR 438 to which one of us (Kazi Ebadul Hoque J) was a party. In that case after discussing various decisions of different jurisdictions especially of the Supreme Court of India it was held:

“Right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution-free water and air, bare necessities of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity.”

74. In that case no question of deprivation of life for want of livelihood was involved. But in the instant cases before us, the question is whether right to life under Articles 31 and 32 of the Constitution would be adversely affected by the deprivation of livelihood of the Citizens. It has already been noticed that section 28 of The Embankment and Drainage Act, 1952 provides for payment of compensation for injuriously affecting certain rights of inhabitants upon which their livelihood depends. This provision, thus, recognizes right to livelihood of the citizens of the country. In the facts and circumstances of these two cases it is clear that livelihood of some inhabitants of ‘FAP-20’ project area dependant on fishing would be adversely affected. We, thus, find that life of those persons would, ultimately, be affected due to the deprivation of their such livelihood. So, we are of this view that right to life under Articles 31 and 32 of the Constitution also includes right to livelihood. Since, the afforestation provisions of law have provided for compensating such adverse effect to the livelihood of the inhabitants of the ‘FAP-20’ project area, there is no question of violation of Fundamental Right.

75. In a Pilot Project, although, positive targets are expected but that would not automatically over-rule the potential of negative consequences or even failure of the project. ...

The Compartmentalization Pilot Project, ‘FAP-20’, being an experimental project, precautionary measures are needed to be integrated into the project to ensure that no citizen suffers damage from an act of the authority save in accordance with law.

76. Turning now to the question how far the judiciary can intervene in such matter. In SADE Smith’s “Constitutional and Administrative Law” Fourth Edition, Page 562 as referred to by Dr. Mohiuddin Farooque, it is stated:

“Action taken by a public authority not only runs the risk of being ultra vires in substance but may in certain cases be ultra vires in form: Certain powers are exercisable only subject to procedural safeguards enshrined in the enabling statute. The relevant Act may require that some person or organization be consulted before action is taken or an order made. Notice of intention to act may have to be given in a particular form or by a specified date. What happens if the procedure laid down is not complied with by the authority? First, the Courts will classify the procedural or formal requirement as mandatory or directory. If a requirement is merely directory then substantial compliance with the procedure laid down will suffice to validate the action; and in some cases even total non-compliance will not affect the validity of what has been done. If a mandatory requirement is not observed then the act or decision will be vitiated by the non-compliance with the statute. This does not mean that the act or decision has no legal effect and can be ignored or treated as void. The House of Lords has stressed that the use of such terms as void and voidable has little practical meaning in administrative law where the supervisory jurisdiction of the High Court operates to ensure the proper exercise of powers by public authorities. Non-compliance with a mandatory procedural requirement results in the act or decision being susceptible to being quashed by the High

Court which will then make whatever order to the public authority it sees as appropriate to remedy the unlawful action taken.”

77. Judicial review of the administrative action should be made where there is necessity for judicial action and obligation. Such action must be taken in public interest. The purpose of Judicial review is to ensure that the citizen of the country receives protection of law and the administrative action comply with the norms of procedure set for it by laws of the land. Judicial Power is the “safest possible safeguard” against abuse of power by administrative authority and the judiciary cannot be deprived of the said power.

78. It has already been noticed that Article 31 of our Constitution gives the right to protection of law to the life, liberty, property, etc., Article 32 ensures that no one can be deprived of life and liberty except in accordance with law and thus protects life from unlawful deprivation. Article 40 gives every citizen right to enter upon lawful profession or occupation and Article 42 protects right to property. The petitioner of each of the writ petitions alleges the violation of the Fundamental Rights guaranteed under Articles 31, 32, 40 and 42 of the Constitution. All the above Fundamental Rights are subject to law involved in the matter. In the event of violation of Fundamental Right or even any violation of the law of the land, this Court under judicial review of the administrative action, can interfere with unlawful action taken by any administrative authority. It has, already, been noticed that ‘FAP-20’ activities have been undertaken by the respondents in accordance with the law of the land regarding the adoption and approval of the scheme but violations of some provisions of the law of the land in implementing the project is found but the Fundamental Rights stated above do not appear to have been violated.

79. Now, the question is whether this Court will declare the activities and implementation of ‘FAP-20’ project to be without lawful authority for the alleged violation of some of the provisions of the afforestation laws of the land.

80. From the materials on record, it appears that ‘FAP-20’ project is a developmental project, although experimental, aimed at controlling flood which regularly brings miseries to the people of the flood prone areas of the district of Tangail specially during the rainy season of the year. A substantial amount appears to have been spent and the project work has been started long before and also partially, implemented. Success and not the failure of the project is expected. In the event of any interference into the ‘FAP-20’ activities, the country will be deprived of the benefits expected to be derived from the implementation of the scheme and also from getting foreign assistance in the development work of the country and, in future, donor countries will be apprehensive in coming up with foreign assistance in the wake of natural disaster. At the present stage of the implementation of the project, it will be impractical to stop the work and to undo the same. But in implementing the project, the respondents, cannot with impunity, violate the provisions of laws of the land referred to and discussed above. We are of this considered view that ‘FAP-20’ project work should be executed complying with the afforestation requirements of laws of the land.

81. In the facts and circumstances and having regard to the provisions of law, we propose to give some directions to the respondents for strict compliance of the same in the greater public interest: “The respondents, thus, are directed-

- (a) to comply with the provisions and procedures contained in sections 28, 30 and 31 of The Embankment and Drainage Act, 1952 (East Bengal Act I of 1953),
- (b) to comply with the provisions contained in Article 11(1)(c) of Bangladesh Water and Power Development Boards Order, 1972 (President's Order No.59 of 1972), for re-settlement and re-housing of

actually displaced from their residence the execution of the scheme, that is, implementation of 'FAP-20' Project,

(c) to secure the archaeological structure (site) of the 'Attia Mosque' and 'Kadim Hamdani Mosque' falling within the 'FAP-20' Project area from any damage, disfigurement, defacement and injury by the project activities. And,

(d) to ensure that no serious damage to environment and ecology is caused, 'FAP-20' activities."

82. Before parting with the matter, we inclined to observe that the people of Bangladesh live with flood and fight with flood for centuries. The people of Bangladesh face the painful experience of flood causing colossal damage to crops and properties. Faced with the peculiar geographic climatic situation, it becomes a difficult task control flood and other catastrophes that fan on people of Bangladesh. Flood water come from outside. No action can be effective until upstream flow can be checked and controlled. Under the International Law, the upstream states have got a tremendous responsibility to play their part in regulating and taking integrated approach in tackling flood related hazards and the burden of the load of flood cannot be Placed on Bangladesh alone.

83. Before concluding, we express our appreciation to Dr. Mohiuddin Farooque and his organisation "Bangladesh Environmental Lawyers Association", "(BELA)" who are championing the cause of the public and the downtrodden people of the community, who as helpless citizens, cannot ventilate their grievances before the Courts of law and, also, making efforts to protect and conserve environment and ecology of the country and "BELA" is coming forward with Public Interest Litigation (PIL) before the Courts of law.

84. In the result, both the Rules are made absolute-in-part. The respondents are allowed to execute and implement the 'FAP-20' Project activities subject to the strict compliance with the directions made above.

Having regard to the facts and circumstances of the cases, there will be no order as to costs.

\* \* \*

#### 4. **M.C. Mehta v. Union of India & Others (Supreme Court of India 2004)**

*In a previous opinion, the Court came to the conclusion that the mining activities in the vicinity of protected wildlife sanctuaries and tourist resorts are bound to cast serious impact on the local ecology. The Court applied the precautionary principle and principles of sustainable development and ordered a series of remedies including the establishment of a monitoring committee to oversee compliance with administrative orders on a mine to mine basis.*

The main question to be examined in these matters is whether the mining activity in area up to 5 kilometers from the Delhi-Haryana border on the Haryana side of the ridge and also in the Aravalli hills causes environment degradation and what directions are required to be issued. The background in which the question has come up for consideration may first be noticed.

The Haryana Pollution Control Board (HPCB) was directed by orders of this Court dated 20th November, 1995 to inspect and ascertain the impact of mining operation on the Badkal Lake and Surajkund - ecologically sensitive area falling within the State of Haryana. In the report that was submitted, it was stated that explosives are being used for rock blasting for the purpose of mining; unscientific mining operation was resulting in lying of overburden materials (topsoil and murum remain) haphazardly; and deep mining for extracting silica sand lumps is causing ecological disaster as these mines lie unreclaimed and abandoned. It was, inter alia, recommended that the Environmental Management Plan (EMP) should be prepared by mine lease holders for their mines and actual mining operation made operative after obtaining approval from the State Departments of Environment or HPCB; the EMP should be implemented following a time bound action plan; land reclamation and afforestation programmes shall also be included in the EMP and must be implemented strictly by the implementing authorities. The report recommended stoppage of mining activities within a radius of 5 kms. from Badkal Lake and Surajkund (tourist place). The Haryana Government, on the basis of the recommendations made in the report, stopped mining operations within the radius of 5 kms of Badkal Lake and Surajkund. The mine operators raised objections to the recommendations of stoppage of mining operations. According to them, pollution, if any, that was generated by the mining activities cannot go beyond a distance of 1 km. and the stoppage was wholly unjustified.

##### NEERI Report and earlier directions

By order dated April 12, 1996, the Court sought the expert opinion of National Environmental Engineering Research Institute (NEERI) on the point whether the mining operations in the said area are to be stopped in the interest of environmental protection, pollution control and tourism development and, if so, whether the limit should be 5 kms. or less. . . .

On consideration of the reports, this Court came to the conclusion that the mining activities in the vicinity of tourist resorts are bound to cast serious impact on the local ecology. The mining brings extensive alteration in the natural land profile of the area. Mined pits and unattended dumps of overburdened left behind during the mining operations are the irreversible consequences of the mining operations and rock blasting, movement of heavy vehicles, movements and operations of mining equipment and machinery cause considerable pollution in the shape of noise and vibration. The ambient air in the mining area gets highly polluted by the dust generated by the blasting operations, vehicular movement, loading/unloading/transportation and the exhaust gases from equipment and machinery used in the mining operations. It was directed that in order to preserve environment and control pollution within the vicinity of two tourist resorts, it is necessary to stop mining activity within 2 kms. radius of the tourist resorts of

Badkal Lake and Surajkund. . . . Further, it was directed that failing to comply with the recommendations may result in the closure of the mining operations and that the mining leases within the area from 2 kms. to 5 kms. radius shall not be renewed without obtaining prior no objection certificate from the HPCB as also from the Central Pollution Control Board (CPCB). Unless both the Boards grant no objection certificate, the mining leases in the said area shall not be renewed. (M.C. Mehta v. Union of India & Ors. [(1996) 8 SCC 462]).

### Present Issues

The aspects to be examined include the compliance of the conditions imposed by the Pollution Boards while granting no objection certificate for mining and also compliance of various statutory provisions and notifications as also obtaining of the requisite clearances and permissions from the concerned authorities before starting the mining operations.

In matters under consideration, the areas of mining fall within the districts of Faridabad and Gurgaon in the Haryana State. I.A. No.1785/01 has been filed by the Delhi Ridge Management Board praying that the Government of Haryana be directed to stop all mining activities and pumping of ground water in and from area up to 5 kms from Delhi-Haryana border in the Haryana side of the Ridge, inter alia, stating that in the larger interest of maintaining the ecological balance of the environment and protecting the Asola Bhatti Wildlife Sanctuary and the ridge located in Delhi and adjoining Haryana, it is necessary to stop mining. In the application, it has been averred that the Asola Bhatti Wildlife Sanctuary is located on the southern ridge which is one of the oldest mountain ranges of the world and represents the biogeographical outer layer of the Aravalli mountain range which is one of the most protected areas in the country. The sanctuary is significant as it is instrumental in protecting the green lung of National Capital of Delhi and acts as a carbon sink for the industrial and vehicular emissions of the country's capital which is witnessing rapid growth in its pollution level each year. The ridge, it is averred, is a potential shelter belt against advancing desertification and has been notified a wildlife sanctuary and reserve forest by the Government of National Capital Territory of Delhi. Regarding the mining activities, it is averred that for extraction of Badarpur (Silica sand), there is large scale mining activity on the Haryana side just adjacent to the wildlife sanctuary of the ridge which activities threaten the sanctuaries habitat and also pumping of large quantity of ground water from mining pits. It was also stated that the ground water level was being depleted as a result of the mining activity. Further, the query dust that comes out of mining pits is a serious health hazard for human population living nearby and also the wild animals inhabiting the sanctuary pointing out that the mining and extraction of ground water had been banned in National Capital Territory of Delhi and the ridge being protected as per the order of this Court, it is necessary, that the ridge on the Haryana side is also protected - that being the extension of the range and, therefore, mining, withdrawal of ground water and destruction of flora, etc. should also be restricted outside Delhi or at least upto 5 kms. from Delhi-Haryana border towards Haryana. On 6th May, 2002, this Court directed the Chief Secretary, Government of Haryana to stop, within 48 hours, all mining activities and pumping of ground water in and from an area up to 5kms. from Delhi- Haryana border in the Haryana side of the ridge and also in the Aravalli Hills. The question to be considered is whether the order shall be made absolute or vacated or modified.

Our examination of the issues is confined to the effect on ecology of the mining activity carried on within an area of 5 Kms. of Delhi-Haryana Border on Haryana side in areas falling within the district of Faridabad and Gurgaon and in Aravalli Hills within Gurgaon District. The question is whether the mining activity deserves to be absolutely banned or permitted on compliance of stringent conditions and by monitoring it to prevent the environmental pollution.



### EPCA Visits

In terms of the order passed by this Court on 22nd July, 2002, Environmental Pollution Central Authority (EPCA) was directed to give a report with regard to environment in the area preferably after a personal visit to the area in question without any advance notice. . . .

During the visit, prima facie, EPCA found evidence of clear violation of some of the key conditions of order of this court dated May 10, 1996. . . .

The most serious violation noticed by the EPCA was the continuation of mining even after reaching the ground water level which has been disallowed by the regulatory agencies. . . . [The Court describes evidence of many other violations.]

From the above, it is clear that little or nothing has been done to seriously comply with the directives of the Hon'ble Supreme Court as well as to enforce the regulations and conditions laid down by the authorities for environmental management of the mining areas. . . .

The NOC given by the Central Pollution Control Board, includes an explicit condition regarding ground water:

That the mine owner will ensure that there is no discharge of effluent of ground water outside lease premises. They must take measures for rain water harvesting and reuse of water so as not to affect the groundwater table in the areas. Most importantly, it stipulates that no mining operations shall be carried out in the water table area.

This condition has been grossly violated. Even the Haryana government's affidavit in court accepts that pumping of ground water is taking place, though it attempts to soften the issue by arguing that it is only being done in a few cases. Under this condition, mining is not allowed in the water table area. EPCA saw deep and extensive pits of mines with vast water bodies. EPCA also saw evidence of pumps and pipes being used to drain out the ground water so that mining could continue. Therefore, the miners are mining for silica, but also in the process, mining and destroying the ground water reserves of the areas. In times of such water stress and desperation, this water mining is nothing less than a gross act of wastage of a key resource. This time the stress has been further aggravated by the failure of monsoon. Notices have been issued in the nearby housing colonies stating that fall in groundwater table due to lack of rains is responsible for water shortage in the area this season. This only indicates how important it is to conserve ground water in the region for long term sustainability of drinking water sources. Ground water is the only source of drinking water here.

On the basis of study and visit as well as the report of the Central Ground Water Board, EPCA made the following recommendations:

- "1. The ban on the mining activities and pumping of ground water in and from an area up to 5 kms. from the Delhi-Haryana border in the Haryana side of the ridge and also in the Aravalli Hill must be maintained.
2. Not only must further degradation be halted but, all efforts must be made to ensure that the local economy is rejuvenated, with the use of plantations and local water harvesting based opportunities. It is indeed sad to note the plight of people living in these hills who are caught between losing their water dependent livelihood and between losing their only desperate livelihood to break stones in the quarries. It is essential that the Government of Haryana seriously implements programmes to enhance the land based livelihood of people . . . Local people must not be thrown into making false choices, which may secure

their present but will destroy their future. Already, all the villages visited by EPCA complained of dire and desperate shortages of drinking water. Women talked about long queues before taps to collect water. . . .

7. EPCA would also recommend that the mining area outside the 5 kms. area must be demarcated and regulated. In this context, EPCA would like to draw the attention of the court to the violations and gross disregard for regulations found in the present mines. It is not out of place to mention that these mines are owned by very powerful and highly placed individuals in the establishment. . . .

The EPCA, while reaffirming the recommendations that had been made in its earlier report dated 9th August, 2002, made the following recommendations :

"The overall assessment of the environmental impact of the mining activities in the area especially its implication for ground water level in the region reaffirms EPCA's assessment presented in its earlier report. EPCA upholds its earlier recommendations made vide the report submitted to the Hon'ble Supreme Court on August 9, 2002.

EPCA is concerned that if mining is allowed to continue in this area, it will have serious implications for the groundwater reserve which is the only source of drinking water in the area. . . . Unless immediate measures are taken to conserve and augment water resources in the area acute survival crisis is expected. Interviews with local villagers in the vicinity of mines confirm that water shortage is already a serious problem in the region. The extent of degradation in and around mines is the evidence of failure to enforce basic rules for ecological safeguards. . . ."

#### Submissions for Confirming or Varying Order dated 6th May, 2002

Having regard to the ground realities as reflected in the aforesaid reports, should the order passed on 6th May, 2002 be varied is the question? The continuance of the order has been strenuously objected to by the mining lease holders and also by the Government of Haryana. . . . We have also heard Mr. Raju Ramachandran and Mr. Altaf Ahmad, learned Additional Solicitor Generals for the Ministry of Environment and Forest, Government of India, Mr. C.S. Vaidyanathan and Mr. Kaushik (in support of IA No.1825/2002 filed by the villagers). Mr. Ranjit Kumar, learned Amicus and Mr. M.C. Mehta, Advocate/petitioner-in- person and Mr. Kailash Vasudeva for Government of Delhi have made submissions in support of closure of mining activity and for making the order dated 6th May, 2002 absolute by prohibiting all mining activities and pumping of ground water in and from an area upto 5 kms. from Delhi- Haryana Border in the Haryana side of the Ridge and also in the Aravalli Hills.

#### Notifications Regarding Mining on Aravalli Hills

The notification dated 7th May, 1992 issued by the Ministry of Environment and Forest, Government of India under Section 3(2)(v) of the EP Act read with Rule 5 of the Rules made under the said Act has considerable bearing on the aspect of mining in Aravalli Hills. The notification, inter alia, bans all new mining operations including renewals of mining leases and sets out the procedure for taking prior permission before undertaking such an activity. . . .

The powers vested in the Central Government in terms of the aforesaid notification dated 7th May, 1992 were delegated to the State Governments concerned, namely, Rajasthan and Haryana by issue of notification dated November 29, 1999 by the Central Government, Ministry of Environment and Forest. . . The Central Government, in terms of notification dated 28th February, 2003, has withdrawn the

delegation in favour of State Governments. . . . [Statutory requirements for environmental impact assessments were not met.]

### Legal Parameters

The natural sources of air, water and soil cannot be utilized if the utilization results in irreversible damage to environments. There has been accelerated degradation of environment primarily on account of lack of effective enforcement of environmental laws and non-compliance of the statutory norms. This Court has repeatedly said that the right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life. (See *Subhash Kumar v. State of Bihar* [AIR 1991 SC 420]. Further, by 42nd Constitutional Amendment, Article 48-A was inserted in the Constitution in Part IV stipulating that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Article 51A, inter alia, provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures. Article 47 which provides that it shall be the duty of the State to raise the level of nutrition and the standard of living and to improve public health is also relevant in this connection. The most vital necessities, namely, air, water and soil, having regard to right of life under Article 21 cannot be permitted to be misused and polluted so as to reduce the quality of life of others. Having regard to the right of the community at large it is permissible to encourage the participation of Amicus Curiae, the appointment of experts and the appointments of monitoring committees. The approach of the Court has to be liberal towards ensuring social justice and protection of human rights. In *M.C. Mehta v. Union of India* [(1987) 4 SCC 463], this Court held that life, public health and ecology has priority over unemployment and loss of revenue. The definition of 'sustainable development' which Brundtland gave more than 3 decades back still holds good. The phrase covers the development that meets the needs of the present without compromising the ability of the future generation to meet their own needs. In *Narmada Bachao Andolan v. Union of India & Ors.* [(2000) 10 SCC 664], this Court observed that sustainable development means the type or extent of development that can take place and which can be sustained by nature/ecology with or without mitigation. In these matters, the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable person's " test.

The mining operation is hazardous in nature. It impairs ecology and people's right of natural resources. The entire process of setting up and functioning of mining operation require utmost good faith and honesty on the part of the intending entrepreneur. For carrying on any mining activity close to township which has tendency to degrade environment and are likely to affect air, water and soil and impair the quality of life of inhabitants of the area, there would be greater responsibility on the part of the entrepreneur. The fullest disclosures including the potential for increased burdens on the environment consequent upon possible increase in the quantum and degree of pollution, has to be made at the outset so that public and all those concerned including authorities may decide whether the permission can at all be granted for carrying on mining activity. The regulatory authorities have to act with utmost care in ensuring compliance of safeguards, norms and standards to be observed by such entrepreneurs. When questioned, the regulatory authorities have to show that the said authorities acted in the manner enjoined upon them. Where the regulatory authorities, either connive or act negligently by not taking prompt action to prevent, avoid or control the damage to environment, natural resources and peoples' life, health and property, the principles of accountability for restoration and compensation have to be applied. The development and the protection of environments are not enemies. If without degrading the environment or minimising adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development, in that eventuality, the

development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck. We may note that to stall fast the depletion of forest, series of orders have been passed by this Court in T.N. Godavarman's case regulating the felling of trees in all the forests in the country. Principle 15 of Rio Conference of 1992 relating to the applicability of precautionary principle which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing effective measures to prevent environmental degradation is also required to be kept in view. In such matters, many a times, the option to be adopted is not very easy or in a straight jacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment. Bearing in mind the aforesaid principles, we have to consider the main question: should the mining activity in areas in question be banned altogether or permitted and, if so, conditions to be provided therefor? The reports and suggestions of NEERI, EPCA and CEC have already been extensively noted. The effect of mining activity in area up to 5 km. from Delhi-Haryana border on Haryana side of the ridge and also in the Aravalli Hills is to be seen in light of these reports and another report dealt later. One of the aspect stated in these reports is about carrying on of mining activity in close proximity to the residential area and/or main roads carrying traffic. . . .

#### Modification of Order dated 6th May, 2002 Regarding Mining in Aravalli

Now, the question is should mining activities in the Aravalli range in Gurgaon district be permitted to restart and, to that extent, the order dated 6th May, 2002 be modified, meanwhile directing implementation of recommendations in the report of CMPDI and earlier referred reports. The other option is to first constitute a monitoring committee directing it to individually examine and inspect mines from environmental angle in the light of the said recommendations and file a report in this Court in respect of individual mines with its recommendations for restart or otherwise as also recommendation, if any, for the payment by the mine operators and/or by State Government towards environmental fund having regard to the precautionary principles and polluter pays principle and on consideration of that report, to decide the aspect of modification of the order dated 6th May, 2002, partially or entirely. We are of the view that the second option is more appropriate. We are conscious of observations in CMPDI that measures for protecting the environment can be undertaken without stopping mine operations and also the suggestions of MOEF to permit mining subject to the mine lease holders undertaking to comply with such conditions which remain to be complied, but, having regard to the enormous degradation of the environment, in our view, the safer and the proper course is to first constitute a Monitoring Committee, get a report from it and only thereafter consider, on individual mine to mine basis, lifting of ban imposed in terms of order dated 6th May, 2002. Before concluding this aspect, we may note that assuming there was any ambiguity about the applicability of order dated 6th May, 2002 to mining in Aravalli Range, it is clarified that the said order would be applicable to all the mines in Aravalli hill range in Gurgaon district. . . .

We have already extracted the recommendations of NEERI, as also violations noticed in the reports submitted by EPCA and the suggestions of EPCA, CEC and CMPDI. The Monitoring Committee shall inspect the leases in question in Faridabad District as well in the light of these recommendations and file its report containing suggestions on recommencement or otherwise of the mining activity therein. It may be reiterated that if, despite stringent conditions, the degradation of environment continues and reaches a stage of no return, this Court may have to consider, at a later date, the closure of mining activity in areas

where there is such a risk. As earlier noticed as well, it would not be expedient to lift the ban on mining imposed in terms of the order of this Court dated 6th May, 2002 before ensuring implementation of suggestions of CMPDI and other recommendations of experts (NEERI, EPCA and CEC). The safer course is to consider this question, on individual basis after receipt of report of the Monitoring Committee.

### Conclusions

1. The order dated 6th May, 2002 as clarified hereinbefore cannot be vacated or varied before consideration of the report of the Monitoring Committee constituted by this judgment.
2. The notification of environment assessment clearance dated 27th January, 1994 is applicable also when renewal of mining lease is considered after issue of the notification.
3. On the facts of the case, the mining activity on areas covered under Section 4 and/or 5 of Punjab Land Preservation Act, 1900 cannot be undertaken without approval under the Forest (Conservation) Act, 1980.
4. No mining activity can be carried out on area over which plantation has been undertaken under Aravalli project by utilization of foreign funds.
5. The mining activity can be permitted only on the basis of sustainable development and on compliance of stringent conditions.
6. The Aravalli hill range has to be protected at any cost. In case despite stringent condition, there is an adverse irreversible effect on the ecology in the Aravalli hill range area, at a later date, the total stoppage of mining activity in the area may have to be considered. For similar reasons such step may have to be considered in respect of mining in Faridabad District as well.
7. MOEF is directed to prepare a short term and long term action plan for the restoration of environmental quality of Aravalli hills in Gurgaon district having regard to what is stated in final report of CMPDI within four months.
8. Violation of any of the conditions would entail the risk of cancellation of mining lease. The mining activity shall continue only on strict compliance of the stipulated conditions. The matters are directed to be listed after reopening of courts after summer vacation on receipt of the report from the Monitoring Committee.

\* \* \*

**5. Santosh Mittal vs State Of Rajasthan And Ors. (The High Court of Judicature for Rajasthan 2004)**

*Relying on data from an NGO, the Court found that drinks made locally by PepsiCo and Coca-Cola contained pesticides and other carcinogenic chemicals that were not found in similar drinks made elsewhere. The Court held that plaintiffs' constitutional right to free expression included the right to receive information and therefore ordered the makers of carbonated beverages to indicate clearly on the package the details of its composition & nature and quantity of pesticides and chemicals, if any, present therein.*

1. The petitioners' claim that the carbonated drinks manufactured by PepsiCo and Coca-Cola are contaminated and laced with pesticides, which are dangerous to human life. The petitioners seek a ban on their sale and use by the public at large. It is also the case of the petitioners that the drinks manufactured by these companies contain suspended impurities. ... It has been argued in these petitions by the learned counsel for the petitioners that the manufactures ought to make a complete and full disclosure of the composition and contents of their products including the presence, if any, of the pesticides and chemicals therein, so that the consumers can make an informed choice before buying, selecting and consuming the products.

2. The learned counsel for the respondent companies submitted that the companies are not required under law, to disclose the presence or absence of pesticides in their products. It is also submitted that the products contain 90% water, 9.0% sugar and 0. 1% preservatives. According to them in case water contains pesticides, they cannot be blamed for it. It is claimed and asserted by them that the water used for manufacturing the soft drinks by them is subjected to reverse osmosis process and certain other scientific procedures. This is being done to purify the water. It was also argued that their products meet the European standards of quality and purity.

3. They submitted that it is not relevant to divulge information with regard to the presence or absence of DDT from the beverages. They wondered as to how the information would be relevant or material or of any significance to the consumers. Both the counsel for Coca-Cola and PepsiCo submitted that small traces of DDT and other pesticides are not harmful to the health of the consumers. It was contended on behalf of PepsiCo that the water used for manufacturing carbonated beverages by the company in the State of Rajasthan is drawn from deep wells with a view to obviate mixing of any undesirable element or chemical in it.

4. We have considered the submissions of the learned counsel for the parties.

5. On August 5, 2003, the Director, Centre for Science and Environment (for short 'CSE') an NGO based in Delhi, made public a report of the analysis of pesticide residues in soft drinks. Both electronic and print media covered this report prominently. In the report it was stated that CSE found pesticide residues in the samples of twelve soft drink brands procured by it from open market in Delhi. As per the report of the CSE, thirty-six samples of twelve different brands of the aforesaid soft drinks were tested, from which it was concluded as follows:-



"Out of the 16 organochlorines, 12 organophosphorus and 4 synthetic pyrethroids analysed soft drink samples. Lindane, DDT and its metabolites, Malathion and Chlorpyrifos were most commonly found in 36 soft drink samples tested.

Lindane (Hexachlorocyclohexane), a potent carcinogen was detected in 100% of the samples analysed.

The average concentration detected in all the samples were 0.0021 mg/L, which is 21 times higher than the EEC limit for individual pesticides. Lindane is the most toxic of all the isomers of HCH and has powerful insecticidal properties and is used for the control of insects of field crops and pests in houses.

DDT (dichlorodiphenyltrichloroethane) was detected in 81% of the samples analysed. The average concentration of total DDT (DDT+DDD + DDE) in all the samples was 0.0015 mg/L, which is 15 times higher than the EEC limit.

Chlorpyrifos, a suspected neuroteratogen was detected in 100% of the 36 samples analysed with an average concentration of 0.0042 mg/L of chlorpyrifos which is 42 times higher than the prescribed EEC limit.

Malathion was present in 97% of the samples analysed with an average concentration of malathion (0.0087 mg/L) which is 87 times higher than the EEC limit. Malathion was present in all samples except one sample of Sprite (BN 787).

Synthetic Pyrethroid- Out of 4 synthetic pesticides- cypermethrin, deltamethrin, fenvalerate and permethrin analysed, none was detected in any of the samples.

The average concentration of total organochlorines was 0.0038 mg/L, that of total organophosphorus was 0.0219 mg/L and the level of total pesticides detected was 0.0168 mg/L, which is 34 times higher than the total EEC limit. The variation in different brands could be due to the different ingredients present in different brands, composition and pH.

No pesticide residues were detected in the Coca-Cola and Pepsi samples from USA manufactured by the same multinationals."

Therefore, it is apparent that the samples of the said soft drinks contained pesticides. It is also significant that in the Coca-Cola and Pepsi samples received from USA, no pesticide residues were detected though they were manufactured by the same multinationals.

6. The aforesaid report refers to the baneful effect of the DDT and its metabolites. The effect, as noted in the report, is as follows:-

"DDT (dichlorodiphenyltrichloroethane) and its metabolites were detected in 81% of the soft drink samples. They have been linked to altered sexual development in various species, to a decrease semen quality and to increased risk of breast cancer in women. (Sharps RM. Et. a, 1993; Carlsen E et a, 1992; Stone R et a, 1994). DDT and its metabolites have also been shown to mimic estrogen, binding to and activating the estrogen receptors (ER's) thereby often producing estrogen like effects (Jaga K, 2000). They may alter a number of harmful estrogen-regulated health effects in humans such as breast cancer (Cocco P et a, 2002), spontaneous abortion (Korick SA et a', 2001) reduced bone mineral density (Bread et a', 2000). DDT and its metabolites because of their lipophilicity and long half lives accumulate in the food chain. Their weak oestrogenic

effects may result from altered metabolism and competition for binding to cytosol and nuclear receptors of steroid hormones. (Levine R et al, 1991).

DDT reportedly induces cancer in animals, mimics estrogen activity, induces antiandrogen effects, and impairs Natural Killer (NK) cells and T lymphocyte responses. Occupational exposure to insecticides resulted in frequent infections and immunological abnormalities. DDT, dichlorodiphenyldichloroethylene (DDE), and dichlorodiphenyldichloroethane (DDD) in blood levels have been associated with several immune parameters in patients occupationally exposed to insecticides. The majority of 49 patients who worked as farmers or farmhands in the former German Democratic Republic, were contaminated with more than one chemical- most commonly DDE, PCBs, and HCB and 80% of them had been exposed for more than 20 years (Daniel et al, 2002).

Comparison of blood levels of HCB and total DDT in 159 women with breast cancer and 250 presumably healthy showed that mean levels of total DDT and HCB were significantly higher for breast cancer patients than for controls. No differences in serum levels of total DDT or HCB were found between estrogen receptor positive and estrogen receptor negative patients with breast cancer which implies that persistent pollutants may occur in higher concentration in blood samples from breast cancer patients from controls (Charlier C et al, 2003).

There are mixture effects even when each mixture component is present at concentrations that individually produces insignificant effects. Lifetime treatment of mice with DDT induced liver tumors in a dose related manner and the tumors included overtly metastasizing hepatoblastomas (Hoyer AP et al, ' 1998). Main metabolites of DDT (pp' DDE and pp' DDD) are both carcinogenic. Exposure to DDE resulted in high incidence of liver tumors in both male and female mice. The combined exposure to DDE and DDD resulted in a marked increase and early appearance of liver tumors in both sexes (Turoso VSeta; 1973).

Mixture of 4 organochlorines (op' DDT, pp' DDE 1-BHC and pp' DDT) acted together to produce proliferative effects in MCF-7 human breast cancer cells and the combined effect was additive (Gertrudis C et al 2001). A study suggests that exposure to a mixture of DDT, HCH and endosulfan and decreased fertility in males, an increase in birth defects and in neonatal deaths (Rupa DS, 1991). Detoxification processes both in humans and animals involve conversion of DDT to less toxic acetate; little is known about variations from person to person in these detoxification mechanisms, and even less about intermediate metabolism concerned. Regardless of detoxification mechanisms, DDT is stored cumulatively in body fat and excretion is extremely slow even after intake ceases (Smith MI, 1946)." ...

11. ... From the opinion of Dr. Karanth it can be deduced the large intake of beverages containing pesticides is harmful to health. In example 5 above, he candidly admits that even a small quantity of pesticide in a soft drink is not good. Therefore, unless the bottle or the container mentions the composition of the carbonated beverage or soft drink, including the presence, if any, of the pesticides and chemicals, on it and the extent thereof, it will not be possible for the consumers to assess and form an informed opinion as to whether they should buy and consume the same and if so, to what extent. We do not wish to comment upon the question as to what quantity of pesticides when consumed can have ill effects on the health of a person. That matter must be left to the experts. The real question, however, is

whether or not the consumers should be given the entire information about the contents of the beverages for exercising informed choice. Even though the pesticides may not have been induced by the manufactures, it appears to us that the consumers have a fundamental right to the full disclosure of the composition and contents of the beverages.

12. [Article 19\(1\)\(a\)](#) of the Constitution secures to all citizens freedom of speech and expression, which includes a right to acquire information. Unless a person has a right to receive information, he will not be able to enjoy the right to freedom of speech and expression. The right to receive information and knowledge is a necessary concomitant of the right to freedom of speech and expression.

[In Secretary, Ministry of Information and Broadcasting, Govt. of India and Ors. v. Cricket Association of Bengal and Ors.](#), 1995 2 SCC 161, the Supreme Court held that the right to freedom of speech and expression includes right to impart and receive information. In this regard the Supreme Court held as follows:-

"36. The freedom to receive and to communicate information and ideas without interference is an important aspect of the freedom of free speech and expression. We may in this connection refer to [Article 10](#) of the European Convention on Human Rights which states as follows:

"10.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

....The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits and 'aware' citizenry..."

13. [In State of U.P. v. Raj Narayan and Ors.](#), (1975) 4 SCC 428 (Para 74) the Supreme Court held that the right to know is derived from the concept of freedom of speech and expression. The supreme Court did not approve of the tendency to cover with veil of secrecy the common routine business on the ground that the same was not in the public interest. In this regard the Court observed as follows:-

"...The right to know, which is derived from the concept of freedom of speech though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public.

Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine...."

14. [In Indian Express Newspapers \(Bombay\) Private Ltd. and Ors. v. Union of India and Ors.](#), (1985) 1 SCC 641, [Article 19\(1\)\(a\)](#) was liberally interpreted to include the right to circulate one's views by words of mouth or writing or through audio visual devices.

15. [In Association For Democratic Reforms v. Union of India and Anr.](#), 89 (2001 DLT 291, it was held by a Division Bench of the Delhi High Court that several rights flow from [Article 19\(1\)\(a\)](#) including right to receive information, and this being so, the State must ensure the availability of the right of the citizen to receive information with regard to the particulars of the candidates standing for elections, so that he can exercise an informed choice for casting his vote. In this regard, the court held as follows:-

"20. Having regard to the decisions cited above, it appears to us that the right of freedom of expression includes several specific rights which are bound together and through which a common string passes. These include:

- (1) Right to voice one's opinion.
- (2) Right to seek information and ideas.
- (3) Right to receive information.
- (4) Right to impart information, etc. It also appears to us that the State is under an obligation to create conditions in which the aforesaid right flowing from [Article 19\(1\)\(a\)](#) can be effectively and efficiently enjoyed by the citizens. Right to seek, receive and impart information can be through word of mouth, in writing or in print, in the form of art or through television, radio, etc."

16. The Supreme Court in [Union of India v. Association for Democratic Reforms and Anr.](#), (2002) 5 SCC 294 held that right to freedom of speech and expression includes the right to education, to inform and to entertain and also the right to be educated, informed and entertained. The Supreme Court while holding so, observed as follows:-

"5. The right to get information in democracy is recognized all throughout and it is a natural right flowing from the concept of democracy. At this stage, we would refer to [Article 19\(1\)](#) and [\(2\)](#) of the International Covenant on Civil and Political Right, which is as under:-

- "(1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.""

The right to receive information has also been given recognition through the international conventions. We may also refer to the European Convention of Human Right and the International Covenant on Civil and Political Rights. In essence, they provide to the effect that everyone has a right to freedom of expression and this right includes freedom to impart information and ideas of all kinds regardless of the limitations of frontiers either orally, in writing or in print in the form of art or through any other media of his choice.

17. [In Ozair Husain v. Union of India](#), 101 (2002 DLT 229) the Delhi High Court, having regard to Articles 19, 21 and the conventions, held as follows:-

"11. World has moved towards universalisation of right to freedom of expression. In this context we may refer to [Article 10](#) of the European Convention of Human Rights. [Article 10](#) of the Convention provides that every one has a right to freedom of expression and this right shall include freedom to hold opinions and to receive information and ideas without interference by public authority and regardless of frontiers.

12. Again, Articles 19(1) and 19(2) of the International Covenant on Civil and Political Right declares that every one shall have the right to hold opinions without interference, and every one shall have the right to freedom of expression, and this right shall include freedom to seek, receive and impart information of ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. It needs to be noted that India is a signatory to the aforesaid convention.

13. It is well settled by several judgments of the Supreme Court that while interpreting constitutional provisions dealing with fundamental rights the Courts must not forget principles embodied in the international conventions and instruments and as far as possible the Courts must give effect to the principles contained in those instruments. In Apparel Export Promotion council v. A.K. Chopra, I (1999) SLT 212 = 2000 (1) All India Service Law Journal 65, the Supreme Court went to the extent of holding that the courts are under an obligation to give due regard to the international conventions and norms while construing domestic laws, more so when there is no inconsistency between them and the domestic laws. To the same effect is an earlier decision of the Supreme Court in Vishakha and Ors. v. State of Rajasthan and Ors., III (1997) CCR 126 (SC) = (1997) 6 SCC 241.

14. Right to hold opinion and to receive information and ideas without interference embodied in the Covenant is concomitant to the right to freedom of speech and expression which includes right to free flow of information. Since ancient times we have allowed noble thought to come from all sides [Rig. Veda], This has helped in forming, building, strengthening, nurturing, replenishing and recreating opinions and beliefs of an individual.

15. Drawing from the aforesaid decisions, effect must be given to the Covenant. Reading [Article 19\(1\)\(a\)](#) along with the Covenant, it must be recognized that right to freedom of speech and expression includes freedom to seek, receive and impart information of ideas. It seems to us that freedom to hold opinions, ideas, beliefs and freedom of thought, etc., which is also enshrined in Preamble the Constitution, is part of freedom of speech and expression.

Consideration of the question with reference to the [Article 21](#) of the Constitution:

16. [Article 21](#) enshrines right to life and personal liberty. Expressions "right to life and personal liberty are compendious terms which include within themselves variety of rights and attributes. Some of them are also found in [Article 19](#) and thus have two sources at the same time (see [Kharak Singh v. State of U. P.](#), AIR 1963 SC 1295. In R. P. Limited v.

Proprietors, *Indian Express Newspapers, Bombay, Pvt. Ltd.* (1988) 4 SCC 592, (at page 613), the Supreme Court read into [Article 21](#) the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. In view of transnational development when distances are shrinking, international communities are coming together for cooperating in various spheres and they are moving towards global perspectives in various fields including human rights, the expression "liberty" must receive an expanded meaning. The expression cannot be cribbed or confined to mere freedom from bodily restraint, it is wide enough to expand to full range of rights including right to hold a particular opinion and right to sustain and nature that opinion. For sustaining and nurturing that opinion it becomes necessary to receive information. In this view of the matter, we have no hesitation in holding that [Article 21](#) grants freedom to an individual to follow and to stick to his opinions, and for pursuing such a course he has right to receive information and also a right to know the ingredients or the constituents cosmetics, during and food products."

Thus, drawing from various decisions of the Supreme Court and the covenants referred to above, it was held that the right to know is a necessary ingredient of participatory democracy and the same springs from [Article 19\(1\)\(a\)](#) and [21](#) of the Constitution.

18. In *People's Union for Civil Liberties and Anr. v. Union of India and Ors.* (2004) 2 SCC 476, the Supreme Court reiterated and held to the effect that there exists a relationship or linkage between the right to know and the freedom of speech and expression.

19. The learned counsel for the respondent companies contended that neither the [Prevention of Food Adulteration Act](#), 1954 nor the Prevention of Food Adulteration Rules, 1955 envisage total exclusion of pesticides from the beverages and soft drinks. It was submitted that the [Prevention of Food Adulteration Act](#), 1954 and the Rules do not prescribe any standard for water. They canvassed that in case water contains pesticide, how the Companies can be responsible for it since pesticide residue is not an intentional additive but is an incidental contaminant entering the end product from the raw material-. According to them if there is no restriction on the consumption of water containing pesticides, how can there be any restriction on the sale and the consumption of beverages containing pesticides.

20. The argument does not appeal to us. Insofar as water is concerned, it is a necessity as no one can survive without the same. As regards beverages, they are products of trade and commerce produced by the manufactures. They are sold for a price. One can survive without carbonated beverages and soft drinks, but none can survive without water. Once a person pays price for a commercial product it must be totally safe. If a carbonated beverage or soft drink is not free from pesticides and chemicals, the consumer must be told that it contains pesticides or chemicals and the extent of their presence must be specified on the product. The sale of the product should not be allowed without disclosing the composition of the product and the presence, if any, of insecticide, pesticide and chemicals. It was submitted that in case such a disclosure is made, there would be panic in the market and the business will dwindle. The contention cannot be a ground to give a go-by to Articles 19(1)(a) and 21 of the Constitution for the sake of business of the manufactures. It is not difficult to imagine why the respondent companies want to keep the question of the presence of pesticides in carbonated beverages and soft drinks under wraps. It is only because of the commercial interest that such disclosure is being withheld from the public and the consumers. Commercial interests are subservient to the fundamental rights. The manufactures cannot be allowed to keep the contents of the carbonated beverages and soft drinks under veil of secrecy. Such secrecy cannot be legitimately allowed and the veil of secrecy must be lifted for public knowledge and



information in the public interest, so that they can make an informed choice for the purpose of buying the product.

21. In view of the aforesaid discussion we hold that in consonance with the spirit and content of Articles 19(1)(a) and 21 of the Constitution the manufacturers of beverages namely Pepsi-Cola & Coco-Cola and other manufacturers of beverages and soft drinks, are bound to clearly specify on the bottle or package containing the carbonated beverage of soft drink, as the case may be, or on a label or a wrapper wrapped around it, the details of its composition & nature and quantity of pesticides and chemicals, if any, present therein.

22. Accordingly, the writ petitions are allowed. We direct the respondent companies namely PepsiCo and Coca-Cola, and all other manufacturers of carbonated beverages and soft drinks, to disclose the composition and contents of the products, including the presence, if any, of the pesticides and chemicals, on the bottle, package or container, as the case may be.

23. With the aforesaid directions and observations, the writ petitions are disposed of.

\* \* \*

## **6. Advisory Opinion: Whether the Supervision of and Assistance to Public and Private Waste Cleanup and Disposal Organs is Unconstitutional? (Taiwan Constitutional Court 2006)**

*This advisory opinion concludes that a law that permits federal authorities to suspend the licensure of non-complying waste disposal companies does not exceed constitutional constraints on legislative power, or unduly infringe upon constitutionally guaranteed rights to work.*

### Issue

Are the provisions of Article 31(i) of the erstwhile Regulation on the Supervision of and Assistance to Public and Private Waste Cleanup and Disposal Organs unconstitutional?

### Holding

Article 15 of the Constitution provides that the people's right of work shall be guaranteed; that is, the people have the freedom to work and choose their occupations. In order to promote public interests, restrictions may be imposed by law or orders as delegated by law on the means of engaging in work and on the necessary qualifications or other requirements to the extent that they are in line with Article 23 of the Constitution. Where the law delegates the power of issuing orders to the competent authority for the purpose of making supplementary provisions, the contents thereof shall be in line with the legislative intent, and shall not go beyond the scope of the enabling statute. As has been made clear by this Court in its previous interpretations, where an order is issued under the general authorization of the enabling statute, a comprehensive judgment shall be made in respect of the legislative purposes of the law itself and the associated meanings of the provisions on the whole, instead of adhering to the letter of the law, so as to determine whether it goes beyond the scope of legal authorization or not.

Under Article 21 of the Waste Disposal Act as amended and promulgated on November 20, 1985, the central competent authority shall prescribe the regulations governing the supervision of and assistance to

public and private waste cleanup and disposal organs, as well as the qualifications of the specialized technical personnel. Although the said enabling provision did not specify the content and scope of the qualifications of the specialized technical personnel, it should be reasoned, based on construction of the law on the whole, that the lawmakers' intent was to delegate the power to the competent authority to decide not only on the qualifications of the specialized technical personnel, but also on such matters as the supervision of how said technical personnel should properly perform their duties, so as to fulfill the authorized purposes of effectively supervising and assisting the public and private waste cleanup and disposal organs.

Pursuant to the aforesaid authorization, the Environmental Protection Administration, Executive Yuan, formulated and issued the Regulation on the Supervision of and Assistance to Public and Private Waste Cleanup and Disposal Organs (abolished) on November 19, 1997. Article 31 (i) thereof provided, "In circumstances where the disposal organs broke the law or operated improperly, thus seriously polluting the environment or jeopardizing human health, the competent authority shall revoke the certificates of qualification for the cleanup or disposal technicians hired by such organs." The said provision refers to such circumstances where the waste cleanup or disposal organs broke the law or operated improperly so as to seriously pollute the environment or to jeopardize human health, for which the competent authority shall revoke the certificates of qualification for the cleanup or disposal technicians within the scope of their employment and duty. Thus it does not go beyond the scope of authorization mandated by Article 21 of the said Waste Disposal Act. Instead, it is an effective method of improving environmental sanitation and preserving the public health by means of achieving the authorized purposes of effectively supervising and assisting the public and private waste cleanup and disposal organs. The restrictions imposed on the people's right of work do not go beyond the necessary extent, and are not only consistent with the provisions of Article 23 of the Constitution, but also in line with the intent of Article 15 thereof.

### Reasoning

Article 15 of the Constitution provides that the people's right of work shall be guaranteed; that is, the people have the freedom to work and choose their occupations. In order to promote public interests, restrictions may be imposed by law or orders as delegated by law on the means of engaging in work and on the necessary qualifications or other requirements to the extent that they are in line with Article 23 of the Constitution. Where the law delegates the power of issuing orders to the competent authority for the purpose of making supplementary provisions, the contents thereof shall be in line with the legislative intent, and shall not go beyond the scope of the enabling statute. As has been made clear by this Court in its previous interpretations, where an order is issued under the general authorization of the enabling statute, a comprehensive judgment shall be made in respect of the legislative purposes of the law itself and the associated meanings of the provisions on the whole, instead of adhering to the letter of the law, so as to determine whether it goes beyond the scope of legal authorization or not.

In the light of the prosperous development of businesses and industries, the expansion of industrial production, the complexity of materials used, and the frequent elimination and replacement of products, the amount and variety of waste have become overwhelming, much of which is polluting and noxious, and requires the handling by specialized waste cleanup and disposal organs and personnel so as to prevent environmental pollution and to forestall the damage to public health and the environment. In order to ensure that the tools, methods, equipment and places used by a private waste cleanup and disposal organ to dispose of the waste meet technological and professional demands, Article 15-I of the Waste Disposal Act as amended and promulgated on April 9, 1980, added a provision requiring the placement of specialized technical personnel, which read, "A private waste disposal organ shall first effect the

registration for an industry or a business, then specify its specialized technical personnel and the tools, methods, equipment and places for cleanup, disposal and storage, and last apply to the local competent authority for the issuance of a license before it can be commissioned to clean up and dispose of waste." With regard to the qualifications of specialized technical personnel, a second paragraph was added to the aforesaid article to bring the provincial and municipal standards into agreement, which read, "The qualifications of the specialized technical personnel mentioned in the preceding paragraph shall be prescribed by the central competent authority." The aforesaid Article 15-I of the Waste Disposal Act was subsequently amended and rearranged as the first part of Article 20 on November 20, 1985. Furthermore, as it was found necessary to revise and augment the regulations regarding the supervision of and assistance to public and private waste cleanup and disposal organs so as to more effectively supervise and assist the same, the aforesaid Article 15-II of said Act was amended and rearranged as Article 21 thereof, which read, "The central competent authority shall prescribe the regulations governing the supervision of and assistance to public and private waste cleanup and disposal organs, as well as the qualifications of the specialized technical personnel, mentioned in the preceding article" (hereinafter referred to as Article 21 of the former Waste Disposal Act). The provisions of the first part of Article 20 mentioned above were further amended on November 11, 1988, which read, "A public or private waste cleanup and disposal organ shall, in operating the business of waste storage, cleanup or disposal, specify its specialized technical personnel and the tools, methods, equipment and places for storage, cleanup and disposal, and apply to the local competent authority for the issuance of a license" (hereinafter referred to as the first part of Article 20 of the former Waste Disposal Act). Although the aforesaid provisions of the first part of Article 20 and Article 21 of the former Waste Disposal Act imposed restrictions on the operators of public and private waste cleanup and disposal organs and their specialized technical personnel's right of work, and conditioned the operation of the said business on the specifications of the specialized technical personnel, such restrictions were indeed rightfully imposed because, considering the fact that specialized waste treatment and disposal is essential in a modern industrialized nation for the prevention of environmental pollution and the occurrences that may jeopardize the public health and the environment, and that, once the damage is done, the negative effects may well last for generations to come and recovery is hardly likely, post facto punishment will not be the most effective means of achieving the legislative purpose of preventing environmental pollution.

Article 21 of the former Waste Disposal Act provided, "The central competent authority shall prescribe the regulations governing the supervision of and assistance to public and private waste cleanup and disposal organs, as well as the qualifications of the specialized technical personnel, mentioned in the preceding article." Although the said enabling provision did not specify the content and scope of the qualifications of the specialized technical personnel, the intent of the Waste Disposal Act, in providing for the placement of specialized technical personnel, was to ensure that public and private waste cleanup and disposal organs, in operating the business of waste storage, cleanup or disposal, meet technological and professional demands. Therefore, it should be reasoned, based on construction of the law on the whole, that the lawmakers' intent was to delegate the power to the competent authority to decide not only on the qualifications of the specialized technical personnel, but also on such matters as the supervision of how said technical personnel should properly perform their duties, so as to fulfill the authorized purposes of effectively supervising and assisting the public and private waste cleanup and disposal organs.

Pursuant to Article 21 of the former Waste Disposal Act, the Environmental Protection Administration, Executive Yuan, formulated and issued the Regulation on the Supervision of and Assistance to Public and Private Waste Cleanup and Disposal Organs on November 19, 1997 (hereinafter referred to as the Former Regulation on Supervision and Assistance, which was abolished on October 9, 2002). Article 14 thereof provided, "A cleanup and disposal technician shall engage in the practice of waste cleanup and disposal

only after he or she obtains a certificate of qualification issued by the competent authority (Paragraph I). A cleanup and disposal technician, in engaging in the practice of waste cleanup and disposal, shall be responsible for the normal operation of the cleanup and disposal organ that hires him or her and the resolution of the technical issues relating to waste cleanup and disposal, and shall review the applications for relevant licenses, periodic monitoring reports, contracts, delivery slips and operation records and affix his or her signature and seal thereto after making sure that the contents thereof are true and correct (Paragraph II)." Furthermore, the placement of specialized technical personnel is a prerequisite to the application for the issuance of a license or for the extension of the validity of the license by public and private waste cleanup and disposal organs (See Article 20 of the former Waste Disposal Act, Articles 5 and 12 of the Regulation on the Supervision of and Assistance to Public and Private Waste Cleanup and Disposal Organs as amended and issued on August 5, 1998, and Article 7 thereof as amended and issued on June 29, 1999). Accordingly, in line with Article 14-II of the aforesaid Former Regulation on Supervision and Assistance, a waste cleanup and disposal technician who is employed by a cleanup and disposal organ shall be responsible for the normal operation of the organ, resolution of the technical issues relating to waste cleanup and disposal, and shall review relevant documentation, thus shouldering the heavy responsibility of making sure that the organ is able to effectively clean up and dispose of waste, so as to prevent environmental pollution and to forestall any damage to the public health and the environment. As such, Article 31 (i) of the Former Regulation on Supervision and Assistance provided, "In circumstances where the cleanup or disposal organs broke the law or operated improperly, thus seriously polluting the environment or jeopardizing human health, the competent authority shall revoke the certificates of qualification for the cleanup or disposal technicians hired by such organs." The said provision refers to such circumstances where the waste cleanup or disposal organs broke the law or improperly operated so as to seriously pollute the environment or to jeopardize human health, for which the competent authority shall revoke the certificates of qualification for the cleanup or disposal technicians within the scope of their employment and duty. Thus it does not go beyond the scope of authorization mandated by Article 21 of the said Waste Disposal Act, which dictates how specialized technical personnel should properly perform their duties. Furthermore, the provision is intended to urge waste cleanup and disposal technicians not only to possess the requisite professional skills, but also to carry out their duties faithfully. As such, it is an effective method of improving environmental sanitation and preserving the public health by means of achieving the authorized purposes of effectively supervising and assisting the public and private waste cleanup and disposal organs as contemplated by Article 21 of the aforesaid Waste Disposal Act. In addition, where a waste cleanup and disposal technician's certificate of qualifications is revoked on the condition that the waste cleanup and disposal organ which hired him or her was in violation of the law or operating improperly, thus seriously polluting the environment or jeopardizing human health, a justifiable and rational basis may be found between the achievement of the regulatory end and the means of revoking an incompetent cleanup and disposal technician's certificate of qualifications after taking into account the tremendous negative impact that such action will exert on the environmental sanitation and public health, as well as the extent and type of legally protected interests that will be violated. Therefore, there is no violation of the principle against irrational basis. The restrictions do not go beyond the necessary extent, and are not only consistent with the provisions of Article 23 of the Constitution, but are also in line with the intent of Article 15 thereof, which guarantees the right of work.

\*Original Translation by Vincent C. Kuan.

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## 7. Naewonsa Temple v. Korea Rail Network Authority (Supreme Court of Korea 2006)

*The temple and 3 other plaintiffs challenged the construction of a railroad in an area with historic, spiritual, and ecological significance. The Court summarily rejected the argument that the salamanders whose habitat would presumably be threatened had standing to sue. Interpreting the constitutional right to live in a healthy and sound environment in conjunction with the Framework Act on Environment Policy, the Court found that the environmental impact assessments indicated that there was insufficient possibility that the construction of the tunnel in this case would infringe the environmental benefits of the above appellants.*

Provisional injunction to prohibit a construction from starting - Supreme Court Decisions 2004MA1148 and 1149 [2006] KRSC 13 (2 June 2006)

### Disposition

The appeal shall be all dismissed. The costs of appeal shall be borne by the appellants: Naewonsa Temple, Mitaam and the Friends of Salamanders. ...

### Summary of Disposition

[1] The case affirming the decision of the court below that salamanders are amphibious animals that belong to the family of salamander and the order of salamander that live in and around Mountain Chunseong, so the salamanders themselves or the nature itself that includes salamanders cannot be admitted to this case.

[2] The case holding that although Naewonsa Temple, Mitaam and the Friends of Salamanders requested the Korea Rail Network Authority to prohibit the construction of some of the locations in accordance with their constitutional rights such as [Article 35-1 of the Constitution](#) on the right to environment or the right to defend nature and the provisions of relevant laws such as the Framework Act on Environment Policy, those provisions cannot be interpreted to generate such specific right to request a prohibition against the construction

[3] [Article 35-1 of the Constitution](#) stipulates, "all citizens have right to live in a healthy and sound environment, and the country and the citizens shall make effort into preserving the environment. " This identifies the right to environment as a basic constitutional right and at the same time levies the obligation to make effort into preserving the environment on the country and the citizens, so the country bears the obligation to protect the natural environment in setting up and implementing various development and construction plans so that the citizens who live in such natural environment can lead a healthy and sound life and to hand it down to the posterity.

[4] The Environment Impact Assessment System has its purpose to promote healthy and safe lives of the people by evaluating and reviewing a project's impact on the environment, before implementing it ([Article 1 of the Act on Assessment of impacts of Works on Environment, Traffic, Disasters, etc.](#), hereinafter referred to as the "Integrated Act on Assessment of Impact"), so for the appellee to implement the high speed railway projects that go on for a long period of time across the country, they shall follow the environment impact assessment procedure in accordance with the above act, and if a new situation is discovered after the environment impact assessment procedure and the possibility of the project to infringe the environmental benefits of the land owners arises and if the previous environment impact assessment procedure is not enough to disperse concerns over such possibility, a new environment impact

assessment procedure shall be done or other appropriate measures shall be taken to prevent the infringement of such environmental benefits before implementing the project, and the above land owners shall claim it as their right under the Private Code. But the above guarantee of rights through environment impact assessment procedure is to protect real infringement of environmental benefits, so even if a new situation is discovered that calls for another environment impact assessment, if it is hard to acknowledge the relationship between such new situation and the environmental benefits of the land owners, or if a new environment impact assessment or a similar research to the effect is conducted and the possibility of infringing the environmental benefits of the land owners does not exist any more, they shall not seek the suspension of the project,

[5] The case holding that there is insufficient possibility that the construction of the tunnel in this case would infringe the environmental benefits, where the Korea Rail Network Authority is implementing a tunnel construction as part of long-term express railroad business covering the whole areas of the country, and in order to resolve the issue of the impact on environment, the Korea Rail Network Authority requested the Korea Geological Engineering Society in June 2002 to assess the environment impact again, and according to that survey and the opinion of the experts at the request of the Ministry of Environment, the tunnel in this case was found to not have much impact on the environment surrounding Mountain Chunseong

...This is to judge the Reasons for Appeal.

#### 1. On the admissibility of salamanders to legal proceedings

According to the reasons for the judgment of the court below, it is righteous that the court below judged that salamanders are amphibious animals that belong to the family of salamander and the order of salamander that live in and around Mountain Chunseong, so the salamanders themselves or the nature itself that includes salamanders cannot be admitted to this case, and there is no illegality including misunderstanding of legal reasoning concerning the admissibility of the above appellant to legal proceedings.

#### 2. On the right to environment and the right to defend nature of the other appellants, as their right to be preserved

As the appellants, Naewonsa Temple, Mitaam and the Friends of Salamanders cannot directly request the appellee to prohibit the construction of some of the locations in accordance with their constitutional rights, such as [Article 35-1 of the Constitution](#) on the right to environment or the right to defend nature and as provisions of relevant laws such as the Framework Act on Environment Policy cannot be interpreted to generate such specific right to request either (refer to the Supreme Court Decision 94Ma2218 Delivered on May 23, 1995 et al.), it is righteous that the court below judged in the purport that the appellants, Naewonsa Temple, Mitaam and the Friends of Salamanders' right to environment or the right to defend nature shall not be acknowledged as the right to be preserved and the appeal by the Friends of Salamanders (The above appellant is a private organization, not a legal entity, that was established to engage in movements to preserve natural environment and the eco system, including Mountain Chunseong and only claims the constitutional right to environment or the right to defend nature should be the right to be preserved in this case.) shall not be acknowledged as the right to be preserved, and there is no illegality including misunderstanding of legal reasoning on the right to environment and the right to defend nature, the admissibility of the Friends of Salamanders to legal proceedings and the appellants' values that should be protected under law.

#### 3. On the rest of the Reasons for Appeal by the appellants Naewonsa Temple and Mitaam



A. The appellants Naewonsa Temple and Mitaam are traditional temples in Mountain Chunseong and are located near an area where the 13.5km-long Wonhyo Tunnel that goes through Mountain Chunseong (hereinafter referred to as the "tunnel in this case") passes through, and have the right to own some of the land that is included in the area for the tunnel construction. The above appellants seek the tunnel in this case to be prohibited from being constructed, to exclude or prevent infringement of their environmental benefits.

B. [Article 35-1 of the Constitution](#) stipulates, "all citizens have right to live in a healthy and sound environment, and the country and the citizens shall make effort into preserving the environment. " This identifies the right to environment as a basic constitutional right and at the same time levies the obligation to make effort into preserving the environment on the country and the citizens, so the country bears the obligation to protect the precious natural environment in setting up and implementing various development and construction plans so that the citizens who live in such natural environment can lead a healthy and sound life and to hand it down to the posterity.

The Framework Act on Environment Policy stipulates that environmental preservation is an absolutely necessary element in not only the citizens' healthy lives but also the preservation of homeland as well as the permanent development of the nation. It declares its basic mission to have the country and the implementer of environmental projects make effort into maintain and create the environment in a better condition, and to give priority to environmental preservation in engaging in all activities that use the environment so that the current citizens can fully enjoy the benefits as well as hand it down to the future generation ([Article 2](#)), and levies the obligation on the country to set up and implement adequate environmental preservation plans ([Article 4-1](#)) and the obligation to make effort into minimizing harmful effects on the environment of such administrative or developmental projects, to prevent the homeland and natural environment from being damaged ([Article 7-2 Section 3](#)). In addition, the Natural Environment Conservation Act specifically identifies what measures the country shall take to protect the natural environment from artificial damages and to conserve the various ecosystems. The Act levies the first obligation of setting up and implementing natural environment conservation measures to prevent excessive damage of natural environment due to development projects and for the sustainable use of nature ([Article 1](#) and [Article 4-1](#)). Furthermore, the Framework Act on the Development of the Railway Industry stipulates the country's obligation to prepare environmentally friendly policies in setting up and implementing railway industry policies including the construction of railways ([Article 4-2](#)), and the Wetland Conservation Act stipulates the country's obligation to conserve wetlands ([Article 3-1](#)). ...

Although the appellee, as a special legal entity established in accordance with the Korea Rail Network Authority Act, has an independent status from the government, [but ] shall be deemed to perform the function of a government agency, in implementing large scale public projects such as high speed railway projects.

C. The appellee bears the obligation to use various policy tools to adequately perform the ideology and purpose of the right to environment. As it is realistically difficult or takes a significant amount of time and money to restore an already damaged environment, it would be more effective to prevent such damage instead of trying to recover it reactively.

The Environment Impact Assessment System has its purpose to promote healthy and safe lives of the people by evaluating and reviewing a project's impact on the environment, before implementing it ([Article 1 of the Act on Assessment of Impacts of Works on Environment, Traffic, Disasters, etc.](#), hereinafter referred to as the "Integrated Act on Assessment of Impact"), so for the appellee to implement the high speed railway projects that go on for a long period of time across the country, they shall follow the environment impact assessment procedure in accordance with the above act, and if a new situation is discovered after the environment impact assessment procedure and the possibility of the project to

infringe the environmental benefits of the land owners arises and if the previous environment impact assessment procedure is not enough to disperse concerns over such possibility, a new environment impact assessment procedure shall be done or other appropriate measures shall be taken to prevent the infringement of such environmental benefits before implementing the project, and the above land owners shall claim it as their right under the Private Code.

But the above guarantee of rights through environment impact assessment procedure is to protect real infringement of environmental benefits, so even if a new situation is discovered that calls for another environment impact assessment, if it is hard to acknowledge the relationship between such new situation and the environmental benefits of the land owners, or if a new environment impact assessment or a similar research to the effect is conducted and the possibility of infringing the environmental benefits of the land owners does not exist any more, they shall not seek the suspension of the project.

[The appellee did not violate] the procedure of implementing a re-writing and re-consultation on the environment impact assessment document. ...

E. Next, let us see if possibility of the project to infringe the environmental benefits of the landowners arose and if the previous environment impact assessment procedure was not enough to disperse concerns over such possibility.

[After reviewing the documents:] Even though the appellee prepared an environmental impact assessment document, the fact was not reflected that more flora and fauna than what was recorded on the above environmental impact assessment document as well as many wetlands with high protective value exist in Mountain Chunseong. Furthermore, from the perspective of only the construction area of the tunnel in this case, the construction did not start even 7 years after the environmental impact assessment consultation, so some wetlands had been designated as wetland conservation areas and other environmental elements had been found, so the above environmental impact assessment is not sufficient enough to disperse the possibility of infringing the environmental benefits of the appellants as well as the degree of the impact and damage that could be caused to the environmental elements including the flora and fauna and the wetlands in Mountain Chunseong.

Meanwhile, however, according to records, when the Buddhist community and environment groups opposed the construction of the tunnel in this case raising the issue of the safety of the tunnel in this case as well as the above changes in the situation, the appellee considered the changes in the situation after the above environmental impact assessment and requested the Korea Geological Engineering Society in June 2002 to assess the environment impact again. The result that the tunnel in this case would not have much impact on the environment was reached in December 2003. The Ministry of Environment requested 3 specialists to review the adequateness of the above report in October 2004, who said that the above report had been prepared following appropriate procedures and methods and that the tunnel in this case would not have much impact on the environment. In addition, the appellee and environment groups agreed to establish a committee in May 2003 under the Prime Minister's Office to review the existing and alternative routes, whose two-month review resulted in a report that it is feasible to maintain the existing route that goes through the tunnel in this case.

So, as the above appellants argue, issues such as the safety of the construction and the protection of various wetlands surrounding Mountain Chunseong can arise, but the appellee requested the Korea Geological Engineering Society in June 2002 to assess the environment impact again, and according to that survey and the opinion of the experts at the request of the Ministry of Environment, the tunnel in this case was found to not have much impact on the environment, therefore currently, there is insufficient possibility that the construction of the tunnel in this case would infringe the environmental benefits of the above appellants.

F. Therefore, the judgment of the court below that dismissed the request of the above appellants is righteous and there is no illegality that affected the judgment of the court below, such as misunderstanding of legal reasoning concerning the interpretation of relevant laws including the Integrated Act of Assessment of Impact and concerning the infringement of environmental benefits.

#### 4. Conclusion

Therefore, the appeal shall all be dismissed, and the cost of appeal shall be borne by the appellants: Naewonsa Temple, Mitaam and the Friends of Salamanders. This decision is delivered with the assent of all Justices.

\* \* \*

### **8. Arnold v Minister Administering the Water Management Act 2000 (High Court of Australia 2010)**

*In this case, the High Court rejected a constitutional challenge to the federal government's increased regulation of groundwater extraction, which affected landowners and farmers claimed contravened a constitutional prohibition against the Commonwealth abridging "the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation." Based on reasoning in the Tasmanian Dam and other cases, the High Court held that groundwater does not constitute "waters of rivers" under the constitution.*

#### Introduction

On 1 November 2006, bore licences held by the appellants, who are farmers in the Lower Murray region of New South Wales, were by operation of the *Water Management Act 2000* (NSW) "replaced" with aquifer access licences. The appellants' entitlements to extract groundwater were less under the aquifer access licences than under the bore licences. The replacement was effected under the same statutory scheme and pursuant to the same intergovernmental agreements as were considered in *ICM Agriculture Pty Ltd v The Commonwealth*.

The appellants challenged the replacement of their licences on a number of grounds, including two arising under the Constitution. Broadly, they were that the replacement, pursuant to a Funding Agreement between the Commonwealth and the State of New South Wales, constituted an acquisition of their property on other than just terms contrary to s 51(xxxi) of the Constitution and that the Funding Agreement itself was a regulation of trade or commerce which contravened s100 of the Constitution. That section provides: "The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation."

...

Having regard to the decision of this Court in *ICM Agriculture Pty Ltd*, the challenge based on s 51(xxxi) cannot succeed. For the reasons given below, the challenge based on s 100 of the Constitution must also fail.

Although the statutory scheme under which the appellants' bore licences were replaced was the same as that considered in *ICM Agriculture Pty Ltd*, there were certain aspects of its implementation particular to

these appellants. A brief outline of the history of the statutes, statutory processes and intergovernmental agreements culminating in the replacement of the licences follows. ...

#### Proceedings in the Land and Environment Court

On 22 January 2007, the appellants commenced proceedings in the Land and Environment Court of New South Wales challenging, on a variety of grounds, the validity and operation of the statutes, statutory instruments and regulations underpinning the purported replacement of their bore licences. ...

By their further amended application filed 16 November 2007 the appellants sought a declaration of the invalidity of the *National Water Commission Act* or the provisions of that Act so far as it related to water and water resources. They sought a declaration that Pts 2 and 3 of Ch 3 and Sched 10 of the *Water Management Act* were inoperative with respect to their licences and that the proclamation of 25 October 2006 was also inoperative. ...

On 1 May 2009, this Court granted to the appellants special leave to appeal against the decision of the Court of Appeal on two grounds and referred to a Full Court the question whether special leave should be granted in respect of a ground relating to s 100 of the Constitution.

#### Grounds of appeal – disposition

The first of these grounds of appeal fails for the reasons set out in the joint judgment of Gummow and Crennan JJ and myself in *ICM Agriculture Pty Ltd*. The second of the grounds is parasitic on the first and fails with it. ... I agree generally with the reasons of Gummow and Crennan JJ in their joint judgment in relation to these grounds of appeal. ...

The application for special leave was referred to a Full Court in relation to the ground that:

"The New South Wales Court of Appeal erred in holding that the National Water Commission Act 2004 and the 2005 Funding Agreement were not laws or regulations of trade or commerce within the meaning of section 100 of the Constitution."

The Commonwealth attached to its submissions a draft notice of contention it wished to file in the event that special leave were granted. The matters raised on the draft notice were that, for the purposes and within the meaning of s 100 of the Constitution:

There was no law or regulation of the Commonwealth by which any right of the appellants was 'abridged';

Such rights as the appellants formerly had were not to the use of the waters of any 'river';

There was no abridgment of the 'reasonable use' of any waters for conservation or irrigation."

#### The pleadings and argument on the s 100 ground.

The Court of Appeal disposed of the appellants' argument on the basis that *Morgan v The Commonwealth* was binding authority for the proposition that the words "by any law or regulation of trade or commerce"

in ss 98 to 102 of the Constitution referred only to laws made under the trade and commerce power in s 51(i).

Although, it was said, there were obiter dicta by Deane J in *The Tasmanian Dam Case*[27] suggesting that this Court might reconsider *Morgan*, the Court of Appeal held that, in any event, no statute or agreement relied upon by the appellants could be characterised as a "law or regulation of trade or commerce."

The Court of Appeal dealt with the grounds raised by the appellants before it on the assumption that the factual allegations relied upon to support their claims for relief were true. Paragraph 36 of the appellants' further amended points of claim in the Land and Environment Court alleged:

"Further or alternatively in the premises the [Commonwealth] has by a law or by regulation of trade or commerce of the Applicants and/or water users of New South Wales abridged the rights of the State and of the residents of the State to the reasonable use of the waters of the State including the Murray River and its tributaries and linked aquifers being ancient underground rivers in the particular circumstances of the case for conservation or irrigation."

This was a pleading which on the face of it established a less than substantial factual foundation for the appellants' invocation of s 100. The appellants submitted that it had been assumed, for the purposes of the summary dismissal application, that the waters the subject of the rights abridged pursuant to the Funding Agreement were "waters of rivers" within the meaning of s 100. But that assumption involved an assumption of law, namely that groundwater as described in the Water Sharing Plan made pursuant to the Funding Agreement was capable of constituting the "waters of rivers" for the purposes of s 100. That assumption was not accepted in argument before this Court. The pleading as drawn referred to "waters of the State", a term which describes no relevant category of water. The pleading must be taken, in the circumstances, as asserting that the appellants are residents of the State of New South Wales, whose rights to the reasonable use of the waters of the Murray River have been abridged. The reference to "tributaries" can be taken as a reference to the waters of the Murray River. The concept of "linked aquifers" which are underground rivers is unclear. It was not asserted that the aquifers themselves are part of the Murray River. Nor does the pleading convey that there are currently flowing "ancient underground rivers".

The Court of Appeal said that no issue arose in this case as to whether or not groundwater fell within the concept of "waters of rivers" in s 100. As noted above, however, this involved a question of law which was agitated on the referred application for special leave to this Court.

The appellants argued that the words "law or regulation of trade or commerce" in s 100 are not confined to laws made under s 51(i). They sought leave to reopen *Morgan*, and submitted that it should be overruled. They submitted that the Funding Agreement was a regulation of trade or commerce and was therefore subject to the guarantee in s 100 and invalid for contravening it. The next step in their argument was that the Funding Agreement determined the content of the 2006 Water Sharing Plan. They submitted that whether the Minister's decision to promulgate the Water Sharing Plan was vitiated by the invalid Funding Agreement was a question of fact dependent upon evidence to be decided at trial, and should not have been determined on a summary judgment application.

### Section 100 and the bore licences

Section 100 of the Constitution gives rise to a number of important constructional questions, some of which were agitated before this Court on the referred application for special leave. The section was

described by Quick and Garran as being one which takes its place in the Constitution, along with s 99, as "a further limitation of the trade and commerce power." The limitations in ss 99 and 100 were held in *Morgan* to be confined to laws made under s 51(i) of the Constitution. That confinement of the limitation was endorsed by three of the Justices in *The Tasmanian Dam Case*.

No reference was made in *Morgan*, nor later in *The Tasmanian Dam Case*, to the drafting history relating to s 99 or s 100. That is not surprising. It was not until *Cole v Whitfield* that this Court accepted that such references could be made to ascertain the contemporary meaning of language used in a provision of the Constitution, the subject to which that language was directed, and the nature and objectives of the movement towards federation from which the Constitution emerged. However, the invitation to overrule *Morgan* should be declined for present purposes. This case does not require that its correctness be re-examined, although the artificiality of its consequences, to which Mason J adverted in *The Tasmanian Dam Case*, remains.

The appellants' invocation of s 100 was directed to the validity of the Funding Agreement. It was upon the premise of its invalidity that they based their submissions that the exercise of ministerial power in making the Water Sharing Plan was vitiated. Having regard to the drafting history and irrespective of the correctness of the Court's decision in *Morgan*, it is difficult to see how an agreement made between the executive governments of the Commonwealth and the States could, of itself, constitute a "law or regulation of trade or commerce". There is also an interesting question whether the term "right of ... the residents" in s 100 is used in a collective sense rather than as a reference to individual rights.

Critical and sufficient for the disposition of the application is the question whether the rights of the appellants said to have been abridged by the replacement of their bore licences related to the use of the "waters of rivers" within the meaning of s 100.

The drafting history in my opinion makes clear that the qualification on Commonwealth legislative power imposed by s 100 was directed to the application, to the waters of rivers, of legislative powers with respect to trade and commerce and navigation and shipping. The subject matter of the limitation originally contained in the proposed s 52(VIII), as adopted at the Melbourne session of the Convention in 1898, was rivers which could be used for navigation or shipping. ... Against this background, and without suggesting that the prohibition is limited to navigable rivers, there is no plausible basis for construing the limitation as applying to underground water in aquifers.

This conclusion reflects the historical context of s 100. As Gleeson CJ said in *Singh v The Commonwealth*:

"Recognition of the importance of context in the interpretation of a text that was written a century ago is not inconsistent with the role of the Constitution as a dynamic instrument of government. It is no more than an application of orthodox legal principle."

The dismissal should stand.

### Conclusion

Special leave to appeal should be granted on the s 100 ground, and leave to the Commonwealth to file its notices of contention in relation to s 100 and s 51(xxi) (confined to ground 2). The appeal should be



dismissed with costs in favour of the Commonwealth. The State of New South Wales and the Minister sought no order as to costs.

\* \* \*

## 9. Mendaing v. Ramu Nico Management (National Court of Justice for Papua New Guinea, 2011)

*In this case, the National Court of Justice of PNG found that the plaintiffs proved that the defendant's method of disposing of tailings from the Ramu Nickel Mining Project via deep-sea injection near the Basamuk, Madang Province violated National Goal No 4 of the national constitution, which provides that "Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations." The court also held that the plaintiffs had standing to pursue their claims.*

The plaintiffs, who claim to have an interest in customary land areas including seawaters affected by a nickel project constructed by the first defendant, commenced proceedings by writ of summons seeking a permanent injunction to restrain the first defendant from operating a deep-sea tailings placement (DSTP) system. The plaintiffs' claim for relief was based on three causes of action [including] breach of National Goal No 4 of the *Constitution*. The defendants argued ... as to the constitutional claim, that it was baseless in view of *Constitution*, Section 25(1), which provides that the National Goals and Directive Principles are non-justiciable; and, generally, that the plaintiffs lacked standing to prosecute their grievances as some were not genuine landowners and that in the event that any one or more of their causes of action were sustained the court should decline to grant an injunction as they were guilty of undue delay and would suffer no substantial prejudice if an injunction were not granted whereas the first defendant and others whose livelihood depends on the mine commencing operation soon would be seriously and adversely affected.

### Held

[1-3 omitted.]

4. The plaintiffs established to the satisfaction of the court that approval for and operation of the DSTP are actions that are contrary to National Goal No 4 of the *Constitution*.

5. Each of the plaintiffs amply demonstrated that they are from coastal areas and have a genuine concern for the environmental effects of the DSTP. They all have standing to prosecute the action in nuisance.

6. Despite the plaintiffs having established a cause of action in private nuisance and in public nuisance and that the proposed activity is contrary to National Goal No 4, the court declined to grant the injunction sought as (a) there had been some delay by the plaintiffs in commencing the proceedings; (b) the first defendant had been led to believe by the conduct of the second and third defendants that it had approval to operate the DSTP and the prospects of it facing these sorts of proceedings would not have been reasonably foreseeable; (c) the interests of the first defendant and many people whose livelihood depends on imminent commencement of the DSTP and the mine could be adversely affected; (d) all defendants appeared to be making genuine efforts to put in place effective monitoring protocols to ensure that any problems with operation of the DSTP will be quickly remedied; and (e) if environmental harm of the type reasonably apprehended by the plaintiffs does actually occur they will be able to commence fresh proceedings at short notice and seek the type of relief being denied them in these proceedings.

7. All other relief sought by the plaintiffs except for the requirement for consultation was refused. As to consultation, the court ordered that the plaintiffs must be consulted and kept informed on a three-monthly basis on tailings and waste disposal issues concerning the mine, for the life of the mine.

8. The parties were ordered to pay their own costs. [Internal reference material omitted.]

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This was a trial in which the plaintiffs are seeking amongst other things a permanent injunction to restrain commission of alleged common law nuisance, unlawful environment harm and breaches of the National Goals and Directive Principles.

1. The plaintiffs, who claim to have an interest in customary land areas including seawaters that will be affected by the Ramu Nickel Project, have commenced proceedings seeking a permanent injunction to stop the first defendant operating a deepsea tailings placement (DSTP) system at Basamuk, Madang Province. The Project consists of:

- a mine at Kurumbukari (comprising a series of open-cut pits and a plant to produce ore slurry) in the high country in Usino-Bundi District of Madang Province;
- a 135-km slurry pipeline that takes the ore slurry to a refinery at Basamuk on the Rai Coast of Madang Province;
- the refinery and wharf facilities at Basamuk, from where refined products, principally nickel and cobalt will be exported; and
- the DSTP system, the method of tailings disposal approved by the Director of Environment.

2. The DSTP will transport the tailings through a sloping 400-metre pipeline to a depth of 150 metres. At the discharge point – 400 metres offshore at a depth of 150 metres – the tailings will be pumped, at a rate of 5 million tonnes and 58 million cubic metres per year, into the sea at Basamuk Bay. This process is planned to operate for the life of the project, estimated to be 20 years. The underwater area into which the tailings will be discharged is Basamuk Canyon. It is estimated to be 1100 metres deep. Basamuk Bay forms part of a larger indentation on the northern coast of Madang Province called Astrolabe Bay, the underwater area of which is called Vitiaz Basin.

3. The mine, the pipeline, the refinery and wharf were constructed from 2008 to 2010. Construction of the DSTP was due to commence in early 2010 but was restrained by an interim injunction granted by this court in March 2010 in proceedings, WS No 202 of 2010, commenced by a different group of plaintiffs to those involved in the present case. Those earlier proceedings were, following a series of rulings on interlocutory matters, discontinued in September 2010 on the eve of the due date for commencement of the trial (see *Ramu Nico Management (MCC) Ltd v Tarsie* (2010) SC1075, *Tarsie v Ramu Nico Management (MCC) Ltd* (2010) N3960, *Tarsie v Ramu Nico Management (MCC) Ltd* (2010) N3987, *Tarsie v Ramu Nico Management (MCC) Ltd* (2010) N4005, *Tarsie v Ramu Nico Management (MCC) Ltd* (2010) N4097, *Tarsie v Ramu Nico Management (MCC) Ltd* (2010) N4141 and *Tarsie v Ramu Nico Management (MCC) Ltd* (2010) N4142).

4. Immediately after discontinuance of the *Tarsie* proceedings, the principal plaintiff, Louis Medaing, commenced the current proceedings. In October 2010 I granted an interim injunction to restrain the operation of the DSTP, but not its construction (*Medaing v Ramu Nico Management (MCC) Ltd* (2010) N4127). More plaintiffs have since joined the proceedings with the leave of the court (*Medaing v Ramu Nico Management (MCC) Ltd* (2010) N4158).

5. The DSTP system was constructed in November-December 2010. It was tested in January 2011 and is almost ready to be commissioned. The interim injunction is preventing its operation. No other tailings disposal facility has been built. Without the DSTP the mine cannot operate. Also preventing operation of the DSTP and the project is the need for approval by the Director of Environment of an Operational Environment Management Plan. Under the Environment Permit granted to the mine developer to construct and operate the project, nothing can happen until the OEMP is approved.

6. The defendants are:

- Ramu Nico Management (MCC) Ltd, known commonly as "MCC", the developer of the mine and the project, the first defendant;
- the State, second defendant;
- Dr Wari Iamo, in his capacity as Director of Environment, the office he holds and in which various powers, functions, duties and responsibilities are vested under the *Environment Act* 2000, the third defendant.

7. The plaintiffs' claim for relief is based on three causes of action:

- First, the common law tort of nuisance. The plaintiffs argue that they have the right under the underlying law of PNG to sue for unlawful interference in the enjoyment of their land and sea and that operation of the DSTP will constitute a common law nuisance.
- Secondly, breach of the *Environment Act* 2000. The plaintiffs argue that operation of the DSTP will cause serious environmental harm, which is not authorised by the statutory approvals that have been granted by the Director to MCC, and is therefore unlawful.
- Thirdly, breach of National Goal No 4 (*natural resources and environment*) of the *Constitution*, which is for "Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations".

8. The defendants argue that the plaintiffs cannot prove any of their causes of action. As to the common law claim they say that the plaintiffs have not proven that operation of the DSTP will constitute a nuisance. If the court finds that a nuisance will occur, the plaintiffs' claim has been excluded by the *Environment Act* 2000, which now provides a code for prosecution of alleged environmental harm; and in any event the environmental harm is authorised by the approvals already given to MCC and this provides a complete defence to any action in nuisance. As to the alleged breach of the *Environment Act*, the defendants say that there will be no breach in view of the approval given under the repealed *Environmental Planning Act* Chapter No 370, which is saved under Section 136 of the 2000 Act, and the amended permits granted since commencement of the 2000 Act.

As to the constitutional claim, the defendants argue that it is baseless in view of *Constitution*, Section 25(1), which provides that the National Goals and Directive Principles are non-justiciable (ie cannot be heard or determined by a court).

9. The defendants also argue that the plaintiffs lack standing to prosecute their grievances as some are not genuine landowners. In the event that any of the plaintiffs' causes of action are sustained, the defendants say that the court nevertheless should decline to grant any injunction as the plaintiffs have been guilty of undue delay and would suffer no substantial prejudice if an injunction were not granted whereas MCC, which has invested heavily in the project, and others whose livelihood depends on the project commencing operation soon, would be seriously adversely affected.

10. This judgment provides reasons for the court's determination of each cause of action and the relief sought by the plaintiffs. Most of the relief sought is equitable, which means that if the plaintiffs establish one or more cause of action, they are not entitled as of right to an injunction or the other orders and declarations they seek. They must convince the court that it is in the interests of justice to grant relief and that the court should exercise its discretion in their favour.

11. At the centre of each cause of action is the plaintiffs' contention that operation of the DSTP will have a serious and adverse effect on the marine environment and their own land, environment, livelihood and quality of life. It is therefore necessary to first summarise the evidence and make findings of fact before determining whether any cause of action is established and, if it is, whether any form of relief should be granted in favour of the plaintiffs. The judgment is set out as follows.

#### PART A – THE EVIDENCE

#### PART B – FINDINGS OF FACT

#### PART C – THE COMMON LAW ACTION IN NUISANCE

#### PART D – THE ALLEGED BREACH OF THE ENVIRONMENT ACT

#### PART E – THE ALLEGED BREACH OF NATIONAL GOAL NO 4

#### PART F – REMEDIES

#### PART G – CONCLUSION

[The remainder of this excerpt focuses on Parts E, F & G.]

### PART E: THE ALLEGED BREACH OF NATIONAL GOAL NO 4

#### 1 The Plaintiffs' Arguments

113. The plaintiffs argue that operation of the DSTP will be contrary to National Goal No 4 (*natural resources and environment*) of the *Constitution* and its accompanying Directive Principles, which state:

*We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.*

WE ACCORDINGLY CALL FOR—

- (1) *wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and*
- (2) *the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and*
- (3) *all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.*

114. The plaintiffs argue that the disposal of waste by MCC into Basamuk Bay and Astrolabe Bay and consequently the 1999 environmental plan and all permits which allow such disposal are contrary to National Goal No 4 in that they do not promote sustainable development of the environment and the economic, social and physical wellbeing of people by safeguarding the life-supporting capacity of air, water, soil and ecosystems for present and future generations, and do not mitigate adverse effects of the activity. They argue that those activities ought to be restrained pursuant to Sections 25 and 23 of the *Constitution*.

115. Section 25 (*implementation of the National Goals and Directive Principles*) states:

- (1) *Except to the extent provided in Subsections (3) and (4), the National Goals and Directive Principles are non-justiciable.*
- (2) *Nevertheless, it is the duty of all governmental bodies to apply and give effect to them as far as lies within their respective powers.*
- (3) *Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced, without failing to give effect to the intention of the Parliament or to this Constitution, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.*
- (4) *Subsection (1) does not apply to the jurisdiction of the Ombudsman Commission or of any other body prescribed for the purposes of Division III.2 (leadership code), which shall take the National Goals and Directive Principles fully into account in all cases as appropriate.*

116. Section 23 (*sanctions*) states:

- (1) *Where any provision of a Constitutional Law prohibits or restricts an act, or imposes a duty, then unless a Constitutional Law or an Act of the Parliament provides for the enforcement of that provision the National Court may—*



*(a) impose a sentence of imprisonment for a period not exceeding 10 years or a fine not exceeding K10 000.00; or*

*(b) in the absence of any other equally effective remedy under the laws of Papua New Guinea, order the making of compensation by a person (including a governmental body) who is in default,*

*or both, for a breach of the prohibition, restriction or duty, and may make such further order in the circumstances as it thinks proper.*

*(2) Where a provision of a Constitutional Law prohibits or restricts an act or imposes a duty, the National Court may, if it thinks it proper to do so, make any order that it thinks proper for preventing or remedying a breach of the prohibition, restriction or duty, and Subsection (1) applies to a failure to comply with the order as if it were a breach of a provision of this Constitution.*

*(3) Where the National Court considers it proper to do so, it may include in an order under Subsection (2) an anticipatory order under Subsection (1).*

## 2 Are The National Goals And Directive Principles Justiciable?

117. I agree that it is arguable, in view of findings of fact already made in this case about the likely environmental effect of the DSTP, that approval and operation of the DSTP will be contrary to National Goal No 4. But is it open to the court to consider making a determination to that effect, or even to express an opinion on the issue, in light of Section 25(1) of the *Constitution*, which provides that the National Goals and Directive Principles are non-justiciable?

118. The term "non-justiciable" (pronounced jus'tisheehbuhl) is defined by Schedule 1.7 (*non-justiciable*) of the *Constitution* in these terms:

*Where a Constitutional Law declares a question to be non-justiciable, the question may not be heard or determined by any court or tribunal, but nothing in this section limits the jurisdiction of the Ombudsman Commission or of any other tribunal established for the purposes of Division III.2 (leadership code).*

119. This would appear to mean that the question whether any activity is contrary to any of the National Goals and Directive Principles cannot be heard or determined by a court. This is the approach advanced by the defendants. They argue that I should decline to even consider whether the approval or operation of the DSTP breaches the National Goals and Directive Principles. To hear, let alone, determine such a question would offend against Section 25(1), and the court would be exceeding its jurisdiction.

120. That, on the face of it, would be a reasonable approach to take. If a law states that a question is non-justiciable the normal meaning of that term would suggest that the question should not be determined

by the court: argument about whether the question should be answered one way or the other ought not be allowed. However, as Mrs Nonggorr, for the plaintiffs, has been at pains to point out since commencement of these proceedings, Section 25(1) does not exclude the jurisdiction of the courts entirely. Section 25(1) is subject to an exception. It is prefaced by the words "Except to the extent provided by Subsections (3) and (4)". Subsection (4) concerns the jurisdiction of the Ombudsman Commission and is not relevant for present purposes. But Subsection (3) is very relevant, or at least the parts of it that I paraphrase as follows:

Where any judicial power can reasonably be exercised in such a way as to give effect to the National Goals and Directive Principles, and without failing to give effect to the intention of the Parliament or to this *Constitution*, it is to be exercised and shall be enforced in that way.

### 3 Duty to Express Opinion

121. I am in these proceedings exercising the judicial powers of the People of Papua New Guinea. Section 25(3) is enjoining me, as a Judge, to give effect to the National Goals and Directive Principles. Neither the *Constitution* – through which the judicial power of the People is conferred on Judges – nor the Parliament – which has expressed its intentions through legislation such as the *Environment Act* – has indicated that the question of whether the DSTP will be contrary to the National Goals and Directive Principles is beyond the jurisdiction of the National Court. I therefore feel that I am justified, indeed I am obliged, especially in light of the extensive evidence that has been brought before the court and the nature of the findings of fact that I have made, to exercise my judicial powers in such a way as to give effect to the National Goals and Directive Principles; and the best and most appropriate way of doing that is by expressing an opinion on the proposition that the plaintiffs have advanced.

122. The National Goals and Directive Principles are in the Preamble to the *Constitution*. They underlie the *Constitution*. They are the proclaimed aims of the People.

Core values.

All persons and bodies are directed by the *Constitution* to be guided by them and the Directive Principles in pursuing and achieving the aims of the People. They cannot be ignored.

123. I therefore feel obliged to state that my considered opinion as a Judge, having heard extensive evidence on the likely environmental effect of the DSTP and made findings of fact on that subject, is that the approval of the DSTP and its operation has been and will be contrary to National Goal No 4. It amounts to an abuse and depletion of Papua New Guinea's natural resources and environment – not their conservation – for the collective benefit of the People of Papua New Guinea and for the benefit of future generations, to discharge into a near-pristine sea (a widely recognised hotspot of biodiversity), mine tailings at a rate of 5 million tonnes of solids and 58.9 million cubic metres of tailings liquor per year. It constitutes unwise use of our natural resources and environment, particularly in and on the seabed and in the sea. It amounts to a breach of our duty of trust for future generations for this to happen. It is a course of action that shows deafness to the call of the People through Directive Principle 4(2) to conserve and replenish our sacred and scenic marine environment in Astrolabe Bay. It puts other coastal waters of Madang Province at risk. Inadequate protection has been given to our valued fish and other marine organisms.

124. Having expressed that opinion, I do not consider that Section 25(3) requires that I proceed to make orders under Section 23 of the *Constitution* to enforce that opinion; and I decline to do so.

#### 4 Conclusion Re Third Cause of Action

125. The plaintiffs have established to the satisfaction of the court that approval for and operation of the DSTP are actions that are contrary to National Goal No 4 of the *Constitution*.

#### PART F: REMEDIES

126. Before addressing the question of remedies I will recap what has so far been decided on the plaintiffs' three causes of action:

- 1 both private nuisance and public nuisance have been proven;
- 2 breaches of the *Environment Act* have not been established;
- 3 breaches of National Goal No 4 have been established.

127. As they have succeeded with two of their three causes of action the plaintiffs are eligible to be granted the relief they are seeking. The word eligible is used advisedly. The plaintiffs have no entitlement to relief. They need to persuade the court that it is just, fair and appropriate to grant relief and that the court should, in the interests of justice, exercise its discretion in their favour. The principal relief they seek is a permanent *quia timet* injunction to restrain the first defendant, MCC, from committing nuisance and interfering with the plaintiffs' use and enjoyment of their customary land and water rights and from discharging tailings into the sea at Basamuk Bay using the DSTP system. The other relief sought that remains open for consideration following determination of the causes of action is a declaration that the plaintiffs be consulted and informed on all matters concerning tailings and waste disposal concerning the Ramu Nickel Project. Each matter will be addressed separately.

#### 1. Injunction to Stop DSTP

128. The question is whether an injunction should be granted restraining MCC from operating the DSTP. In exercising the discretion whether to grant such an injunction there are a number of matters that I consider should be taken into account:

- (a) Do the plaintiffs have standing to be granted such relief?
- (b) Has there been an unreasonable delay in seeking an injunction?
- (c) Is operating the DSTP an unlawful activity?
- (d) What is the likelihood of the environmental harm actually occurring and how extensive is it likely to be?
- (e) What will be the consequences of granting an injunction?
- (f) Will the National Goals and Directive Principles be advanced by granting an injunction?
- (g) Have the parties acted in good faith?

Each will be addressed in turn.

(a) Do the plaintiffs have standing to be granted such relief?

129. The defendants argue that the court should not consider granting an injunction to any of the plaintiffs who have not established ownership of land. As their principal cause of action is nuisance, which is a tort intended to protect a person's interest in land, the plaintiffs need to establish that it is actually *their* land that is under imminent threat of damage. They point out that two of the plaintiffs, Louis Medaing (first plaintiff) and Terry Kunning (second plaintiff) are actually in dispute over the same portion of land at Basamuk. They suggest that Mr Medaing has misled the court as to his clan of origin and he is not a genuine customary landowner in the Basamuk area. They assert that I cannot determine the land claims of Mr Medaing and Mr Kunning as the National Court has no jurisdiction to determine questions of ownership of customary land.

130. The correctness of the last-mentioned proposition is not in question. It is a well-established principle of land law in Papua New Guinea that the National Court has no jurisdiction to determine disputes about ownership of customary land (*The State v Lohia Sisia* [1987] PNGLR 102, *Ronny Wabia v BP Exploration Co Ltd* [1998] PNGLR 8). I do not think I am in danger of offending against it and I fail to see its relevance to the question of whether an injunction should be granted in the terms sought. I have already found as a fact that the plaintiffs have a genuine interest in the subject matter of these proceedings. They are concerned that the tailings will contain chemicals or poisons, that this will affect fish stocks and other marine resources and that the tailings will be washed by sea currents towards their fishing grounds and villages. They have a sufficient legal interest. They have standing to be granted an injunction.

(b) Has there been an unreasonable delay in seeking an injunction?

131. Delay on the part of a plaintiff in seeking an injunction is always a relevant factor for the court to take into account. A delay is suggestive of acquiescence in the defendant's conduct and can cause the defendant to conduct its affairs in the belief that the plaintiff has accepted the status quo (*Lakunda Plantation Pty Ltd v Ian Maluvil* [1981] PNGLR 252). Here, there has been a substantial delay on the part of the plaintiffs. There is evidence that the plan to construct a DSTP system was communicated to villagers on the Rai Coast in 1999 and that it has been no secret that that was always the preferred method of tailings disposal. As I said in *Eddie Tarsie v Dr Wari Iamo* (2010) N4033 the people who are now (with some justification) concerned about the environmental effect of the DSTP should have been more diligent earlier in voicing their concerns. They have to some extent acquiesced in the DSTP by not commencing these proceedings much sooner. In the meantime, the developers of the project, originally Highlands Pacific Ltd and more recently, and in particular, MCC, have been left to make their plans and investments on the reasonable assumption that there would be no objection to the DSTP of the type that they have been confronted with in the current proceedings and in the earlier *Tarsie* proceedings. The issue of delays weighs against the plaintiffs.

(c) Is operating the DSTP an unlawful activity?

132. No. The arguments about the DSTP being unlawful under the *Environment Act* have been rejected.

(d) What is the likelihood of the environmental harm actually occurring and how extensive is it likely to be?

133. There are two factors to take into account here: the probability of harm and the nature and extent of the harm (*Pastor Johnson Pyawa v Cr Andake Nunwa* (2010) N4143). The more likely the harm is to

occur and the greater its extent and seriousness if it does occur, the stronger is the case for an injunction to restrain the activity that will cause harm.

134. Here there is a reasonable probability of harm and if it does occur in the manner that the plaintiffs are concerned about – if the benthos is destroyed over a wider area than contemplated, the tailings have a toxic effect on marine organisms, upwelling causes the tailings to move shoreward and up the coasts – the environmental consequences may be catastrophic, causing irreparable damage to the ecology of Astrolabe Bay and other coastal waters, and seriously harming the lives and future of the plaintiffs and thousands of other coastal people in Madang Province.

135. However, it is also relevant that all defendants appear to be making genuine efforts to put in place effective monitoring protocols to ensure that any problems with operation of the DSTP will be quickly remedied. The engagement of SAMS, though criticised as 'green wash' by Dr Luick, is a positive step towards prevention and mitigation of excessive harm. If environmental harm of the type reasonably apprehended by the plaintiffs does actually occur the plaintiffs will be able to commence fresh proceedings at short notice and seek the type of relief being sought in these proceedings.

(e) What will be the consequences of granting an injunction?

136. The defendants urge the court to take into account the great prejudice and inconvenience an injunction will cause. I agree that this is a weighty consideration. As I have already found, a permanent injunction will not mean an end to the project but would lead to an extensive delay in its commissioning. The extra cost involved for MCC would be considerable. An alternative method of tailings disposal would have to be decided on and then constructed. The multiplier effect on the provincial and national economy of commencement of a project of this magnitude would be delayed. Investor confidence in PNG would be impaired. In economic terms the consequences would be disastrous.

(f) Will the National Goals and Directive Principles be advanced by granting an injunction?

137. Yes. I have determined that in my opinion operating the DSTP will be contrary to National Goal No 4. It follows that the National Goals and Directive Principles will be advanced by granting an injunction. This factor weighs in favour of the case for an injunction.

(g) Have the parties acted in good faith?

138. I have made a finding that the plaintiffs have acted in good faith, and I draw the same conclusion regarding the conduct of the three defendants. I reject the plaintiffs' submissions that the defendants have not acted bona fides.

## 2 Conclusion Re Permanent Injunction

139. Of the seven factors identified, three (standing, likelihood and extent of environmental harm, National Goal No 4) favour a permanent injunction. Three do not (delay by plaintiffs, lawfulness of DSTP, economic consequences). One (good faith of parties) is equally balanced. I have decided that the substantial factors favouring an injunction are outweighed by the opposing factors. This is a borderline case. The plaintiffs have marshalled a compelling body of scientific evidence that the Director of Environment has approved operation of a very risky activity that could have catastrophic consequences for the plaintiffs and the coastal people of Madang Province. But I am satisfied that he has made that decision in good faith. If an injunction were to be granted at this late stage the economic consequences would for MCC and for the People of Madang Province be very damaging. Needless to say, if these proceedings had been commenced much earlier, the result may well have been different. My conclusion therefore is that the application for an injunction is refused.

### 3 Consultation

140. The plaintiffs seek a declaration that, whatever the outcome of their application for an injunction, they must be consulted in the future about tailings disposal issues. This is a straightforward question to determine. I see no good reason why they should not be consulted. I will grant relief generally in the terms sought, except that I consider that it will be a more effective remedy if, rather than being put in the form of a declaration, the requirement for consultation be made the subject of an order.

### PART G: CONCLUSION

141. The plaintiffs have succeeded on two of the three causes of action which they prosecuted. They have failed to achieve their principal objective, which was to obtain a permanent injunction restraining operation of the DSTP. In these circumstances it is appropriate that the parties bear their own costs.

### ORDER

(1) It is declared that:

- (a) the plaintiffs have established a cause of action in private nuisance and public nuisance in respect of the operation of the deep-sea tailings placement system;
- (b) operation of the DSTP will not be unlawful under the *Environment Act* 2000;
- (c) operation of the DSTP will be contrary to National Goal No 4 (*natural resources and environment*) of the *Constitution*.

(2) It is ordered that the plaintiffs must be consulted and kept informed by the defendants, at least every three-months, on tailings and waste disposal issues concerning the mine, and this order shall continue for the life of the mine unless and until amended or set aside by the court.

(3) All other relief sought in the statement of claim is refused.

(4) The injunction granted on 22 October 2010 restraining operation of the DSTP system is dissolved.

(5) The parties shall bear their own costs.

(6) Time for entry of this order is abridged to the date of settlement by the Registrar which shall take place forthwith.

\* \* \*



## 10. Pro Public v Godavari Marble Industries Pvt. Ltd. and Others (Supreme Court of Nepal 2015)

*In this case, the Court considered whether continued marble mining in an area protected both by the government and by UNESCO because of its ecological, historic, and spiritual significance was consistent with the constitutional commitment to a healthy environment. The Court reviewed the history of international environmental protection, as well as Nepal's constitutional environmental jurisprudence and found a strong constitutional commitment to environmental justice. It held that the anticipated economic benefits of continued mining were outweighed by the harm it would do to the environment and to the people whose right to live with dignity and freedom required a healthy environment.*

...

### Facts-in-Brief of the Writ Petition

The petitioners had filed a writ petition in 2001 (Chaitra 20, 2058 B.S.) seeking voidance of the decision of Nepal Government to grant permission to Godavari Marble Industry Pvt. Ltd. for quarrying and operating the Marble Industry until 2011 (2068 B.S.) in the Godavari area which is full of biological diversity as the impugned decision and the accompanying activities were inconsistent with the Constitution of the Kingdom of Nepal, 1990 and the prevalent Nepal law. That writ petition resulted in a split decision on Baisakh 10, 2063 (2006) which is currently *sub judice* before a Full Bench. Respondent Department of Mines and Geology, which had been framed as a respondent even in the earlier Writ Petition No.3394 (005 Full Bench), made a decision extending the permission granted to Godavari Marble Industry Pvt. Ltd. for conducting quarrying up to an additional period of 10 years effective from the date of its expiration, even though the above mentioned writ petition was still *sub judice* before the Full Bench. Hence, the petitioners prayed for quashing the impugned decision of Poush 23, 2067 (2010) as it was at once arbitrary, '*mala fide*' and unlawful. The petitioners further contended that due to the topographical location of Phulchowki hillock, which can be used as the highest hillock for sightseeing of Kathmandu valley, Godavari area is considered to be very significant. 571 species of flowers, 300 species of butterflies, 254 species of birds and 80 species of trees having beautiful leaves, besides the water resources and religious and cultural heritage, are some of the major significant things of Godavari area. But due to the continuing operation of respondent Godavari Marble Industry ever since 1966 (2023 B.S.) in the heart of Godavari area was causing virtual destruction of the environmental, biological, religious and cultural existence of Godavari area.

A study report called 'Kathmandu Valley, Environment and Cultural Heritage: A Protective Inventory' prepared jointly by Nepal Government, UNO and UNESCO had also proposed for declaring Godavari area as a protected area. Even the report called 'Conservation Project For Phulchowki Mountain, Nepal' prepared jointly by Department of National Parks and Wildlife Conservation, which falls under Ministry of Forest and Soil Conservation, and the International Council For Bird Preservation, U.K. has also floated the proposal of declaring Godavari - Phulchowki area as a protected area.

Various national and international experts have made their views and comments available to the petitioner Pro Public regarding the urgency of protection and promotion of Godavari area. Not only national and international experts working in the area of environment conservation, several agencies of Nepal Government have also explained the significance of Godavari-Phulchowki area and pointed out the negative impacts caused on the environment and the flora and fauna by the operation of Godavari Marble Industry in that area. Nepal Government, Department of Forest, Nepal Agriculture Research Council,

Fisheries Research Division, Godavari and the Royal Botanical Garden have pointed out the environmental significance and the threat caused to the flora and fauna of this area.

All this shows that the Godavari area, which is full of biological diversity and is being used as a habitat of rare wild life and vegetation, is an invaluable national heritage and its conservation appears to be indispensable for the present as well as the future generations. Needless to say, therefore, the impugned decision extending for 10 years Godavari Marble Industry's time period for quarrying made by Department of Mines and Geology was obviously arbitrary and unlawful. Thus the impugned decision was inconsistent with the Constitution and the prevalent Nepal law and the earlier order issued by the apex Court, and it was not only contrary to the principle of rule of law rather it was also made with a '*mala fide*' intention of evading the legal provisions.

On the one hand, the issue of whether or not respondent Godavari Marble Industry should be closed down is under consideration (*sub judice*) before the Court. On the other hand, the Industry has been also closed down following the order of its closure since Ashwin 19, 2065 (2008). Thus as the impugned decision of extending the permission granted to respondent Godavari Marble Industry for an additional period of 10 years was '*mala fide*', arbitrary and unlawful, the petitioners prayed for the issuance of the following orders pursuant to Articles 32 and 107(2) of the Interim Constitution of Nepal, 2007: [to quash the order of the Department of Mines to extend permission for an additional 10 years; to issue orders of mandamus to (a) declare the Godavari area as prohibited for mining, (b) to establish the Godavari area as an Environmental Protection Area and (c) to declare the forest of Godavari area as a protected forest; to conduct a study to ascertain the truth about the damages suffered by the families on account of Godavari Marble Industry and to issue an order ... to provide necessary compensation; to order Godavari Marble Industry ... [to pay] necessary amount required for restoring Godavari area to its earlier condition prior to the operation of the mines; [to compensate for legal costs] for bringing and advocating the PIL petition before the Supreme Court for protection of the Godavari area; to issue an Interim order ... restraining the operation of the impugned decision extending the lease period of operating respondent Godavari Marble Industry and the other activities related thereto until the final disposal of the present writ petition[, *inter alia*].

[The written submissions were summarized in the Court's opinion and are further summarized here:

The petitioners adduced evidence of the ecological importance of the area and argued that "Marble may be brought from other places as well but if the environment is destroyed it cannot be brought back. The research and studies made by the national and international sectors have pointed out that Godavari Marble Industry has caused damage to the biological diversity of that area, and so recommendations have been made for closing it down. Besides, the Industry has been always presented as running into loss, and it has paid negligible income tax to the State. And indulgence in the transaction of stones and concrete in the name of marble has further contributed negative impacts on the environment. Therefore, the learned Advocate pleaded for issuance of the order as prayed for by the petitioners." One advocate submitted that "The biological diversity of Godavari area is incomparable not only for Nepal rather also for the world, and it needs to be protected. The Supreme Court of Nepal has displayed a significant role in regard to environment protection ever since its establishment. Even in the present dispute, the apex Court must display judicial activism and protect the environment of Godavari area."

The government and the Respondent submitted that "The issue of where to allow operation of an Industry and where to prevent it from such operation is a matter related to the policy and discretionary power of the Executive. Hence, the Court should not interfere in such a matter." They further argued that "only 5 hectare is being used for

mining purpose," which is a negligible amount which "cannot be supposed to cause any adverse impact on the environment of Godavari." The Government further argued that while it "is also not at all in favor of environmental pollution, [t]he regulatory authorities including the Department of Mines have been regularly monitoring the activities of the Industry to ensure that it is not causing any adverse impacts on the environment. In case there is any problem, it may be on the management side of the Industry. The demand for proper management of such a problem may be valid. But the call for closing down the Industry instead cannot be held as reasonable." Industry advocates argued that there was insufficient evidence of adverse effects on the environment.

Interested parties also made submissions: "It is the local people who may be affected by the Industry. Even in 1996, an agreement had been reached between the local residents and the Industry to let the Industry operate and to take measures for minimizing the impacts caused by the Industry. A letter delivered by a legally constituted Consumers Association has stated that the presence of Godavari Marble Industry in that area has rather contributed to the protection of the forest. Moreover, 500 people of that area have also got employments. The respondent Industry is, in fact, not a polluting Industry."]

### **Order**

After listening to the logical arguments of the learned Counsels appearing on behalf of the petitioners and the respondents, and after going through the pleading notes submitted by them as well as the writ petition and the written replies, besides the relevant constitutional and legal provisions, the present writ petition needs to be decided focusing basically on the following issues:

1. How and in which way the international standards maintaining balance between the concept of environmental justice and environment and development activities are evolving?
2. What kind of jurisprudential norms have been developed by this Court in respect of environmental justice?
3. What is the significance of Phoolchowki-Godavari area from biological diversity and environmental viewpoint as well as from religious and cultural viewpoint? Also, whether or not the operation of Godavari Marble Industries has caused any adverse impacts on biological diversity and ecological balance of that area?
4. Whether or not the activities including quarrying conducted by Godavari Marble Industries in Godavari area are compatible with the constitutional provisions and the Nepal law in regard to environmental protection?
5. Whether or not the order as prayed for by the petitioners should be issued? Or what other type of orders shall be appropriate for issuing in this regard? ...

Air, water, light, and heat and the flora and fauna which are integrally dependent constitute, in totality, the Nature. The actions and reactions caused by the presence or existence of all those elements existing in the Nature may be described as environment. These five elements are also known as "*Panchtatva*" in the Eastern Philosophy and the issue of retaining the natural form of those elements or components preventing the decay of their quality seems to be related to environmental protection.

According to the United States Environmental Protection Agency (EPA), "Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies."

It has been mentioned in Section 2 clause (a) of the Environment Protection Act, 1997 that “environment” means the natural, cultural and social systems, economic and human activities and their components as well as the interaction and inter-relation among those components. This definition of environment seems to be comprehensive and in accord with the international approach. Actually speaking, it shall be erroneous or incomplete to view only the natural components as environment. In fact, environment in totality is built up by cultural and social systems, the components born of economic and human activities and their intermingling and the relation among such components. The social needs and economic affluence of the people are dependent on the Nature. The human activities are conducted for the fulfillment of those needs. On the other hand the Nature has got its own rule of operation. The Sun rising in the East and setting in the West is a natural rule. The changes in the seasons occur due to natural reasons. The events like birth and death are also related to Nature. Therefore, there is no disputing the fact that the entire environment is built up on the inter-relation and interaction among the natural components and human activities.

... Because animals, plants and entire life cycle are interdependent on the Nature, their existence is also connected with the existence of the Nature. Human beings are natural creatures, and so their life is also directly dependent on the Nature similar to that of other animals and the flora and fauna. If we remember the initial stage of human development, no difference can be found between the State of human beings and other animals or the flora and fauna. It was not simply a fictitious story that human beings also used to live in the lap of Nature being integrated with other animal in the natural form. The primitive condition of a human community still today living a nomadic life in the forests of some countries of the world including Nepal directly testifies to this reality.

The modern human community has changed its identity along with the course of evolution of time. Human beings claim to stand on superior footing in comparison to other animals in the Universe due to their sense of awareness and application of rationality. However, as this respect for superiority has not been given by other independent animals, and it is simply a self declaration of human beings themselves, its final decision shall be made in the future by the Nature itself.

There is no disputing the fact that human beings can be able to stand on a different footing in comparison to other animals. Man has been successful to develop different structures, techniques and methods by making multi lateral use of the Nature. Men created dimensions of development have made human life easier and more comfortable. On the basis of this very development oriented change accomplished by men, man has not only been able to keep other animals in his control rather he seems to be also trying to assert his control over the whole Nature.

Not only the soil and stones and the forest lying on the exterior part of the Earth, other minerals including oil, gas etc. lying inside the Earth have been excessively exploited. Things like operating transportation by building tunnels under the ground or blocking or changing the flow of river for electrification or irrigation have now become ordinary things. Quarrying has been conducted not only under the ground but also reaching even the bottom of the Sea. Also, the chances of accidents in Sky have increased due to man created development.

That with every stage of development the human community is moving towards modernization is a truth. However, on account of the extent of environmental pollution caused by the adverse impacts of uncontrolled exploitation of Nature, not only the human community rather the entire flora and fauna have reached a terrifying level of destruction. On the basis of analysis of the severity and average analysis of the adverse impacts visible in the environment along with the developments and constructions following the Second World War, the Scientists are making public the surveys about the existence of the Earth being exposed to risk in the near future. Not only that, scientific studies are underway regarding the possibility of transferring the human habitation in the space or on other planets. The belief that the

Nature's limit of tolerance is likely to exceed the limits is closer to truth. Big atomic furnaces and chemical plants have been set up because a situation has arisen where the natural means and resources have proved deficient in sustaining the increasing population, increasing consumption and development of solar energy. From time to time, several men and women and animals have lost their lives as a result of explosions or leakage in such furnaces or plants, whereas there is no record at all of the immediate and long term impacts on the environment. The marine life system is experiencing serious impacts in the event of leakage of oil and chemical substances in the sea. As the degree of acid increases in the soil due to excessive use of biological insecticides and chemical substances, the agricultural products have become dependent not on the Nature rather on the insecticides and chemical substances. The traditional seeds of cereal crops are gradually being replaced by the genetically modified (GOM) seeds. So terrible are the impacts on the environment caused by chemical weapons and noise pollution, poisonous smoke and noise pollution emitting from industrial plants and vehicular means of transportation. The degree of harmful green house gas is ever increasing due to those manmade activities and excessive exploitation of natural resources.

On account of the impacts caused by climatic changes the whole earth and air have become heated more than two degree Celsius. Due to yearly increasing temperature, the life of some densely populated cities is becoming affected. Likewise, due to gradual melting, there has emerged increasing danger of white Himalayan ranges getting converted into black and ugly Mountains. On account of early increase in the sea level there appears probability of even habitation being exposed to risks. Ever increasing are the effects caused by untimely floods, landslides and desertification resulting from drought, excessive rain or lack of rain. The sources of water are getting dried up whereas the available sources of water are becoming unusable having become polluted. The existence of marsh area has been exposed to risk, and air pollution and noise pollution have transgressed the limit of natural tolerance.

Some incurable diseases never seen before among the people are becoming visible due to use of chemical substances and insecticides. Not only this, due to ever increasing shrinkage in the size of forests the animals and the flora and fauna have virtually reached the stage of extinction. The wild animals like rhinoceros, elephants, tigers, bears, marine animals and creatures like whale and dolphin, rare birds and butterflies, snakes, frogs and insects may become such commodities which could be seen only in museums in the days to come. Not only that, Scientists and environmentalists seem to be seriously worried at the realization of the fact that the coming generations may be deprived of viewing the white Himalayas and the blue Seas and the air. In short, today due to the destructions caused to the cleanliness of the Nature including water, Earth and air, the eco-system has become disturbed.

The Nature and its environment are regulated by the rule of the Nature. Any activities done against those rules which are also known as the eco-system may cause disturbance to the balance of the Nature. Even through animals and the flora and fauna follow this rule of the Nature knowingly or unknowingly, human beings are trying to transgress its limits. Modern men who boast of having reached the pinnacle of development are becoming dependent on machines. The food and living habits, daily routine and certain activities seem to be unpalatable to the society and thus contrary to the natural rules. In the name of ultra modernism such unnatural and polluted methods are being imported at a swift speed towards an undeveloped and backward society.

Analyzed from another angle, along with the course of development of human civilization the human interest and concerns towards the Nature and environment are getting reflected in a greater or lesser degree. It is believed that the Eastern philosophy is born or has evolved out of the natural rules. It is especially a significant aspect of the Eastern philosophy to worship the Nature treating it as a form of God. Water, earth, air, and light are, in fact, worshipped in the Eastern civilization. Not only that, some animals and plants are still worshipped respectfully being treated as the incarnation or form of God. The



significance of Nature has been described in the Vedas and the Scriptures, and it has been also pointed out to protect (worship) them. The expressions like “Peace with the Earth, Peace with the Plants” are indicative of this fact.

Other philosophies and Sects also do not seem to have ignored the Nature. In one way or the other all philosophies, religions and sects are found to have accorded importance to the Nature and to its protection. Thus, there is no disputing the fact that the campaign for environmental protection started together with the course of development of human civilization. However, one should not forget that its degree has existed in accordance with society’s relative thought or its level of consciousness.

Following the establishment of the United Nations on the modern global stage, this campaign started getting a tangible form. Especially due to the greater leaps of the Western world in industrial revolution or development in the eighteenth century, this seems to have also caused negative impacts on the environment. On account of environmental imbalance and impacts coupled with competitive race in development are being focused on by the Scientists in their research and enquiry which has resulted in official and scientific outlooks becoming public in this regard.

As world peace being the main objective behind establishment of the United Nations, its initial days were focused in this direction. UNO has gradually raised the issue of human rights and environment as its main agenda. This world organization seems to have tried to address the environmental agenda effectively for the first time expressing concern for the deteriorating environment through the UN Conference on human environment held in Stockholm of Sweden in 1972.

In the meantime, UNO constituted the World Commission on Environment and Development (WCED) and focused its attention on the issue of environment and development. As ex-Prime Minister of Norway Gro Harlem Brundtland, who had Science and Public Health background, was designated as the Chairperson of that Committee, it is also called Brundtland Commission. This Committee had submitted in 1987 a report called “Our Common Future” which coined and defined the term ‘sustainable development’. This report explains environment and development – the subjects which could not be clarified by Stockholm Conference of 1972 as: “the ‘environment’ is where we live; and ‘development’ is what we all do in attempting to improve our lot within that abode. The two are inseparable.” Similarly, intergenerational equity has been placed at the center point in the definition of sustainable development made by the Brundtland Commission. It has mentioned in the report that the essence of sustainable development is constituted by the requirements that economic development should be able to fulfill the needs of the poor and the affected group of people must have direct participation or ownership in the process, even though economic development is expected for fulfilling social requirements.

That report seeks to arrive at the conclusion that development cannot embrace environmental protection if Human Development Indicator is not linked with poverty alleviation gender equality and redistribution of means and sources. And it also seeks to internalize human feelings and needs. The following things mentioned in the report in regard to sustainable development are worthy of consideration: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” It contains two key concepts:

The concept of ‘needs’ in particular the essential needs of the world’s poor, to which overriding priority should be given; and

The idea of limitations imposed by the State of technology and social organization on the environment’s ability to meet present and future needs.”

In essence, economic development, environmental protection and social justice are the three major dimensions of sustainable development.



UNO has taken forward its subsequent programs resorting to the foundation stone laid down by the report of Brundtland Commission which is itself based on the focal point of environmental protection. To further describe it in more clear words, also because the issues of sustainable development and environment pointed out in the report have been accorded a universal form through the official bodies of UNO and larger Conferences of its members, it has made significant contribution to and occupies a significant place in the evolution of environment justice jurisprudence.

However, even today the benefits generated by the Nature could not be equitably distributed among the people as pointed out by that report. The present level of development as existing between two countries of the world can be hardly compared to each other. Whereas some countries are exploiting excessively the natural means and resources and are also causing harm to the environment in the same proportion, many countries are still trapped in unemployment, poverty, backwardness, gender discrimination and violence. It needs no study to understand that the terrible problems like climate change, increase in the temperature of the Earth etc. have emerged not due to the poor countries of Asia and Africa rather due to the so-called developed and rich European and American countries. 99 percent means and resources have become concentrated in the hands of 1 percent people of the world whereas 99 percent of the people have only 1 percent means and resources at their disposal. The effects and impacts caused by the widening gap between the rich and the poor appear to be causing in some way or other unnecessary pressure on the Nature.

However, 'Our Common Future', that is to say, the issues pointed out by Brundtland Commission, seems to have laid down the basis for organizing the World Conference on Environment in Rio de-Janeiro in 1992. Agenda -21 had been made public as the Rio Declaration in this conference which is also known as the Earth Summit. That Declaration incorporates the strategies and operational policy to be adopted at the global, national and local level in order to make the age (life) of the Earth sustainable. Agenda 21 has also again expressed its commitment in favor of economic development to be made without causing any harm to environment. It has also stressed the need of the developed nations helping the developing and underdeveloped countries to realize this matter.

Similarly, the discussion had been mainly focused on decreasing the production of biological insecticides, petrol containing lead and gas, proper management of poisonous chemical radiological dust and dirt, decreasing the effects caused by the use of alternative energy on climate change, adopting measures for protecting air pollution against the smoke emitting from the use of means of transportation and the problems relating to the increasing use of water and its limited supply.

The agreement for making a Convention on climate change, which was subsequently known as Kyoto Protocol, is a product of the agreement reached at this very Conference. Likewise, the agreement to open the Convention on Biological Diversity for signature was also another achievement of that Conference. On the whole, this Conference had agreed to open for signature the Convention on Biological Diversity, Framework Convention on Climate Change and UN Convention to Combat Desertification. Moreover, the Conference also adopted Rio Declaration on Environment and Development, Agenda --21 and the Principles relating to Forest, which have laid emphasis on the need of maintaining balance between environmental protection and sustainable development, as a Declaration.

Article 1 of the Convention on Biological Diversity, 1992 describes protection of biological diversity, its sustainable use and impartial and equitable distribution of its benefits as the main goals of the Convention. Defining biological diversity, it has been mentioned in Article 2 of this Convention, "Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems". Similarly, provisions have been

made about policies in Article 3, jurisdiction in Article 4, cooperation in Article 5 and methods or measures of protection and sustainable use.

Origin of the Nature and sustaining life on the Earth are the main objectives of this Convention. The Convention recognizes that biological diversity is about more than plants animals and micro organisms and their ecosystems- it is about people and our need for food security, medicines, fresh air and water, shelter, and a clean and healthy environment in which to live.” This Convention has laid emphasis on all these things. Emphasis has been consistently placed on various aspects of biological diversity in the series of Conferences held and Declarations made under this Convention.

Likewise, the Conference on Population and Development, 1997, Millennium Development Goal 2000, Earth Summit, 2002 and the Conference on Sustainable Development, 2012 are also related to environment and sustainable development.

Nearly twenty years after the Rio Conference, Rio-20, that is, Rio Earth Summit, 2012 was organized in the same city of Brazil in 2012. Discussing the developments made and the problems encountered during this period, the world community reaffirmed its commitment to sustainable development and environment.

In the later day, UNO has been advancing its activities by constituting a Task Force in order to transform the millennium development goal into sustainable development goal. In regard to sustainable development goal, issues like hunger and poverty, health and education, climate change and protection of sea and forest have been mainly included in the preliminary Terms of Reference (TOR).

Thus, it appears from the above mentioned activities being undertaken at the initiative of UNO that the modern world has shown main interest and concern regarding environmental protection. Moreover, the protection of environment and biological diversity has been made obligatory for the member States through the international Conventions and the concept of environment and sustainable development has been simultaneously pushed forward through Conference, Declaration, goal strategies and programs.

In its capacity of a responsible member of UNO, Nepal has been participating in the steps taken by UNO. Nepal has participated in all the important Conferences on environment. Nepal has ratified and signed more than fifteen international Conventions and Declarations relating to environment including the biological diversity convention, 1992. According to Section 9 of the Nepal Treaty Act, 1990, the international treaties and agreements shall be applicable at par with Nepal law.

The right to live in a clean environment has been established as a fundamental right in the Interim Constitution of Nepal, 2007 whereas protection of biological diversity and environment has been incorporated in the main policy of the State. The environmental Protection Act, 2053 and the Rules have provided significant legal basis in this direction. This Court has also made judicial interpretations of environmental justice in accordance with the jurisprudential norms. Right from the Sixth Plan, Nepal has included sustainable development as its development agenda. Similarly, in regard to various issues relating to environmental protection including biological diversity protection, a national strategy and programs have been designed by the concerned bodies of Nepal Government which are under implementation.

Sometimes environment and development are also treated as each other’s competitors. Environment is closely related to the continuity of the existence of world of creatures including the human beings. Retaining the existence of life is not at all possible in a polluted environment. On the other hand, development uplifts the standard of life of human beings and widens the basis of economic development. As an answer to the 21st century has been possible only due to the development of modern human civilization and progress, the thought of completely stopping all development activities cannot be

acceptable either. It is due to development that today the world society has been classified into the categories like rich and poor, developed and undeveloped, civilized and uncivilized, modern and backward, powerful and weak etc. Whereas the progress and influence of the developed countries could be possible only because of their development, the countries which have been relegated to a state of backwardness in regard to development opportunities are passing through a state of being ignored and inferiority complex. Therefore, also in order to make proportional and reasonable distribution of the benefits of natural means and resources among the world community, it is not proper to halt the pace of development in the underdeveloped countries. In fact, it is indispensable to make the development activities human rights friendly. In this context it may be effective to adopt the measures ensuring equal participation, equitable distribution of benefits and generational transfer of the means and resources by adopting the measures causing the least possible harms to environment and exploiting the natural means and resources only to a desirable extent.

In short, it seems rational to determine the development activities and their impact on environment in relation to the benefits, and the degree of pollution caused by it. When the volume of adverse impacts on environment caused by development becomes higher in comparison to the benefits accruing from development, it creates a state of imbalance.

Now the second issue - What type of jurisprudential norms has been developed in respect of environmental justice by this Court - needs to be considered and resolved. ... Some representative orders made by this Court in this context have been mentioned below;

**1. Advocate Surya Prasad Dangol Vs. Marble Industries Pvt. Ltd. and Others (Writ No. 35/2049), Date of Order: 2052/7/14, Full Bench (NKP 2052, Golden Anniversary Special Issue, P. 169)**

The Government should pay appropriate attention to finding out a suitable and practical alternative to explosions and take suitable steps. The report shows that instead of marble quarrying, the tendency is more towards production of concrete, and the greater number of explosions creates a situation causing pollution of V, water and air. So if Marble production is given priority, it may render considerable assistance to reduction of environmental destruction.

Human life is the end, and development is a means of leading a happy life. Man cannot live in a clean and healthy manner without clean and healthy environment. Thus environmental protection is an end and, taking this reality into consideration, measures should be undertaken to protect environment from destruction. Effective and satisfactory work has not been done regarding a sensitive matter like environmental protection of Godavari area which is of human, national and international significance. Also, taking this matter into consideration, as it looks appropriate to issue instructions regarding matters like enforcing the Mine and Mineral Substances Act, 1985, which is yet to be enforced, enactment of necessary laws for the protection of air, water, sound and environment and undertaking measure for effective protection of the environment of Godavari area, an instructive orders is hereby issued in the name of the respondents.

**2. Advocate Prakash Mani Sharma Vs. Cabinet Secretariat and Others (Writ No.2991/2052) Date of Order: 2054/2/27, Division Bench:**

Besides the matters relating to religious, cultural and historical beliefs, the issues concerning environment and environmental protection raised in the writ petition appear to be necessary, sensitive, humane and of national or international significance. An instructive order is hereby issued in the name of His Majesty's Government, Cabinet Secretariat to conduct monitoring of whether or not any action has been taken by the concerned bodies in accordance with Nepal's commitment expressed in the Convention on the Protection of the world Cultural and Natural Heritage, 1972 and the rights guaranteed by Nepal law, and as there is a need of concrete and effective steps to be taken by His Majesty's Government to maintain

uniformity in all sectors by preparing a national policy regarding matters of religious, cultural and historical significance, to take action accordingly.

**3. Advocate Prakash Mani Sharma Vs. Ministry of Youth, Sports and Culture (Writ No. 3018/2053), Date of Order : 2056/2/31, Division Bench**

If permission is granted to construct the road proposed for construction from Budhnagar to Panchayanghat near Maternity Hospital, there is no disputing the fact that the close interdependent relation existing between Bagmati river and monasteries, temples, and 'ghats' (stepped platform beside a river) shall be finished, and it shall also affect the existence of old *ghats* (stepped platform beside a river), '*bhakaris*' (thatched huts), monasteries, temples etc. and cast adverse impact on the cultural norms and values of the Hindu Kingdom. Therefore, as the road has been constructed in an unauthorized manner from Budhnagar to Panchayanghat, which is so close to Maternity Hospital, and because an interim order has been already issued by this Court to restrain the construction done in an unauthorized manner and as the UN Park Construction Committee is also likely to construct the road, as mentioned in Writ No 3017, an instructive order is hereby issued in the name of local administration office and Kathmandu Metropolitan Office not to construct, or cause to be constructed, the above mentioned unauthorized road.

**4. Advocate Prakash Mani Sharma Vs. Nepal Drinking Water Corporation and Others (Writ No. 2237/2047), Date of Order: 2057/3/26, Division Bench**

As the petitioners have claimed that drinking water has not been regular and clean, and as Drinking Water Corporation has put forward the plea that bacterial examination has been conducted in accordance with the norms of World Health Organization, there seems to be disagreement between both the parties resulting in a dispute and because it is incompatible with the principle of writ to make a decision after evaluating proof and evidence, the writ petition is quashed.

However, in view of the fact that Nepal Drinking Water Corporation cannot get immunity from its vital responsibility towards the people, it should always remain conscious and alert towards its functions, duties and obligations prescribed by the Statute and should conduct necessary study, enquiry and research, and keep trying for getting grants as much as possible for the purpose of supplying clean adequate drinking water on regular basis.

So Correspondence should be made, specially drawing the attention of the Ministry of Housing and Physical Planning, to issue appropriate instructions including whatsoever is deemed necessary to caution the Drinking Water Corporation and its subordinate Drinking Water Corporations about their obligations to distribute clean water as mentioned in the Preamble of the Act.

**5. Advocate Prakash Mani Sharma Vs. Prime Minister Girija Pd. Koirala and Others (Writ No. 25/2058), Date of Order: 2058/6/11, Full Bench**

The writ cannot be issued as prayed for because the joint Statement does not look contrary to Nepal law. However, in the context of controlling pollution caused by the means of vehicular transportation and the enforcement of Nepal Vehicle Pollution Standard, 2056 internalizing the standards set by Euro-1 for protection of the deteriorating environment, it shall be better not to be convinced that only through certification of pollution standard given by vehicular means production companies of their countries our objectives shall be fulfilled. Taking into consideration the above mentioned fact, an instructive order is hereby issued in the name of respondent Ministry of Population and Environment to make an appropriate mechanism to ascertain whether or not the imported vehicular means conform to the prescribed standards.

**6. Advocate Thaneshwor Acharya Vs. Bhrikuti Pulp and Paper Nepal Ltd. And Others (Writ No. 3089/2057), Date of Order: 2058/8/9**

There is no dispute that it is a major duty of the respondent Industry to operate without causing any damage to environment. A look at the fulfillment of human needs as well as the indispensability of development requires that the Industry needs to be operated maintaining balance in the environment. In view of the statement of the respondent Industry made in its written reply about its sensitivity in regard to environment and water pollution and also its commitment for not allowing such things to happen, it does not seem appropriate to issue the writ to close down the Industry or to shift it somewhere else as sought by the petitioner. Nevertheless, such a matter cannot be ignored rather it is necessary to be sensitive and more active in this regard. So an instructive order is hereby issued in the name of the respondent Bhrikuti Pulp and Paper Industries to set up immediately a water treatment plant for discharging the water used in the Industry as pure water and to use the dust collector effectively to prevent mingling of dust of husk (chaff) in the smoke.

**7. Advocate Bharatmani Gautam Vs. Cabinet Secretariat and Others (writ No.3474/2056), Date of Order: 2059/2/, Division Bench**

Treating the issue raised by the petitioners in the petition as an environmental threat and taking into consideration the crisis likely to emerge in the days ahead, even though the respondents appear to be doing necessary works for sorting out the problem, it seems expedient to regulate the management of Methane gas emitting from the landfill site at Gokarna. As it has not been clearly printed out which respondent has got what kind of legal duty, a writ of mandamus cannot be issued on the basis of a generalized allegation regarding failure to comply with public duty as reflected by the documents enclosed in the case file. However, from the written reply it appears that effective and satisfactory preventive action has not been taken for prevention of Methane gas emitting from the landfill site at Gokarna as mentioned in the petition. So as it appears that it shall be appropriate to issue an instructive order in respect of taking action for regulating Methane gas by making relevant law so as to maintain environmental balance in consideration of the sensitivity of this matter, this instructive order is hereby issued in the name of the respondents.

**8. Advocate Prakash Mani Sharma Vs. Cabinet Secretariat (Writ No. 3440/2053), Date of Order: 2059/11/27, Division Bench**

Generally, nobody shall disagree with the view of the petitioner that environmental pollution should be minimized. Particularly the smoke emitting from different types of means of vehicular transportation plying on the roads in Kathmandu is found to be causing much negative effects on public health. The reports enclosed in the case file submitted by the study group constituted by concerned bodies of respondent His Majesty's Government also show that necessary action is being taken for the implementation of those reports. In spite of that such pollution does not seem to be controlled or lessened. Therefore, this instructive order is hereby issued in the name of His Majesty's Government, Cabinet Secretariat to carry out necessary study to prevent pollution of environment outside the valley and to enforce effective measures within two years at the maximum for the protection of public health from the smoke emitting from buses, minibuses, tractors, trucks etc. including small tempos and taxis plying inside Kathmandu valley.

**9. Advocate Prakash Mani Sharma vs. Office of Prime Minister and the Council of Ministers (Writ No. 3413/2058), Date of Order; 2016/4/12), Division Bench**

In spite of necessary provisions made by the Constitution and the law to maintain a pollution-free clean environment, it could not be implemented and even though it has been contended in the written reply that His Majesty's Government is cautious about environmental protection, the report submitted by the expert committee shows that respondent His Majesty's Government has not performed its duties in accordance with the law.



As mentioned in the report submitted by the above mentioned expert team constituted as per the order of this Court, the respondent Industry has been found to have operated by mixing the effluent released in the Aaurahi River contrary to the standards. Therefore, an instructive order is hereby issued in the name of the respondents to operate the Industry only after making arrangements for necessary reforms as soon as possible not exceeding the standards mentioned in the aforesaid gazette and to give time to make reforms including installation of necessary equipments by the end of current fiscal year and to allow the operation of the Industry only within the specified standards after inspecting or getting it inspected by the above-mentioned expert committee or another expert committee as required.

**10. Bhimsen Thapa and Others vs. Cabinet Secretariat and Others (Writ No. 3024/2056), Date of Order: 2060/10/6, Division Bench**

As it has been mentioned in the written replies submitted by Commander-in- Chief of the Army and No. 3 Brigade that, adopting strict provisions about security, firing activities shall be conducted undertaking measures to prevent accidents not at heights but at the plain surface, there does not exist any ground for stopping the activities relating to firing range at present. How the Government wants to utilize any land of any place depends on its policy and program, and so it is not proper to describe any act '*mala fide*' in a casual way. So as the activities of the respondents cannot be described as unlawful and also because the petitioners have failed to show a case of non-compliance with legal obligation, the contention of the petitioners praying for the issuance of the writs including certiorari and habeas corpus does not have any merit.

However, the State is obligated to protect the life and property of the public and to prevent any adverse impact on environment and thus to secure everyone's right to lead a peaceful life. So an instructive order is hereby issued in the name of the respondents to take into consideration the conclusions pointed out in the report and the recommendations mentioned therein regarding the impacts likely to be caused by the use of the above mentioned firing range, and to conduct the firing practice by the Army after making immediate and long term arrangements for their implementation.

**11. Shatrugan Pd. Gupta vs. Everest Paper Mills Pvt. Ltd. and Others (Writ No. 3480/2059), Date of Order: 2064/4/12, Division Bench**

As mentioned in the report given by the expert committee constituted as per the order of this Court, the respondent Industry seems to have polluted the Aurahi (Bagle) River by operating the Industries mixing the effluents released in that river contrary to the prescribed standards. Therefore, an instructive order is hereby issued in the name of the respondents to operate the Industry only after making arrangements for necessary reforms not violating the standards prescribed in the gazette and granting time to the Industry up to the end of the current fiscal year and causing inspection of the Industry by the above-mentioned expert committee or by any other expert committee, if so needed, to allow the operation of the Industry only within the prescribed standards. Besides, the following additional orders have been also issued:

To undertake inspection of the respondent Industry including the pollution control machine installed by the Industry and to send compulsorily one copy of the inspection report given by the expert committee to this Court and another copy to Pro Public – 1.

Failure to appoint Environment Inspector till date should be taken seriously. So make arrangements as soon as possible for the infrastructure as mentioned in the Act including the appointment of Inspector, and implement and cause it to be implemented.

**12. Advocate Santosh Kumar Mahato Vs. Cabinet Secretariat and Others (Writ No. 3043), Date of Order: 2061/8/4, Division Bench**



As there is a need of conducting extensive and serious study and research regarding the impacts caused on environment by the use of plastic bags and arriving at an appropriate decision on the basis of the scientific conclusion so received, it seems expedient to constitute a technical committee for this purpose.

Hence, an order of mandamus along with an instructive order is hereby issued in the name of His Majesty's Government, Ministers and the Ministry of Population and Environment to constitute a technical committee comprising RONAST, a plastic expert and an environmentalist, a Chemist of Tribhuvan University, His Majesty's Government, Ministry of Population and Environment, all Municipalities within Kathmandu valley and a representative of Nepal Plastic Producers Association, and to give a Term of Reference (TOR) to that committee to undertake study and research about all the questions mentioned above except question No. 4 and to submit a report along with its opinion within this very fiscal year and also to submit one copy of that report in this Court.

Moreover, the writ of mandamus is hereby issued in the name of the respondent Municipalities to make a decision on the sale and purchase of consumption of plastic bags in Kathmandu valley based on the report given by the aforesaid technical committee and the concerned residents.

**13. Advocate Prakash Mani Sharma Vs. Cabinet Secretariat (Writ No. 2898/2060) Date of Order: 2061/9/6, Division Bench**

It is the duty of His Majesty's Government to implement the provisions of the Act. If not implemented, the provisions shall remain confined only to law. It seems obligatory to fulfill the vacancy of Environment Inspector as per Section 8 of the Environment Protection Act, 1997. An instructive order is hereby issued in the name of the respondent Ministry of Population and Environment to decide what type of qualifications are necessary for the post of Environment Inspector and also to take the advice of concerned experts having coordination with Public Service Commission and Ministry of General Administration, if so needed, and fulfill the post as soon as possible or to make necessary provisions about prescribing functions and duties of Inspector.

**14. Advocate Bhojraj Ayer and Others vs. Office of Prime Minister and the Council of Ministers (Writ No. 3180/2061), Date of Order: 2062/2/23, Division Bench.**

It appears that animals are slaughtered on the bank of rivers and in open space without examination of their health, and their meat is sold, without examining it, at open shops. Thus whereas unregulated slaughter of animals has increased pollution and due to consuming unhealthy meat being sold without examination, the common people are not only spending huge amounts for medical treatment of serious types of disease, this has also infringed the fundamental and legal rights of the consumers to live in a clean and healthy way. The Legislature has brought about the Animals Slaughterhouse and Meat Inspection Act, 2055 (1999) for the purpose of getting healthy meat for food. It protects the right of consumers to get healthy meat and meat related objects for consumption through implementation of this Act.

Even if it is not feasible to implement fully the law made and issued by the Legislature at a time, the Executive should make a work plan for phase wise implementation, and start implementing it as per the needs. Only then the objectives of the Act can be deemed as fulfilled. Even though the Animal Slaughterhouse and Meat Inspection Act, 1999 promulgated after the Royal assent on Chaitra 8, 2055 (1998), the concerned Department of His Majesty's Government has not done anything in this regard.

Therefore, an instructive order is hereby issued in the name of concerned organizations of His Majesty's Government to prepare, and cause to be prepared, at the earliest infrastructures for implementing the present Animal Slaughterhouse and Meat Inspection Act, 1999 and to implement this Act as sought by the

petitioner, and also to give prior information to the common people about how to implement this Act phase wise.

**15. Advocate Prakash Mani Sharma Vs. Cabinet Secretariat (Writ No. 3027/2059), Date of Order: 2062/11/3, Division Bench**

If a brick kiln does not install pollution prevention machine or does not operate using the new VSKB technology closing down the old technology, Ministry of Environment and other concerned organizations need to take a tough decision in larger public interest in accordance with the principle of “Private interest must yield to public interest.” It is the constitutional duty of Government, which is entrusted with the constitutional duty of governance of the State, to enforce each and every letter of the law so as to protect against the harms caused to public health by polluted environment. Therefore, this instructive order is hereby issued in the name of respondent His majesty’s Government to do as mentioned below:

To constitute a team comprising representatives from Ministry of Industries, Commerce and Supply, Ministry of Environment, Science and Technology, Ministry of Labor and Transport, Department of Housing and necessary number of experts and also one representative of petitioner Pro Public to conduct a study about how many brick kilns operating inside Kathmandu valley have installed pollution prevention technology and how many have not done so, and to identify those brick kilns which have caused pollution,

To study about the impacts on construction undertaken by the State, development and construction of public houses if brick industries are closed down, and about what can be their alternative,

To cause the closure of brick industries located around quality resorts built up in the rural area for tourists who are a source of foreign exchange earnings for the national exchequer, schools where children study and areas of dense habitation,

In respect of brick industries located in the areas other than as mentioned in No. 3, this committee must see to it that pollution control equipments are installed by the intervention of the official agency designated by law within required and reasonable time in the brick kilns which have been identified by the aforesaid study as causing pollution, and

To complete the requirements mentioned in No. 1, 2, and 3 within six months and send a copy of the report to this Court as well and to grant reasonable time to the respondents to fulfill the requirement mentioned in No. 4.

**16. Prakash Mani Sharma vs. Ministry of Population and Environment (Writ No. 3429/2061) Date of Order: 2062/9/4, Division Bench**

The writ of mandamus is issued in the name of the respondents asking them to prescribe standard within six months for the Industries specified in the Schedule of the Environment Protection Rules, 2054 in consultation with the experts and also to enforce those legal provisions.

The Constitution of the Kingdom of Nepal, 1990 and the Environment Protection Act, 1997 and the Rules, 1998 have entrusted to the State the responsibility of doing necessary works for environmental protection so as to prevent any adverse impacts on the health of the people. And even though orders have been issued by this Court in several cases even in the past for the enforcement of those laws, there has been delay in the enforcement of the law due to failure to prescribe the standards of sound pollution. As granting permission to operate the Industry distributing temporary license in contravention of the law is contrary to the legal provisions of the Act, it is required to display special caution towards also monitoring the standards prescribed for the Industries mentioned in Schedule-7. Therefore, an instructive order is hereby issued to undertake those works at the earliest.

17. Advocate Dhananjay Khanal vs. the Office of Prime Minister and Council of Ministers and Others (Writ No. 73 of the year 2062 B.S.), Date of Order: 2063/2/25, Special Bench

The present writ petition has been lodged under PIL in the interest of public good and the petitioner has presented with his petition a copy of *Research & Investigation Tear-Gas Harassing Agent of Toxic Chemical Weapon*, Aug 1989 Vol. 262. A copy of the Bulletin presented by the petitioner shows that even today tear gas used in the world, and, if used proper, tear gas is not detrimental to the health. It has been mentioned in the second page of that Bulletin that “if used correctly, the toxic effects of exposure are transient and of no long term consequence.” As it appears from the copy of the said Bulletin that there is also a disputable side of tear gas, an instructive order is hereby issued in the name of Office of the Council of Ministers to constitute an expert team comprising a representatives of Ministry of Health, Ministry of Home Affairs, and the Police under the chairmanship of a concerned expert or a Scientist and to complete, and cause to be completed, the study within one year about the issues raised in the petition including questions like - How much is tear gas detrimental to health? What can be its alternative? Or is there no alternative? And if there is an alternative, what is that? And how much effective it shall be on the part of the local administrator to maintain peace and security by exercising the means of other legal measures except the use of tear gas or whether such alternative shall not be effective? And the respondents are also directed to take whatever necessary action shall be required in this regard and to send a copy the study report to this Court as well.

18. Advocate Dhanjanaya Khanl vs. the Office of the Prime Minister and the Council of Ministers (Writ No.3401 of the year 2060), Date of Order: 2063/5/11 Division Bench

Protection of Bishjari Lake and the area surrounding it which is registered in the list of world wetlands is a matter of not only national but also of international significance. So if any Project is likely to be started around Bishjari lake and in its vicinity, an instructive order is hereby issued to prepare a comprehensive Master Plan and make necessary arrangements regarding the protection of the area of wetlands of Bishjari lake and to take actions in that regard taking into consideration Sections 9 and 10 of the Environment Protection Act, 2053, Marsh Land Policy, 2053, Ramsar Convention, 1971, Convention on Biological Diversity, 1992 and also Article 26 (2) of the Constitution.

19. Devi Prasad Gautam vs. District Forest Office Bara and Others (Writ No 0058 of the year 2064), 2067/1/15

Energy is used in the operation of stone mine. Use of energy produces at least noise and dust. Thus if noise and dust are produced in the forest and river, it casts direct effects on the birds and animals living in the forest and in water. Besides, the act of transportation in all those processes contributes all the more to noise and dust pollution. The report on Environment Impact Study prepared by the Company in English language explains this matter. However, the written reply and the activities of the government bodies are just contrary. If the government agencies get confused in this manner or fail to realize their duty, how the right to a pollution free environment guaranteed by the Constitution and the State Policy shall be the realized. The Government must display seriousness in this regard. As the government organizations have erred in this case, attention has been drawn towards a sensitive issue like environment.

The impugned decision of the respondent Department of Industries made on Chaitra 23, 2063 (2006) to grant certificate of registration to respondent Nepal Progressive Construction Pvt. Ltd. Registering it as a Stone Aggregates Production Industry, and also the letter issued on Asadh 29, 2063 (2006) by District Forest Office Bara given on the same ground granting permission to that Industry to collect stones appear to be contrary from the viewpoint of environment impact evaluation, the prevalent legal provisions and the Policy on Environment adopted by Nepal, and , therefore, the impugned decision and the letter are quashed through an order of certiorari.

**20. Bhojraj Ayer Vs. Prime Minister and Office of Council of Ministers (Writ No.99 of the year 2061), Date of Order: 2066/12/15**

This Court has issued various orders at different stages of the proceedings for protection of environment so as to prevent the Bagmati River from being polluted, and a report on the actions taken by the respondents in regard to implementation of those orders has been submitted. A look at the details of the report shows that a Solid Waste Management Bill, 2065 has been prepared and Bagmati Civilization Development Council Bill is under consideration before the Parliament; Bagmati Work Plan has been approved by Nepal Government, Council of Ministers on Shrawan 27, 2066 (2009), and in course of its implementation budget has been allocated and action is underway; action has been taken to constitute a necessary umbrella organization as per the decision of Nepal Government on Magh 9, 2065 (2008) in order to maintain cleanliness of Bagmati river, and a provision has been made requiring construction of a septic tank while constructing a house within the urban area. Therefore, as there does not seem to be any ground to initiate contempt proceedings, the present petition is hereby closed.

As mentioned in the order issued by this Court on 2058/9/2 regarding conservation of Bagmati river and the various orders issued by this Court regarding the present petition, an order is further issued directing the Verdict Implementation Division of this Court to obtain the implementation status report every four months from the powerful Bagmati Civilization Integration Development Committee, Kathmandu Metropolis, Lalitpur Sub-Metropolitan City and, if necessary, the respondents framed in other petitions as well as the Secretary of the concerned Ministry summoned by this Court regarding whether or not action has been taken by the respondents in respect of the activities which have been accepted by them in the report and which they have pledged to do as ordered by this Court and whether the work plan has been implemented. And the Division is further ordered to conduct regular monitoring and, if it is found that no progress has been made in the work or no action has been taken as mentioned in the report, to reopen the case file of this petition and present it before the bench for further hearing.

**21. Purnabhakta Dangol vs. Office of the Prime Minister and Council of Ministers and Others (Writ No.2891) Date of Order: 2063/3/20, Division Bench**

It has been mentioned in the petition that, without paying attention to the environmental aspect and without adopting the procedure prescribed by law and also without having any advice from the experts, the respondents have indulged in felling the trees on either side of the Arniko Highway and also other trees inside the Valley. The written replies submitted by the respondents show that they seemed to have acted lightly sometimes stating that they did not have any responsibility about the issue raised by the petitioners and sometimes saying that the alleged work has been already completed. This shows that the respondents were also not serious about the responsibility entrusted to them by the Act and the Rules.

Thus effective and satisfactory action has not been taken in respect of an issue of sensitive, humane, national and international significance as mentioned above, and as the Council of Ministers has also decided on 2059/1/19 to undertake activities like re-forestation and constructing Garden Parks, an instructive order is hereby issued in the name of the Ministry of Physical Planning and Construction, Department of Roads and the Municipalities to implement, and cause to be implemented, those works and make special arrangements for environmental protection.

**22. Bhojraj Ayer and Others vs. Office of the Prime Minister and Council of Ministers and Others (Writ No. 3377 of the year 2060), Date of Order 2061/5/1, Division Bench**

In order to set up a fund for pollution control in the context of adverse impacts being caused even on the provisions made in the Environment Protection Act, 1997 for guaranteeing a clean and healthy environment, an instructive order is hereby issued in the name of Nepal Government to prescribe a date for the enforcement of the above mentioned provisions of the Act to make arrangements for setting up a

Pollution Control Fund through any other suitable method on the basis of the present specified price of the petroleum products or without causing any additional financial burden on the consumers.

**23. Narayan Prasad Devkota Vs. Office of the Prime Minister and the Council of Ministers and Others (NKP 2067, Volume 12, Decision No. 8521, P. 2053)**

While making a plan, the planners and the Government must balance economic development and industrial development. Today's world of the 21<sup>st</sup> century must be conscious of the needs and significance of a clean environment. Economic development at the cost of environmental destruction cannot be acceptable.

Under the Public Trust Doctrine, Nepal Government can be only a trustee of the natural resources of Nepal, and no one should be allowed to do any act unrestrainedly in regard to Nepal's natural resources which may cause adverse impacts on the environment on the basis of only paying nominal revenue.

Quarrying and utilization of the natural resources should not be viewed only from the angle of economic profit. Rather quarrying and its use should be allowed only if the use of such natural resources does not cause any adverse impacts on the environment. While allowing the business utility of any natural resource, the first and foremost thing to be considered is that such use should be allowed in such a way as not to cause any impact on the sensitive institutions and the people including the human habitation in the surrounding vicinity, forests, environment, schools, hospitals etc.

The above mentioned jurisprudential outlook developed by this Court with respect to environmental protection reflects the worries and concerns of the Court regarding environment. In fact, it cannot be disputed that today the global environment is being badly polluted due to the impacts of pollution resulting in various types of human activities. While on the one hand there is a need of fast industrialization and extensive utilization of natural resources for human community from the viewpoint of economic development, on the other hand such type of activities are likely to expose the existence of the whole Nature to danger. The issue of closing the doors of economic development or allowing the destruction of biological diversity and environmental pollution cannot be considered reasonable from any angle. The indispensability of development for economic progress cannot be denied whereas it is also not proper to look for an alternative to clean environment and protection of biological diversity for the sake of the existence of the whole Nature including the human beings. For this there is no alternative to move forward by maintaining a balance between development and environment.

In fact, several examples can be found where the judiciaries around the world have presented themselves, when required, in a strict manner for environmental protection. The Supreme Court of the United States of America has displayed judicial activism from time to time in favor of protection of biological diversity including owl protection and environmental protection. As mentioned in the petition, the decision relating to control of pollution of the river Ganges and the decision about the impacts caused by the Industries operating in the vicinity of Taj Mahal, registered in the list of world heritage as an object of historical and cultural significance, are treated as milestones from the viewpoint of jurisprudential development of environmental justice in this area. The above mentioned orders clearly reflect that this Court has also stood firmly on the side of sustainable development and environment.

In some circumstance the Courts are also dubbed as an antagonist to development. However, there can be no separate interest or any hidden vested objective of the Court to obstruct the activities of economic development or to push the society backwards. Similarly, it shall not also be in tune with the judicial responsibility of protecting the larger interests to tolerate the significant adverse impacts on environment in the name of development or to display inaction or a state of dormancy. Therefore, striking a balance between development and environment, the Court must stand in favor of sustainable development prone to wider, inclusive and equitable distribution of benefits of development. This fact should be remembered



that this Court is also presenting itself in accordance with the international jurisprudential norms of environmental justice.

Now what is the significance of Godavari area from biological and environmental viewpoint as well as religions and cultural viewpoints, and whether or not the operation of Godavari Marble Industries has caused any adverse impacts on biological diversity and ecological balance of that area are some other issues which need to be considered.

... Godavari, which is located nearly 15 km south east of Kathmandu, represents ecological system of the mid-hilly region, enjoys religious significance due to the presence of *Nav Dhara* (Nine Streams) and Godavari *Kund* (Pond), known as plantation ground for special guests visiting Nepal and a research place for the Scientists which has the highest mountain of Kathmandu Valley Phulchowki, often described as an open living Museum of the flora and fauna, and also famous for the inhabitants of Kathmandu, this well known place of Godavari is slowly getting trapped in environmental distortions caused by destruction of forests and industrial operation, and is awaiting for protection.

[The Court then reviewed the many studies that had been conducted of the Godavari area, including assessments of its natural resources, forest resources, and water resources; of the preservation of its aquatic, land, and bird species; and of its spiritual and cultural significance from national government and NGO sources as well as international and foreign sources. One illustrative example follows:]

In the letter written by Russell W Peterson, President of International Council for Bird Preservation, to the Prime Minister of Nepal in July, 1988, which is enclosed with the above-mentioned study report, mention has been made about the impacts caused by the continuous quarrying being carried out in the lower part of Phulchowki, i.e., Godavari area, on the basis of the matters published in the technical study report of International Council for Bird Preservation in the following way: "The continued quarrying on the lower slopes is a major threat, especially to the vitally important subtropical forest, and this really should be stopped immediately." [The study --Conservation 'Project' for Phulchowki Mountain, Nepal -- indicated:] If Phulchowki's forests and their wildlife are to continue to survive, action must come soon; the quarries must be closed and Phulchowki designated a protected area. At the present rate of destruction, the stage will be reached in the foreseeable future where many species will disappear. Even if the trees were to recover, some of the forest inhabitants would take many years to recognize and others would never do so."

In fact, it is not possible for the Court to have expertise in every discipline and subject. Therefore, the Court needs to rely on the views of the concerned experts on some technical issues. However those reports use to be reliable only so long as those are not proved otherwise. The respondent Industry could not refute convincingly that the opinions expressed in the aforesaid study report, which formed the basis of the writ petition, were otherwise or they were prejudiced towards the Industry in such way. The studies got conducted by different agencies through teams comprising national as well as even international experts at different times have also reaffirmed the conclusions of the study conducted in 2054 B.S. Therefore, the Court has to presume that the matters mentioned in the aforesaid study reports prepared in an independent way at a time when there was no dispute are scientific, factual and objective. ...

On the basis of the conclusion of that study report there appears truth in the Statement of the petitioners that the respondent Industry indulged more in the transaction of stones and concrete than in marble and also in evasion of revenue. It cannot be appropriate to allow freedom for production of stones and concrete under the shield of marble for the economic benefit of an individual, and thus exposing the valuable natural resources to danger. ...

On the basis of the issues identified in the aforesaid study reports there is no doubt that adverse impacts have been exerted upon the religious and cultural significance of Godavari area and also on its biological



diversity, ecological system and geological position. Not only that, it cannot be said either that appropriate and adequate measures had been taken for preservation of that area in accordance with the directive orders issued by this Court or those types of harms had been minimized or there was such probability. So in view of the biological diversity and environmental sensitivity of that area, it looks necessary to keep it intact as pointed out in the study reports.

Now another question needs to be considered and decided: Whether or not the activities relating to quarrying conducted by Godavari Marble Industries in Godavari area are compatible with the constitutional provisions and the law of Nepal regarding environmental protection?.

It has been contended in the present petition that the operation of Godavari Marble Industries has chiefly infringed the right to live with dignity and the right to live in a clean environment guaranteed respectively by Article 12(1) and Article 16(1) of the Interim Constitution of Nepal, 2007, and nothing has been done to maintain a clean environment by preservation of biological diversity as envisioned in Article 35(5) in accordance with the State Policy. Similarly, the petitioners have further contended that the legal rights granted by Section 12(1) and Section 27(1) of the Mine and Mineral Substances Act, 1985 and Rule 19(b) and Rule 43(d) of the Mine and Mineral Substances Rules, 1999, Section 7 and Section 10(1) of the Environment Protection Act, 1997 and the Preamble of the Forest Act, 1993 and the right expressed in the Preamble and the spirit of the Forest Act, 1993 have been also infringed. However, the respondent Godavari Marble Industries has taken the plea in its written reply that it had not infringed the legal and constitutional rights as claimed by the petitioners.

Article 12 relating to the right to freedom in the Interim Constitution of Nepal, 2007, reads as follows:

**“Article 12. Right to Freedom:** (1): Every person shall have to right to live with dignity and no law shall be made providing for capital punishment.

2. No person shall be deprived of his personal liberty save in accordance with law.”

Article 12(1) of the Interim Constitution has also incorporated the right to live with dignity under the right to life. It shall be erroneous and incomplete to have a narrow thinking that the right to life is only a matter of sustaining life. Rather it should be understood that all rights necessary for living a dignified life as a human being are included in it. Not only that, it cannot be imagined to live with dignity in a polluted environment rather it may create an adverse situation even exposing human life to dangers.

Similarly, Article 16(1) of the Intern Constitution of Nepal has guaranteed that every person shall have the right to live in a clean environment. This provision of the Interim Constitution establishing the right to live in a clean environment as a fundamental right can be rarely seen not only in the South Asian Region but also in the constitutions of the developed countries of the world. This constitutional provision seems to have provided constitutional immunity from polluted environment to not only the Nepali citizens but also to every person residing in Nepal. The State does not have any alternative to ensuring availability of this right envisioned as a fundamental right without any precondition or obstruction.

Likewise, the petitioners have also alleged that whereas due to the operation of the respondent Industry the environment of Godavari area in gradually becoming polluted, respondent Nepal Government has not duly executed the State Policies enshrined in Article 35 of the Constitution. Clause (5) of Article 35 provides as follows:

“(5) The State shall make such arrangements as required for keeping the environment clean. The State shall give priority to the prevention of adverse impacts on the environment caused by physical development activities, by increasing the awareness of the general public about environmental cleanliness as well as to the protection of the environment and special protection of the rare wildlife. The State shall

make arrangements for the protection and sustainable uses and equitable distribution of the benefits derived from the flora and fauna and biological diversity.”

The aforesaid constitutional provision States that protection of environment should remain under the priority of the State and that the operation of development activities should not impact on the environment. That is to say, it has established the need of taking forward development and environment in a balanced way as the State Policy. Unlike the preceding Constitution, the Interim Constitution of Nepal has widened the concept of environmental justice requiring the State Policy to address the protection of forest and biological diversity and their sustainable uses and equitable distribution of the benefits accruing from them. This approach adopted by the Interim Constitution looks compatible with the provisions of the International Convention on Biological Diversity, 1992.

It has become clear from the analysis of the first issue made above that the concept of environmental justice is not of a stable or static Nature rather it is a dynamic and future centered concept likely to develop and become refined gradually. With the development of Science and Technology, new types of problems and challenges are being accumulated every day, and the latest outlooks are also emerging in the environmental justice sector so as to address them. The developed countries have already started the assessment of environmental impacts which are likely to emerge after hundreds of years.

Right from the enactment of the 1990 Constitution to the time of the promulgation of the Interim Constitution, wide spread changes have emerged in the national and international outlook on biological diversity and the environmental protection sector. It was natural to see a reflection of its impacts in the Interim Constitution of Nepal. Still more concepts in this regard may be expected to get incorporated in the Constitution to be made in the future.

As it is necessary to have a future centered outlook, while having discussion in the context of environmental justice, it shall not be a proper and rational thought to retrogress from the concepts, constitutional and legal provisions and the national and international practices developed so far.

On the whole, the Interim Constitution of Nepal, 2007 has guaranteed a person's right to live as a fundamental right. Moreover, the Interim constitution has also placed the right to live in a clean environment under the category of fundamental rights. It is in the knowledge of the bench that the State Policies are not the matters which can be directly implemented by the Court. Nonetheless, any type of restriction whatsoever on the uninhibited enjoyment of fundamental rights cannot be acceptable at all. Even the State Policies are also not placed in the Constitution only for a cosmetic purpose. It can be hardly considered proper to go on incorporating one after another major issues relating to the rights in the Constitution but responsible bodies of the State displaying apathy towards enforcement of the fundamental rights and the State Policies specified in the Constitution. Incorporating unenforceable rights in the Constitution detracts from reliability of the State. Therefore, the concerned bodies of the State should sincerely endeavor to implement literally the spirit and provisions of the Constitution. If it is not found so, this Court shall issue necessary order or directive in the regard.

The significance of Godavari area and the adverse impacts caused by the respondent Industry on that area have been adequately analyzed above in course of resolution of the third issue. On the basis of the aforesaid analysis it cannot be Stated that the impacts caused by the operation of the respondent Industry on biological diversity and environment of that area have not affected individual's right to live in a clean environment guaranteed by the Constitution.

In fact, the right to live in a clean environment is an inborn and inherent right of men to live in a clean environment. There can be no dispute that such natural rights relating to life should be enjoyed uninterruptedly. As man is a natural creature, this right of man to live cannot be violated in any condition or circumstance. Besides, it has been also mentioned in the writ petition that the act of quarrying being

conducted since long time by the respondent Industries in a sensitive area having biological diversity is contradictory to the Mine and Mineral Substances Act, 1985 and the Mine and Mineral Substances Rules, 1999. [Statutory application ensues].

There seem to be existing adequate grounds for preventing operation of the respondent Marble Industry in the Godavari area. First of all, there are dense settlements and the continuing expansion of settlements in Kathmandu valley which is so close to this area. Secondly, the topography of the capital city of Kathmandu valley is like a pit surrounded on all four sides by mountains. Godavari area is located just fifteen kilometers away from the capital. It is necessary to pay serious attention to pollution caused to the environment of this area by dust, smoke, diesel and petrol which serve as biological fuel and the use of various means of modern transportation which emit various types of gas. ...

The analysis made above shows that the act of quarrying of quarries in Godavari area shall destroy the beauty of Kathmandu valley and result in destruction of biological diversity. So there is a need to maintain environmental cleanliness, remove pollution from Kathmandu and maintain greenery on the bare hills restoring again the destroyed forests.

On the other hand Godavari Marble does not seem to have produced pure marble. It has not been also sold or adequately used either. The marble imported from abroad including India has covered the market. Even the supervision made by the Court as per the earlier order has shown that marble has been produced in a very lesser quantity and mostly broken marble has been produced whereas stones and concrete have been produced in greater quantity.

...The studies conducted by Ministry of Forest and its subordinate departments have also concluded that no quarrying of minerals should be allowed in the forest area of Godavari which is of national importance and full of biological diversity. On the basis of those studies the Ministry of Forest had also made a decision on Ashwin 19, 2065 (2008) to close down respondent Marble Industry.

However, that decision could not prevail for long and after sometime it was decided to allow the Industries to operate as per the directive of the Parliamentary Committee.

... The Legislature and the Executive and the various agencies under the Executive have different viewpoints in regard to whether or not any Industry causing deterioration to biological diversity and environment should be allowed to operate or be closed down. This clearly shows that the biological diversity protection has not been implemented effectively. If there is a conflict of interests between different agencies of the State in this regard, it is sure that it is not the State rather some other person who will derive benefit from. Therefore, there must be only one collective opinion of the State regarding a sensitive matter like environment. It does not look decent that the Parliament and another agency of the Government itself hold one type of opinion about such an important issue and another agency holds quite a different opinion, and thus they indulge in the game of 'hide and seek' regarding opening and closure of the Industries.

In totality, the continued existence of every creation or object of the Nature has its own natural reason and significance. Every object has its own different norms and values. It cannot be acceptable to dismantle the basic norms and values of the Nature for the sake of some body's vested objective or financial interest. The things like air, water, forest and biological diversity which are interlinked to identity and existence of the Nature have not been made only for one generation. They should not be allowed to decay on any pretext. Nobody can claim to have freedom to destroy the basic form and norms of the Nature and its constituents and their norms in the name of development. The benefits resulting from development activities cannot be compared to the value of the gifts given by the Nature. So even if any significant profit is likely to accrue from physical development activities, no activity causing negative impact or destruction of the Nature and environment should be allowed to continue.

As we cannot talk about destroying our snow capped mountains (*Himal*) and hills or filling up the seas for the sake of any development or economic benefit, similarly the value of biological diversity cannot be exchanged with marble or stone and concrete. There can be no price for the religious and cultural heritage, biological diversity, birds, insects, butterflies and vegetation exposed to extinction and eco-system and natural beauty of Godavari area. Because such invaluable natural heritage is worth protecting and worthy of preservation even for the distant posterity, not marble, even if gold or diamond is to become available, not to talk of destroying a life giving hill like Godavari which is full of biological diversity, one cannot be allowed to even scratch it.

Now, the last question needs to be decided whether or not the order as prayed for by the petitioners should be issued, and if so, what type of order should be issued.

... Latest concepts emerging at the international level in the context of environmental justice, the jurisprudential values developed by this Court, the environmental and cultural significance of Godavari area and the impacts caused by respondent Godavari Marble Industry on that area as well as the relevant existing constitutional and legal provisions have been extensively analyzed above serially in course of addressing the first to the fourth issues.

... On the basis of an overall analysis of the above discussed theoretical concepts, objective realities and the existing constitutional and legal provisions, there seems to be no dispute that the agenda of pollution control and environmental protection is not an agenda of any specific country rather it is an issue of collective interest, concern and obligation of the world community as a whole. Moreover, to say that the development activities should be totally stopped for the sake of environmental protection is also tantamount to causing obstruction to society's road to economic development. Therefore, there can be also no dispute about moving forward in the direction of sustainable development striking a balance between development and environment. There have been some assumptions that in order to strike a balance between development and environment the harms resulting from environmental pollution should not outweigh the benefits resulting from development activities; the benefits of development should not be confined only to a specific class or individual rather it should be distributed in a wider and equitable manner and the transfer of natural means and resources should be ensured for the future generation without subjecting them to excessive exploitation.

... Moreover, Godavari Marble Industries also seems to have adopted some measures for minimizing the harms. But the efforts for reform have proved colorless in the context of the biological, geographical and geological significance of Godavari area, where the Industry is situated. Moreover, the quality and storage of marbles of that area are not good; excessive quarrying is required for lesser quantity of marbles; and the respondent Industries seems to be functioning more as a stone Industry rather than as a marble Industry. In comparison to the limited employments given by the respondent Industry and the revenue paid by it, the harms caused to that area seem to be irreparable. Hence, since its protection seems to be indispensable in the wider interest of the human race, it does not look reasonable to continue further the development activities.

Article 12(1) and Article 16 (1) of the Interim Constitution of Nepal, 2007 have placed respectively the right to live with dignity and the right to live in a clean environment as fundamental rights. In order to maintain a clean environment, Article 35 (2) of the Constitution has prescribed a State Policy to work for balanced and sustainable development also protecting biological diversity. Section 11a of the Mine and Mineral Substances Act, 1985 has prohibited causing adverse impacts on the environment while conducting mineral works, and such impacts have been specified by Rule 32 of the Mine and Mineral Substances Rules, 1999. The activities of the respondent Industry seem to have also caused significant adverse impacts on the environment of Godavari area. Moreover, as Section 12 of the Act has provided

for declaring an area of public good and historical significance as a mineral activity prohibited area, this area needs to be developed in the form of a protected area.

Therefore, in the context of the above mentioned ideological concept of environmental justice, the judicial principles laid down by this Court regarding environmental protection, the relevant constitutional and legal provisions, the biological significance of Phulchowki - Godavari area and also the adverse impacts caused by the activities of the respondent Marble Industry on the environment of that area, the following orders are hereby issued in the name of the respondents pursuant to clause (2) of Article 107 of the Interim Constitution of Nepal 2007:

- a) The decision made by the Department of Mines and Geology on Poush 23, 2067 (2010), despite the case being *sub judice* in this Court, to extend the term of operating the mine until 2021 (2078 BS) and all the activities related thereto are quashed by an order of certiorari.
- b) Due to Phulchowki-Godavari area's climate, biological diversity, natural beauty, geographical and geological topography, eco-system and historical, religious and cultural significance, conducting mine and mineral work in that area appears contradictory to public good as per Sub-Section (1) of the Mine and Mineral Substances Act, 1985 and Section (d) of Rule 43 of the Mine and Mineral Substances Rules, 1999. So an order of continuous mandamus is hereby issued in the name of respondents Nepal Government, Office of the Prime Minister and Council of Ministers, Ministry of Industries, Commerce and Supply and Department of Mines and Geology to declare, pursuant to Section 12(1) of the said Act the Godavari area as a prohibited area regarding mineral work and to halt and, cause to be halted, mineral work with immediate effect, and not to grant from now on such permission to anybody.
- c) An order is further issued in the name of respondent Prime Minister and the Council of Ministers to constitute a committee comprising the representatives of Ministry of Forest, Ministry of Environment and Department of Mines and Geology and at least two experts to conduct and, to get conducted, research and study within six months of receiving this order in order to identify the accurate and actual status of the adverse impacts on the ground level and the damage caused to the environment and biological diversity as a result of mine and mineral works conducted for long by respondent Godavari Marble Industry and, minimizing the negative impacts caused by it, to declare the activities relating to protection and improvements required for taking this area back to its earlier natural State, and also to declare the said area as a protected area or Reserve or park whatsoever seems appropriate, and to submit its recommendations about making necessary law and policy related provisions, programs and the management of necessary means and resources.
- d) Taking into consideration the recommendations made by the above mentioned Committee, while determining the boundary between the human settlement and the significant Phulchowki-Godavari area which is enriched with climate, biological diversity, natural beauty, geographical and geological topography, eco-system, rare and threatened flora and fauna and its historical, religious and cultural significance, an order of Mandamus is hereby issued in the name of Nepal Government, Office of Prime Minister and the Council of Ministers, the Ministry of Population and Environment and the Ministry of Forest and Soil Conservation to prepare a map of all this and declare that area as a protected area pursuant of Section 10(1) of the Environment Protection Act, 1996 or Reserve or Park according to any other law or whatsoever it deems appropriate within one year from the date of receiving this order.
- e) Until the Completion of the tasks within the time limit as mentioned in aforesaid columns (b), (c) and (d), the Ministry of Environment and the Ministry of Forest should be instructed to submit updated progress reports every three months.



f) Let the order be sent to the concerned bodies through the Office of Attorney General, and its continuous monitoring should be done by the Monitoring and Inspection Division of this Court.

\* \* \*

## **11. Teitiota v Ministry of Business Innovation and Employment (Supreme Court of New Zealand 2015)**

*Application for refugee status for native of Kiribati which is facing steadily rising sea water levels as a result of climate change which, over time, may force the inhabitants of Kiribati to leave their islands. However, the Court found that on the facts of this case, the applicant did not face "serious harm" and that there was no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can.*

- A. The application for leave to adduce further evidence is granted.
- B. The application for leave to appeal is dismissed.
- C. There is no order for costs.

### **REASONS**

#### Introduction

[1] The applicant, Mr Teitiota, seeks leave to appeal against a decision of the Court of Appeal under s 245 of the Immigration Act 2009 refusing him leave to appeal to the High Court against a decision of the Immigration and Protection Tribunal. The Tribunal had found that Mr Teitiota could not bring himself within either the Refugee Convention or New Zealand's protected person jurisdiction on the basis that his homeland, Kiribati, was suffering the effects of climate change.

Application for leave to adduce further evidence

[2] The applicant, Mr Teitiota, seeks leave to adduce further evidence, in particular: (a) The decision of officials of the Ministry of Business, Innovation and Employment on the applications of Mr Teitiota's wife and children for refugee and/or protected person status. Their applications were declined. [and] (b) The Synthesis Report of the Fifth Assessment Report of the Intergovernmental Panel on Climate Change published in November 2014.

[3] As the material is in the nature of updating evidence, we grant leave for its admission.

#### Factual background

[4] Mr Teitiota and his wife came to New Zealand from Kiribati in 2007 and remained after their permits expired in October 2010. Accordingly, they are in New Zealand unlawfully. Although their three children were born in New Zealand, none is entitled to New Zealand citizenship.

[5] After being apprehended following a traffic stop, Mr Teitiota applied for refugee status under s 129 of the Immigration Act 2009 and/or protected person status under s 131. No applications were made by his wife and children at that time. The basis for Mr Teitiota's application was that his homeland, Kiribati, is facing steadily rising sea water levels as a result of climate change. The fear is that, over time, the rising sea water levels and the associated environmental degradation will force the inhabitants of Kiribati to leave their islands....



[7] Mr Teitiotia now seeks leave to appeal to this Court against the Court of Appeal's decision... If leave were granted and the appeal succeeded, Mr Teitiotia would obtain leave to appeal to the High Court against the Tribunal's decision....

Should leave be granted?

[11] ... In his written submissions in support of the application for leave, Dr Kidd identifies the key issue as being: [W]hether New Zealand's refugee law extends protection to a person who faces environmental displacement and the operation of a number of International Conventions, most importantly relating to the care of his three children under the age of six born in NZ.

He then submits that the proposed appeal raises four points:

- (a) Whether as a matter of public international law an "environmental refugee" qualifies for protection under art 1A(2) of the Refugee Convention.
- (b) Whether, in the alternative, the manner in which art 1A(2) is incorporated into New Zealand law provides a basis for a broader interpretation of "refugee" in s 129(1) of the Immigration Act.
- (c) Whether the United Nations Convention on the Rights of the Child is relevant to the assessment of "harm" for the purposes of the Refugee Convention.
- (d) Whether the right to life under the ICCPR includes a right of a people not to be deprived of its means of subsistence.

[12] We agree with the Courts below that, in the particular factual context of this case (even with the addition of the new evidence), the questions identified raise no arguable question of law of general or public importance. In relation to the Refugee Convention, while Kiribati undoubtedly faces challenges, Mr Teitiotia does not, if returned, face "serious harm" and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can. Nor do we consider that the provisions of the ICCPR relied on have any application on these facts. Finally, we are not persuaded that there is any risk of a substantial miscarriage of justice.

[13] That said, we note that both the Tribunal and the High Court, emphasised their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case.

Decision

[14] The application for leave to appeal is dismissed. Given the circumstances of the application, there is no order for costs.

\* \* \*

## 12. **Raub Australian Gold Mining v. Hue Shieh Lee (Court of Appeal, Malaysia 2016)**

*This is a SLAPP suit, in which a gold mining company sued a community activist for defamation because of statements she had made describing the results of surveys which had indicated a higher than normal prevalence of illness in areas near the gold mining operations. Recognizing the value to society of activists, the Court held that the statements were not defamatory.*

### JUDGMENT OF THE COURT

#### Introduction

1. This is an appeal against the decision of the High Court in which the learned Judge dismissed the Appellant's /Plaintiff's claims premised on the tort of defamation and malicious falsehood in respect of two alleged publications by the Respondent/Defendant....

#### Background facts

3. The Appellant is the only gold processing company in Bukit Koman, Raub, Pahang.
4. The Respondent has a residential address in Bukit Koman and is the vice president of the Pahang Raub Ban Cyanide in Gold Mining Action Committee (BCAC) which was formed undoubtedly to look after the health and welfare of the residents in Bukit Koman.
5. What had happened was that the Respondent in her task as the vice president of the BCAC allegedly uttered defamatory words in two articles, the first one is set out at paragraph 6 of the Statement of Claim which reads as follows (First Article):
  - (a) "A random survey covering households in the area was conducted in May 2012 and the survey done by interviewing the residents from house to house and the interview was based on a standardize questionnaire with a total of 383 residents responded as the results were tabulated in the appendix page."
  - (b) "So survey results show that, 50% of the residents suffering from skin diseases and eye irritation and another 40% of the respondent has coughing, these results suggest that a possible cause is an air borne irritant affecting these respondents and there were 8 cases of cancer among the respondent."
  - (c) "As specified complaints such as giddiness and lethargy was also high and above 35% and the residents are aware of the business of the gold mine and the gold extracting facility RAGM near to their home. Persistent and strong cyanide like odour has been detected by majority of the residents since the Raub plant started operation in February 2009, such odour has been never present in Bukit Koman in prior times."

6. The second article ... "contains the following passages which were derived from the words spoken, uttered and/or published by the Defendant to persons from Free Malaysia Today (FMT) website knowing and expecting the said words to be reported on the FMT website and are prima facie defamatory of the Plaintiff in the way of its trade and business: (a) "According to Sherly, RAGM has even claimed that they have generated many jobs for the villagers who number a little over 1,000 people. When asked how many villagers work at the mine, Sherly said that it was less than 10 people."

#### Our grounds of decision

7. In any action for defamation, the Court is generally tasked with three issues which are these:

- (i) Whether the published words are defamatory and the burden is on the Plaintiff (the Appellant here) to prove the same?
- (ii) Whether the published words refer to the Plaintiff (the Appellant)?
- (iii) Whether the published words were in fact published to a third person by the Defendant (the Respondent here) and the burden is on the Plaintiff (the Appellant) to prove the same?...

13. In construing those words, this Court must look at them in a holistic manner. The Respondent holds herself as the vice president of BCAC which is an activist group. This fact is not disputed; hence she is a bona fide activist which by definition is a person who campaigns for some kind of social change. In the context of this case, she chose to take up the cause of the residents Bukit Koman who were fearful for their health. Towards that end, a survey on the health of the residents was done and premised on the findings of the survey, the Respondent called a press conference to inform the public the result of the survey. Learned counsel for the Appellant during submission had conceded that had the press statement stopped at paragraph 6(b) of amended statement of claim, the words therein would not be defamatory. What learned counsel finds objectionable is paragraph 6(c) of the amended statement of claim which talks of the presence of cyanide odour which had caused sickness among the residents.

14. To recapitulate, these are the exact words of paragraph 6(c):

“As specified complaints such as giddiness and lethargy was also high and above 35% and the residents are aware of the business of the gold mine and the gold extracting facility RAGM near to their home. Persistent and strong cyanide like odour has been detected by majority of the residents since the Raub plant started operation in February 2009, such odour has been never present in Bukit Koman in prior times.”

15. With respect to learned counsel, what the Respondent was saying was simply that the survey commissioned by the villagers had discovered that there is some sort of cyanide like odour had been detected since 2009 and this odour was not present prior to 2009. In our view, she was only stating a finding of the survey and expressing her concern for the health of the residents. By expressing her concern for the residents, she was only exercising her rights as an activist to bring to the attention of the relevant authorities to allay the residents’ fear. That was what happened. The Department of Health did an investigation and found that the ill health of the residents was not abnormal. But that does not make the statement by the Respondent defamatory. In fact, we say that she should be commended for doing her social duty to bring to the attention what was the fear of the residents at Bukit Koman which is a village next to the plant owned and built by the Appellant. We must also not lose track of the context in which the statements were made. The context being the press conference and a survey report of the residents concerning their health in which the Respondent wanted to highlight to the press and the public.

16. Further, looking at the press statement as a whole in a reasonable and objective manner, we, with respect, cannot see how those words had exposed the Appellant to hatred, contempt or ridicule or lowered the Appellant in the estimation of the society at large. We must also not lose sight of the fact that the existence of activists group is very much part of today’s society, so much so that it is undeniable that they have contributed much to the general wellbeing of the society at large. That said, we are mindful of the obvious fact that they do not have a licence to defame. In the case at hand, the most it can be said, is that what was said may not be “music to the ear” or “irritating” to the Appellant but that cannot be equated to defamatory utterances. We now live in a much more liberal society where the concept of transparency and accountability are very much part and parcel of our lives. Hence the freedom of speech entrenched in our Constitution must be construed in that context. As aptly put by the late Raja Azlan Shah Ag LP (as he

then was) in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29:

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – “with less rigidity and more generosity than other Acts”. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.”

17. What His Royal Highness said was simply that values of society change as time progresses and it is incumbent on the Courts to interpret the fundamental right of freedom of speech to reflect the present day values of the society. Of late our Courts have recognised the right to life in the framework of our constitution (see *Tan Teck Seng v Suruhanjaya Perkhimatan Pendidikan & Anor* (1998) 3 MLJ 289 and *Nor Anak Nyawai v Borneo Pulp* (2001) 6 MLJ 241) which in our view includes the right to live in a safe and healthy environment. ...

23. Taking that in the context of a defamation action as we have here and bearing in mind that the burden of proof is on the Appellant to prove publication of the exact words uttered by the Respondent, the way paragraph 9 of the amended statement of claim is crafted or fashioned does not in any way directly state what exactly the words uttered by the Respondent. In fact, the manner it was fashioned or pleaded was in the form of hearsay evidence. Bundle B documents require proof as to what was heard by the reporter was the same as was reported. Hence we agree with the learned Judge when she said as follows:

“47. In my opinion, the 2nd set of words complained of are not the actual or uttered or published by the Defendant to a third party against the Plaintiff. Instead, the 2nd set of words complained of is in fact a report or statement by FMT and/or Aneesa Alphonsus. The Plaintiff failed to call Aneesa Alphonsus of FMT, the reporter or publisher of the 2nd set of word complained of, as a witness to prove that she had interviewed the Defendant and the Defendant, did say that RAGM/the Plaintiff had even claimed that they have generated a little over 1000 jobs for the villagers, and the Defendant then said that RAGM generated jobs for less than 10 people.”

24. For the aforesaid reason, we say that there was no proof of publication by the Respondent as held by the learned Judge.

25. Assuming we are wrong that there was no publication, we now look at the words complained of in the Second Article. According to the Appellant, those words contain defamatory meaning in that “the [Appellant] is a dishonest company who represented that it had generated many jobs for the villagers when in fact only less than 10 individuals from the village work at the Appellant’s Carbon in Leach Plant” and “the [Appellant] is a company that practices deceit and always misrepresents facts” (see page 72 of submission of Appellant’s counsel).

26. Again applying the approach of Lord Morris, we, with respect, do not find that the meaning as ascribed to by learned counsel for the Appellant as a reasonable interpretation. The Respondent in our view was saying that there are 1000 villagers living a Bukit Koman and the Appellant had only employed less than 10 villagers in its plant there. The number “1000” cannot refer to the number of jobs generated by the Appellant. Hence we agree with learned counsel for the Respondent that the Appellant was putting words into the mouth of the Respondent. Again, we must not lose sight that the Respondent was protecting the welfare of the residents there and was merely expressing a view on the Appellant. That

view may not be accurate but it can easily be corrected by the Appellant through a press release but in no way, does it turn those words into meanings as subscribed to by the Appellant...

28. Accordingly, we dismiss the appeal with costs in the sum of RM20,000.00 subject to payment of allocatur fees. We also order that the deposit be refunded to the Appellant.

\* \* \*

### 13. **Salim v. State of Uttarakhand (High Court of Uttarakhand at Nainital 2017)**

*Following the precedent that a Hindu idol is a juristic entity, the Court in this case held that the Rivers Ganges and Yamuna, worshipped by Hindus, was a juristic person. The Court discussed Hindu practice and belief systems at length and examined the distinction between juristic and natural persons, finding that recognition of an entity as juristic person is for subserving the needs and faith of society which required the rivers be declared legal persons/living person under Articles 48-A and 51A(g) of the Constitution of India. The Court further declared that certain government representatives were to act in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries and also to promote the health and well being of these rivers.*

[In a 2016 judgment, the Court had issued mandatory directions including: 1) eviction of respondents within 12 weeks; 2) Central Government to create a functioning Ganga Management Board within 3 months pursuant to the U.P. Re-organization Act; and 3) immediate banning of mining in river bed of Ganga and its highest flood plain area (and making District and Sub-Divisional Magistrates personally responsible for implementation). In recent communications, the Court has learned that "neither the State of U.P. nor the State of Uttarakhand is cooperating with the Central Government for the constitution of Ganga Management Board" and that other orders had not been complied with."]

... 9. The Court shows its serious displeasure about the manner in which the State of U.P. and State of Uttarakhand have acted in this matter. It is a sign of non-governance. We need not remind the State Governments that they are bound to obey the orders passed by the Central Government failing which the consequences may ensue under Article 365 of the Constitution of India. Consequently, the Chief Secretaries of the State of U.P. and State of Uttarakhand are directed to cooperate with the Central Government in a right earnest manner for the constitution of Ganga Management Board by appointing the Members, failing which it shall be open to the Central Government to constitute the Ganga Management Board without the Members of the successor States, as directed hereinabove.

10. The extraordinary situation has arisen since Rivers Ganga and Yamuna are losing their very existence. This situation requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna.

11. Rivers Ganges and Yamuna are worshipped by Hindus. These rivers are very sacred and revered. The Hindus have a deep spiritual connection with Rivers Ganges & Yamuna. According to Hindu beliefs, a dip in River Ganga can wash away all the sins. The Ganga is also called 'Ganga Maa'. It finds mentioned in ancient Hindu scriptures including 'Rigveda'. The river Ganga originates from Gaumukh Glacier and River Yamuna originates from Yamnotri Glacier.

12. In 1969 (1) SCC 555 their Lordships of Hon. Supreme Court in '*Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta*' have held that a Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebaites who are entrusted with the possession and management of its property. In paragraph no.6, their Lordships have held as under: -

"6. That the consecrated idol in a Hindu temple is a juridical person has been expressly laid down in Manohar Ganesh's case, I.L.R. 12 Bom. 247 which Mr. Prannath Saraswati, the author of the 'Tagore Lectures on Endowments' rightly enough speaks of as one ranking as the leading case on the subject, and in which West J., discusses the whole matter with much erudition. And in more than one case, the decision of the Judicial Committee proceeds on precisely the same footing (Maharanee Shibessourec Dehia v. Mothocpath Acharjo 13 M.I.A. 270 and Prosanna Kumari Debya v. Golab Chand



Baboo L.R. 2 IndAp145 Such ascription of legal personality to an idol must however be incomplete unless it be linked of human guardians for them variously designated in *Debya v. Golab Chand Baboo* L.R. 2 IndAp145 the Judicial Committee observed thus : 'It is only in an ideal sense that property can be said to belong to an idol and the possession and management must in the nature of things be entrusted with some person as shebait or manager. It would seem to follow that the person so entrusted must be necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir'-words which seem to be almost on echo of what was said in relation to a church in a judgment of the days of Edward I: 'A church is always under age and is to be treated as an infant and it is not according to law that infants should be disinherited by the negligence of their guardians or be barred of an action in case they would complain of things wrongfully done by their guardians while they are under age' (Pollock and Maitland's 'History of English Law', Volume I, 483."

13. In 1999 (5) SCC 50, their Lordships of Hon. Apex Court in the case of “*Ram Jankijee Deities & others v. State of Bihar & others*” have held that Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply discover its existence and such images do not require consecration or Pratistha but a manmade image requires consecration. This manmade image may be painted on a wall or canvas. God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. It was further held that the deity/idol are the juridical person entitled to hold the property. In paragraph nos.14, 16 and 19, their Lordships have held as under: -

“14. Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. The Padma Purana says: "the image of Hari (God) prepared of stone earth, wood, metal or the like and established according to the rites laid down in the Vedas, Smritis and Tantras is called the established images...where the self- possessed Vishnu has placed himself on earth in stone or wood for the benefit of mankind, that is styled the self-revealed." (B.K. Mukherjea -Hindu Law of Religious and Charitable Trusts: 5th Edn.) A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply discover its existence and such images do not require consecration or Pratistha but a manmade image requires consecration. This manmade image may be painted on a wall or canvas. The Salgram Shila depicts Narayana being the Lord of the Lords and represents Vishnu Bhagwan. It is a Shila - the shalagram form partaking the form of Lord of the Lords Narayana and Vishnu.

16. The observations of the Division Bench has been in our view true to the Shastras and we do lend our concurrence to the same. If the people believe in the temples' religious efficacy no other requirement exists as regards other areas and the learned Judge it seems has completely overlooked this aspect of Hindu Shastras - In any event, Hindus have in Shastras "Agni" Devta; "Vayu" Devta - these deities are shapeless and formless but for every ritual Hindus offer their oblations before the deity. The Ahuti to the deity is the ultimate - the learned Single Judge however was pleased not to put any reliance thereon. It is not a particular image which is a juridical person but it is a particular bent of mind which consecrate the image.

19. God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. "The Supreme Being has no attribute, which consists of pure spirit and which is without a second being, i.e. God is the only Being existing in reality, there is no other being in real existence excepting Him - (see in this context Golap Chandra Sarkar, Sastri's Hindu Law: 8th Edn.). It is the human concept of the Lord of the Lords - it is the human vision of the Lord of the Lords: How one sees the deity: how one feels the deity and recognises the deity and then establishes the same in the temple upon however performance of the consecration ceremony. Shastras do provide as to how to consecrate and the usual ceremonies of Sankalpa and Utsarga shall have to be performed for proper and effective dedication of the property to a deity and in order to be termed as a juristic person. In the conception of Debutter, two essential ideas are required to be performed: In the first place, the property which is dedicated to the deity vests in an ideal sense in the deity itself as a juristic person and in the second place, the personality of the idol being linked up with natural personality of the shebait, being the manager or being the Dharam karta and who is entrusted with the custody of the idol and who is responsible otherwise for preservation of the property of the idol. The Deva Pratistha Tatwa of Raghunandan and Matsya and Devi Puranas though may not be uniform in its description as to how Pratistha or consecration of image does take place but it is customary that the image is first carried to the Snan Mandap and thereafter the founder utters the Sankalpa Mantra and upon completion thereof, the image is given bath with Holy water, Ghee, Dahi, Honey and Rose water and thereafter the oblation to the sacred fire by which the Pran Pratistha takes place and the eternal spirit is infused in that particular idol and the image is then taken to the temple itself and the same is thereafter formally dedicated to the deity. A simple piece of wood or stone may become the image or idol and divinity is attributed to the same. As noticed above, it is formless, shapeless but it is the human concept of a particular divine existence which gives it the shape, the size and the colour. While it is true that the learned Single Judge has quoted some eminent authors but in our view the same does not however, lend any assistance to the matter in issue and the Principles of Hindu Law seems to have been totally misread by the learned Single Judge."

14. In AIR 2000 SC 1421, their Lordships of Hon. Supreme Court in the case of '*Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others*' have held that the concept 'Juristic Person' arose out of necessities in the human development- Recognition of an entity as juristic person- is for subserving the needs and faith of society. In paragraph nos.11, 13 and 14, their Lordships held as under: -

"11. The very words "Juristic Person" connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a "Person" in the various countries we find surprisingly it has projected differently at different times. In

some countries even human beings were not treated to be as persons in law. Under the Roman Law a "Slave" was not a person. 8

He had no right to a family. He was treated like an animal or chattel. In French Colonies also, before slavery was abolished, the slaves were not treated to be legal persons. They were later given recognition as legal persons only through a statute. Similarly, in the U.S. the African-Americans had no legal rights though they were not treated as chattel. ...

13. With the development of society, 'where an individual's interaction fell short, to upsurge social development, co-operation of a larger circle of individuals was necessitated. Thus, institutions like corporations and companies were created, to help the society in achieving the desired result. The very Constitution of State, municipal corporation, company etc. are all creations of the law and these "Juristic Persons" arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.

Corpus Juris Secundum, Vol. LXV, page 40 says:

Natural person. A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. In the C.J.S. definition 'Person' it is stated that the word "person," in its primary sense, means natural person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons.

Corpus Juris Secundum, Vol. VI, page 778 says:

Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

Salmond on Jurisprudence, 12th Edn., 305 says:

A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human being is one of the most noteworthy feats of the legal imagination.... Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations. ... If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention...

1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members....1

2. The second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself....

3. The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses - a charitable fund, for example or a trust estate...

Jurisprudence by Paton, 3rd Edn. page 349 and 350 says: 9

It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty-bearing units - all entities recognised by the law as capable of being parties to legal relationship. Salmond said: 'So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties...

...Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a corporation which may sue and be sued in the corporate name. An idol may be regarded as a legal persona in itself, or a particular fund may be incorporated. It is clear that neither the idol nor the fund can carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract: and, of necessity, the law recognises certain human agents as representatives of the idol or of the fund. The acts of such agents, however (within limits set by the law and when they are acting as such), are imputed to the legal persona of the idol and are not the juristic acts of the human agents themselves. This is no mere academic distinction, for it is the legal persona of the idol that is bound to the legal relationships created, not that of the agent. Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities." Analytical and Historical Jurisprudence, 3rd Edn. At page 357 describes "person";

We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed.

14. Thus, it is well settled and confirmed by the authorities on jurisprudence and Courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. This recognition is for subserving the needs and faith of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law. When an idol, was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian. As a minor cannot express himself, so the idol, but like a guardian, the Shebait and manager have limitations under which they have to act. Similarly, where there is any endowment for charitable purpose it can create institutions like a church hospital, gurudwara etc. The entrustment of an endowed fund for a purpose can only be used by the person so entrusted for that purpose in as much as he receives it for that purpose alone in trust. When the donor endows for an Idol or for a mosque or for any institution, it necessitates the creation of a juristic person. The law also circumscribes the rights of any person receiving such entrustment to use it only for the purpose of such a juristic person. The endowment may be given for various purposes, may be for a church, idol, gurdwara

or such other things that the human faculty may conceive of, out of faith and conscience but it gains the status of juristic person when it is recognised by the society as such.”

15. In AIR 1972 Allahabad 287, learned Single Judge of Allahabad High Court in case of ‘Moorti Shree Behari ji v. Prem Dass 7 others’ has held that a deity can sue as a pauper. In paragraph no.6, it was held as under: -

“6. The question then that arises is why a deity who is juristic person and can sue or be sued through its Pujari, Shebait or any other person interested, cannot sue as a pauper? To my mind when an incorporated limited company has been held by this Court capable of suing as a pauper, a fortiori it follows that a deity can also sue as a pauper. The learned Judge of the court below was in error in explaining away the Full Bench decision of this Court in the case of AIR 1959 All 540 (FB) (supra) on the observation that It related to a joint stock company, hence not applicable. The court below thus was in error in rejecting the application of the deity for that reason.

16. With the development of the society where the interaction of individuals fell short to upsurge the social development, the concept of juristic person was devised and created by human laws for the purposes of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, as their Lordships have held in the judgments cited hereinabove, that for a bigger thrust of socio-political-scientific development, evolution of a fictional personality to be a juristic person becomes inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. *This recognition is for subserving the needs and faith of the society. Corpus Juris Secundum, Vol.6, page 778 explains the concept of juristic persons/artificial persons thus: “Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.” A juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons. Juristic persons being the arbitrary creations of law, as many kinds of juristic persons have been created by law as the society require for its development. (See Salmond on Jurisprudence 12<sup>th</sup> Edition Pages 305 and 306).* Thus, to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons.

17. All the Hindus have deep Astha in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and well being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.

18. The constitution of Ganga Management Board is necessary for the purpose of irrigation, rural and urban water supply, hydro power generation, navigation, industries. There is utmost expediency to give legal status as a living person/legal entity to Rivers Ganga and Yamuna r/w Articles 48-A and 51A(g) of the Constitution of India.

19. Accordingly, while exercising the parens patrie jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and

the Advocate General of the State of Uttarakhand are hereby declared *persons in loco parentis* as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers.

20. The Advocate General shall represent at all legal proceedings to protect the interest of Rivers Ganges and Yamuna.

21. The presence of the Secretary, Ministry of Water Resources, River Development & Ganga Rejuvenation is dispensed with.

22. Let a copy of this order be sent by the Registry to the Chief Secretary of the State of Uttarakhand forthwith.

\* \* \*

#### **14. Miglani v. State of Uttarakhand & others (High Court of Uttarakhand at Nainital 2017)**

*Ten days after the Salim case, and under continuous mandamus in this PIL, the Court declared, in its parens patriae jurisdiction, that Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system and have the status of legal persons with all corresponding rights. The Court focused on the importance of nature for the planet and for human development, citing a wide variety of literary, spiritual, ecological, as well as domestic and foreign legal sources, and held that the fundamental human rights on which human survival depends are Nature's rights. Skeptical of traditional principles of environmental law (including sustainable development, greening economies, polluter pays, and the precautionary principle), the Court identified certain individuals to act in loco parentis as the human face to protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand.*

... The present miscellaneous application (CLMA 3003/17) has been filed by the petitioner for declaring the Himalayas, Glaciers, Streams, Water Bodies etc. as legal entities as juristic persons at par with pious rivers Ganga and Yamuna.

In normal circumstances, we would not have permitted the petitioner to file an application after the disposal of petition but since the matter was kept alive on the principle of 'continuous mandamus' and for the compliance of the judgment, we have entertained this application in the larger public interest and to avoid further litigation. Moreover, the petition was filed as a public interest litigation. [The Court reviewed the principles governing public interest litigations including that the principles of pleadings are liberal and that technicalities should be eschewed; that there is no determination of adjudication of individual rights and the proceedings cut across and transcend these traditional forms and inhibitions; that the "rights" of those who bring the action on behalf of the others must necessarily be subordinate to the "interests" of those for whose benefit the action is brought; that the grievance in a public interest action, generally speaking, is about the content and conduct of government action in relation to the constitutional or statutory rights of segments of society; that the pattern of relief need not be necessarily be derived logically from the rights asserted or found; and that "more importantly," the court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for the



organisation of the proceedings, moulding of the relief and this is important also supervising the implementation thereof."

16. The writ petitions before us are not inter-partes disputes and have been raised by way of public interest litigation and the controversy before the court is as to whether for social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. ...

Gangotri Glacier is situated in District Uttarakashi of the State of Uttarakhand. It is 330.2 kilometres long and between 0.5 to 2.0 kilometres wide. It is one of the largest Glaciers in the Himalayas. However, it is receding since 1780. The receding is quick after 1971. According to the images of NASA, over the last 25 years, Gangotri glacier has retreated more than 850 meters, with a recession of 76 meters from 1996 to 1999 alone. River Ganga originates from Gangotri Glacier. River Yamuna originates from Yamunotri Glacier. It is also situated in District Uttarkashi. Yamunotri Glacier is also receding at an alarming rate. These Glaciers are receding due to pollution as well as climate change. The urgent remedial steps are required to be taken to ensure that the receding of these Glaciers is stopped.

Both Ganga and Yamuna Rivers are revered as deities by Hindus. Glacial Ice is the largest reservoir of fresh water on earth.

In State of Uttarakhand, there are various natural parks. The natural parks are threatened due to human activities around these parks and overall degradation of environment. These natural parks function as lungs for the entire atmosphere. The forests are also threatened due to large scale de-forestation. The mountains are denuded of the forests and jungles.

In one of the articles contained in "The Secret Abode of Fireflies, Loving and Losing Spaces of Nature in the City", the importance of trees is explained in article "Foresters without Diplomas" written by Sri Wangari Muta Maathai (Kenyan Environmentalist and Nobel Peace Winner-2004), which is as under :-

"We could see Mount Kenya from my house, and I grew up hearing that God lives in Mount Kenya and all good things come from there. The clouds, the rains, the rivers in which I played with frogs' egg and tadpoles; they all start from there. And they said that sometimes Ngai likes to take a walk in the mountains and the forests. If anyone used their machetes to cut down trees, it was said that the trees would bleed. You were only allowed to collect dry, fallen wood for fuel these forests full of fig trees.

'For my people, the fig tree is scared and when we were growing up it was everywhere. I would go collect firewood for our mother; she warned me, "Do not collect firewood from a fig tree. That is a tree of God. We don't cut it. We don't burn it. We don't use it for beauty. It must stand there." When we offer sacrifice, we do it under a fig tree, 'she shares, urging on a greater awareness of how an awesome symmetry binds people to their land and to each other, her thoughts seamlessly flowing in and out of each other and her eyes, brilliant points, charging the mellow lighting and cream sophistication of the room. 'I am spiritually nurtured by the fact that what I am doing is in accordance with a spiritual constitution, a rhythm. For me, in the work that I do, it is a spiritual fulfillment, rather than a religious or dogmatic conviction. I was raised by people who were not detached from the land. We didn't have anything written, all our scriptures were oral, and they are embedded in me, although I went through Christian teaching and became a Catholic. But I do find that even in other scriptures, you come across a Garden of Eden or some engagement with nature. And there is much more to forests than trees; trees are only what we see, and there is so much we still don't understand,' she stresses.

Wangari continues with glorious concentration, ‘One of the ways through which communities conserve their biodiversity and their resources is through culture, and I want to emphasize that for me culture is very important, very enriching, because culture influences who we are. Festivals, rituals and ceremonies are all a part of our culture as well, and can you imagine how much we conserved because we incorporated nature into our festivals, into our religions, into our dances, into our songs, into our symbols, into our stories? And they define who we are. When they are destroyed, our environment too is destroyed. Any very often when we forget who we are, we lose all our wonderful associations, our values that we’ve brought from the past generations. Once this gets translated into resources, it is converted into money...but in life everything is not money!’ her voices rises, indignant, exasperated. ...

In the same book in article captioned “Nature has Rights too” written by Vikram Soni & Sanjay Parikh, the rights of Nature have been explained, as under: -

“Human rights commissions are obligatory vigilantes in all democracies. Human rights are about inequities between one set of human beings and another. These range from usurping the sovereign rights of one nation by another more powerful one, to more local violations. They arise when the rich and powerful exploit the poor and disenfranchised. They reveal themselves in violence against women, violence against members of lower caste and creeds and other such instances. They are horrible acts and are often portrayed graphically.

Violations against nature can be equally appalling despite being viewed through the filter of ‘environmental damage’. The Stockholm Declaration accepts the environment as part of basic human rights-the right to life itself.

The United Nations Millennium Report and the International Panel on Climate Change (IPCC) Reports both indicate that 60 per cent of earth’s ecosystems are experiencing terminal loss. And the loss of these natural resources, whether of the Amazon forest, of sea life, elephants and tigers, rivers and lakes, glaciers or aquifers below the ground is strongly impacting human life.

Whereas human rights occupy centre stage and deal with human conflict, loss of natural resources threatens human survival itself. We must understand that the fundamental human rights on which human survival depends are Nature’s rights.

Language is such a powerful medium of communication that it colours all our metaphors, beliefs and imagination. But language can also craft deception – it can wash over common sense and sensibility. This is the case in the present scenario of extreme material consumption powered by the global free market.

The seductive vision of development has become so pre-emptive that the few remaining original forests – our biodiversity treasury- are being destroyed to make way for huge mines or dams or lucrative real estate projects. And we attempt to balance the destruction with ‘compensatory afforestation’, words that suggest that whatever damage is being done can be undone or compensated by artificial plantation.

To the unschooled and unsuspecting, this would appear to be a fair trade-off for development. But it is like giving sanction to the insane national that it is all right to kill all wild tigers as long as we replace them by farming the same population in captivity. Can valuable natural biodiversity that has evolved over thousands of years ever be compensated? Such subterfuge finds acceptance by court and government and is often subsumed in the dangerous cliché ‘sustainable development’. If sustainable development finishes off all our biodiversity, heritage and resources, is it admissible?

‘Green buildings’ is acceptable currency in the destruction of valuable heritage and resources. In the popular imagination, the word ‘green’ is so comforting that it clouds, the real loss, which is irreplaceable. So do modern terms like ‘ecotourism’ and ‘ecofriendly development’, where the prefix ‘eco’ works to

trample the true value of the natural resource. Natural water resources are exploited by commercial building activities for short-term profits; and there's the magical phrase 'water harvesting'. Apart from depleting an irreplaceable natural resource like a deep underground aquifer or a flood plain, it is a well-kept secret that water harvesting saves no more than a fraction of the original resource. ...

Having a law is one thing, ensuring its implementation is quite another. The precautionary principle has not been enforced, for example, on big projects like the Three Gorges dam on the Yangtze river in China, which has not been declared a disaster by the government. The Tehri dam on the Ganga, in a seismic Himalayan zone, and the Sardar Sarovar dam on the Narmada in India may follow suit.

Another notion is that poverty is itself a cause of pollution and that economic development will remove poverty and improve the environment. Poverty alleviation is often misused to justify development at the cost of environmental degradation. Let's see what is happening to people who have no link with the global economy but live simply amidst pure unpolluted streams, clean air and forests. The environment is what gives our lives a quality that cannot be bought, and they have preserved it this way. Their simple lifestyle is non-invasive. But now this basic and essential resource is being whittled away by big companies that acquire huge swathes of virgin land for mining or 'development', leaving these people mute and destitute.

In the present climate, when we have already lost over half our natural resources, it is evident that principles like 'the polluter pays', 'the precautionary principle' or 'sustainable development' do not work any more- we are well past the point of precaution – and must be changed to stop further damage to resources that cannot be created by man.

Instead, we must have a Nature's Rights Commission made up of concerned citizens and scientists whose integrity is above any political and monetary affiliation. We only need a simple law that provides absolute protection to all valuable natural resources, be it forests, rivers, aquifers or lakes. The law could be a public trust doctrine, which has its basis in the ancient belief that Nature's laws impose certain conditions on human conduct in its relationship with Nature. There is a precedent for this. The Israeli parliament- the Knesset – has set up the Israeli Commission for Future Generations as an inner-parliamentary entity. Its charter is to safeguard valuable natural heritage and natural resources. Its role is to oversee each legislative process, with special regard to long-term issues, and to prevent potentially damaging legislation from passage in the Knesset. This Commission has been given the authority to initiate bills that advance the interests of future generations. There is a historical precedent as well. Under Byzantine law, the concept of *jus gentium*, a law for all people and nations, was developed to protect Nature's resources. Later, this led to the Public Trust Doctrine in the Magna Carta of the thirteenth century. More recently, the Water Framework Directive of the European Union recognises natural water resources as a protected heritage."

[The Court then reviews the spiritual and ecological value of the Himalayan ecosystems including their flora and fauna, phytogeographical considerations, endemism, and the conservation of endangered species. The Court also reviewed major milestones in environmental protection at the international level.

...

National policies and/or legislation aimed at management, conservation and sustainable development of forests should include the protection of ecologically viable representative or unique examples of forests, including primary/or-growth forests, cultural, spiritual, historical, religious and other unique and valued forests of national importance. National policies should ensure that environmental impact assessments should be carried out where actions are likely to have significant adverse impacts on important forest resources. National policy should be formulated with respect to all types of forests taking into account of the pressures and demands imposed on forest ecosystems.

Lord Gautam Budha and Lord Mahavira also sat under the trees for enlightenment. The trees in India are worshipped as incarnations of the goddess: Bamani Rupeshwari, Vandurga. The goddess of the forest, Aranyi, has inspired a whole body of texts, known as 'Aranyi Sanskriti'. It means, "the Civilisation of Forest".

Animals and birds are trapped in the fire. Birds lose their sense of direction due to heavy smog.

It is the human beings who have encroached upon the forest land of wild animals. The habitat of wild animal is shrinking resulting in wild animals coming contact with the human beings.

Trees and wild animals have natural fundamental rights to survive in their natural own habitat and healthy environment.

The New Zealand Parliament has enacted '*Te 42 Urewera Act 2014*' whereby the 'Urewera National Park' has been given the legal entity under Section 11 of the Act. The purpose of the Act is to preserve, as far as possible, *Te Urewera* in its natural state, the indigenous ecological systems, biodiversity and its historical cultural heritage.

It is the fundamental duty of all the citizens to preserve and conserve the nature in its pristine glory. There is a grave threat to the very existence of Glaciers, Air, Rivers, rivulets, streams, Water Bodies including Meadows and Dales. The Court can take judicial notice of the fact that few cities are not liveable due to higher level of pollutants in the atmosphere. The Courts are duty bound to protect the environmental ecology under the 'New Environment Justice Jurisprudence' and also under the principles of *parens patriae*.

The principle of *parens patriae* has been evoked by the Hon. U.S. Supreme Court in 136 U.S. 1 (1890) in the case of *Mormon Church v. United States*, 136 U.S. 1 as under: ... "here the legislature is the *parens patriae*, and unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England." Chief Justice Marshall, in the *Dartmouth College Case*, said: "By the Revolution, the duties as well as the powers of government devolved on the people. . . . It is admitted that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department."

And Mr. Justice Baldwin, in *Magill v. Brown*, Brightly 346, 373, a case arising on Sarah Zane's will, referring to this declaration of Chief Justice Marshall, said: "The Revolution devolved on the state all the transcendent power of Parliament, and the prerogative of the Crown, and gave their acts the same force and effect." ... [additional quotations from U.S. Supreme Court cases omitted, and distinguishing those adopting a common law interpretation]

This summary of the case law involving *parens patriae* actions leads to the following conclusions. In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development -- neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract -- certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and wellbeing -- both physical and economic -- of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system. The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. One helpful indication in

determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.

Distinct from but related to the general wellbeing of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system. Thus, the State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce. ... Once again, we caution that the State must be more than a nominal party. But a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population. We turn now to the allegations of the complaint to determine whether they satisfy either or both of these criteria.

The term *parens patriae* has been explained [as follows:] the “prerogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function often necessary to be exercised in the interest of humanity, and for the prevention of injury to those who cannot protect themselves.” After the American Revolution, the U.S. states extended this quasi-sovereign doctrine to cover “disputes between the interests of separate states with regard to natural resources and territory.” The doctrine has a lengthy history of application to protect “rivers, the sea, and the seashore... [that] is especially important to the community's well being.

(2) Environmental *Parens Patriae* Actions -*Parens patriae* public nuisance claims for water and air pollution were used in several interstate environmental lawsuits in the early twentieth century. By the turn of the twentieth century, states were suing other states using their *parens patriae* powers to protect natural resources and territory. ...

### (3) The *Parens Patriae* Action as a Fourth Branch of Government

Critics fear that the unseemly alliance of greedy trial lawyers and publicity-seeking government lawyers will undermine the public interest. Public health torts by state AGs raise the objectionable prospect of trial lawyers receiving multi-billion dollar payouts, among other public policy and ethical concerns. The state AGs solicited trial lawyers to pursue contingent fee lawsuits, which meant that if the state lost, the private attorneys would bear the expenses. The concern is that these contingency fee arrangements may prevent government lawyers from properly representing their state's citizenry. Cash-strapped states may be tempted to misuse the legal system by extorting concessions from deep-pocketed corporations even when the legal liability is unclear. Financial, careerist and/or ideological incentives may encourage AGs to violate their fiduciary duty to protect the public, creating a crisis of legitimacy.

239 American Psychiatric Association, News Release, American Psychiatric Association Calls for Payment of Oil Spill Mental Health Claims (Aug. 13, 2010) <http://www.psych.org/MainMenu/Newsroom/NewsReleases/2010-News-Releases/Oil-Spill-Mental-Health-Claims-.aspx?FT=.pdf> (last visited Aug. 26, 2010) (“Mental illnesses brought on by difficult situations surrounding the BP oil spill may be less visible than other injuries, but they are real. An entire way of life has been destroyed, and this is causing anxiety, depression, posttraumatic stress disorder, substance use disorders, thoughts of suicide and other problems,” said APA President Deborah Hensler, a prominent critic of these “social policy torts” asks whether it is appropriate for state AGs and trial lawyers to be bypassing the legislature in regulating by government litigation: Social policy torts have been criticized as ‘a form of regulation through litigation’ in that attorneys general not only seek payments for government programs that help those who have been injured but also seek changes in the business practices of the



industries being sued. The tobacco litigation has inspired new private/public partnerships in handgun, lead paint, and managed care litigation.

Despite these risks, a “de facto fourth branch of government” may be a pragmatic necessity. Hundreds of thousands of potential plaintiffs will not be able to find representation if no collective injury mechanism is available. Tort reforms such as caps on damages enacted in Gulf Coast states makes it likely that attorneys will screen out many worthy cases. To the extent that many businesses and others injured by the oil spill do not sue, there will be a problem of under-deterrence. Government-sponsored *parens patriae* lawsuits result in a deterrence gain from bringing cases not cost-efficient if filed by individual claimants....

Besides our constitutional and legal duties, it is our moral duty to protect the environment and ecology. ...

Rivers and Lakes have intrinsic right not to be polluted. Polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to person.

Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system. The rivers are not just water bodies. These are scientifically and biologically living.

The rivers, forests, lakes, water bodies, air, glaciers, human life are unified and are indivisible whole. The integrity of the rivers is required to be maintained from Glaciers to Ocean.

However, we would hasten to observe that the local inhabitants living on the banks of rivers, lakes and whose lives are linked with rivers and lakes must have their voice too.

The rivers sustained the aquatic life. The flora and fauna are also dependent on the rivers.

Rivers are grasping for breath. We must recognize and bestow the Constitutional legal rights to the ‘Mother Earth’.

The very existence of the rivers, forests, lakes, water bodies, air and glaciers is at stake due to global warming, climate change and pollution.

Trees are the buffer zone necessary to protect the glaciers from direct and indirect heat. One tree sustains life of thousand of insects. Birds chirp and make their nests on the trees. Trees are mini-reservoirs and have a capacity to store the water. The water stored by the trees is released slowly. The Oak tree preserves about 75,000/- gallon of pure water. Plucking of one leaf, grass blade also damages the environment universally.

The leading civilizations have vanished due to severe droughts. Water is elixir of life and we must conserve and preserve every drop of water. The value of water should not be undermined only for the reason that it is still available in plenty.

The past generations have handed over the ‘Mother Earth’ to us in its pristine glory and we are morally bound to hand over the same Mother Earth to the next generation.

With the development of society where the interaction of individuals fell short to upsurge the social development, the concept of juristic person was devised and created by human laws for the purposes of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person. For a bigger thrust of socio-political-scientific development, evolution of a fictional personality to be a juristic person becomes inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. This recognition is for subserving the needs and faith of the society. All



the persons have a constitutional and moral responsibility to endeavour to avoid damage or injury to nature (*in damno vitando*). Any person causing any injury and harm, intentionally or unintentionally to the Himalayas, Glaciers, rivers, streams, rivulets, lakes, air, meadows, dales, jungles and forests is liable to be proceeded against under the common law, penal laws, environmental laws and other statutory enactments governing the field.

*Corpus Juris Secundum*, Vol.6, page 778 explains the concept of juristic persons/artificial persons thus: “Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.” A juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons. Juristic persons being the arbitrary creations of law, as many kinds of juristic persons have been created by law as the society require for its development. (*See Salmond on Jurisprudence 12<sup>th</sup> Edition Pages 305 and 306*). Thus, the Himalayan Mountain Ranges, Glaciers, rivers, streams, rivulets, lakes, jungles, air, forests, meadows, dales, wetlands, grasslands and springs are required to be declared as the legal entity/legal person/juristic person/ juridical person/moral person/artificial person for their survival, safety, sustenance and resurgence.

...

Accordingly, the following directions are issued: -

1. The Union of India is directed to complete the tender process of 10 Crematoriums within eight weeks. Codal formalities for remaining 40 Crematoriums be also completed within three months.
2. We, by invoking our *parens patriae* jurisdiction, declare the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/juridical person/ moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/ legal rights.
3. The Chief Secretary, State of Uttarakhand, Director NAMAMI Gange Project, Mr. Praveen Kumar, Director (NMCg), Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange Project, Advocate General, State of Uttarakhand, Dr. Balram K. Gupta, Director (Academics), Chandigarh Judicial Academy and Mr. M.C. Mehta, Senior Advocate, Hon. Supreme Court, are hereby declared the *persons in loco parentis* as the human face to protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand. These Officers are bound to uphold the status of these bodies and also to promote their health and well being.
4. The Chief Secretary of the State of Uttarakhand is also permitted to co-opt as many as Seven public representatives from all the cities, towns and villages of the State of Uttarakhand to give representation to the communities living on the banks of rivers near lakes and glaciers.
5. The rights of these legal entities shall be equivalent to the rights of human beings and the injury/harm caused to these bodies shall be treated as harm/injury caused to the human beings.
6. There shall be a direction to the respondent no.2 to strictly comply by the judgment dated 02.12.2016 and to ensure that the industries, hotels, Ashrams and other establishments, which are discharging the sewerage in the rivers, are sealed.
7. Now, as far direction no. ‘A’, issued vide judgment dated 02.12.2016, is concerned, the Union of India is directed to reconcile the constitution of Inter-State Council under Article 263 of the Constitution of India vis-à-vis the Statutory Authority created under Section 3 of the Environment (Protection) Act, by

making it Ganga specific, and the decision, to this effect, be taken within six months instead of one month, as undertaken by Mr. Praveen Kumar, Director (NMCG).

The Court appreciates the timely release of a sum of Rs.862.00 crores by the Union of India. The Court also places on record its appreciation for the sincere concern shown by Ms. Uma Bharti, Minister, Water Resources, River Development & Ganga Rejuvenation, Dr. Amarjit Singh, Secretary, Ministry of Water Resources, River Development & Ganga Rejuvenation, Mr. U.P. Singh, Director General (NMCG), Mr. Praveen Kumar, Director (NMCG) and Mr. Ishwar Singh, Legal Advisor, NAMAMI Ganga Project for their untiring efforts made to save River Ganga in particular and environment in general.

All pending applications stand disposed of in the above terms.

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## 15. Ashgar Leghari v. Federation of Pakistan (Lahore High Court, 2018).

*This case was brought under the Lahore High Court's continuing mandamus jurisdiction, assessing the work of the Climate Change Commission it had established in 2015. The Court reviewed at some length the threats of climate change in Pakistan, considering its effects on water resources as well as forestry, agriculture, among other things but found that the Commission had been the driving force in sensitizing the Governments and other stakeholders regarding gravity and importance of climate change and had accomplished 66% of the goals assigned to it. The Court then dissolved the CCC and established a Standing Committee to act as a link between the Court and the Executive and to render assistance to the government to further implementation.*

*Climate change is one of the greatest threats to human rights of our generation, posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world.*

*Achim Steiner<sup>2</sup>  
UNEP Executive Director*

The petitioner, who is an agriculturist, has approached this Court as a citizen for the enforcement of his fundamental rights. He submits that overwhelming majority of scientists, experts, and professional scientific organizations related to earth sciences agree that there is sufficient evidence that climate change is for real. He submits that no one can deny the devastating impact of increase in frequency and intensity of climate extremes. Further, most of the experts agree that the major cause is human activities, which include a complex interaction with the natural environment coupled with social and economic changes that are increasing the greenhouse gases (GHG) in the atmosphere, which are increasing global temperature and in turn causing climate change.

2. The climate system is a highly complex system consisting of the atmosphere, the hydrosphere, the cryosphere, the land surface and the biosphere, and the interactions between them. He submits that for Pakistan, climate change is no longer a distant threat. We are already feeling and experiencing its impacts across the country and the region. The country experienced devastating floods during the last three years. These changes come with far reaching consequences and real economic costs.

3. Learned counsel for the petitioner submits that in order to address the threat of climate change, the National Climate Change Policy, 2012 (“Policy”) and the Framework for Implementation of Climate Change Policy (2014-2030) (“Framework”) has been announced by the Ministry of Climate Change, Government of Pakistan, however, no implementation on the ground has taken place. He fears that in the absence of any strategy by the Government to conserve water or move to heat resilient crops, he will not be able to sustain his livelihood. He submits that inaction on the part of Ministry of Climate Change and other Ministries and Departments in not implementing the Framework, offends his fundamental rights, in particular, Articles 9 and 14 of the Constitution besides the constitutional principles of social and economic justice. He submits that international environmental principles like the doctrine of public trust, sustainable development, precautionary principle and intergenerational equity form part of the abovementioned fundamental rights also stand offended. Reliance is placed on *Ms. Imrana Tiwana and*

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<sup>2</sup> Human Rights and Climate Change – UNEP- 2015

*others v. Province of Punjab and others* (PLD 2015 Lahore 522) and *Ms. Shehla Zia and others v. WAPDA* (PLD 1994 SC 693).

4. The Court treated this environmental public interest petition as a *rolling review* or a *continuing mandamus* and considering it to be a writ of *kalikasan*<sup>3</sup>, as they call it in Philippines, the Court proceeded in an inquisitorial manner by summoning the following parties for assistance:

**Federal Government.**

- i. Cabinet Division, Government of Pakistan.
- ii. Ministry of Finance, Revenue and Planning and Development.
- iii. Ministry of Foreign Affairs
- iv. Ministry of Inter-Provisional Coordination.
- v. Ministry of Law and Justice
- vi. Ministry of Climate Change.
- vii. Ministry of National Food Security and Research.
- viii. Ministry of Water and Power
- ix. Irrigation Department.
- x. National Disaster Management Authority (NDMA).

**Provincial Government.**

- i. Agricultural Department.
- ii. Environment Protection Department/EPA.
- iii. Food Department.
- iv. Forestry, Wildlife and Fisheries Department.
- v. Health Department.
- vi. Housing, Urban Development and Public Health Engineering Department.
- vii. Planning and Development Department.
- viii. Irrigation Department.
- ix. Law and Parliamentary Affairs Department.
- x. Disaster Management Department (DMD).

5. The above Ministries and Departments along with their focal persons rendered full assistance and filed their respective replies. The National Climate Change Policy, 2010 provides as under:-

**1. Goal**

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.

**2. Policy Objectives** --The main objectives of Pakistan's Climate Change Policy include:

1. To pursue sustained economic growth by appropriately addressing the challenges of climate change;
2. To integrate climate change policy with other inter-related national policies;

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<sup>3</sup> a legal remedy designed for the protection of one's constitutional right to a healthy environment.

3. To focus on pro-poor gender sensitive adaptation while also promoting mitigation to the extent possible in a cost-effective manner;
4. To ensure water security, food security and energy security of the country in the face of the challenges posed by climate change;
5. To minimize the risks arising from the expected increase in frequency and intensity of extreme weather events such as floods, droughts and tropical storms;
6. To strengthen inter-ministerial decision making and coordination mechanisms on climate change;
7. To facilitate effective use of the opportunities, particularly financial, available both nationally and internationally;
8. To foster the development of appropriate economic incentives to encourage public and private sector investment in adaptation measures;
9. To enhance the awareness, skill and institutional capacity of relevant stakeholders;
10. To promote conservation of natural resources and long term sustainability.

### **3. Pakistan's Vulnerability to Climate Change Threats**

The important climate change threats to Pakistan are:

1. Considerable increase in the frequency and intensity of extreme weather events, coupled with erratic monsoon rains causing frequent and intense floods and droughts;
2. Projected recession of the Hindu Kush-Karakoram-Himalayan (HKH) glaciers due to global warming and carbon soot deposits from trans-boundary pollution sources, threatening water inflows into the Indus River System (IRS);
3. Increased siltation of major dams caused by more frequent and intense floods;
4. Rising temperatures resulting in enhanced heat and water-stressed conditions, particularly in arid and semi-arid regions, leading to reduced agricultural productivity;
5. Further decrease in the already scanty forest cover, from too rapid change in climatic conditions to allow natural migration of adversely affected plant species;
6. Increased intrusion of saline water in the Indus delta, adversely affecting coastal agriculture, mangroves and the breeding grounds of fish;
7. Threat to coastal areas due to projected sea level rise and increased cyclonic activity due to higher sea surface temperatures;

8. Increased stress between upper riparian and lower riparian regions in relation to sharing of water resources;

9. Increased health risks and climate change induced migration.

The above threats lead to major survival concerns for Pakistan, particularly in relation to the country's water security, food security and energy security.

#### 4. Climate Change Adaptation

Pakistan makes a tiny contribution to total global greenhouse gas (GHG) emissions (among the lowest in the world) but it is among the countries most vulnerable to climate change, and it has very low technical and financial capacity to adapt to its adverse impacts. For Pakistan to continue on a development path to achieve the goals articulated in the Planning Commission's Vision 2030 document, it is imperative to prepare the ground to enable it to face this new challenge. While Pakistan is working on a strategy that seeks to conserve energy, improve energy efficiency and optimize fuel mix to support global efforts for reduction in GHG emissions, the more immediate and pressing task is to prepare itself for adaptation to climate change. Only by devising and implementing appropriate adaptation measures will it be possible to ensure water, food and energy security for the country as well as to minimize the impact of natural disasters on human life, health and property.

##### 4.1. Water Resources

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. Country specific climate change projections strongly suggest the following future trends in Pakistan: decrease in glacier volume and snow cover leading to alterations in the seasonal flow pattern of the Indus River System (IRS); increased annual flows for a few decades followed by decline in flows in subsequent years; increase in the formation and outburst of glacial lakes; higher frequency and intensity of extreme climate events coupled with irregular monsoon rains causing frequent floods and droughts; and greater demand on water due to higher evapotranspiration rates at elevated temperatures.

These trends will have a significant impact on the spatial and temporal distribution of water resources on both annual and inter-annual basis in the country. This will further exacerbate the already difficult situation of a water- stressed country facing demand increases due to population growth and increasing economic activity.

6. In order to implement the National Climate Change Policy, Federal Government has come up with the Framework for Implementation of Climate Change Policy (2014-2030) which, *inter-alia*, sets four time-frames for implementation of the Policy in the following manner:-

Priority Actions (PA): within 2-years

Short term Actions (SA): within 5-years

Medium term Actions (MA): within 10 years

Long term Actions (LA): within 20-years

7. In view of Pakistan's high vulnerability to adverse impacts of climate change, in particular extreme events, adaptation effort is the focus of the Policy and the Framework. The vulnerabilities of various



sectors to climate change have been highlighted and appropriate adaptation actions spelled out. These cover actions to address issues in various sectors such as water, agriculture, forestry, coastal areas, biodiversity, health and other vulnerable ecosystems. Notwithstanding the fact that Pakistan's contribution to global greenhouse gas emissions is very small, its role as a responsible member of the global community in combating climate change has been highlighted by giving due importance to mitigation efforts in sectors such as energy, forestry, transport, industries, urban planning, agriculture and livestock.

8. The Framework for Implementation of the Policy has been developed not as an end in itself, but rather a catalyst for mainstreaming climate change concerns into decision making that will create enabling conditions for integrated climate compatible development processes. It is, therefore, not a stand-alone document, but rather an integral and synergistic complement to future planning in the country. The Framework is a “living document”. 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.

9. The Framework provides adaptation actions for various sectors in the following manner:-

#### Water Sector: Adaptation Actions:

Pakistan is an agricultural country. Therefore water is an essential resource for sustained economic growth as well as human survival. Water, which is one of the most important national resources is increasingly becoming a scarce natural resource. Presently agriculture sector is using 93% domestic sector 5% and industrial sector 2% of water resources. Our Indus Basin Irrigation System (IBIS) is the world's largest contiguous irrigation system. Water resources are inextricably linked with climate; hence, the projected climate change has serious implications for Pakistan's water resources. The freshwater resources in Pakistan are mainly based on snow and glacier melt and monsoon rains, both being highly sensitive to climate change. Pakistan has moved from a water affluent country to water stressed country. In 1947, per capita water availability was 5000 cubic meter, which has currently decreased to around 1000 cubic meter, and projected to decrease to 800 cubic meter per capita by the year 2025. The country-specific climate projections strongly suggest the following future trends in Pakistan: decrease in the glacier volume and snow cover leading to alterations in the seasonal flow pattern of IRS; increase in the formation and burst of glacial lakes; higher frequency and intensity of extreme climate events coupled with irregular monsoon rains causing frequent floods and droughts; greater demand of water due to increased evapotranspiration rates at elevated temperatures.

#### Agriculture and Livestock: Adaptation Actions:

Agriculture sector is the life line and the single largest sector of Pakistan's economy. It contributes 21% to the GDP, employs 45% of the labour force and contributes about 70% to the export earnings. Agriculture in Pakistan is greatly affected by short term climate variability and could be harmed significantly by long-term climate change.

Shortening length of growing period:

The duration of crop growth cycle is related to temperature; an increase in temperature will speed up crop growth and shorten the duration between sowing and harvesting. This shortening could have an adverse effect on productivity of crops and fodder for livestock.

Changes in river flows:

The Indus River System gets about 80% water from the Hindu-Kush-Himalaya glaciers. Increasing atmospheric temperatures are expected to increase glacier melt. IPCC (2007) projected that glacier melt in Himalayas would cause increased rivers flows during the next few decades and then followed by decreased river flows, as the glaciers recede.

Increased crop evapotranspiration:

Increased atmospheric temperature would cause higher water evaporation from soil and from plant leaves. These higher evapotranspiration losses would mean that plants would need more water to maintain optimum growth.

Land Degradation:

The deterioration of productive agricultural land areas due to water logging and salinity is causing major threat to food security in the country. Soil erosion due to water and wind is universally recognized as a serious threat to productive agriculture land areas. Water and wind erosion is the direct consequence of climatic parameters of high intensity rainfall, wind-velocity and higher temperatures. The northern mountainous region suffers from unfavourable soil and moisture regime, thereby causing soil erosion. Similarly arid regions of Punjab (Cholistan), Sindh (Tharparker) and Balochistan (Chaghi Desert and sandy coastal areas) are affected by wind-erosion.

Extreme Weather Events:

According to IPCC (2007), the frequency and intensity of extreme weather events, such as floods, heavy precipitation events, droughts, cyclones etc. are expected to increase in future. Such extreme events can also affect food security.

Livestock Sector:

Since the agriculture & livestock sector are heavily dependent on the vagaries of nature, it is highly vulnerable to climate change phenomena. Climate change will impact food security of the country mainly through reduced crop productivity, adverse impact on livestock health and increased agricultural production losses because of extreme weather events. This will necessitate the agriculture and livestock sectors, particularly in rain-fed areas, to adapt to these climatic changes.

Forestry Sector:

Generally most of the forests in Pakistan are prone to the threats of changing climate in the form of changes in species composition, disease and insect attacks, more frequent forest fires, and shifting habitats due to unfavourable climatic conditions. Further research is required to investigate the real and specific climate change threats to each forest type so as to undertake realistic adaptation measures.

10. Petitioner submits that the most immediate and serious threat to Pakistan is that of water, food and energy security. It is submitted that priority items under the Framework have not been complied with and

no action has been taken by the respective Governments or authorities to develop adaptative capacity and resilience to address climate change.

11. Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.

12. Fundamental rights, like the right to life (Article 9) which includes the right to a healthy and clean environment and right to human dignity (Article 14) read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has taken a center stage in the scheme of our constitutional rights. It appears that we have to move on. The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e., *Climate Change*.

13. As no substantial work has been done to implement the Framework by the Government, and realizing that its effective and immediate implementation is necessary for the protection and safeguard of the fundamental rights of the people, this Court constituted Climate Change Commission ("CCC") vide order dated 14.09.2015 in the following manner:- [naming members including Dr. Parvez Hassan (Advocate), and high level representatives of the ministries of Climate Change, Water and Power, Finance, the National Disaster Management Authority, the Ministry of Foreign Affairs, and Provincial departments of Irrigation, Agriculture, Food, Forest, Health, Disaster Management, Environmental Protection, as well as many other public officials and private advocates. The Court further identified the terms of reference of the Commission and its powers, as well as setting down some details concerning voting structure, expenses, and secretariat. The Court required the Commission to "file interim reports as and when directed by" the Court.

15. Water has become Pakistan's number one development and governance issue.

"[C]limate change poses more existential challenges. The changing monsoon pattern is making water supply erratic. It has started reaching the upper reaches of our Himalayan ranges and parts of Balochistan not traditionally covered by monsoon rains. Karachi and other coastal areas have begun to receive more frequent warnings about cyclones. Changes in rain patterns raise questions about food security and the need to invest in climate-smart agriculture. While we have a greater incidence of hydro-metrological droughts in parts of Balochistan, Punjab and Sindh, urban and rural flooding is becoming a recurrent phenomenon. In fact, torrential rains in the Jammu region and the upper reaches of the Kabul river basin have flooded Sialkot in Punjab and Nowshera in KP, drawing attention to emerging transboundary risks. As the glaciers recede, we face the threat of permanent reduction in our water lifeline."<sup>4</sup>

16. [The Court included the 2017 recommendations of the Climate Change Commission as well as the 2018 recommendations of the Council of Common Interest.]

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<sup>4</sup> The fuel of economic growth by Ali Tauqeer Sheikh, CEO, LEAD Pakistan, Dawn, March 22nd, 2016.

19. Climate Change Commission was constituted to ensure that the concerned Ministries, as well as, concerned Departments take charge of the matter so that the Province, as well as, the Country moves towards climate resilient development. According to the report submitted by the Commission almost 66.11% of the priority items of the Framework have been completed due to effort made by the Commission. The Chairman submits that the Commission has achieved its goals and now the matters should be left to the respective Governments to take forward. It is also pointed out that during the pendency of this petition the Federal Government has promulgated “Pakistan Climate Change Act, 2017” (“Act”), which was gazetted on April, 3, 2017 and establishes Pakistan Climate Change Authority. He proposes that in order to move forward, it is best if the Federal Government is directed to give effect to the aforesaid Act and further implement the Framework. I tend to agree with the Chairman of the CCC. Commissions constituted by our courts have played multiple roles, especially commissions constituted to address environmental concerns. In this case the Commission has been the driving force in sensitizing the Governments and other stakeholders regarding gravity and importance of climate change. The Commission has been a platform for discussion and planning regarding climate change and has materially assisted in developing human capacity to face the challenges of climate change under the auspices of the members of the Commission, in particular LEAD Pakistan. It is only because of the able stewardship of the Chairman, Dr. Parvez Hassan and the untiring and passionate efforts of the Members of the Commission that 66.11% of priority actions under the Framework have been successfully implemented.

#### *Environmental Justice*

20. On a jurisprudential plane, a judge today must be conscious and alive to the beauty and magnificence of nature, the interconnectedness of life systems on this planet and the interdependence of ecosystems. From *Environmental Justice*, which was largely localized and limited to our own ecosystems and biodiversity, we have moved on to *Climate Justice*. Our environmental jurisprudence from *Shehla Zia case* to *Imrana Tiwana case* (referred to above) has weaved our constitutional values and fundamental rights with the international environmental principles. The environmental issues brought to our courts were local geographical issues, be it air pollution, urban planning, water scarcity, deforestation or noise pollution. Being a local issue, evolution of environmental justice over these years revolved around the national and provincial environmental laws, fundamental rights and principles of international environmental laws. The solutions entailed penalties and shifting or stoppage of polluting industries based on a precautionary approach leading to the recognition of the Environmental Impact Assessment (EIA).

#### *Climate Justice*

21. Enter Climate Change. With this the construct of *Environmental Justice* requires reconsideration. Climate Justice links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly. Climate justice is informed by science, responds to science and acknowledges the need for equitable stewardship of the world's resources.<sup>5</sup> The instant case adds a new dimension to the rich jurisprudence on environmental justice in our country. Climate Change has moved the debate from a linear local environmental issue to a more complex global problem. In this context of climate change, the identity of the polluter is not clearly ascertainable and by and large falls outside the national jurisdiction. Who is to be penalized and who is to be restrained? On the global platform the remedies are *adaptation* or *mitigation*. In case of Pakistan, adaptation is largely the way forward.

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<sup>5</sup> Mary Robinson Foundation- Climate Justice

Adaptation is a response to global warming and climate change, that seeks to reduce the vulnerability of social and biological systems to relatively sudden change and thus offset the effects of global warming.<sup>6</sup> Adaptation is especially important in developing countries since these countries are predicted to bear the brunt of the effects of global warming.<sup>7</sup> Adaptation is the capacity and potential for humans to adapt (called adaptive capacity) and is unevenly distributed across different regions and populations, and developing countries generally have less capacity to adapt. Mitigation consists of actions to limit the magnitude or rate of long-term climate change. Climate change mitigation generally involves reductions in human (anthropogenic) emissions of greenhouse gases (GHGs). Mitigation may also be achieved by increasing the capacity of carbon sinks, e.g., through reforestation. Mitigation policies can substantially reduce the risks associated with human-induced global warming.<sup>8</sup>

22. Adaptation, as a strategy engages many stakeholders, which hitherto were not part of the environmental dialogue. Climate Justice, therefore, moves beyond the construct of environmental justice. It has to embrace multiple new dimensions like Health Security, Food Security, Energy Security, Water Security, Human Displacement, Human Trafficking and Disasters Management within its fold. Climate Justice covers agriculture, health, food, building approvals, industrial licenses, technology, infrastructural work, human resource, human and climate trafficking, disaster preparedness, health, etc. While mitigation can still be addressed with environmental justice, adaptation can only be addressed through *Climate Justice*, where the courts help build adaptive capacity and climate resilience by engaging with multiple stakeholders.

#### *Water Justice*

23. In the context of Pakistan, the impending water crises are accelerated by the impact of climate change on the hydrological cycle. The availability of water resources to satisfy the demands of society and those of the environment is a crisis of governance and justice. Water is life. Water is a human right and all people should have access to clean and affordable water. Water has interconnectedness with people and resources and is a commons that should be held in public trust. This brings us to *Water Justice*, a sub-concept of Climate Justice. Water justice refers to the access of individuals to clean water. More specifically, the access of individuals to clean water for survival (drinking, fishing, etc.) and recreational purposes as a human right. Water justice demands that all communities be able to access and manage water for beneficial uses, including drinking, waste removal, cultural and spiritual practices, reliance on the wildlife it sustains, and enjoyment for recreational purposes. Right to life and Right to human dignity under articles 9 and 14 of the Constitution protect and realise human rights in general, and the human right to water and sanitation in particular. In adjudicating water and water-related cases, we have to be mindful of the essential and inseparable connection of water with the environment, land and other ecosystems. Climate Justice and Water Justice go hand in hand and are rooted in articles 9 and 14 of our Constitution and stand firmly on our preambular constitutional values of social and economic justice.

#### *Dissolution of the Climate Change Commission*

24. The submissions made by the Chairman of CCC regarding passing future responsibility of implementing the Framework to the Government is accepted. The Climate Change Commission after rendering a remarkable public and pro bono service, is hereby dissolved. The constitution and working of

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<sup>6</sup> "UNFCCC Glossary of Climate Change Acronyms"

<sup>7</sup> Cole, Daniel A. "Climate Change, Adaptation, and Development", 26 UCLA J. ENVTL. L. & POL'Y 1, 3 (2008).

<sup>8</sup> Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007

the Commission has resulted in developing a valuable resource on climate change which can be useful for the Government in the years to come. The respective Governments have to still implement the Framework, formulate the National Water Policy and ensure that the new Act is actualized and given effect to in letter and spirit. These objectives are critical for sustainable development and for the safeguard and protection of the fundamental rights of the people of Pakistan.

*Standing Committee on Climate Change*

25. In order to facilitate the working of the Federal Government, Ministry of Climate Change, Provincial Government, Planning & Development Department, as well as, CCI, the Court hereby constitutes a Standing Committee on Climate Change, which will act as a link between the Court and the Executive and will render assistance to the above mentioned Governments and Agencies in order to ensure that the Policy and the Framework continue to be implemented. The Federal and Provincial Governments and the CCI shall engage, entertain and consider the suggestions and proposals made by the Standing Committee....

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## B. Central and South America and the Caribbean

### 1. Pablo Miguel Fabián Martínez Y Otros (Tribunal Constitucional de Peru, 2006) (La Oroya)

*Plaintiffs living in one of the most polluted cities in the world argued that nearby smelters were contaminating their air and giving them lead poisoning; they sought information about health risks and remedial measures to improve the health of members of the community as well as ongoing monitoring of epidemiological and environmental conditions. The court emphasized the indivisibility and interdependence of all rights including especially rights to health, education, dignified quality of life, and social equality, as well as rights of citizenship and political participation to ensure respect for human dignity, which is the purpose of all human rights. Relying on constitutional law and general principles of international environmental law, the Court ordered a series of remedial measures including the establishment of a medical emergency response system for lead poisoning, the identification of baseline levels of ambient air quality, the conduct of epidemiological and environmental surveys, and provisions for providing the community with adequate access to information about the health and environmental health effects of nearby industries.*

#### FUNDAMENTOS

##### §1. Delimitación del petitorio

1. Los demandantes solicitan que el Ministerio de Salud y la Dirección General de Salud Ambiental (Digesa) cumplan los siguientes mandatos:
  - a) Diseñar e implementar una *estrategia de salud pública de emergencia* que tenga como objetivo la recuperación de la salud de los afectados por contaminantes en la ciudad de La Oroya; la protección de los grupos vulnerables; la adopción de medidas de prevención del daño a la salud y el levantamiento de informes sobre los riesgos a los cuales la población se encuentra expuesta, todo ello conforme a lo dispuesto por los artículos 96, 97, 98, 99, 103, 104, 105, 106 y 123 de la Ley General de Salud (26842).
  - b) Declarar en *Estado de Alerta* a la ciudad de La Oroya, lo cual implica la elaboración de un plan de estado de alerta de salud proponer los niveles de estado de alerta de la ciudad de La Oroya a la Presidencia del Consejo de Ministros y, precisamente, la declaración del estado de alerta, todo ello a tenor de los artículos 23 y 25 del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental.
  - c) Establecer *programas de vigilancia epidemiológica y ambiental*, de conformidad con el artículo 15 del mencionado Decreto Supremo 074-2001-PCM.
2. En el presente caso, teniendo en cuenta que la pretensión de los demandantes en cuanto a la exigencia del cumplimiento de los mandatos contenidos en las referidas disposiciones legales y reglamentarias, no solo se relaciona con el control de la inacción administrativa sino, precisamente, con que tal inacción vulnera los derechos a la salud y a un medio ambiente equilibrado y adecuado, es preciso analizar, previamente, tales derechos, toda vez que detrás de la cuestionada inacción administrativa se encuentra la denuncia sobre la vulneración de los derechos fundamentales invocados.

3. Como se apreciará más adelante, lo antes expuesto supone que si bien los derechos a la salud y a un medio ambiente equilibrado y adecuado no podrían ser protegidos «directamente» mediante el proceso de cumplimiento, sí pueden ser tutelados de modo «indirecto», siempre y cuando exista un mandato claro, concreto y vigente, dispuesto en una ley o un acto administrativo, que se encuentre indisolublemente ligado a la protección de tales derechos fundamentales.

## **§2. El cumplimiento de la Ley 26842 y del Decreto Supremo 074-2001-PCM, y la protección de la salud**

### **a) Elementos básicos del Estado democrático y social de Derecho**

4. El Tribunal Constitucional ha sostenido, en reiterada jurisprudencia, que el Estado peruano, definido por la Constitución de 1993, presenta las características que identifican a un Estado democrático y social de Derecho, tal como se desprende de una interpretación conjunta de los artículos 3 y 43 de la Norma Fundamental. Asimismo, se sustenta en los principios esenciales de libertad, seguridad, propiedad privada, soberanía popular, separación de las funciones supremas del Estado y reconocimiento de los derechos fundamentales.

5. Un Estado democrático y social de Derecho

(...) no obvia los principios y derechos básicos del Estado de Derecho, tales como la libertad, la seguridad, la propiedad privada y la igualdad ante la ley; antes bien, pretende conseguir su mayor efectividad, dotándolos de una base y un contenido material, a partir del supuesto de que individuo y sociedad no son categorías aisladas y contradictorias, sino dos términos en implicación recíproca. Así, no hay posibilidad de materializar la libertad si su establecimiento y garantías formales no van acompañados de unas condiciones existenciales mínimas que hagan posible su ejercicio real (...), lo que supone la existencia de un conjunto de principios que instrumentalicen las instituciones políticas, fundamenten el sistema jurídico estadual y sustenten sus funciones”.

6. Asimismo, el Tribunal Constitucional ha dejado sentado que la configuración del Estado democrático y social de Derecho requiere de dos aspectos básicos:

- a) La existencia de condiciones materiales para alcanzar sus presupuestos, lo que exige una relación directa con las posibilidades reales y objetivas del Estado y con una participación activa de los ciudadanos en el quehacer estatal, y
- b) La identificación del Estado con los fines de su contenido social, de forma tal que pueda evaluar, con criterio prudente, tanto los contextos que justifiquen su accionar como su abstención, evitando tornarse en obstáculo para el desarrollo social.

7. Precisamente, entre los fines de contenido social que identifican a este modelo de Estado se encuentran el *derecho a la salud*, el derecho al trabajo y el derecho a la educación, entre otros; por lo tanto, para lograr una mayor efectividad de tales derechos, tal como se ha mencionado en los párrafos precedentes, el Estado tiene tanto «obligaciones de hacer» (realizar acciones que tiendan al logro de un mayor disfrute del derecho) como «obligaciones de no hacer» (abstenerse de interferir en el ejercicio de los derechos), por lo que no resultan válidas aquellas posiciones que solo ven en los derechos civiles y políticos (libertad, seguridad y propiedad, entre otros) obligaciones estatales de “no hacer”, y en los derechos sociales (salud, trabajo, educación), solo obligaciones estatales de “hacer”.

8. En el Estado democrático y social de Derecho, la consecución de la mencionada participación activa de los ciudadanos en el sistema democrático, así como el logro del desarrollo social, requieren de una decidida labor del Estado expresada en «realizar acciones» que garanticen un efectivo disfrute de derechos tales como la libertad, seguridad, propiedad (por ejemplo, optimizando los servicios de seguridad, la función jurisdiccional o los registros de propiedad), *a la salud*, el trabajo y la educación (por ejemplo, mejorando los servicios de salud, creando más puestos de trabajo y eliminando el analfabetismo), entre otros; y en la «abstención» de afectar tales derechos (por ejemplo, no interferir irrazonable y desproporcionadamente en la libertad o propiedad, o no afectar o perjudicar los servicios educativos y de salud existentes).
9. Como lo ha sostenido el Tribunal Constitucional en el caso Meza García, al referirse a la efectividad de los derechos sociales

No se trata, sin embargo, de meras normas programáticas de *eficacia mediata*, como tradicionalmente se ha señalado para diferenciarlos de los denominados derechos civiles y políticos de *eficacia inmediata*, pues justamente su mínima satisfacción representa una garantía indispensable para el goce de los derechos civiles y políticos. De este modo, sin educación, salud y calidad de vida digna en general, mal podría hablarse de libertad e igualdad social, lo que hace que tanto el legislador como la administración de justicia deban pensar en el reconocimiento de los mismos en forma conjunta e interdependiente”.

10. Es más, en la actualidad, algunos de los derechos clásicamente considerados civiles y políticos han adquirido una indudable influencia social. Sobre el particular, se ha manifestado que “La pérdida del carácter absoluto del derecho de propiedad sobre la base de consideraciones sociales es el ejemplo más cabal al respecto, aunque no el único. Las actuales tendencias del derecho de daños asignan un lugar central a la distribución social de riesgos y beneficios como criterio para determinar la obligación de reparar. El impetuoso surgimiento de un derecho del consumo ha transformado sustancialmente los vínculos contractuales cuando participan de la relación consumidores y usuarios. La consideración tradicional de la libertad de expresión y prensa ha adquirido dimensiones sociales que cobran cuerpo a través de la formulación de la libertad de información como derecho de todo miembro de la sociedad (...)”.
11. Por tanto, en un Estado democrático y social de Derecho, los derechos sociales (*como el derecho a la salud*) se constituyen como una ampliación de los derechos civiles y políticos, y tienen por finalidad, al igual que ellos, erigirse en garantías para el individuo y para la sociedad, de manera tal que se pueda lograr el respeto de la dignidad humana, una efectiva participación ciudadana en el sistema democrático y el desarrollo de todos los sectores que conforman la sociedad, en especial de aquellos que carecen de las condiciones físicas, materiales o de otra índole que les impiden un efectivo disfrute de sus derechos fundamentales.

#### **b) La exigibilidad de derechos sociales como el derecho a la salud**

12. El Tribunal Constitucional ha subrayado en anterior oportunidad que

Aunque la dignidad de la persona es el presupuesto ontológico común a todos los derechos fundamentales, no menos cierto es que entre ellos es posible establecer diferencias de distinto orden. La heterogeneidad que presentan los derechos fundamentales entre sí, no sólo reposa en

cuestiones teóricas de carácter histórico, sino que estas disimilitudes, a su vez, pueden revestir significativas repercusiones prácticas”. Determinados derechos “forman parte de aquellos derechos fundamentales sociales de preceptividad diferida, prestacionales, o también denominados progresivos o programáticos”<sup>[5]</sup>.

13. Sin lugar a dudas, esta preceptividad diferida no implica en modo alguno el desconocimiento de la condición de derechos fundamentales que ostentan los derechos sociales, o que el reconocimiento de estos como derechos fundamentales vaya a depender de su nivel de exigibilidad (que cuenten con mecanismos jurisdiccionales para su protección). Como se verá más adelante, los derechos sociales son derechos fundamentales por su relación e identificación con la dignidad de la persona y porque así se encuentran consagrados en nuestra Constitución. Es más, la Norma Fundamental establece, en su artículo 3, que

La enumeración de los derechos establecidos en este capítulo no excluye los demás que la Constitución garantiza, ni otros de naturaleza análoga o que se fundan en la dignidad del hombre, o en los principios de soberanía del pueblo del Estado democrático de derecho y de la forma republicana de gobierno”.

14. La exigibilidad, entonces, se constituye en una categoría vinculada a la efectividad de los derechos fundamentales, pero no determina si un derecho es fundamental o no. Por ello,

(...) en el Estado social y democrático de derecho, la *ratio fundamentalis* no puede ser privativa de los denominados derechos de defensa, es decir, de aquellos derechos cuya plena vigencia se encuentra, en principio, garantizada con una conducta estatal abstencionista, sino que es compartida también por los derechos de prestación que reclaman del Estado una intervención concreta, dinámica y eficiente, a efectos de asegurar las condiciones mínimas para una vida acorde con el principio-derecho de dignidad humana”<sup>[6]</sup>.

15. Asimismo, el Tribunal acotó, en la mencionada sentencia, que

(...) sostener que los derechos sociales se reducen a un vínculo de responsabilidad política entre el constituyente y el legislador, no solo es una ingenuidad en cuanto a la existencia de dicho vínculo, sino también una distorsión evidente en cuanto al sentido y coherencia que debe mantener la Constitución (...). En consecuencia, la exigencia judicial de un derecho social dependerá de factores tales como la gravedad y razonabilidad del caso, su vinculación o afectación de otros derechos y la disponibilidad presupuestal del Estado, siempre y cuando puedan comprobarse acciones concretas de su parte para la ejecución de políticas sociales”

#### **c) El proceso de cumplimiento, la inacción administrativa y la protección “indirecta” del derecho a la salud**

16. El Tribunal Constitucional ha sostenido también que el contenido constitucionalmente protegido del derecho a la salud

(...) comprende la facultad que tiene todo ser humano de mantener la normalidad orgánica funcional, tanto física como mental; y de restablecerse cuando se presente una perturbación en la estabilidad orgánica y funcional de su ser, lo que implica, por tanto, una acción de conservación y otra de restablecimiento; acciones que el Estado debe proteger tratando de que todas las personas,

cada día, tengan una mejor calidad de vida, para lo cual debe invertir en la modernización y fortalecimiento de todas las instituciones encargadas de la prestación del servicio de salud, debiendo adoptar políticas, planes y programas en ese sentido”.<sup>[8]</sup>

17. De ello se desprende que, la protección del derecho a la salud se relaciona con la obligación por parte del Estado de realizar todas aquellas acciones tendentes a prevenir los daños a la salud de las personas, conservar las condiciones necesarias que aseguren el efectivo ejercicio de este derecho, y atender, con la urgencia y eficacia que el caso lo exija, las situaciones de afectación a la salud de toda persona, prioritariamente aquellas vinculadas con la salud de los niños, adolescentes, madres y ancianos, entre otras.
18. En cuanto a la protección «indirecta» del derecho a la salud mediante el proceso de cumplimiento, cabe destacar que procederá siempre y cuando exista un mandato claro, concreto y vigente contenido en una norma legal o en un acto administrativo, mandato que precisamente se deberá encontrar en una relación indisoluble con la protección del referido derecho fundamental.
19. Conforme se desprende del artículo 200, inciso 6, de la Constitución, que establece que  

“La Acción de Cumplimiento (...) procede contra cualquier autoridad o funcionario renuente a acatar una norma legal o un acto administrativo, sin perjuicio de las responsabilidades de ley”, el objeto de este proceso es el control de la inactividad administrativa, que se produce cuando la autoridad o funcionario se muestra renuente a acatar un mandato que se encuentra obligado(a) a cumplir.
20. Desarrollando este precepto, el legislador estableció, en el artículo 66 del Código Procesal Constitucional, que el proceso de cumplimiento tiene como objeto ordenar que el funcionario o autoridad pública renuente
  - 1) Dé cumplimiento a una norma legal o ejecute un acto administrativo firme; o
  - 2) Se pronuncie expresamente cuando las normas legales le ordenan emitir una resolución administrativa o dictar un reglamento.
21. De este modo, en el proceso de cumplimiento no solo se examina: a) si el funcionario o autoridad pública ha omitido cumplir una actuación administrativa debida que es exigida por un mandato contenido en una ley o en un acto administrativo, sino, además, b) si este funcionario o autoridad pública ha omitido realizar un acto *jurídico* debido, ya sea que se trate de la expedición de resoluciones administrativas o del dictado de reglamentos, de manera conjunta o unilateral.
22. Como es de verse, el proceso de cumplimiento sirve para controlar la inacción de los funcionarios o autoridades públicas, de modo tal que se puedan identificar conductas omisivas, actos pasivos e inertes o la inobservancia de los deberes que la ley les impone a estos funcionarios y autoridades públicas, y, a consecuencia de ello, se ordene el cumplimiento del acto omitido o el cumplimiento eficaz del acto aparente o defectuosamente cumplido, y se determine el nivel de responsabilidades, si las hubiere.
23. Y es que en virtud del principio de legalidad de la función ejecutiva, los agentes públicos deben fundar todas sus actuaciones en la normativa vigente. “El principio de vinculación positiva de la Administración a la Ley” exige que la certeza de validez de toda acción administrativa dependa de la

medida en que pueda referirse a un precepto jurídico o que, partiendo de este, pueda derivársele como su cobertura o desarrollo necesario. El marco normativo para la administración es un valor indisponible, *motu proprio*, irrenunciable ni transigible”.<sup>[9]</sup>

24. Precisamente, el apartado 1.1. del artículo IV del Título Preliminar de la Ley 27444, del Procedimiento Administrativo General, establece que “Las autoridades administrativas deben actuar con respeto a la Constitución, la ley y al derecho, dentro de las facultades que le estén atribuidas y de acuerdo con los fines para los que les fueron conferidas”.
25. De este modo se evidencia cómo, en el ámbito de la administración pública, las actuaciones de los funcionarios y autoridades públicas deben desarrollarse dentro del marco normativo establecido en la ley y en la Constitución, marco que contiene sus competencias, así como los límites de su actuación, por lo que resultan arbitrarias aquellas actuaciones, entre otras, que deliberadamente omitan el cumplimiento de una mandato contenido en una ley o en un acto administrativo; omitan expedir resoluciones administrativas o dictar reglamentos, o cumplan aparente, parcial o defectuosamente tales mandatos.
26. En directa relación con lo expuesto se encuentra el imperativo de que tales funcionarios y autoridades cumplan los respectivos mandatos dentro de los plazos asignados, bajo responsabilidad de ley, y que, de no encontrarse fijados tales plazos, los mandatos se acaten dentro de un plazo razonable y proporcional, debiendo tenerse siempre en consideración el nivel de urgente atención que requieren determinados derechos, principalmente los fundamentales, que pueden resultar afectados por el incumplimiento de los mandatos.

### **§3. El cumplimiento de la Ley 26842 y la protección del derecho a un medio ambiente equilibrado y adecuado al desarrollo de su vida**

27. Teniendo en cuenta que el proceso de autos se relaciona con el cumplimiento de un mandato contenido en una ley, el mismo que, a su vez, tiene como finalidad la protección del derecho a un medio ambiente equilibrado y adecuado al desarrollo de la vida, conviene examinar determinados elementos que forman parte del contenido constitucionalmente protegido de este derecho.
28. El artículo 2, inciso 22, de la Constitución, reconoce el derecho de toda persona  
  
(...) a la paz, a la tranquilidad, al disfrute del tiempo libre y al descanso, así como a gozar de un ambiente equilibrado y adecuado al desarrollo de su vida”.
29. Sobre el particular el Tribunal Constitucional ha señalado en el caso Regalías Mineras, que

El contenido del derecho fundamental a un medio ambiente equilibrado y adecuado para el desarrollo de la persona está determinado por los siguientes elementos, a saber: 1) el derecho de gozar de ese medio ambiente, y 2) el derecho a que ese medio ambiente se preserve.

En su primera manifestación, esto es, el derecho de gozar de un medio ambiente equilibrado y adecuado, dicho derecho comporta la facultad de las personas de poder disfrutar de un medio ambiente en el que sus elementos se desarrollan e interrelacionan de manera natural y armónica; y, en el caso de que el hombre intervenga, no debe



suponer una alteración sustantiva de la interrelación que existe entre los elementos del medio ambiente. Esto supone, por tanto, el disfrute no de cualquier entorno, sino únicamente del adecuado para el desarrollo de la persona y de su dignidad (artículo 1 de la Constitución). De lo contrario, su goce se vería frustrado y el derecho quedaría, así, carente de contenido.

Pero también el derecho en análisis se concretiza en el derecho a que el medio ambiente se preserve. El derecho a la preservación de un medio ambiente sano y equilibrado entraña obligaciones ineludibles, para los poderes públicos, de mantener los bienes ambientales en las condiciones adecuadas para su disfrute. A juicio de este Tribunal, tal obligación alcanza también a los particulares, y con mayor razón a aquellos cuyas actividades económicas inciden, directa o indirectamente, en el medio ambiente.<sup>[10]</sup>

30. Por otro lado, el Tribunal Constitucional apuntó que en cuanto al vínculo existente entre la producción económica y el derecho a un ambiente equilibrado y adecuado al desarrollo de la vida, deben coexistir los siguientes principios, entre otros, para garantizar de mejor manera la protección del derecho materia de evaluación:

En cuanto al vínculo existente entre la producción económica y el derecho a un ambiente equilibrado y adecuado al desarrollo de la vida, se materializa en función de los principios siguientes: a) el principio de desarrollo sostenible o sustentable (...); b) el principio de conservación, en cuyo mérito se busca mantener en estado óptimo los bienes ambientales; c) el principio de prevención, que supone resguardar los bienes ambientales de cualquier peligro que pueda afectar su existencia; d) el principio de restauración, referido al saneamiento y recuperación de los bienes ambientales deteriorados; e) el principio de mejora, en cuya virtud se busca maximizar los beneficios de los bienes ambientales en pro del disfrute humano; f) el principio precautorio, que comporta adoptar medidas de cautela y reserva cuando exista incertidumbre científica e indicios de amenaza sobre la real dimensión de los efectos de las actividades humanas sobre el ambiente; y, g) el principio de compensación, que implica la creación de mecanismos de reparación por la explotación de los recursos no renovables.<sup>[11]</sup>

31. Entre los citados principios cabe destacar que el *principio de desarrollo sostenible o sustentable* constituye una pauta basilar para que la gestión humana sea capaz de generar una mayor calidad y mejores condiciones de vida en beneficio de la población actual, pero manteniendo la potencialidad del ambiente para satisfacer las necesidades y las aspiraciones de vida de las generaciones futuras. Por ende, propugna que la utilización de los bienes ambientales para el consumo no se “financien” incurriendo en “deudas” sociales para el porvenir.
32. Asimismo cabe anotar que el *principio precautorio o de precaución* opera en situaciones donde se presenten amenazas de un daño a la salud o al medio ambiente y donde no se tenga certeza científica de que dichas amenazas puedan constituir un grave daño. Tal principio se encuentra reconocido en nuestro ordenamiento interno, entre otros, en el artículo VII del Título Preliminar de la Ley General del Ambiente, 28611, así como en el artículo 10, inciso f, del Decreto Supremo 0022-2001-PCM, donde se establece que

Son instrumentos de la Política Nacional Ambiental las normas, estrategias, planes y acciones que establece el CONAM y las que proponen y disponen, según sea el caso, en cada nivel –nacional,

regional y local— las entidades del sector público, del sector privado y la sociedad civil. El sustento de la política y de sus instrumentos lo constituyen los siguientes lineamientos: (...) f) la aplicación del criterio de precaución, de modo que, cuando haya peligro de daño grave o irreversible, la falta de certeza absoluta no deberá utilizarse como razón para postergar la adopción de medidas eficaces para impedir la degradación del ambiente.

33. Finalmente, en la Declaración de Río sobre el Medio Ambiente y el Desarrollo, del mes de junio de 1992, que tiene entre sus principales fines la integridad del sistema ambiental y de desarrollo mundial, se proclama, entre otras cosas, una serie de principios, entre los que mencionaremos los siguientes:

Principio 1. Los seres humanos constituyen el centro de las preocupaciones relacionadas con el desarrollo sostenible. Tienen derecho a una vida saludable y productiva en armonía con la naturaleza.

Principio 3. El derecho al desarrollo debe ejercerse en forma tal que responda equitativamente a las necesidades de desarrollo y ambientales de las generaciones presentes y futuras.

Principio 4. A fin de alcanzar el desarrollo sostenible, la protección del medio ambiente deberá constituir parte integrante del proceso de desarrollo y no podrá considerarse en forma aislada.

Principio 10. El 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. Los Estados deberán facilitar y fomentar la sensibilización y la participación de la población poniendo la información a disposición de todos. Deberá proporcionarse acceso efectivo a los procedimientos judiciales y administrativos, entre éstos el resarcimiento de daños y los recursos pertinentes.

Principio 11. Los Estados deberán promulgar *leyes eficaces sobre el medio ambiente*. Las normas, los objetivos de ordenación y las prioridades ambientales deberían reflejar el contexto ambiental y de desarrollo al que se aplican (...).[énfasis agregado]

Principio 13. Los Estados deberán desarrollar la legislación nacional relativa a la responsabilidad y la indemnización respecto de las víctimas de la contaminación y otros daños ambientales. Los Estados deberán cooperar, asimismo, de manera expedita y más decidida en la elaboración de nuevas leyes internacionales sobre responsabilidad e indemnización por los efectos adversos de los daños ambientales causados por las actividades realizadas dentro de su jurisdicción, o bajo su control, en zonas situadas fuera de su jurisdicción.

Principio 15. 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.

Principio 16. Las autoridades nacionales deberían procurar fomentar la internalización de los costos ambientales y el uso de instrumentos económicos, teniendo en cuenta el criterio de que el que contamina debe, en PRINCIPIO, cargar con los costos de la

contaminación, teniendo debidamente en cuenta el interés público y sin distorsionar el comercio ni las inversiones internacionales.

Principio 17. Deberá emprenderse una evaluación del impacto ambiental, en calidad de instrumento nacional, respecto de cualquier actividad propuesta que probablemente haya de producir un impacto negativo considerable en el medio ambiente y que esté sujeta a la decisión de una autoridad nacional competente.

#### **§4. Análisis del caso concreto. La actuación del Ministerio de Salud ante el grave estado de salud de la población de La Oroya**

##### **a) El proceso de cumplimiento y la exigencia de actuación «eficaz» de la administración**

34. Habiéndose verificado los bienes jurídicos cuya protección se demanda a tenor de las disposiciones de la Ley 26842, General de Salud, y del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales del Calidad Ambiental, y cuyo cumplimiento se exige en el presente proceso, es pertinente examinar las tres pretensiones de los demandantes.

35. Cabe puntualizar, en primer término, que, conforme a los mencionados artículos 200, inciso 6, de la Constitución y 66 ss. del Código Procesal Constitucional, para exigir el cumplimiento de la norma legal, la ejecución del acto administrativo y la orden de emisión de una resolución, además de la renuencia del funcionario o autoridad pública, el mandato contenido en aquellos deberá reunir los siguientes requisitos mínimos comunes, entre otros: <sup>[12]</sup>

- a) Ser un mandato vigente.
- b) Ser un mandato cierto y claro, es decir, debe inferirse indubitadamente de la norma legal o del acto administrativo.
- c) No estar sujeto a controversia ni a interpretaciones dispares.
- d) Ser de ineludible y obligatorio cumplimiento.
- e) Ser incondicional. Excepcionalmente, podrá tratarse de un mandato condicional, siempre y cuando se haya acreditado haber satisfecho las condiciones que la satisfacción no sea compleja y que no requiera de actuación probatoria.

36. Asimismo, en la susodicha sentencia el Tribunal Constitucional recalcó que

(...) el acatamiento de una norma legal o un acto administrativo tiene su más importante manifestación en el nivel de su eficacia”.<sup>[13]</sup>

Por ello, como se mencionó antes, el proceso de cumplimiento tiene como finalidad proteger la eficacia de las normas legales y los actos administrativos. Carecería, por tanto, de objeto un proceso como el de autos si el cumplimiento de los mandatos se realizara de manera “aparente”, “parcial” o “deficiente”.

37. En otros términos, el proceso de cumplimiento no puede tener como finalidad el examen sobre el cumplimiento “formal” del mandato contenido en una norma legal o acto administrativo, sino, más bien, el examen sobre el cumplimiento *eficaz* de tal mandato, por lo que si en un caso concreto se verifica la existencia de actos de cumplimiento aparente, parcial, incompleto o imperfecto, el proceso de cumplimiento servirá para exigir a la autoridad administrativa precisamente el cumplimiento eficaz de lo dispuesto en el mandato.

## **b) El estado de salud de la población de La Oroya y la contaminación por plomo en sangre**

38. Antes de ingresar al análisis de las pretensiones planteadas por los demandantes, así como de la actuación del Ministerio de Salud y, en especial, de la Dirección General de Salud Ambiental (Digesa), es preciso saber cuál es el estado de salud de la población de La Oroya, toda vez que tal examen va a resultar decisivo para determinar el nivel de “eficacia” de las medidas adoptadas por los referidos órganos administrativos en cumplimiento de la Ley 26842, General de Salud, y del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental del Aire.
39. A fojas 48 de autos aparece la clasificación de niveles de plomo en sangre y las respectivas acciones recomendadas, elaborada por el Centro de Control de Enfermedades de Estados Unidos (CDC), la misma que se consigna en calidad de anexo del “Estudio de Niveles de Plomo en la Sangre de la Población en La Oroya 2000-2001”, realizado por la empresa Doe Run Perú, que establece lo siguiente:

<b>Plomo en sangre (µg/100 ml)</b>	<b>Acción recomendada</b>
Menor a 9	Un niño clase 1 no está intoxicado por plomo. Se recomienda análisis de plomo de rutina
De 10 a 14	Análisis periódico de plomo. Si son varios niños se deben considerar actividades primarias de prevención
De 15 a 19	Análisis periódico de plomo. Llevar historial para valorar posibles fuentes de plomo. Revisar la dieta y limpieza de los miembros de la familia. Analizar el nivel de hierro. Debe considerarse una investigación ambiental si los niveles persisten
De 20 a 44	Requiere de evaluación médica completa. Identificar y eliminar la fuente ambiental de plomo
De 45 a 69	Iniciar tratamiento médico, valoración y resolución ambiental en las próximas 48 horas
Más de 70	Hospitalización, iniciar tratamiento médico, valoración y resolución ambiental inmediatamente.

40. En los informes adjuntados en autos, se expresa lo siguiente: en el “Estudio de Plomo en sangre en una población seleccionada de La Oroya”, realizado en 1999 por la Dirección General de Salud Ambiental (Digesa) del Ministerio de Salud, se encontraron los siguientes resultados (f. 23):

Teniendo en cuenta que el límite promedio permisible de plomo en sangre de los niños contenido en los lineamientos de la Organización Mundial de Salud (OMS) es de 10 µg/100 ml:

<b>Grupos de edad</b>	<b>Promedio</b>
De 2 a 4 años	-> 38.6 µg/100 ml
De 4 a 6 años	-> 34.1 µg/100 ml
De 6 a 8 años	-> 36.3 µg/100 ml
De 8 a 10 años	-> 30.6 µg/100 ml
Total	-> 33.6 µg/100 ml

41. Asimismo, en el referido estudio de Digesa, que es de público conocimiento, se hallaron, en los 346 niños evaluados, los siguientes niveles de plomo en la sangre ( $\mu\text{g}/100\text{ ml}$ ):

<b>N.º de niños</b>	<b>Rango de plomo en sangre (<math>\mu\text{g}/100\text{ ml}</math>)</b>
3 (0.9%)	0 a 10 $\mu\text{g}/100\text{ ml}$
45 (13.3%)	10.1 a 20 $\mu\text{g}/100\text{ ml}$
234 (67.0%)	20.1 a 44 $\mu\text{g}/100\text{ ml}$
62 (18.3%)	44.1 a 70 $\mu\text{g}/100\text{ ml}$
2 (0.6%)	más de 70 $\mu\text{g}/100\text{ ml}$

42. A su vez, el Informe del Consorcio Unión por el Desarrollo Sustentable de la Provincia de Yauli, La Oroya (UNES), denominado “Evaluación de Niveles de Plomo y Factores de Exposición en Gestantes y Niños Menores de 3 años de la Ciudad de La Oroya”, elaborado en el mes de marzo de 2000, obrante de fojas 80 a 114, concluyó que los niveles de contaminación sanguínea de madres gestantes cuyas edades oscilaban entre los 20 y 24 años, era de una media de 39.49 mg/dl, valor que se encuentra, se afirma, muy por encima del límite establecido como seguro por la Organización Mundial de Salud (OMS), que es de 30 mg/dl (f. 90 vuelta).
43. En el mismo informe (f. 95), en lo que se refiere a los resultados encontrados luego del análisis de niños entre los 0 y 2 años de edad, se precisa que “Los resultados de niveles de contaminación sanguínea en niños (...) obtuvieron una media de 41.82 mg/dl y una desviación estándar de 13.09; valores realmente alarmantes al encontrarse muy por encima del valor de 10 ug/dl, establecido como límite seguro por el CDC [Centro de Control de Enfermedades de los Estados Unidos para niños] y la ANP [Academia Norteamericana de Pediatría]”.
44. De otro lado, es menester mencionar algunas de las conclusiones extraídas del “Estudio de Niveles de Plomo en la Sangre de la Población en La Oroya 2000-2001, “obrando a fojas 44, realizado por la empresa Doe Run Perú , donde se determinó que

4.1.1. El estudio realizado en la población de La Oroya nos demuestra que los niveles promedio de plomo en sangre de los niños están por encima de los recomendados en los lineamientos de la Organización Mundial de Salud y el Centro para el Control de Enfermedades de Estados Unidos (10  $\mu\text{g}/100\text{ ml}$ ). Sin embargo, no se observaron signos ni síntomas atribuibles al efecto nocivo del plomo, ni deterioro de rendimiento escolar. Los resultados promedio del total de 5.062 muestras son los siguientes:

- 0 a 3 años: 26.1  $\mu\text{g}/100\text{ ml}$
- 4 a 5 años: 23.7  $\mu\text{g}/100\text{ ml}$
- 7 a 15 años: 20.3  $\mu\text{g}/100\text{ ml}$
- Más de 16: 13.7  $\mu\text{g}/100\text{ ml}$

4.1.2 . Los niveles de plomo en la sangre más altos se encontraron en La Oroya Antigua, siendo los niños de 0 a 6 años la población que presenta mayores niveles. Los promedios de plomo en sangre en esta área son los siguientes:

- 0 a 3 años: 36.7  $\mu\text{g}/100\text{ ml}$

- 4 a 6 años: 32.9 µg/100 ml
- 7 a 15 años: 27.8 µg/100 ml
- Más de 16: 18.0 µg/100 ml

45. Asimismo, conforme aparece a fojas 553 vuelta, el Ministerio de Salud, mediante la Dirección Regional de Salud de Junín, en el documento denominado “Plan Operativo 2005 para el Control de los Niveles de Plomo en Sangre en la Población Infantil y Gestantes de La Oroya Antigua”, elaborado en el mes de febrero de 2005, sostuvo que “La situación ambiental en La Oroya se ha venido degradando desde la entrada en operación de la fundición, con la constante acumulación de pasivos ambientales en la zona de influencia, degradando suelos, flora y fauna, así como la asimilación de plomo en la población residente en La Oroya”.
46. A fojas 623 ss. corre el documento elaborado por el Ministerio de Salud, denominado “Dosaje de plomo en sangre en niños menores de 6 años. La Oroya Junín Perú”, elaborado entre los meses de noviembre de 2004 y enero de 2005, en el que se aprecian los siguientes resultados:

N.º de niños		Niveles de plomo en niños (µg/dl)	
1	(0,127%)	menos de 10	µg/dl
16	(2,03%)	10 a 15	µg/dl
54	(6,85%)	15 a 20	µg/dl
646	(81,98%)	20 a 45	µg/dl
66	(8,38%)	45 a 70	µg/dl
5	(0,63%)	70 a más	µg/dl

47. A fojas 774 ss. aparece el documento denominado “Desarrollo de un Plan de Intervención Integral para Reducir la Exposición al Plomo y otros Contaminantes en el Centro Minero de La Oroya, Perú”, preparado en el mes de agosto de 2005 por el equipo de asistencia técnica del Centro de Control y Prevención de Enfermedades de Estados Unidos (CDC), para la Agencia para el Desarrollo Internacional del Gobierno de los Estados Unidos (AID), con el objetivo de apoyar a los funcionarios de la Dirección General de Salud Ambiental (Digesa) del Perú, en el que se consignaron las siguientes conclusiones:

1. *Existe un control mínimo del plomo.* (...) Ninguna autoridad independiente de gobierno monitorea la efectividad y el impacto de las intervenciones implementadas. La presencia de plomo en el suelo, polvo, agua y aire probablemente continuará manteniendo niveles elevados de plomo en la sangre de las personas de La Oroya y sus alrededores. Discusiones interminables retrasan la protección que los niños pequeños necesitan en La Oroya.
2. *Existe una fragmentación entre las autoridades responsables del control del plomo.* (...) el equipo de DIGESA reporta que no tiene los recursos o autoridad para abordar la problemática en La Oroya (...).
5. *No han sido determinados los impactos en el medio ambiente y la salud.* No se ha establecido una línea de base con las medidas e impactos en la salud humana y en el ambiente para la región (...).

48. Finalmente, a fojas 91 y 92 del cuaderno del Tribunal Constitucional obra el “Estudio sobre la contaminación ambiental en los hogares de La Oroya y Concepción y sus efectos en la salud de sus residentes”, elaborado en el mes de diciembre de 2005 por el consorcio conformado por la



Universidad de San Luis, Missouri, Estados Unidos, y el Arzobispado de Huancayo, estudio en el que se llega, entre otras, a las siguientes conclusiones:

Los niveles de plomo en sangre encontrados en La Oroya son similares a los encontrados en monitoreos anteriores realizados por la DIGESA y el MINSA (...).

Desde el punto de vista de la salud comunitaria, estos niveles ilustran una vez más el grave estado de envenenamiento con plomo que existe en la población de La Oroya, especialmente en los grupos más vulnerables, como son los infantes y niños de corta edad.

49. Como se aprecia en los citados estudios, desde el año 1999 la propia Dirección General de Salud Ambiental (Digesa), así como diferentes instituciones acreditaron la existencia de exceso de contaminación en el aire de la ciudad de La Oroya, y que en el caso de contaminación por plomo en la sangre, especialmente en los niños, se sobrepasó el límite máximo establecido por la Organización Mundial de la Salud (10 µg/100 ml), llegándose incluso a detectar, por ejemplo, en el Informe DIGESA 1999, *2 casos de niños en los que se sobrepasaba los 70 µg/100ml, 62 niños que registraban entre 44.1 y 62 µg/100 ml, y 234 que registraban entre 20.1 y 44 µg/100 ml*, entre otros resultados, lo que exigía por parte del Ministerio de Salud, en su condición de ente rector del sector Salud (artículo 2 de la Ley 27657 del Ministerio de Salud), la adopción de inmediatas medidas de protección, recuperación y rehabilitación de la salud de las personas que habitan en la ciudad, entre otras acciones.

**c) Examen de la primera pretensión: implementar una estrategia de salud pública de emergencia para La Oroya**

50. Los demandantes exigen el cumplimiento, entre otros, de los siguientes artículos de la Ley 26842, General de Salud:

Artículo 103.- La protección del ambiente es responsabilidad del Estado y de las personas naturales y jurídicas, los que tienen la obligación de mantenerlo dentro de los estándares que para preservar la salud de las personas, establece la Autoridad de Salud competente.

Artículo 105.- Corresponde a la Autoridad de Salud competente dictar las medidas necesarias para minimizar y controlar los riesgos para la salud de las personas derivados de elementos, factores y agentes ambientales, de conformidad con lo que establece, en cada caso, la ley de la materia.

Artículo 106.- Cuando la contaminación del ambiente signifique riesgo o daño a la salud de las personas, la Autoridad de Salud de nivel nacional dictará las medidas de prevención y control indispensables para que cesen los actos o hechos que ocasionan dichos riesgos y daños.

51. Asimismo, solicitan el cumplimiento, entre otros, de los siguientes artículos del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales del Calidad Ambiental:

Artículo 11.- Diagnóstico de Línea Base.- El diagnóstico de línea base tiene por objeto evaluar de manera integral la calidad del aire en una zona y sus impactos sobre la salud y

el ambiente. Este diagnóstico servirá para la toma de decisiones correspondientes a la elaboración de los Planes de acción y manejo de la calidad del aire. Los diagnósticos de línea de base serán elaborados por el Ministerio de Salud, a través de la Dirección General de Salud Ambiental - DIGESA, en coordinación con otras entidades públicas sectoriales, regionales y locales así como las entidades privadas correspondientes, sobre la base de los siguientes estudios, que serán elaborados de conformidad con lo dispuesto en los artículos 12, 13, 14 y 15 de esta norma:

- a) Monitoreo
- b) Inventario de emisiones
- c) Estudios epidemiológicos.

....

### **Consideraciones del Tribunal Constitucional**

56. Sobre el particular, el Tribunal Constitucional considera que la pretensión de los demandantes debe estimarse en parte, toda vez que, si bien el Ministerio de Salud ha adoptado determinadas medidas, establecidas en la Ley 26842, General de Salud, y en el Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental del Aire, su cumplimiento no ha sido eficaz, sino más bien parcial e incompleto.
57. En efecto, de la revisión de autos se desprende que desde la entrada en vigencia de los mencionados artículos de la Ley 26842 (21 de enero de 1998) y del referido Reglamento (25 de junio de 2001), ha transcurrido en exceso un plazo razonable para que el Ministerio de Salud, en especial la Dirección General de Salud Ambiental (Digesa), cumpla eficazmente los mandatos contenidos en las mencionadas disposiciones.
58. Cabe precisar que si bien es cierto que conforme al artículo 20 del Decreto Supremo 074-2001-PCM, la elaboración de un *Plan de Acción* es responsabilidad de la GESTA Zonal del Aire (Grupo de Estudio Técnico Ambiental de la Calidad del Aire encargado de formular y evaluar los planes de acción para el mejoramiento de la calidad del aire en una Zona de Atención Prioritaria), y no directamente del Ministerio de Salud, también lo es que tal grupo, para la elaboración del mencionado Plan de Acción, requiere, imprescindiblemente, el diagnóstico de línea base que debe elaborar el citado ministerio, a través de la Dirección General de Salud Ambiental (Digesa), conforme lo dispone el artículo 11 del referido Decreto Supremo, por lo que, al no haberse cumplido tal mandato en un plazo razonable, debe exigirse su inmediata observancia, de modo tal que se pueda implementar, con la urgencia del caso, el respectivo Plan de Acción y se proceda, con celeridad, a la recuperación de la salud de la población afectada.
59. No obstante lo expuesto, debe tenerse en cuenta el mandato dispuesto en el mencionado artículo 106, que establece que “Cuando la contaminación del ambiente signifique riesgo o daño a la salud de las personas, la *Autoridad de Salud de nivel nacional* dictará las medidas de prevención y control indispensables para que cesen los actos o hechos que ocasionan dichos riesgos y daños”, así como el mandato del artículo 2 de la Ley 27657, que dispone que “El Ministerio de Salud es (...) el ente rector del Sector Salud que conduce, regula y promueve la intervención del Sistema Nacional de Salud, con la finalidad de lograr el desarrollo de la persona humana, a través de la promoción, *protección, recuperación y rehabilitación de su salud* y del desarrollo de un entorno saludable, con pleno respeto de los derechos fundamentales de la persona, desde su concepción hasta su muerte natural”, cuyo

cumplimiento también es exigido en la demanda de autos (ff.13 y 15), pues en conjunto dichos mandatos exigen al Ministerio de Salud, en su calidad de ente rector del Sistema Nacional de Salud, la protección, recuperación y rehabilitación de la salud de las personas, no solo mediante la implementación de un «sistema ordinario», sino también mediante la implementación de un «sistema de emergencia» que establezca acciones inmediatas ante situaciones de grave afectación de la salud de la población [énfasis agregado].

60. En el caso concreto de la población de la ciudad de La Oroya, sobre todo de los niños y mujeres gestantes, ocurre que desde 1999, año en que se realizaron los primeros estudios que determinaron la existencia de población contaminada con plomo en la sangre, hasta la actualidad, han transcurrido más de 7 años sin que el Ministerio de Salud implemente un sistema de emergencia que proteja, recupere y rehabilite la salud de la población afectada. Por ello, cabe preguntarse: ¿cuánto más se debe esperar para que el Ministerio de Salud cumpla su deber de dictar las medidas indispensables e inmediatas para que se otorgue atención médica especializada a la población de La Oroya cuya sangre se encuentra contaminada con plomo?
61. El mandato contenido en las referidas disposiciones, cuyo cumplimiento es responsabilidad del Ministerio de Salud, se encuentra indisolublemente ligado a la protección del derecho fundamental a la salud de los niños y mujeres gestantes de La Oroya, cuya sangre se encuentra contaminada con plomo, tal como se ha acreditado en autos. No es válido sostener que la protección de este derecho fundamental, por su dimensión de derecho social, deba diferirse en el tiempo a la espera de determinadas políticas de Estado. Tal protección debe ser inmediata, pues la grave situación que atraviesan los niños y mujeres gestantes contaminados, exige del Estado una intervención concreta, dinámica y eficiente, dado que, en este caso, el derecho a la salud se presenta como un derecho exigible y, como tal, de ineludible atención. Por tanto, debe ordenarse al Ministerio de Salud que, en el plazo de 30 días, implemente un sistema de emergencia para atender la salud de la personas contaminadas con plomo, en el caso de la ciudad de La Oroya, a efectos de lograr su inmediata recuperación.

**d) Examen de la segunda pretensión: declarar en Estado de Alerta a la ciudad de La Oroya**

62. ...

**Consideraciones del Tribunal Constitucional**

65. Sobre el particular, el Tribunal Constitucional considera que la pretensión de los demandantes debe estimarse, toda vez que en el presente caso el Ministerio de Salud no ha realizado, con la urgencia que el caso concreto exige, las acciones eficaces tendientes a declarar en estado de alerta la ciudad de La Oroya, pese a la evidente existencia de exceso de concentración de contaminantes del aire en la mencionada localidad, incumpliendo el mandato contenido en el artículo 23 del Decreto Supremo 074-2001-PCM, así como en el artículo 105 de la Ley 26842.

....

70. En el presente caso de los documentos anexados a la demanda se advierte que los niveles de contaminación por plomo y otros elementos químicos en la ciudad de La Oroya han sobrepasado estándares mínimos reconocidos internacionalmente, generando graves afectaciones de los derechos a la salud y a un medio ambiente equilibrado y adecuado de la población de esta ciudad, razón por la cual el emplazado Ministerio de Salud está en la obligación, conforme a los mandatos contenidos en

los artículos 23 del Decreto Supremo 074-2001-PCM y 105 de la Ley 26842, de realizar, urgentemente, las acciones pertinentes para la implementación de un sistema que permita la declaración del respectivo estado de alerta y, de este modo, atender la salud de la población afectada.

71. La existencia de un convenio suscrito entre el Ministerio de Salud y la empresa Doe Run Perú (Convenio 008-2003-MINSA, suscrito el 4 de julio del 2003), obrante a fojas 363 ss., cuyas cláusulas se han centrado en establecer una “cultura de prevención, a fin de que la población adopte hábitos saludables que disminuyan su exposición al plomo[...]”, “implementar un sistema de vigilancia ambiental en la ciudad de La Oroya priorizando la zona de La Oroya Antigua [...]”, “reducir paulatinamente los niveles de plomo en sangre en la población infantil de la ciudad de La Oroya (...)”, e “impulsar y propugnar la suscripción de convenios de cooperación y gestión con las diversas instituciones públicas y privadas, sin cuya participación no se lograría el objeto de este convenio [...]”.
72. Asimismo, en la parte referida a las obligaciones de la empresa Doe Run Perú, se determina como actuaciones prioritarias aquellas destinadas a “brindar apoyo logístico [...]”, “realizar los análisis químicos de las muestras biológicas y ambientales [...]”, “realizar campañas educativas y de prevención que incluyan estrategias en la búsqueda de cambios de comportamiento de la población de la zona, con la finalidad de disminuir realmente los niveles de intoxicación de la población y que esta adquiera estilos de vida saludable, protegiendo a los niños y a las madres gestantes”, entre otras.
73. Sobre el particular, este Colegiado considera que, si bien en la labor de atención de la salud de la población es importante una actuación conjunta entre el Ministerio de Salud y empresas privadas, ante situaciones de grave alteración de la salud como la contaminación por plomo en sangre, como sucede en el caso de los niños y mujeres gestantes de la ciudad de La Oroya, el Ministerio de Salud, dada su condición de ente rector del sector Salud, es el principal responsable de la recuperación inmediata de la salud de los pobladores afectados, debiendo priorizarse a los niños y las mujeres gestantes. En consecuencia, teniendo en cuenta que, conforme se ha acreditado en los párrafos precedentes, existe exceso de concentración de contaminantes en el aire de la ciudad de La Oroya, debe ordenarse al Ministerio de Salud la realización de todas las acciones dirigidas a declarar el estado de alerta, conforme lo dispone el artículo 23 del Decreto Supremo 074-2001-PCM, de modo tal que se establezcan medidas inmediatas con el propósito de disminuir el riesgo de salud en esta localidad.

**e) Examen de la tercera pretensión: establecer programas de vigilancia epidemiológica y ambiental en la ciudad de La Oroya**

...

**Consideraciones del Tribunal Constitucional**

77. Sobre el particular el Tribunal Constitucional considera que la pretensión de los demandantes debe estimarse, toda vez que en el presente caso el Ministerio de Salud ha omitido establecer “eficazmente” acciones destinadas a establecer programas de vigilancia epidemiológica y ambiental, incumpliendo el mandato contenido en el artículo 15 del Decreto Supremo 074-2001-PCM.
78. En efecto, en principio cabe tener en cuenta que, conforme se aprecia en el Decreto Supremo 074-2001-PCM, existen diferencias entre los denominados “estudios epidemiológicos” (artículo 14) y los

“programas de vigilancia epidemiológica y ambiental” (artículo 15), pues estos últimos son estudios *complementarios* que debe realizar el Ministerio de Salud cuando lo justifique la diferencia existente entre los estándares nacionales de calidad ambiental del aire y los valores encontrados en una determinada zona, de modo tal que se puedan evitar riesgos a la respectiva población.

79. En el presente caso, los demandados no han acreditado haber dado cumplimiento, en su totalidad, al mandato del referido artículo 15, pues no han desarrollado programas de vigilancia epidemiológica y ambiental en la ciudad de La Oroya. En consecuencia, debe estimarse esta pretensión y ordenarse al Ministerio de Salud la implementación de los referidos programas de vigilancia.

Por estos fundamentos, el Tribunal Constitucional, con la autoridad que le confiere la Constitución Política del Perú

### HA RESUELTO

Declarar **FUNDADA** en parte la demanda de cumplimiento presentada por Pablo Miguel Fabián Martínez y otros; en consecuencia:

1. Ordena que el Ministerio de Salud, en el plazo de treinta (30) días, implemente un sistema de emergencia para atender la salud de la personas contaminadas por plomo en la ciudad de La Oroya, debiendo priorizar la atención médica especializada de niños y mujeres gestantes, a efectos de su inmediata recuperación, conforme se expone en los fundamentos 59 a 61 de la presente sentencia, bajo apercibimiento de aplicarse a los responsables las medidas coercitivas establecidas en el Código Procesal Constitucional.
2. Ordena que el Ministerio de Salud, a través de la Dirección General de Salud Ambiental (Digesa), en el plazo de treinta (30) días, cumpla con realizar todas aquellas acciones tendentes a la expedición del diagnóstico de línea base, conforme lo prescribe el artículo 11° del Decreto Supremo 074-2001-PCM, Reglamento de Estándares Nacionales de Calidad Ambiental del Aire, de modo tal que, cuanto antes, puedan implementarse los respectivos planes de acción para el mejoramiento de la calidad del aire en la ciudad de La Oroya.
3. Ordena que el Ministerio de Salud, en el plazo de treinta (30) días, cumpla con realizar todas las acciones tendentes a declarar el Estado de Alerta en la ciudad de La Oroya, conforme lo disponen los artículos 23 y 25 del Decreto Supremo 074-2001-PCM y el artículo 105 de la Ley 26842.
4. Ordena que la Dirección General de Salud Ambiental (Digesa), en el plazo de treinta (30) días, cumpla con realizar acciones tendientes a establecer programas de vigilancia epidemiológica y ambiental en la zona que comprende a la ciudad de La Oroya.
5. Ordena que el Ministerio de Salud, transcurridos los plazos mencionados en los puntos precedentes, informe al Tribunal Constitucional respecto de las acciones tomadas para el cumplimiento de lo dispuesto en la presente sentencia.
6. Exhorta al Gobierno Regional de Junín, Municipalidad Provincial de Yauli-La Oroya, Ministerio de Energía y Minas, Consejo Nacional del Ambiente y empresas privadas, como Doe Run Perú SRL, entre otras, que desarrollan sus actividades mineras en la zona geográfica que comprende a la ciudad de La Oroya, a participar, urgentemente, en las acciones pertinentes que permitan la protección de la

salud de los pobladores de la referida localidad, así como la del medio ambiente en La Oroya, debiendo priorizarse, en todos los casos, el tratamiento de los niños y las mujeres gestantes....

\* \* \*



## 2. Beatriz Silvia Mendoza and others v. National State of Argentina (Supreme Court of Argentina 2008)

*In a landmark ruling against 44 companies and several governmental agencies at the national, provincial, and municipal levels, the Supreme Court of Argentina developed a multi-pronged action plan to assure the clean up of the Matanza/Riachuelo basin, one of the most polluted urban rivers in the world. The action plan included the provision of information, the control of further industrial pollution, cleaning up existing waste dumps, expanding the water and sanitation infrastructure, providing a federal court with ongoing oversight jurisdiction. The case is particularly important for the fusion of environmental and human rights, and for the elaborate remedial measures ordered by the Court.*

### Applicable Precepts and Facts:

1) That in light of the presentation . . . by sixteen people exercising their personal rights in their capacity as victims of the environmental contamination of the Matanza-Riachulo river basin, with some of them also exercising the rights of their minor children, in order to bring various allegations against the National State, the Province of Buenos Aires, the Government of the Autonomous City of Buenos Aires and the forty- four named businesses, this Court issued a judgment on June 20, 2006, . . . adopting several pronouncements. The pronouncements which are relevant to the present action include:

a) Declaring this Tribunal's lack of original jurisdiction with respect to the claim aimed at redressing damage caused to the individual plaintiff's assets as an indirect result of aggression towards the environment.

b) Accepting the filing of the matter governed by Article 117 of the National Constitution, which addresses pollution of inter-jurisdictional environmental resources, and accepting the National State and the Province of Buenos Aires as legally recognized parties to this matter. Under the terms governed by Articles 41 and 43 of the Fundamental Law<sup>9</sup> and Article 30 of Law 25.675, the National State and the Province of Buenos Aires have the duty to ensure the common use of the environment and the collective well- being shaped by the environment, an environmental stewardship pursued through prevention,

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<sup>9</sup> [Section 41 of the Constitution of Argentina states:

“All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law.

The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education.

The Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions. . . .”]

restoration, and ultimately, through compensation for collective harm, according to Article 28 of Law 25.675 (considering paragraph 7).

c) Exercising this Tribunal's ordained faculty and legally recognized power to protect the general interest. To that end, this Court:

I. Requested from the defendant-businesses information relating to all waste thrown into the river; whether they have treatment systems for that waste; and if they have contracted insurance for their activities, as required by Article 22 of Law 25.675.

II. Ordered the National State, the Province of Buenos Aires, the Autonomous City of Buenos Aires, and the Federal Environmental Council (CoFeMa) to present an integrated plan which addresses the area's environmental situation, control over anthropogenic activities, an environmental impact study of the defendant-businesses, an environmental education program, and an environmental informational program.

...

3) That . . . several organizations submitted a request for standing, citing constitutional and non-constitutional text in order to intervene as third-parties in accordance with Article 90 of the Civil and Commercial Procedural Code of the Nation (citing Articles 41 and 43 of the National Constitution and Article 30 of Law 25.675). They expressed that their objective was to ensure that the defendants carried out, among other mandates, the requisite actions for the immediate cessation of contaminating activity and the restoration from the collective environmental damage in the area of the Matanza-Riachuelo River Basin.

This tribunal, in its' pronouncement on August 30, 2006, granted in part the seven organization's petition for intervention as third-parties, admitting only the Environment and Natural Resource Foundation (FARN), Greenpeace Foundation Argentina, Center for Legal and Social Studies (CELS), and the Boca Neighborhood Association. The Court felt that these organization's structural objectives, as found in their respective organic statutes, made participation as third parties appropriate. In this sense, the justification for acceptance as third- parties was not based on the General Interest Framework or the ample connection with the fulfillment of the National Constitution and Argentine laws, but instead by considering the legitimate interests of these organizations in the preservation of a collective right such as the right to a healthy environment....

4) That in a joint submission effectuated August 24, 2006, the National State, the Province of Buenos Aires, the Autonomous City of Buenos Aires and CoFeMa invoked their answer to the Tribunal's request from its' June 20th pronouncement. The submission noted a consensus between the three government jurisdictions regarding the structural dimension of the problem, the decision to join forces in order to reach a solution, and also noted in particular the significance that the National Government has given to the environmental problem. The Integral Plan for the Clean-up of the Matanza- Riachuelo River Basin also accompanied the submission. The parties described the principle features of the clean-up program, its institutional and political structure in regard to the clean-up itself, and the social aspect of the clean-up.

They also exhibited the requested environmental impact evaluations, offered final considerations, and submitted complementary documentation. . . .

6) That on September 5, 2006 the Tribunal began the scheduled hearing. On that date the plaintiffs explained in detail the contents and justification for their claim. For his part, the Secretary of the Environment and Sustainable Development of the Nation, as the representative for the government defendants, presented in front of the Court regarding the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin. The Secretary was subsequently questioned by the members of this Court about various aspects of the clean-up program. . . .

The hearing continued on September 12, on which date the businesses had an opportunity to address the Court, orally presenting their reports. The businesses were also questioned by the Tribunal. . . .

7) That through the pronouncement on February 6, 2007, with respect to the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin, this Court ordered the National State, the Province of Buenos Aires, and the Autonomous City of Buenos Aires to inform the Court of all adopted and completed measures dealing with contamination prevention, restoration, and environmental auditing, as well as measures relating to the environmental impact assessments of the defendant businesses. Lastly, the Court requested information on actions taken related to the industrial sector, the local population, and health care and prevention. Towards that end, a new public hearing was scheduled for February 20, 2007. At that time, the Secretary of the Environment and Sustainable Development of the Nation presented the requested report, answered several requests made by this Court, and submitted accompanying documentation, as requested, in support of the various areas of the mandated clean-up plan.

8) That on February 23, 2007, the Tribunal, after emphasizing that at this stage of the proceeding it lacked the knowledge necessary to issue a ruling, and once again in accordance with its ordained faculties and powers, ordered the intervention of the University of Buenos Aires. Through the work of professors with backgrounds and expertise in the various relevant fields, the University would proceed to inform the Court of the feasibility of the Clean-Up Plan presented by the State authorities. . . .

10) That in view of the presentation by the University of Buenos Aires of the requested report, the Tribunal again utilized its powers recognized in Article 32 of Law 25.675 and in Article 36 of the Procedural Rules in order to convene a public hearing so that the parties and intervening third-parties could orally express their observations of the Integral Plan for the Clean-Up of the Matanza-Riachuelo River Basin. Parties were also to be able to express their observations on the report prepared by the University of Buenos Aires regarding the feasibility of the Clean-Up Plan, presenting evidence in an attempt to contest the scientific aspects of the decision.

11) That said hearing began on July 4, 2007, with an opportunity for the Secretary of the Environment and Sustainable Development of the Nation, acting as the representative for the National State, the Province of Buenos Aires, and the Autonomous City of Buenos Aires, to conduct his exhibition. The Ombudsman of the Nation, the representatives of some non-governmental organizations intervening as

interested third-parties, and representatives of those defendants which chose to participate in this public hearing also received an opportunity to speak. . . .

12) That on August 22, 2007, the Tribunal issued the decisions which are detailed below.

On the defense side, and based on the results of the public hearings and the report prepared by the University of Buenos Aires, the Court gave notice that in order to carry forward the prevention and restoration aspect of the case it was necessary to order the collection of precise, up-to-date, public, and accessible information. Towards that end the Court imposed on the River Basin Authority and the representative for the three State defendants the obligation to inform the Court of the condition of the water, the air, and the underground systems of the river basin. The Court also requested a list of the industries currently in the river basin which conducted potentially contaminating activities, with specific pollutant figures. The Court further requested the minutes from the meetings carried out by the River Basin Authority as well as information from their other activities, reports on population and industry movement from the basin, information on petrochemical projects in the Dock Sud region, utilization of green credits, garbage clean-up, cleaning of the river banks, current and future projects for the expansion of the potable water network, storm drains, sewage systems, progress updates on their projects, the feasibility of their deadlines, definitive costs, financing information for all of the projects, and any additional information on their emergency health plan. . . .

14) That the government defendants submitted the requested reports, which were then subsequently amplified by the River Basin Authority. . . .

By order of the Court, summaries from the plaintiffs and third parties as well particular defenses were ordered, along with the accompanying documentation for each one of the responses. . . .

Whereas:

15) The restoration from and the prevention of environmental harm requires the issuance of urgent, definitive, and effective decisions. In accordance with this principle, the present decision definitely resolves the specific claim regarding restoration and prevention that has gone through this urgent and autonomous process.

The decisive goal is forward-looking and fixes the general criteria required for effective compliance with the stated objective, while still respecting the methods for compliance, methods which are left to the discretionary scope of the administration. Thus, the obligation for compliance should aim at achieving results and meeting the presently described objectives, while leaving the specific procedures to carry out those objectives up to the administration's determination.

At the same time, given the definitive nature of this decision, the process of execution will be delegated to a federal court of first instance, in order to ensure swiftness of future court decisions as well as effective judicial control over compliance.

However, as a consequence of the decision adopted, proceedings related to the indemnification for damages will continue to occur in front of this Court, since said damages do not deal with future action but rather with the attribution of liability stemming from past conduct.

The dictated sentence consists of a binding mandate on the defendants, with specific details that arise from the legal bases which follow and whose content has been determined by this Tribunal in exercise of powers deriving from the Constitution and the General Environmental Law. . . .

Regarding the Integral Plan for the Clean-up of the Matanza-Riachuelo River Basin presented by the defendants, various hearings have been convened which illustrate deficiencies that this Court must take into account. . . .

Moreover, effective implementation requires a program that fixes behavior defined with technical precision, the identification of a subject who is obligated to comply with the decision, the existence of objective indices that allow periodic control over the results, and ample participation in that control.

16) The River Basin Authority, created by Law 26.168, is obligated to carry out the program, and will assume the responsibility for any non-compliance or delays in carrying out the detailed objectives. The Authority must maintain members from the National State, the Province of Buenos Aires, and the Autonomous City of Buenos Aires, to whom responsibility primarily corresponds for territorial settlement of the watershed region and to whom environmental obligations from the National Constitution, as well as more rigid local norms, apply. The responsibilities and obligations of these three entities have been recalled by this Court since its first intervention through the above-mentioned pronouncement on June 20, 2006.

17) The present decision mandates that the River Basin Authority complete the following program:

I) Objectives:

The program must pursue three simultaneous objectives, consisting of:

1) Improvement of the quality of life of the river basin inhabitants;

- 2) The environmental restoration of all of the river basin's components (water, air, and soil;
- 3) The prevention of reasonably foreseeable harm.

In order to measure the level of completion of these objectives the River Basin Authority must adopt one of the available international measurement systems and notify the relevant tribunal of their execution of this decision within 90 (ninety) business days. Failure to comply with this decision within the prescribed period will result in the imposition of a daily fine on the president of the River Basin Authority.

## II) Public Information:

Organize within 30 (thirty) business days a system of public information on the internet for the general public. The system must be clear, concentrated, and accessible, and it must contain all of the up-to-date facts, reports, lists, timelines, costs, etc., which were requested by the August 22, 2007 resolution.

Failure to comply with this order within the prescribed period will result in the imposition of a daily fine on the president of the River Basin Authority.

## III) Industrial Pollution:

- 1) Conduct inspections of all of the businesses currently in the Matanza-Riachuelo river basin within 30 (thirty) business days;
- 2) Identify those businesses deemed polluters through the issuance of a resolution from the River Basin Authority;
- 3) Mandate that all such businesses deemed polluters, who dump waste, discharges, or emissions into the river basin, must present to the relevant authority a treatment plan within 30 (thirty) business days from the date of notification via the issuance of a resolution by the River Basin Authority, as described above in (2);
- 4) Analyze and determine within 60 (sixty) business days the feasibility of the treatment plans referred to in (3), and where appropriate, approve said plans;
- 5) Order that the businesses whose treatment plans have not been submitted or approved – through a resolution from the River Basin Authority – cease in the spilling, emitting, or discharging into the river



basin of any polluting substances. The promulgation of resolutions to that affect may not exceed the deadline of 180 (one hundred eighty) days from the present;

6) Adopt measures for partial or full closure and/or relocation. The River Basin Authority is empowered to extend the deadline or propose alternative measures when it is determined that the economic costs of treatment are unfeasible or when a grave social situation exists;

7) Notify the businesses of the existing lines of credit available to them for this purpose;

8) The public presentation, updated quarterly, of the condition of the water and underground systems, and the air quality of the river basin;

9) The public presentation, detailed and well-founded, of the industrial conversion and relocation project through the framework of the Agreement Act of the action plan, along with for environmental suitability of petrochemical activities in the Dock Sud area, the businesses involved, the affected population, signed conventions, stages and deadlines for completion;

10) The public presentation of the progress and estimated timing of the planned initiatives of the Federal Subprogram Framework for the Urbanization of Villas and Squatter Settlements – Clean-Up of the Matanza- Riachuelo River Basin – Stage One, from November 21, 2006.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

#### IV) Clean-Up of Landfills:

Regarding the task of landfill clean-up from the Integral Plan, the River Bank Authority must:

1) Ensure within 6 (six) months the execution of the following:

a) The necessary measures to stop waste disposal into landfills which will be closed, whether they were legal or clandestine;

b) Measures for the implementation of the program submitted to this Court for the prevention of new open air landfills;

c) Measures to eradicate the homes near landfills and to

subsequently prevent the construction of new homes along them.

2) Order the eradication, clean-up, and closure, within 1 (one) year, of all illegal landfills discovered by the River Basin Authority. . . .

#### V) Cleaning the Riverbanks:

Regarding the task of cleaning the riverbanks under the Integral Clean-Up Plan, the River Basin Authority must inform in a public manner, with details and well-founded support, the following:

1) The finalization of the rodent control, clean-up, and weeding phase of the four individual sectors from the Integral Clean-Up Plan, including deadlines and pertinent budgets;

2) The progress of the public works project to transform the river bank into public parks, in accordance with the provisions of the Integral Clean-Up Plan, including deadlines and pertinent budgets.

#### VI) Expansion of the potable water network:

Regarding the task of expanding the potable water network addressed in the Integral Clean-Up Plan, the River Basin Authority must publicly inform, in a detailed and well-supported manner, on the plan headed by Water and Sanitation Argentina (AySA) and the National Organization for Sanitary Hydraulic Works (Enohsa) for the expansion of water catchments, treatment, and distribution. . . .

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

#### VII) Storm Drainage:

Regarding the task of storm drainage addressed in the Integral Clean-Up Plan, the River Bank Authority must publicly inform, in a detailed and well-supported manner, on the plan for storm drainage works, with particular emphasis on projects that must be completed in 2007, on projects currently being carried out, and on the commencement of works for the expansion of the storm drainage network in the period 2008-2015. In all cases, compliance deadlines and the pertinent budgets must be included.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

## VIII) Sewage Sanitation:

Regarding the task of sewage sanitation addressed in the Integral Clean-Up Plan, the River Basin Authority must publicly inform, in a detailed and well-supported manner, on the expansion projects headed by Water and Sanitation Argentina (AySA). . . .

## IX) Emergency Health Plan:

. . . [T]he River Basin Authority is required to do the following:

1) Within 90 (ninety) days create a socio-demographic map and conduct investigations into environmental risk factors for the purpose of:

a) Determining the at-risk population;

b) Developing a diagnostic database for all diseases in order to aid the determination of pathogens produced by air, soil, and water pollution, along with other pathogens which are not dependent on those factors. Also develop a system for tracking the detected cases in order to verify the prevalence and survival of those pathogens;

c) Developing a publicly accessible Registry Information System Database of the pathogens detected in the river basin;

d) Specifying the epidemiological surveillance measures taken in the emergency zone.

2) Upon completion of the requirements in (1), the River Basin Authority must, within (60) sixty days, elaborate and put into effect specific health programs to meet the needs of the river basin population.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

18) Beyond the provisions from Law 26.168 and the constitutional norms which apply to each jurisdiction, this Tribunal considers transparency when dealing with government management of public resources to be of the utmost institutional importance. To that end, an authority must be responsible for this transparency. Thus, the Auditor General of the Nation will monitor the allocation of funds and all Plan-related budget implementation. . . .

Notwithstanding the above, the judge in charge of program execution may submit any questions related to budget control and execution to the River Basin Authority. The River Basin Authority must respond in a detailed manner within 10 (ten) business days. Also, if any of the subjects who are entitled to observe the information exercise that right, the River Basin Authority must hold a public hearing in its' headquarters within 10 (ten) business days, during which the Authority must explain any non-conformance.

Failure to comply with any of these established deadlines will result in the imposition of a daily fine on the president of the River Basin Authority.

19) It is equally as important to strengthen citizen participation in the monitoring of completion of the program described above.

Said control must be organized through the appointment of a coordinator who is capable of receiving citizen suggestions and of relaying to citizens the proper processes.

To that end, in recognition of their full functional autonomy of not receiving instructions from any other State power, the designation of citizen monitoring coordinator must lie with the Ombudsman of the Nation. The Ombudsman will form a collegiate body with the representatives of the non-governmental organizations who intervened in the cause as third-parties, coordinating these NGO's operations and distributing tasks to them. Tasks should include the reception of updated information and the formulation of concrete plans to present to the River Basin Authority in order to better achieve the mandated goals, and tasks should be guided by the criteria of equality, specialization, reasonableness, and effectiveness.

20) Since the nature and content of this decision is a final declaration over the restoration and prevention issue, a prudent consideration in anticipation of the various circumstances which may arise from the present mandates is demanded.

At this juncture, the Tribunal must make a decision which is the result of carefully balancing two circumstances.

The first – which has been sufficiently identified and emphasized by the June 20, 2006 pronouncement on this matter in order to justify the dismissal of the claims for individual damages . . . – is that this Court must maintain rationality in the cases it hears and decides, so as not to overstep the responsible exercise of the power granted to it by the Supreme Law, which grants this Court jurisdiction as final interpreter, as the last guardian of people's highest rights, and as a participant in the republican form of government.

The other circumstance stems from the institutional requirement that the decisions of this Court are loyally respected, and is mentioned because of the acknowledged power of the River Basin Authority. Any frustration of the constitutional jurisdiction exercised through this pronouncement, whether by the River Basin Authority or any other subject reached by this decision, including national and local authorities, the judiciary, or administrative agencies, must be avoided. In the well-known precedent

P.95.XXXIX Ponce, Carlos Alberto v/ San Luis, Province, from February 24, 2005 (Decision: 328:175), through rulings issued in the first instance, it was established that this Tribunal must judge whether their decisions have been followed, and if not, the Court must take all the necessary steps to ensure strict compliance with its decisions. This includes dismantling the consequences stemming from any local authority's pronouncements which were intended to neutralize, paralyze, or ignore, in whole or in part, mandates issued by this Court.

These considerations, along with the need to preserve a significant level of immediacy of judicial decisions, lead this Tribunal to consider it appropriate and competent to issue this decision according to the terms of Article 499 of the Civil Procedure and Commercial Code of the Nation. It is also appropriate for a federal judge of first instance with jurisdiction over the river bank territory to address the further questions that arise from this case. Considering the jurisdiction addressed by Article 3 of Law 25.519, the report submitted by the Secretary of General Administration regarding human resources, and the decisive fact of its recent inception (2/2006), intervention is granted to the Federal Court of First Instance of Quilmes.

21) In addition to timely enforcement of the decision, the Federal Court of First Instance of Quilmes will also conduct judicial review of contested promulgations by the River Basin Authority (Articles 18 and 109 of the National Constitution). This jurisdiction which will be exclusive in order to ensure uniformity and consistency in the interpretation of questions that arise, as opposed to opening up heterogeneous or even contradictory criteria that might result from review by different judges of first instance. . . . Moreover, in order to make the procedural rules clear, it is appropriate to eliminate intervention by any other judiciary, so that decisions by the magistrate whose intervention has been ordered will be considered equivalent to pronouncements by the superior tribunal for this matter. Thus, challenges brought in front of this Court will not have to first pass through any intermediate court. The delegated tribunal will also have the necessary power to determine the value of the daily fines stemming from non-completion of deadlines. Fines should be of a sufficient quantity in order to deter reticent conduct. Also, the tribunal will be able to order investigations into any crimes that result from non-completion of the judicial mandates in the present decision. . . .

Therefore it is resolved:

1. The verdict is issued with respect to the claims aimed at environmental restoration and prevention.
2. To order the River Basin Authority, created by Law 26.168, to complete the program established by this decision.
3. To provide that the National State, the Province of Buenos Aires, and the Autonomous City of Buenos are equally and concurrently responsible for the implementation of said program.
4. To establish that the Auditor General of the National will monitor the allocation of funds and the budget implementation related to the Integral Clean-Up Plan.

5. To enable citizen participation in the monitoring of the Clean-Up Plan and the present program.
6. To entrust the Ombudsman of the Nation with the coordination of said citizen participation, through the formation of a collegiate group whose members will consist of representatives from the non-governmental organizations who participated as third parties in this action.
7. To confer to the Federal Judge of First Instance of Quilmes jurisdiction to hear all questions related to the implementation of this pronouncement and for the review of final decisions made by the River Basin Authority, according to the jurisdictional reach established above in (20) and (21).
8. To order the joinder of all proceedings and current litigation, where appropriate, according to the pronouncement in (22).
9. To maintain in front of this Court aspects of this cause relating to restitution for collective damage.
10. To order the sending of accurate copies, both paper and electronic, of all relevant materials to the Federal Court of Quilmes, so that the judges will have at their disposal all of the pertinent documentation to handle arising questions.
11. To postpone the pronouncement on costs until the sentence for the claim still pending in front of this court is issued.

Translated by Michael Posner, Visitor at FARN from the Human Rights Program of Harvard Law School

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**3. Padilla Gutierrez, Clara Emilia y otros, todos en su condición de vecinos de lugares aledaños al Parque Nacional Marino Las Baulas de Guanacaste c/ SETENA, Secretaria Técnica Nacional Ambiental (Corte Suprema de Justicia de Costa Rica, Sala Constitucional 2008)**

*Neighbors near a national park established for the protection of leatherback turtles (as well as many other species, including some protected under international law (CITES, RAMSAR) sought an order requiring the national government to assess the impact of tourism (including construction) on the flora and fauna of the park in an integrated and strategic way that accounts for the cumulative effects on the entire ecosystem, instead of on an individualized basis. Sensitive to the ecological interests, the court canceled all the licenses that had already been issued and suspended all work on the project pending the completion of an appropriate study coordinated with all relevant authorities.*

**4.- INTRODUCCIÓN.-**

El Parque Nacional Marino Las Baulas de Guanacaste, fue creado por decreto Ejecutivo N° 20518-MIRENEM del 09.07.91 y luego se le dio el rango legal mediante Ley N° 7524 del 10.07.95.- Se señala claramente que la conservación y protección absolutas de las tortuga baula y su hábitat de anidación, constituye el fin principal de la creación del Parque Nacional Marino Las Baulas de Guanacaste. Se indica que las playas Grande, Ventanas y Langosta de Costa Rica, es una de las tres áreas de mundo donde anida y se reproduce la tortuga baula (*Dermochelys coriacea*). Esta área tiene una enorme importancia si se considera que la “Lista Roja de Especies Amenazadas de la Unión Mundial para la Naturaleza”, categoriza a la tortuga baula de especies en peligro crítico. Asimismo en el área anidan también otras especies de tortugas, como la carpintera, la tortuga negra o toras, y la tortuga carey. También se encuentran varias especies de flora y fauna en peligro de extinción (mangles, árboles de guayacán, caoba y pachote), animales (venados, congos, leones breñeros), aves (garzas blancas y rosadas, halcones, gavilanes), saurios (caimán y cocodrilo americano), y boas, el reptil de mayor tamaño conocido. Según la Convención para el Comercio internacional de especies amenazadas de flora y fauna, CITES, se encuentra en peligro de extinción. Por otra parte, los manglares del Parque, se encuentran dentro de RAMSAR, la Convención relativa a Humedales de Importancia Internacional, y son fundamentales como hábitat de aves acuáticas y áreas de reproducción de diferentes especies marina y forestales.

Por lo expuesto, la tortuga baula, ha sido declarada una especie en extinción. Siendo una de las amenazas más evidente cada temporada, el desarrollo turístico y urbanístico sin control en las playas de anidación. La zona de PLAYA GRNADE, donde se ubica el Parque Nacional Marino LAS BAULAS, es considerada como de extrema vulnerabilidad, de manera que “no se debe permitir ningún tipo de actividades productivas, solamente aquellas enfocadas a la conservación”.

Esta sentencia de la Corte Suprema de Justicia de Costa Rica, se dicta en el marco de un RECURSO DE AMPARO promovido por un grupo de vecinos del Parque Nacional LAS BAULAS contra la “SETENA”, SECRETARIA TÉCNICA NACIONAL AMBIENTAL, por haber violado, según se sostuvo en la demanda, en perjuicio de los amparados, lo dispuesto en el artículo 50 de la Constitución Política, ya que dentro del PARQUE NACIONAL LAS BAULAS y en sus zonas de AMOTIGUAMIENTO, se pretende la construcción de varios complejos residenciales y de cabinas y hoteles de grandes dimensiones, sin que hasta el momento hayan sido sometidos en forma integral, previamente a una EVALUACIÓN DE IMPACTO AMBIENTAL por parte de SETENA para establecer su viabilidad; dicha evaluación, se sostuvo en la demanda, pretende ser subsanada por esta Autoridad, mediante la evaluación de la construcción de cada casa que se pretende construir, sin embargo, esto no es suficiente porque pierde de vista toda la perspectiva de la afectación de los proyectos circundantes. También se dijo en el escrito de

encabezamiento que “no se estableció el impacto en el agua para consumo humano, tampoco la afectación respecto de las aguas servidas, negras, vida silvestre, y en especial el recurso que protege el Parque y todo su ecosistema. Cómo afectarán las luces, la presencia humana, la presencia de mascotas sobre los nidos y recién nacidos, el acceso de esos vecinos nuevos a las playas de anidación, el equipo náutico, el ruido, aguas jabonosas, aspectos todos que no fueron tomados en consideración. Por último, los recurrentes solicitan que se ordene “evaluar el proyecto en forma conjunta y no casa por casa”.-

... A su vez, SETENA en su responde, informa que se limita a analizar individualmente cada proyecto pero no realizar la evaluación en conjunto del desarrollo regional; sosteniendo que cuenta únicamente con competencia para evaluar los formularios, documentos y estudios que se presenten, pero no tiene competencia para realizar estudios por sí misma. Las evaluaciones ambientales que realiza consisten en el análisis de los documentos y escritos que se presentan a su consideración, referentes a dos tipos de procedimientos distintos: la evaluación de impacto ambiental, analizando individualmente cada proyecto y la evaluación de impacto ambiental estratégica, que comprende el análisis de las políticas, programas y planes de ordenamiento territorial que se sometan a la misma.- Asimismo apunta que “del memorial de interposición del recurso se desprende que los recurrentes desean que se realice una evaluación ambiental estratégica y como la competencia de Setena se limita al análisis de los documentos que se presentan, procede a las Municipalidades u otros entes someter a evaluación por parte de la Setena los instrumentos de evaluación ambiental estratégica que esas instituciones realicen.- ...

De manifestaciones adicionales de los demandantes se dijo que en el informe rendido por SETENA se acepta que las evaluaciones cercanas al Parque Nacional Marino Las Baulas se hacen en forma aislada porque nadie les ha solicitado que hagan una evaluación estratégica. Se agrega que no es cierto que SETENA no tenga competencia para realizar esa labor incluso de oficio, “pues es inaudito que si se tiene en claro que se está ante 200 casas dentro de la zona de amortiguamiento del Parque simplemente se señale que la evaluación integral del proyecto corresponde a las Municipalidades”.- Además, el Departamento de Cuencas Hidrográficas del Instituto Costarricense de Acueductos y Alcantarillados presentó en la causa, un informe de una visita que realizó al sector costero de Playa Grande, indicando que la existencia de piscinas en muchas casas construidas, “compromete en forma muy seria y preocupante la oferta de agua subterránea que es explotada actualmente como fuente principal de abastecimiento” recomendando entre otras consideraciones, “desarrollar un estudio hidrogeológico de todo el acuífero de Playa Grande en donde se indique su capacidad de almacenamiento, su actual estado de aprovechamiento y su capacidad potencial, de igual forma se debe determinar su vulnerabilidad a la contaminación”, por lo que concluye que “la Municipalidad debe establecer una moratoria en el desarrollo de la construcción hasta que no se tengan los resultados del estudio indiciado”, y finalmente, hasta tanto no se resuelva el recurso hídrico no resulta posible que se sigan autorizando más y más construcciones del Sector de Playa Grande y sus zonas aledañas. Solicita entonces que se ordene a Setena no aprobar ningún estudio de impacto ambiental de construcción alguna en las zonas adyacentes al Parque Nacional Marino LAS BAULAS de Guanacaste, especialmente en el sector de PLAYA GRANDE, hasta tanto no se tengan los instrumentos para valorar de manera integral el impacto del proyecto de construcción que se pretende desarrollar en la zona y no se cuente específicamente con un estudio hidrogeológico de todo el acuífero de Playa Grande.

Posteriormente, vuelve a manifestar la recurrente que aporta un nuevo estudio realizado por un ingeniero de la Escuela de Geología de la Universidad de Costa Rica, donde concluye que el mapa de vulnerabilidad intrínseca evidencia que el sector más vulnerable se encuentra en el Estero Tamarindo, Estero Ventanas, Playa Grande y Tamarindo, por lo que es necesario tomar medidas de protección del recurso hídrico; en los sectores de vulnerabilidad extrema no se debe permitir ningún tipo de actividades

productivas.- En el mismo sentido, lo informado en oficio del 23 de noviembre de 2006, por el Área de Aguas Subterráneas de Senara, quienes concluyeron que “actualmente se encuentran restringidos los permisos de perforación de pozos en los acuíferos del Potrero, Brasilito, Playa Grande y de Huacas-Tamarindo, debido a los estudios y evaluaciones técnicas que evidencian problemas relacionados a la contaminación”.

La instrucción probatoria, atento la complejidad del caso, incluyó audiencias judiciales con el Ministro de Ambiente y Energía, los miembros del Consejo Nacional de Áreas de Conservación, el Director Ejecutivo del Sistema Nacional de Áreas de Conservación, el Director del Área de Conservación de Tempisque, el Administrador del Parque Nacional Marino Las Baulas, el Director del Departamento de Aguas, todos del Ministerio de Ambiente y Energía, para que informen sobre el estado actual de las construcciones en las propiedades que están dentro del Parque Nacional Las Baulas, las previsiones que se han tomado para la protección del recurso hídrico, la recolección de desechos sólidos, la afectación respecto de la tortuga baula y todo su ecosistema.- Y consecuentemente, para que informen si, el desarrollo urbanístico de la zona, está afectando o podría afectar negativamente al ambiente, indiquen además el estado actual en que se encuentran las expropiaciones que se piensan realizar en la zona.

También, el Tribunal pidió información a la Municipalidad de Santa Cruz, Municipalidad de Nadayure y la Municipalidad de Hojancha, para que informen el estado actual de las construcciones en las propiedades que están dentro del Parque, todos los permisos que se han dado, previsiones para la protección del recurso hídrico; el Instituto Costarricense de Acueductos y Alcantarillados, concretamente el Departamento de Cuencas Hidrográficas, para que informe si el desarrollo urbanizados está afectando o podría afectar negativamente el ambiente del Parque Nacional, concretamente al recurso hídrico, para consumo humano, tratamiento de aguas negras y servidas; el Secretario General de la Setena, que informe el nombre de las personas jurídicas y físicas, y sus domicilios, que tienen proyectos inmobiliarios dentro del Parque, a las que les ha otorgado viabilidad ambiental o que tienen pendiente dicho trámite; previsiones para la protección del recurso hídrico, la recolección de desechos sólidos, la afectación del tortuga BAULA y todo su ecosistema.- Por último, se solicitó informe el Director de la Escuela de Biología Marina de la Universidad Nacional, Maestría de Ciencias Marina y Costeras; el Director de la Facultad de Biología de la Universidad de Costa Rica, los recurrentes, la Procuraduría General de la República.

La Corte Suprema estima en sentencia, como “debidamente demostrados” los siguientes hechos relevantes: 1.- Que NO EXISTE NI SE HA REALIZADO una evaluación de forma integral del impacto que las construcciones dentro y en la zona de amortiguamiento del Parque Nacional Marino LAS BAULAS, producirían sobre los recursos naturales colindantes: la tortuga BAULA, el recurso hídrico, demás vida silvestre, y en general todo el ecosistema. 2.- Que dentro del Parque y sus zonas de amortiguamiento se pretende la construcción de VARIOS COMPLEJOS RESIDENCIALES, CABINAS Y HOTELES.- 3.- Que el Parque cuenta con una zona de influencia, constituyendo la banda de 500 metros a lo largo del límite continental el Área de influencia inmediata, la cual es la zona de amortiguamiento, y que constituye un área ambientalmente frágil: fragilidad biológica- terrestre, fragilidad hídrica, fragilidad por desarrollo urbano.- 4.- Que el DESARROLLO URBANÍSTICO planteado para Playa Grande y Ventanas dista mucho de ser un desarrollo sostenible. De llevarse a cabo estos proyectos dentro de una franja de los 75 metros y sin ningún control del área protegida y su zona de amortiguamiento, se estará frente a un deterioro ambiental irreversible, con una afectación directa sobre el área de anidación más importante de todo el Pacífico Oriental para las tortugas BAULA y sobre los manglares que protege el Parque, incluyendo el SITIO RAMSAR.- 5.- Que la Municipalidad de Santa Cruz, ha otorgado permiso de construcción a proyectos ubicados dentro del área de influencia inmediata

al Parque Nacional Marino LAS BAULAS, área frágil ambiental, incluso sin contar con la respectiva viabilidad ambiental. 6.- Que las evaluaciones que realiza SETENA, consisten en el análisis de documentos y estudios que se presenten a su consideración, referentes a dos tipos de procedimientos: “Evaluación de impacto ambiental” EIA donde analiza individualmente cada proyecto y la “Evaluación ambiental estratégica” EAE, el cual se refiere al análisis de las políticas, programas y planes de ordenamiento territorial que le someten los Municipios u otros entes.- Siendo que este último instrumento no se ha aplicado en el Parque Nacional Marino LAS BAULAS.- Por lo demás, se da por probado que la Setena suspendió mediante resolución, la EIA de los proyectos DENTRO del Parque, hasta que la Sala Constitucional disponga otra cosa.- Que en cuanto a la zona de amortiguamiento, Setena está valorando los procedimientos de evaluación ambiental, aunque solicitará que los desarrolladores asuman el compromiso de cumplir con los lineamientos para la protección de la tortuga BAULA emitidos por el SINAC. Por último, un detalle de los proyectos situados DENTRO del Parque que cuentan con viabilidad ambiental (2); FUERA del Parque que cuentan con viabilidad ambiental (19) calificados en general, casa habitación y condominios residenciales.-

El fondo del asunto se concentra en determinar si resulta cierto que dentro del Parque Nacional Marino LAS BAULAS y su zona de amortiguamiento (500 mts colindantes con los límites del Parque), se pretende la construcción de varios complejos residenciales sin haber sido sometidos a una evaluación integral de impacto ambiental por parte de la SETENA, sino que cada proyecto ha sido valorado de forma individual. Hecho que se comprueba, en consecuencia se desprende que efectivamente SETENA ha otorgado la viabilidad ambiental a proyectos en dicha zona, tanto a las propiedades ubicadas dentro del Parque Nacional Marino como las que se encuentran en la zona de amortiguamiento, de forma individual, sin haber hecho un análisis del impacto integral que tales construcciones producirían en todo el ecosistema. El desarrollo urbanístico planteado para la Playa Grande y Ventanas dista mucho de ser un desarrollo sostenible, y que de llevarse a cabo estos proyectos dentro de la franja de 75 metros y sin ningún control fuera del área protegida y su área de amortiguamiento se estará frente a un deterioro ambiental irreversible, con una afectación directa sobre el área de anidación más importante en todo el Pacífico Oriental para las tortugas baula y sobre los manglares que protege el Parque, incluyendo el sitio RAMSAR.

El hecho de que Setena haya estado otorgando la viabilidad ambiental a proyectos situados, no solo en la zona de amortiguamiento del Parque sino dentro del mismo Parque, de forma individual, sin haber procedido primero, a realizar una valoración integral de la zona, evidentemente pone en riesgo todo el ecosistema del área. Se advierte que ya fueron otorgados dos viabilidades ambientales a proyectos dentro del Parque y que diecinueve más están en trámite, todo ello sin contar con el número exacto de viabilidades otorgadas y en trámite en la zona de amortiguamiento de dicho Parque, “pudiendo preverse que si dentro del Parque no ha existido mayor reparo en el otorgamiento de las viabilidades ambientales, con mucho menos razón se tendrá reparo en su otorgamiento en la zona de amortiguamiento”, a pesar de que el impacto ambiental de los proyectos ubicados dentro de esta zona, igualmente resultan significativos. El descuido de la zona de amortiguamiento es tal, que la misma SETENA informa “que apenas se está valorando los procedimientos de evaluación a solicitar”.

De esta forma, la viabilidades ambientales otorgadas de forma individual por SETENA resultan insuficientes para la protección que el ambiente de la zona costera requiere. Siendo claro que no se ha evaluado en forma integral el impacto ambiental que producirían las construcciones dentro del Parque ni en la zona de amortiguamiento. Cabe señalar que lo anterior es interpretado por la Sala Constitucional de la Corte, con fundamento en el principio precautorio que opera en materia ambiental, como un “riesgo potencial a todo el ecosistema del Parque.- Así entonces, no es suficiente para el Tribunal ni para la

garantía del derecho a gozar de un ambiente sano y ecológicamente equilibrado, que Setena haya procedido con el trámite individual de otorgamiento de viabilidades ambientales, ni mucho menos cuando se contextualiza la situación con el deber de vigilancia que tiene el Estado sobre la materia, la seriedad y contundencia de múltiples estudios realizados a nivel mundial que advierten sobre el peligro de extinción de la tortuga baula y la necesidad de evitar procesos constructivos cerca de los lugares de anidamiento.

#### 6.- AVANCES.-

El reconocimiento de diversos instrumentos de política ambiental en materia de evaluación de impacto ambiental, individual vs. estratégico.- La necesidad de un análisis cuidadoso, amplio, e integral para el otorgamiento de la Viabilidad Ambiental de proyectos de impactos ambientales significativos.- La necesidad de proceder a la valoración integral del proyecto de construcción de complejos hotelero, residencial, condominios y urbanístico.- La efectiva aplicación del Principio Precautorio.- El enfático deber de vigilancia que pesa sobre el Estado, en esta clase de situaciones.- La imperiosa búsqueda del desarrollo urbanístico y turístico, en condiciones ambientalmente sostenibles.- La importancia de una enérgica temprana, anticipatoria, y oportuna, defensa y conservación de áreas de especial protección, que se califican de ecosistemas frágiles y vulnerables, como asimismo de la zona de Influencia o amortiguamiento, en el caso, representada por una banda de unos 500 metros de superficie, colindantes con el Parque Nacional Marino Las Baulas.- La tutela de las especies de nuestra fauna (en este supuesto, la tortuga baula), y flora, amenazadas en peligro o en vías de extinción.

#### 7.- ACUERDO.-

Dada la importancia y protección del Parque Marino Las Baulas desde el punto de vista de conservación y protección del ambiente, dado que SETENA ha estado otorgando la viabilidad ambiental a proyectos situados dentro del parque y su zona de amortiguamiento de forma INDIVIDUAL sin haber hecho un análisis del impacto INTEGRAL que tales construcciones producirían en todo el ecosistema del Parque, dado que la Municipalidad de Santa Cruz ha otorgado permisos de construcción dentro del Parque y su zona de amortiguamiento incluso sin contar con la respectiva viabilidad ambiental, y tomando en cuenta EL PRINCIPIO PRECAUTORIO EN MATERIA AMBIENTAL se acoge el recurso, con todas las consecuencias que se detallan en la parte dispositiva, por lo que se hace lugar a la demanda disponiendo:

- 1.- Anular todas las viabilidad ambientales otorgadas en la propiedades dentro del Parque y se ordena al Ministerio de Ambiente continúe de inmediato con el proceso de expropiación de tales propiedades.-
- 2.- Ordenar a Setena, girar instrucciones para no tramitar nuevas viabilidades dentro del Parque.-
- 3.- Ordena a Setena, proceda en coordinación con el Ministerio de Ambiente y energía, el Instituto Costarricense de Acueductos y Alcantarillados y las Municipalidades de Santa Cruz, Bandayure, Hojancha, Nicoya Y Carrillo, a realizar un estudio integral sobre el impacto que las construcciones y el desarrollo turístico y urbanístico en la zonas de amortiguamiento del Parque Nacional Marino Las Baula, producirían al ambiente y las medidas necesarias a tomar, en donde se valore si conviene mejor también expropiar las propiedades que se indiquen allí, y se indique expresamente el impacto que el ruido, las luces, el uso del agua para consumo humano, las aguas negras y servidas, la presencia humana y otros produciría sobre todo el ecosistema de la zona, en especial, la tortuga baula.
- 4.- Dejar suspendidos y supeditar la validez de las viabilidades otorgadas a la propiedades ubicadas dentro de la zona de amortiguamiento del Parque, hasta tanto no esté listo el estudio integral.
- 5.- Ordenar a SETENA, suspender el trámite de las solicitudes de viabilidad ambiental de las propiedades ubicadas dentro de la zona de amortiguamiento.-
- 6.- Ordenar a la Municipalidad de Santa Cruz, dejar suspendidos y supeditar la validez de los permisos de construcción otorgados a las propiedades ubicadas dentro de la zona de amortiguamiento (banda de 500 metros) del Parque, hasta tanto no esté listo el estudio integral.-
- 7.- Anular todos los permisos de construcción otorgados, si así lo hubiera hecho la Municipalidad de Santa Cruz, a las propiedades ubicadas en zonas de amortiguamiento; en su caso, comunicar este fallo a la Contraloría General de la República, para que

realice las investigaciones y sienta responsabilidades.- 8.- Al Secretario General de Setena, Ministro de Ambiente y Energía, Director Ejecutivo del Consejo Nacional de Áreas Protegidas, Director Superior del sistema Nacional de Conservación, Jefe del Departamento de Cuencas Hidrográficas de Acueductos y Alcantarillados, Alcalde las Municipalidades de Nandayure, Santa Cruz, Carrillo y Nicoya, a tomar todas las medidas y previsiones dentro del ámbito de sus competencias a efectos de preservar todo el ecosistema del Parque Nacional Marino Las Baulas.- Todo ello, bajo apercibimiento de que podría incurrir en el delito tipificado en el artículo 71 de la Ley de la Jurisdicción Constitucional (no cumplir o no hacer cumplir orden judicial en un recurso de amparo, que prevé penas de prisión de 3 meses a 2 años o de 20 a 60 días de multa).- Se condena al Estado y a la Municipalidad de Santa Cruz al pago de las costas, y daños y perjuicios causados con los hechos que sirven a esta declaratoria, los que se liquidarán en ejecución de sentencia de lo contencioso administrativo....

\* \* \*



**4. Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro y de la Viceministra del Medio Ambiente y Recursos Naturales, (Sala de lo Constitucional de la Corte Suprema de Justicia, El Salvador, 2010)**

*When the environmental ministry failed to respond to a petition requesting information about the technical studies on the basis of which a state of environmental emergency was declared due to heightened levels of lead in the petitioner's district, the Court held that the petitioner had established a violation of her constitutional rights to information and petition, and ordered the government to, within 15 days, issue the issued certification of a biochemical study and within 30 days, issue respond to the request with regard to the evaluation of water pollution and gases in the sewage, rainwater, and building pipes. The court also ordered the government to provide damages for failing to respond in a timely manner to petitioner's request.*

El presente proceso de amparo ha sido promovido por la señora Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro y de la Viceministra del Medio Ambiente y Recursos Naturales, por la supuesta vulneración de sus derechos fundamentales de petición y acceso a la información.

Han intervenido en la tramitación de este amparo la parte actora, las autoridades demandadas y el Fiscal de la Corte Suprema de Justicia.

*Analizado el proceso y considerando:*

I. La pretensora sostuvo en su demanda que adquirió una vivienda en Villa Burdeos, Ciudad Versailles, la cual se encuentra ubicada en el municipio de San Juan Opico, departamento de La Libertad, en una zona que el Ministerio del Medio Ambiente y Recursos Naturales --en adelante, MARN-- declaró afectada por contaminación con plomo.

En relación con lo anterior, afirmó que con fechas 16, 17, 23 y 27 de septiembre de 2010 presentó diversas solicitudes al Ministro y a la Viceministra de esa cartera de Estado, a efecto de obtener una certificación de los estudios técnicos que se han llevado a cabo sobre los niveles de contaminación encontrados en el proyecto Ciudad Versailles, pero aún no ha recibido resolución alguna que haya atendido sus requerimientos. En virtud de ello, alegó que se le ha vulnerado su derecho de "petición y respuesta", por lo que solicitó que se admitiera su demanda y se pronunciara sentencia a su favor. ...

III. En el presente caso, el objeto de la controversia puesta en conocimiento de este Tribunal estriba en determinar si el Ministro y la Viceministra del MARN han vulnerado los derechos de petición y acceso a la información de la señora Domitila Rosario Piche Osorio, al no haberse pronunciado sobre las solicitudes que esta les presentó en diversas ocasiones a efecto de obtener una certificación de los estudios técnicos que se habían llevado a cabo sobre los niveles de contaminación encontrados en el proyecto Ciudad Versailles, ubicado en el municipio de San Juan Opico, departamento de La Libertad.

IV. A continuación, corresponde hacer referencia a algunos aspectos sobre el contenido básico de los derechos fundamentales que se aducen vulnerados.

I. A. Tal como se sostuvo en las sentencias de fechas 5-I-2009 y 14-XII-2007, pronunciadas en los procesos de Amp. 668-2006 y 705-2006, respectivamente, el *derecho de petición* contenido en el art. 18 de la Cn. es la facultad que posee toda persona -natural o jurídica, nacional o extranjera— de dirigirse a las autoridades para formular una solicitud por escrito y de manera decorosa. Como correlativo al ejercicio de este derecho, la autoridad ante la cual se formule una petición debe responderla conforme a las facultades que legalmente le han sido conferidas, en forma congruente y oportuna, haciéndoles saber a

los interesados su contenido, lo cual, vale aclarar, no significa que tal resolución deba ser necesariamente favorable a lo pedido, sino solamente emitir la decisión correspondiente.

B. Además, las autoridades legalmente instituidas —que en algún momento sean requeridas para resolver un determinado asunto— tienen la obligación, por una parte, de pronunciarse sobre lo solicitado en un plazo razonable, si no existe un plazo expresamente determinado en el ordenamiento jurídico para ello; y, por otra parte, de motivar y fundamentar debidamente su decisión, siendo necesario que, además, comuniquen lo resuelto al interesado. Por ello, se garantiza y posibilita el ejercicio del derecho de petición cuando una autoridad emite y notifica una decisión a lo que se le ha requerido dentro del plazo establecido o, en su ausencia, dentro de aquel que sea razonable, siendo congruente con lo pedido, siempre en estricta observancia de lo preceptuado en la Constitución y la normativa secundaria pertinente.

C. Específicamente, con relación al plazo en que las autoridades deben resolver las solicitudes que se les presentan, en la sentencia de fecha 11-III-2011, pronunciada en el Amp. 780-2008, se apuntó que se garantiza y posibilita el ejercicio del derecho de petición cuando las autoridades requeridas emiten una resolución dentro del tiempo establecido en la normativa aplicable o, en su ausencia, en uno que resulte razonable a efecto de que los interesados puedan recibir pronta satisfacción. Sin embargo, el mero incumplimiento de los plazos establecidos para formular un pronunciamiento no es constitutivo por sí mismo de vulneración a este derecho, sino solamente aquellas resoluciones que han sido proveídas en un periodo de duración mayor de lo previsible o tolerable, deviniendo en irrazonable.

En virtud de lo anterior, para determinar la irrazonabilidad o no de la duración del plazo para resolver lo pretendido por los interesados, se requiere una concreción y apreciación de las circunstancias del caso en concreto atendiendo a criterios objetivos, como pueden serlo: *i) la actitud de la autoridad requerida*, en tanto que deberá determinarse si las dilaciones son producto de su inactividad que, sin causa de justificación alguna, dejó transcurrir el tiempo sin emitir una decisión de fondo, u omitió adoptar medidas adecuadas para satisfacer lo solicitado; *ii) la complejidad del asunto*, tanto táctica como jurídica; y *iii) la actitud de las partes* en el proceso o procedimiento respectivo.

D. Finalmente, en la sentencia de fecha 15-VII-2011, pronunciada en el Amp. 78- 2011, se afirmó que el derecho de petición constituye un poder de actuación de las personas de dirigir sus requerimientos a las distintas autoridades que señalen las leyes sobre materias que sean de su competencia. Dichas solicitudes pueden realizarse —desde la perspectiva del contenido material de la situación jurídica requerida— sobre dos puntos específicos: *i) sobre un derecho subjetivo o interés legítimo del cual el peticionario es titular y que, en esencia, pretende ejercer ante la autoridad; y ii) respecto de un derecho subjetivo, interés legítimo o situación jurídica de la cual el solicitante no es titular pero de la cual pretende su declaración, constitución o incorporación dentro de su esfera jurídica mediante la petición realizada.*

De lo anterior se colige que es indispensable que dentro del proceso de amparo el actor detalle cuál es el derecho, interés legítimo o situación jurídica material que pretendería tutelar, ejercer, establecer o incorporar dentro de su esfera jurídica material mediante la petición realizada ante las autoridades competentes, puesto que de esa manera se configurarían plenamente los dos elementos —jurídico y material- del agravio alegado respecto de la omisión de resolver la solicitud formulada.

2. A. La *libertad de información*, asegura la publicación o divulgación, con respeto objetivo a la verdad, de hechos de relevancia pública que permitan a las personas conocer la situación en la que se desarrolla su existencia, de manera que, en cuanto miembros de la colectividad, puedan tomar decisiones libres, debidamente informados. La referida libertad se manifiesta en dos derechos: *i) el de comunicar libremente la información veraz por cualquier medio de difusión; y ii) el de recibir o acceder a dicha información en igualdad de condiciones.*

En la Constitución, la libertad de información se encuentra adscrita a la disposición constitucional que estatuye la libertad de expresión -art. 6 inc. 1" -, la cual establece que: "Toda persona puede expresar y difundir libremente sus pensamientos...". Y es que, tal como se determinó en la sentencia de Inc. 13-2012, de fecha 5-XII-2012, la libertad de expresión tiene como presupuesto el derecho de investigar o buscar y recibir informaciones de toda índole, *pública o privada*, que tengan interés público. Situación que, además, es reconocida en similares términos en el ámbito internacional, específicamente, en los arts. 19 de la Declaración Universal de Derechos Humanos, 19.2 del Pacto Internacional de Derechos Civiles y Políticos y 13 de la Convención Americana sobre Derechos Humanos.

B. El *derecho a recibir información* implica el libre acceso de todas las personas a las fuentes en las cuales se contienen datos de relevancia pública. La protección constitucional de la búsqueda y obtención de información se proyecta básicamente frente a los poderes públicos -órganos del Estado, sus dependencias, instituciones autónomas, municipalidades - y a cualquier entidad, organismo o persona que administre recursos públicos, bienes del Estado o ejecute actos de la Administración en general, pues existe un principio general de publicidad y transparencia de la actuación del Estado y de la gestión de fondos públicos.

El derecho a obtener información ha sido desarrollado en la Ley de Acceso a la Información Pública, en virtud de la cual toda persona tiene derecho a solicitar y a recibir información generada, administrada o en poder de las instituciones públicas o de cualquier otra entidad, organismo o persona que administre recursos públicos o, en su caso, a que se le indique la institución o la autoridad competente ante la cual se deba requerir la información. De conformidad con los principios de dicha normativa, la información pública debe ser suministrada al requirente de manera oportuna, transparente, en igualdad de condiciones y mediante procedimientos rápidos, sencillos y expeditos.

C. Por consiguiente —sin tratarse de un listado taxativo--, existirá vulneración al derecho de acceso a la información pública cuando: *i)* de manera injustificada, inmotivada o discriminatoria se niegue o se omita entregar a quien lo requiera, información de carácter público generada, administrada o a cargo de la autoridad o entidad requerida; *ii)* la autoridad proporcione los datos solicitados de manera incompleta o fuera del plazo legal correspondiente o, en su caso, en un plazo excesivo o irrazonable; *iii)* los procedimientos establecidos para proporcionar la información resulten complejos, excesivamente onerosos o generen obstáculos irrazonables o innecesarios para los sujetos que pretendan obtenerla; o *iv)* el funcionario ante el que erróneamente se hizo el requerimiento se abstenga de indicarle al interesado cuál es la institución o autoridad encargada del resguardo de los datos.

V. Desarrollados los puntos previos, corresponde en este apartado analizar si las actuaciones de las autoridades demandadas se sujetaron a la normativa constitucional. ...

B. Detallado el contenido de la prueba incorporada es necesario estudiar el valor probatorio de cada una de ellas. ...

c. En cuanto al derecho de acceso a la información que se alega conculcado, si bien no se ha acreditado dentro de este proceso la existencia de los datos solicitados o que estos se encontraran a disposición de la citada Viceministra, se advierte que cuando la señora Piche Osorio efectuó la petición en referencia —es decir, el 17-IX-2010— ya había sido emitido por parte del Ministro del MARN el Decreto N° 12, de fecha 19-VIII-2010, relativo al Estado de Emergencia Ambiental, en el cual se consignó en su considerando IV que: "... en los meses de julio y agosto del presente año en la zona identificada como Cantón Sitio del Niño, Jurisdicción de San Juan Opico, Departamento de La Libertad, se confirmó mediante la determinación de las concentraciones de plomo en muestras de suelo y agua que persiste contaminación ambiental por plomo en niveles que constituyen un peligro para la salud de la población...".

De lo anterior se colige la existencia de estudios técnicos sobre la emergencia ambiental acontecida en San Juan Opico, por lo que la Viceministra del MARN pudo haberle indicado a la interesada cuál era la autoridad encargada del resguardo de la información o, en su caso, pronunciarse sobre la procedencia de concederle la certificación solicitada, inclusive remitiendo tal requerimiento al funcionario correspondiente.

d. En virtud de lo expuesto, *es procedente estimar la pretensión incoada por la trasgresión a los derechos de petición y de acceso a la información de la señora Domitila Rosario Pinche Osorio, pues se ha comprobado que existen estudios técnicos cuyos resultados podían ser proporcionados a la interesada y que, no obstante haber transcurrido un plazo razonable, la Viceministra del MARN no se ha pronunciado sobre la certificación de la información solicitada.*

B. Corresponde ahora verificar si el Ministro del MARN vulneró los derechos de la pretensora por la supuesta omisión de resolver el escrito de fecha 27-IX-2010.

a. Con la prueba relacionada *supra* se ha comprobado que la señora Piche Osorio, por medio del escrito de fecha 27-IX-2010, le requirió al citado Ministro que le entregara certificación del Estudio de Impacto Ambiental del proyecto Ciudad Versailles, San Juan Opico, con la finalidad de asegurarse de que en esa zona no existía otro problema además del ocasionado por el estado de emergencia ambiental decretado. Dicho escrito consignaba el lugar en el que la peticionaria solicitaba recibir las notificaciones respectivas y fue recibido en el Despacho del señor Ministro en septiembre de 2010 por la señora Ely de López, según se aprecia en el margen inferior derecho de la copia que ha sido incorporada a este expediente, aunque no se distingue con claridad la fecha exacta de su presentación. ...

b. Por consiguiente, con base en la prueba anteriormente detallada, *el Ministro del MARN vulneró los derechos de petición y de acceso a la información de la señora Domitila Rosario Piche Osorio, pues omitió comunicarle a esta en un plazo razonable su decisión respecto de la petición que le fue planteada, lo que trajo como consecuencia la imposibilidad de que la demandante conociera oportunamente lo resuelto por dicha institución y, por tanto, se informara si en la zona en cuestión existía otro problema además del que ocasionó el estado de emergencia ambiental decretado, por lo que es procedente estimar este aspecto de la pretensión incoada por la referida señora.*

C En este apartado se debe examinar si el Ministro del MARN conculcó los derechos invocados por la pretensora por la supuesta omisión de resolver las peticiones que le fueron presentadas en los escritos de fechas 16-IX-2010 y 23-IX-2010.

a. Con la documentación incorporada a este expediente se ha comprobado que la señora Piche Osorio, mediante el escrito presentado el 16-IX-2010, le requirió al aludido Ministro realizar la evaluación de los niveles de contaminación del agua en las tuberías del polígono 43, casa 13, Villa Burdeos, Ciudad Versailles, así como efectuar la inspección del estancamiento de aguas, la contaminación de la tierra y la evaluación de gases en las tuberías de aguas negras y lluvias, petición que fue reiterada mediante el escrito de fecha 22-IX-2010, presentado el 23-IX-2010. ...

b. Ahora bien, de la lectura de las referidas notas se advierte que se resolvió parcialmente la petición formulada por la actora, ya que se omitió hacer mención de los posibles niveles de contaminación del agua en las tuberías de dicha vivienda y la evaluación de gases solicitada en las tuberías de aguas negras y lluvias, por lo que existe una incongruencia omisiva entre lo que fue requerido y lo resuelto por el citado Ministro.

c. No obstante, si bien la anterior omisión ha incidido negativamente en el derecho de petición de la pretensora, no se ha demostrado que haya afectado su derecho de acceso a la información, puesto que, por un lado, los resultados de los mencionados estudios fueron rendidos a la señora Piche Osorio en un plazo

razonable con posterioridad a la toma de las respectivas muestras --seis días para el primer estudio y diecinueve días para el segundo-- y, por otro, no se ha comprobado que existan en poder del Ministro del MARN estudios o datos relativos a los posibles niveles de contaminación del agua en las tuberías de la aludida vivienda o evaluaciones de gases de las tuberías de aguas negras y lluvias, por lo que no podría colegirse que dicha autoridad se haya negado a proporcionarle a la peticionaria la información requerida con relación a tales circunstancias.

d. En consecuencia, con base en la prueba anteriormente detallada se ha acreditado que *el Ministro del MARN vulneró el derecho de petición de la señora Domitila Rosario Piche Osario, pues las delegados de dicha autoridad resolvieron parcialmente lo solicitado por la referida señora, sin que ello haya implicado una transgresión a su derecho de acceso a la información, por lo que es procedente desestimar este último aspecto concreto de la pretensión incoada.*

**VI.** Determinadas las transgresiones constitucionales derivadas de las omisiones de las autoridades demandadas, corresponde establecer el efecto restitutorio de esta sentencia.

1. La ley ha preceptuado en el art. 35 de la L. Pr. Cn. lo que la jurisprudencia constitucional ha denominado "efecto restitutorio", estableciéndolo como la principal consecuencia de una sentencia estimatoria del proceso de amparo. Esta opera cuando se ha reconocido la existencia de un agravio a la parte actora de dicho proceso y mediante su aplicación se pretende reparar el daño causado, ordenando que las cosas vuelvan al estado en que se encontraban antes de la ejecución del acto inconstitucional. Aunado a ello, la mencionada disposición legal señala que, en los supuestos en que tal acto se hubiere ejecutado en todo o en parte *de un modo irremediable*, habrá lugar a una indemnización de daños y perjuicios a favor de la parte demandante, lo que constituye un "efecto alternativo" de la sentencia de amparo.

2. A. En el presente caso, se ha comprobado que la Viceministra del MARN vulneró los derechos de petición y de acceso a la información de la demandante al haber omitido pronunciarse en un plazo razonable sobre la petición que le fue formulada el 17-IX-2010, consistente en que expidiera certificación de un estudio bioquímico realizado en San Juan Opico, por lo que *el efecto restitutorio material con relación a dicha transgresión constitucional consistirá en ordenar a la aludida autoridad que en el plazo de quince días hábiles, contados a partir de la notificación respectiva, resuelva favorable o desfavorablemente— la petición planteada por la actora.*

B. En otro orden, con relación a las solicitudes formuladas por la pretensora al Ministro del MARN mediante los escritos de fechas 16-IX-2010 y 23-IX-2010, las cuales fueron parcialmente atendidas en las notas MARN-DGGAPN-0354-2010 y MARN-DGGA y PN-UDS941-2011, de fechas 18-II-2011 y 11-V-2011, respectivamente, *el efecto restitutorio material respecto a la transgresión al derecho de petición de la actora que se ha constatado en este amparo consistirá en ordenar al referido Ministro que en el plazo de treinta días hábiles, contados a partir de la notificación respectiva, resuelva favorable desfavorablemente— el requerimiento planteado en lo concerniente a realizar la evaluación de los niveles de contaminación del agua en las tuberías de la vivienda en cuestión y de gases de las tuberías de aguas negras y lluvias.*

C Finalmente, en cuanto a la petición formulada por la pretensora al Ministro del MARN mediante el escrito de fecha 27-IX-2010, en el sentido que le entregara certificación del Estudio de Impacto Ambiental del proyecto Ciudad Versailles, San Juan Opico, la cual fue resulta por medio de la nota MARN-DGGA-650-2010, de fecha 19-X-2010, pero que no fue comunicado a la interesada en un plazo razonable, se ha comprobado en este amparo que tal omisión consumó sus efectos de un modo *irremediable, por lo que es imposible efectuar una restitución material de los derechos vulnerados y, en consecuencia, el efecto de esta sentencia se concretará en declarar la infracción a los derechos de*



*petición y de acceso a la información de la pretensora, quedándole expedita la vía indemnizatoria por los daños y perjuicios ocasionadas con la aludida omisión.*

3. A. Con relación a la solicitud planteada por la parte actora en cuanto a que se emita un pronunciamiento sobre el pago de cierta cantidad de dinero en carácter de indemnización de daños y perjuicios, así como costas procesales, el art. 35 inc. 3° de la L.Pr.C.n. prescribe literalmente que: "... [l]a sentencia contendrá, además, la condena en las costas, daños y perjuicios del funcionario que en su informe hubiere negado la existencia del acto reclamado, o hubiese omitido dicho informe o falseado los hechos en el mismo..."

En la resolución de fecha 27-VII-2011, emitida en el Amp. 141-2010, se expresó que la condena que establece el art. 35 inc. 3° de la L.Pr.Cn. procede ante la presencia de una actuación dolosa de la autoridad demandada y no ante el mero ejercicio de su derecho de defensa. Así, al ser el amparo un proceso contradictorio, la autoridad demandada, siempre y cuando respete los principios generales del proceso, tiene derecho a defender su posición -lo que puede hacer negando hechos, guardando silencio, etc.-, sin que por ello deba ser condenada en costas, daños y perjuicios.

B. En el presente caso, tanto el Ministro como la Viceministra del MARN ningún momento han actuado de mala fe, puesto que no negaron la existencia de las peticiones realizadas, sino que se limitaron a *defender su posición negando los argumentos* planteados por la demandante, orientando sus alegaciones a que esta había obtenido una resolución a sus solicitudes y había accedido a la información que requirió.

De igual forma, dichas autoridades presentaron, durante la tramitación del presente amparo, los informes que les fueron requeridos y, además, intervinieron en cada una de las etapas en las que se les otorgó la oportunidad de emitir los argumentos que estimaran convenientes para ejercer su defensa, sin que haya sido posible determinar que aquellas hayan incurrido en incumplimiento de los principios de veracidad, lealtad, buena fe y probidad procesal.

C Por otra parte, la condena en costas, esencialmente, alude a la compensación de los gastos económicamente cuantificables que las partes han de sufragar como consecuencia directa de la sustanciación del proceso, como por ejemplo: los gastos profesionales de los abogados, peritos y demás profesionales cuya intervención haya sido necesaria para su tramitación, así como la obtención de certificaciones, testimonios u otro tipo de documentos determinantes para la controversia que se soliciten a los registros públicos, salvo que estos se requieran directamente por la autoridad judicial o funcionario que tenga a su cargo el conocimiento de los hechos sometidos a discusión.

En cuanto a este punto es necesario indicar que la L.Pr.Cn. no exige para ningún proceso constitucional actuar por medio de un abogado y, en todo caso, la actora de este amparo tiene esa calidad técnica, tal como consta en el sello impreso en cada uno de los escritos que ella ha presentado, por lo que no ha tenido que sufragar gastos por procuración. Por otro lado, no se evidencia la existencia de otro tipo de desembolsos en que haya podido incurrir la demandante, tales como el pago de peritos u otros profesionales o de certificaciones u otro tipo de documentos.

D. En virtud de lo expuesto, *no se cumplen las condiciones para que se condene en costas, daños y perjuicios, con base en el art. 35 inc. 3° de la L.Pr.Cn. a las autoridades administrativas demandadas y, en consecuencia, deberá desestimarse la petición formulada en ese sentido.*

**POR TANTO**, con base en las razones expuestas y lo dispuesto en los arts. 6 y 18 de la Cn., así como en los arts. 32, 33, 34 y 35 de la Ley de Procedimientos Constitucionales, en nombre de la República, esta Sala **FALLA**: (a) *Declárase no ha lugar el amparo* solicitado por la señora Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro del Medio Ambiente y Recursos Naturales, en virtud de no haberse acreditado que las omisiones atribuidas con relación a los escritos presentados con fechas 16-IX-2010 y 23-IX-2010 hayan implicado una transgresión al derecho de



acceso a la información de aquella; (b) *Declárase ha lugar el amparo* requerido por la señora Piche Osorio, en contra de la omisión atribuida al Ministro del Medio Ambiente y Recursos Naturales, con relación a los escritos presentados con fechas 16-IX- 2010 y 23-IX-2010, por existir vulneración al derecho de petición de la referida señora; (C) *Declárase ha lugar el amparo* solicitado por la señora Piche Osorio, en contra de las omisiones atribuidas al Ministro del Medio Ambiente y Recursos Naturales y a la Viceministra del Medio Ambiente y Recursos Naturales con relación a los escritos de fechas 27IX-2010 y 17-IX-2010, respectivamente, por existir vulneración de los derechos de petición y de acceso a la información de aquella; (d) *Ordénase a la Viceministra del Medio Ambiente y Recursos Naturales* que en el plazo de quince días hábiles, contados a partir de la notificación respectiva, resuelva la petición que le fue planteada por la demandante mediante el escrito de fecha 17-IX-2011, consistente en que le expidiera certificación de un estudio bioquímico realizado en San Juan Opico; (e) *Ordénase Ministro del Medio Ambiente y Recursos Naturales* que en el plazo de treinta días hábiles, contados a partir de la notificación respectiva, resuelva la petición planteada por la actora en los escritos presentados con fechas 16-IX-2010 y 23-IX-2010, en lo concerniente a realizar la evaluación de los niveles de contaminación del agua en las tuberías de la vivienda en cuestión y de gases de las tuberías de aguas negras y lluvias; (f) *Queda expedita a la parte actora la vía indemnizatoria* por los daños y perjuicios ocasionados por el Ministro del Medio Ambiente y Recursos Naturales al no haber comunicado en un plazo razonable lo resuelto en la nota MARN-DGGA-650-2010, de fecha 19-X-2010; (g) *Declarase no ha lugar* la petición de la pretensora referida a condenar al pago de cierta cantidad de dinero en carácter de costas procesales, daños y perjuicios, con base en el art. 35 inc. 3" de la L.Pr.Cn. a las autoridades administrativas demandadas; y (f) *Notifíquese. ...*

\* \* \*

## 5. Expediente sobre permisos de mineras a cielo abierto en los sitios de la UNESCO (Superior Tribunal de Justicia de Argentina, 2010)

*Plaintiffs brought an amparo action to seek reversal of a lower court order to grant a permit to allow mining exploration and extraction in an open mine in a UNESCO natural heritage site. Relying on the precautionary principle and other general principles of international environmental law, and with heightened awareness of the historical and natural value of the site, the Court put aside traditional procedural rules, holding that when there is the danger of grave or irreversible "generational harms," the absence of information or scientific certainty can't be used as a reason to delay the adoption of effective means to protect the environment. Moreover, the Court imposed on the defendant the obligation to supply positive proof that the environment was protected. In environmental matters, the court insisted, it is the undeniable role of the judge to participate actively with a view toward vindicating the right to a healthy and uncontaminated environment, as a Fundamental Human Right.*

Las Dras. Alicia Chalabe y Noemí Cazón, en representación de habitantes vecinos de la localidad de Tilcara, departamento del mismo nombre, promovieron el 1º de Agosto de 2.008 “acción de amparo en contra del Estado Provincial a efectos de que ordene a la autoridad administrativa correspondiente – Juzgado Administrativo de Minas- abstenerse de otorgar cualquier permiso de cateo y/o exploración y explotación minera a cielo abierto y/o las que utilicen sustancias químicas como cianuro, mercurio, ácido sulfúrico y otras sustancias tóxicas similares en sus procesos de cateo, prospección, exploración, explotación y/o industrialización de minerales metalíferos, especialmente las referidas al uranio y que revoque los concedidos o en trámite, en la zona de la Quebrada de Humahuaca, de esta provincia de Jujuy, estableciendo de esa manera la plena vigencia del “principio precautorio”, consagrado en el art. 4 de la Ley General del Ambiente N° 25.675, dictada en el año 2.002 que reglamenta el art. 41 de la Constitución Nacional y que dispone que cuando haya peligro de daño grave o irreversible la ausencia de información o certeza científica no deberá utilizarse como razón para postergar la adopción de medidas eficaces, en función de los costos, para impedir la degradación del medio ambiente...” (sic). Fundamentó la parte actora su petición –en principio- en la Declaración de Patrimonio Natural y Cultural de la Humanidad de la Quebrada de Humahuaca efectuada en el mes de julio de 2.003, en París, Francia, para la Organización de Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO).

Paralelamente, para “garantizar la efectividad de la tutela judicial requerida”, en razón del deber de preservación establecido en la Constitución Nacional –adujo- como la obligación de los ciudadanos y de las autoridades de preservar el medio ambiente para las generaciones futuras, pidió se decrete medida cautelar innovativa, a fin de que con habilitación de días y horas inhábiles necesarios, se ordene a la demandada -Poder Ejecutivo de la Provincia- la inmediata suspensión de los pedidos de cateo y exploración de minerales de 1º y 2º categoría tramitados mediante los expedientes administrativos, que individualizó, pertenecientes al Juzgado de Minas de la Provincia, correspondientes al Departamento de Tilcara. Además impetró se informe al Tribunal los permisos de cateo y exploración en trámite o solicitados en la zona y suspenda cada uno de ellos, hasta tanto decida la prohibición de la actividad y producción minera en las condiciones referidas en la Quebrada de Humahuaca, comprendida en la Declaración de Patrimonio Natural y Cultural de la Humanidad efectuada por la UNESCO en el año 2.003.

Alegó que la verosimilitud del derecho que invocó para la cautelar pedida, en el caso se encuentra en la propia esencia, entendió, del derecho ambiental vulnerado, pues requiere de un obrar esencialmente cautelar o precautorio, acorde con el “explícito ropaje” constitucional de los derechos de incidencia colectiva, dentro de cuya familia se encuadra este derecho que justifica una tutela diversificada,

específica, con soluciones particulares, preferente, prioritaria y privilegiada y que es la que solicitó con sustento en el artículo 43 de la Constitución Nacional.

Justificó luego su pedimento en los antecedentes que destacó, esto es, la Declaración de Patrimonio Natural y Cultural de la Humanidad a la zona en cuestión, explayándose en los considerandos del Comité de Patrimonio Mundial de la UNESCO, expresando que la Quebrada de Humahuaca comprende un valle andino de 155 kilómetros en el noroeste argentino, que comienza en el pueblo de Volcán y termina en Tres Cruces. Que dicho comité compuesto por 21 miembros en forma unánime, calificó al paisaje como un “sistema patrimonial de características especiales”. Tilcara –afirmó- fue fundada en el año 1586 y llamada así por la tribu indígena que habitaba la región, es la capital arqueológica de la Provincia de Jujuy, y la más renombrada del corredor natural. Agregó que por Ordenanza N° 45/05 se reconoció al Municipio de San Francisco de Tilcara como “Indígena”, en los términos del Convenio 169 de la Organización Nacional del Trabajo “Sobre Pueblos Indígenas y Tribales en Países Independientes” (1989), adoptado por Argentina mediante Ley N° 24.071, ratificada en julio de 2.000.

Adujo luego la parte actora que la empresa Uranio del Sur S.A. efectuó pedidos de cateo y exploración con los que se formaron los respectivos expedientes (N° 721 Letra U Año 2.007 y N° 1017 Letra U Año 2.008); que en uno de ellos la superficie solicitada es de cinco mil hectáreas (5.000 has) y en el otro caso, de nueve mil noventa y nueve hectáreas (9.099 has), con ubicación ambos en el Departamento de Tilcara, exactamente, se señala en el croquis agregado a las actuaciones, que en la zona de cateo solicitada se encuentra ubicada una comunidad aborígen llamada Volcán de Yacoraite, y en el mismo expediente administrativo consta que existe además un área de reserva de seguridad militar. En la otra causa, se brinda información también por medio del croquis, sobre que en la zona de cateo se halla la comunidad aborígen Yacoraite y otra de nombre Angosto de Yacoraite. Agregó que el Municipio de Tilcara promulgó la Ordenanza N° 13/08, la cual luego de extensos argumentos, dispone, entre otras cosas, la prohibición en la jurisdicción del municipio de radicación de explotaciones mineras metalíferas a cielo abierto y/o explotaciones mineras que utilicen sustancias químicas como cianuro, mercurio, ácido sulfúrico, y otras sustancias tóxicas similares en procesos de cateo, prospección, exploración, explotación y/o industrialización de minerales metalíferas, especialmente las referidas al Uranio.

Narró luego que el 10 de julio de 2.008 se labró un acta (“en el marco de una marcha multitudinaria”) en la que se dejó constancia (fojas 36 de la causa principal) de una reunión llevada a cabo con el Intendente de Tilcara, los integrantes del Concejo Deliberante de esa comuna, el Secretario de Cultura y Turismo de la Provincia, el Director de Minería, la señora Jueza Administrativa de Minas y el Director Provincial de Políticas Ambientales y Recursos Naturales de la Provincia, por la cual se expresa que “a pedido de las comunidades de diferentes regiones de la Provincia y como consecuencia de dos expedientes iniciados en el Juzgado Administrativo de Minas para obtener permisos de exploración de minerales de 1° y 2° categoría en la Quebrada de Humahuaca, luego de un intercambio de ideas y en atención a los antecedentes del caso, a las normas municipales citadas antes, se acordó suspender el trámite de los expedientes administrativos, firmando el acta todos los presentes, salvo la señora jueza de Minas que de su puño y letra agregó textualmente que “Ante la solicitud de suspensión de trámites formulada precedentemente por los funcionarios provinciales y municipales se recibe el documento haciéndose saber que se dictarán las medidas correspondientes en los plazos legales pertinentes, Tilcara, 10 de Julio de 2.008” (sic).

Refirió una declaración periodística del 15 de Julio de 2.008 en la cual el Secretario de Medio Ambiente y Recursos Naturales de la Provincia de Jujuy expresó que “el Gobierno, en el marco de su política de gestión ambiental basada en el concepto de desarrollo sostenido, no autorizará explotaciones mineras que afecten la figura de Patrimonio...” “...desestimamos –agregó el funcionario- la idea de llevar adelante un crecimiento económico a cualquier precio, porque somos férreos defensores de los valores patrimoniales,

históricos y culturales de Jujuy”. Dijo la actora también que dicho funcionario recordó como antecedente que la UNESCO suscribió con el Consejo Internacional de Minería y Metales un acuerdo para lo no exploración de la minería en sitios de Patrimonio Mundial. Adjuntó la publicación que refirió y agregó que hasta la fecha de la demanda (1° de agosto de 2.008) no se había emitido resolución administrativa ni dispuesto la suspensión de los pedidos de exploración. Explicó luego las razones de la procedencia formal de la vía de amparo escogida para la protección de los derechos que invocó, y justificó la inexistencia de otro medio más idóneo como la inexigibilidad e imposibilidad de agotar la vía administrativa.

Adujo también una amenaza cierta, actual e inminente de daño ambiental. Al respecto fundó su posición en una editorial de un diario nacional, de la cual reprodujo palabras del Dr. Luis Castelli, presidente a esa época de la Fundación Naturaleza Para el Futuro (FUNAFU), en el sentido que la posible explotación de una mina de Uranio en la Quebrada de Humahuaca ha despertado la preocupación en una de las zonas más frágiles desde el punto de vista cultural y natural; agregó que varias comunidades de Juella, Yacoraite y Huacalera al igual que el Consejo Deliberante de Tilcara se pronunciaron contra la práctica minera en la zona. Que la nota refiere el conflicto en el año 2.000 que despertó el proyecto de construir una línea de alta tensión que atravesaría la zona hasta llegar a la ciudad de La Quiaca, al fracturar así su belleza natural. Que la propuesta finalmente fue desechada por no encontrarse debidamente justificada desde el punto de vista técnico y económico. Alegó que la conciencia de ese valor logró años después, en el 2.003, que la Quebrada de Humahuaca fuera declarada Patrimonio de la Humanidad por la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO). Que se tuvo en cuenta que se trata de una zona con un “sistema patrimonial de características excepcionales”; expresó que es un “itinerario cultural de 10.000 años”; que por sus senderos caminaron aborígenes de distintas etnias que aún hoy conservan creencias religiosas, ritos, fiestas, arte, música y técnicas agrícolas y ganaderas que constituyen un patrimonio viviente.

Que la declaración importa una responsabilidad especial para las autoridades y sus habitantes, responsabilidad –afirmó- que implica el fortalecimiento de un desarrollo educativo y sustentable de la zona y la preservación de su cultura. Se extendió luego sobre consideraciones acerca de la descripción del lugar cuya defensa pide, y dijo que la Quebrada de Humahuaca es una zona protegida turística por excelencia para la provincia de Jujuy. Que en particular en la región de Yacoraite, nace el río del mismo nombre, que provee de agua a poblaciones ubicadas más abajo y es la única fuente utilizada por pobladores y pequeños productores agrícolas. Entiende que el costo ambiental del daño provocado por cualquier actividad debe ser evaluado en profundidad, teniendo en cuenta que aún cuando esté en condiciones de suministrar beneficios inmediatos puede afectar el aire puro, las aguas limpias, los paisajes deslumbrantes y los sitios de recreación de lugares cuyo valor reside precisamente en esas condiciones naturales. En ese valor, tan poco considerado en los pasivos ambientales, puede residir el potencial económico de una comunidad.

Aseveró que es imprescindible plantear de modo transparente y participativo el grado de impacto o deterioro que ciertas actividades podrían ocasionar en esa área y en su calidad de vida. Que sólo así se fortalecerá la riqueza natural y cultural de nuestro país, muchas veces ignorada, y evitará los profundos desencantos que han provocado proyectos similares en otros lugares del mundo sustentados por la falsa creencia del “mal necesario o inevitable” del progreso.

Se refirió luego a la actividad minera y sus características como a las formas de llevarla a cabo, los métodos de explotación y sus consecuencias, en especial explicó acerca de la llamada “explotación a cielo abierto”. Concluyendo en que los métodos que se utilizan tienen potencialmente capacidad para contaminar las aguas subterráneas; señaló que el carácter de utilidad pública que revisten las etapas de exploración y explotación de las minas, habilita al minero a usar el terreno superficial, afianzando debidamente los daños y perjuicios, y aún más, le otorga derecho a expropiarlo en la medida de sus

necesidades y el propietario –alegó– no puede oponerse por tratarse justamente en el caso de la minería, de una declaración general de interés público, que no debe ser probada por el minero en cada caso.

En ese contexto, expresó que cobraban plena vigencia los nuevos conceptos introducidos por el derecho ambiental, al auxilio de la naturaleza, de los ecosistemas y de los hombres que viven en ellos. Alegó que en esta materia rige el principio precautorio y por ende, dado el carácter catastrófico e irreversible con que a menudo se manifiestan los daños, ante la sola sospecha de riesgo, la falta de evidencias científicas sobre las consecuencias obliga a llamar a la cautela y no a la acción, hasta tanto cualquier sospecha desaparezca, o en su caso, se confirme.

Este cambio de óptica, adujo, implicó desplazar la responsabilidad que hasta entonces sólo se operaba con el daño producido, trasladándolo hasta el momento anterior al hecho potencialmente peligroso, para operar así sobre el riesgo. Y agregó textualmente “esta necesidad expulsa, a juristas y jueces, del firme terreno de los hechos, para conducirnos a las arenas de las probabilidades, único modo de adelantarse temporalmente al daño y hacer posible su prevención”. “En Argentina, las explotaciones de uranio, oro y otros minerales metálicos, llevadas a cabo hasta el momento han dejado daños ambientales catastróficos. La explotación de uranio es letal para los habitantes y los trabajadores de las minas. El daño ambiental es irreparable” (sic). Que todas las mezclas de uranio (natural, enriquecido y empobrecido) tienen los mismos efectos químicos en el cuerpo. Se trata de un material muy tóxico que afecta los sistemas óseo, renal y otros órganos del cuerpo humano, y que por ser radiactivo, además es cancerígeno. Finalmente, expresó al respecto que el Informe Nacional de la Cancillería Argentina sobre Ambiente, Desarrollo de las Naciones Unidas, reunido en Río de Janeiro en Julio de 1.991, expresa que “a los riesgos que se producen en la minería de uranio, se suman los de la operación y básicamente los vinculados a la disposición final de los residuos del proceso” (sic).

Desde el punto de vista jurídico, en la demanda se invocó, expresado sintéticamente, especialmente el segundo párrafo del artículo 41 de la Constitución Nacional. Además el principio precautorio adoptado por la ley de protección al medio ambiente que producirá, expuso, una modificación al régimen de la carga de la prueba, pues quien deberá acreditar la inocuidad de la actividad será el titular de la actividad y no el afectado, transformándose así el principio del derecho civil sobre que quien alega un daño deberá probarlo. Agregó que este principio además introdujo una renovada visión del clásico poder de policía, permitiendo apreciar la legalidad de actos administrativos prohibitivos o limitativos de derechos constitucionales, los que se justificarán a partir de la denominada incertidumbre sobre la falta de pruebas acerca de la inocuidad de determinada actividad. Expresó que tal fue el sentido de la Suprema Corte de Justicia de la Provincia de Buenos Aires, en el caso “Ancore S.A. y otros contra Municipalidad de Daireaux (Tomo IV, 2.002, J.A. pág. 392 a 397), en el que se estableció que frente a la ausencia de reglamentación específica referente a la actividad de los denominados “feed lot”, a raíz de los perjuicios que acarrea ese tipo de explotación de la actividad ganadera (por ejemplo olores muy desagradables), ello no facultaba a soslayar las consecuencias del impacto ambiental que producía. Que en suma, agregó, la responsabilidad en esta materia, tanto las reglas de la causalidad, el juego de las presunciones, la carga de la prueba, la atribución y distribución de responsabilidades y los alcances de los recursos deberán ser revisadas y reordenarse dentro de una nueva visión no sólo procesal sino a la vez del rol del Derecho y de la Justicia. Más adelante invocó como normativa aplicable el artículo 41 de la Constitución Nacional, La Ley N° 25.675 de política Ambiental Nacional- Presupuestos Mínimos para la Gestión Sustentable, 2.002; Código de Minería T.O. por Decreto 456/97; Ley Nacional N° 24.585, modificada por la primera; Ley Provincial N° 5.063 de Medio Ambiente (1.998); Ley N° 5.206 que designa “Paisaje Protegido la Quebrada de Humahuaca en toda su extensión” (2.001); Decreto Reglamentario N° 5.980, de la Ley de Medio Ambiente Provincial, mencionada antes; Decreto 789 de 2.004 que reglamente la ley de paisaje protegido; Ordenanza N° 18/08 del Honorable Consejo Deliberante de la Ciudad de Tilcara y decreto N° 180 de la Municipalidad de San Francisco del Tilcara promulgatorio de la Ordenanza anterior.



Ofrecida la prueba documental que da cuenta la demanda agregada a la causa principal (fojas 67 y vuelta), dejó planteado luego el caso federal.

El Estado Provincial en la audiencia respectiva agregó sendos escritos en los cuales respondió el pedido de cautelar efectuado por la actora y la contestación de la demanda. Alegó en su defensa respecto a la medida innovativa que se trataba de una cuestión que se había tornado abstracta en razón -adujo- de haberse acordado paralizar el procedimiento administrativo con anterioridad a la interposición de la demanda principal. Expresó que la presentación judicial fue notificada al Estado Provincial el 7 de Agosto del año 2.008 y que “en virtud de su competencia y facultades actúo en idéntico sentido al requerido por los actores” (sic), de modo que a juicio de la demandada, no existía trámite que hubiera que paralizar. Respecto al informe sobre los pedidos de exploración y cateo “en la zona declarada patrimonio natural y cultural” (sic), informó que se acompañaba adjunto a la presentación, por lo que también consideró innecesario un pronunciamiento expreso al respecto. Negó luego que se cumplan en el caso con los requisitos para la procedencia de una medida cautelar innovativa como la peticionada. Así expresó, que se trata de remedios procesales de carácter excepcional, que no es otra cosa, agregó, que el correlato de alterar mediante ella el estado de hecho o de derecho existente al tiempo de su dictado confirmando un anticipo de jurisdicción favorable respecto del fallo final, lo que justifica una mayor prudencia en la apreciación de los recaudos que hacen a su admisión. Al respecto consideró insuficiente una “mera declaración” (sic) para ordenar una medida innovativa; respecto a la verosimilitud del derecho afirmó que de la demanda resultaba una petición cautelar de protección “genérica, vaga y sumamente ambigua del derecho ambiental” (sic), sin precisión de la afectación que provocaría la exploración y cateo. Descartó además que existiese daño y peligro en la demora, brindando las razones que entendió adecuadas y adujo que la parte actora no ofreció ni otorgó la contracautela necesaria para responder a eventuales daños que la medida cautelar, en caso de prosperar, pudiera ocasionar. Finalmente, ofreció como prueba los expedientes administrativos que acompañó en fotocopia certificada y listado de los pedidos en trámite; pidió el rechazo de la cautelar impetrada y planteó además el caso federal. En la contestación de demanda (fojas 90/106), alegó el Estado Provincial ante todo la incompetencia del Tribunal Contencioso Administrativo para entender en el asunto, invocando la de la Cámara de Apelaciones en lo Civil y Comercial para recurrir las decisiones del Juzgado de Minas de la Provincia. Luego de negar los hechos alegados por la actora, dijo que la litis se encontraba incorrectamente integrada pues se hacía necesario convocar a la empresa Uranio del Sur S.A. ya que esa “insuficiencia pasiva” (sic) tornaría estéril un pronunciamiento judicial en el sentido pretendido. Alegó también falta de legitimación pasiva en razón justamente de la errónea y defectuosa integración del litigio; entendió improcedente la vía del amparo por la extemporaneidad a raíz de la falta de cumplimiento del trámite administrativo respectivo y previo para acceder a la instancia judicial; interpretó “excesivo” (sic) el objeto de la acción en tanto la vía del amparo resulta improcedente cuando se pretende la revocación de todas las autorizaciones otorgadas a mineros para la exploración, cateo y explotación en la zona de la Quebrada de Humahuaca. Razonó que no puede declararse la nulidad de un acto administrativo dado su presunción de legitimidad y ejecutoriedad; alegó la inexistencia de vulneración a algún derecho constitucional porque el Estado Provincial respeta y exige el cumplimiento de los recaudos legales previstos en materia ambiental minera y además –agregó- los actores tienen oportunidad de volcar las inquietudes o impugnaciones en el marco del procedimiento administrativo. Sostiene que lejos de ser arbitraria o ilegítima las decisiones de la administración “pone de resalto que la situación minera imperante en la actualidad se ajusta a la ley positiva vigente” (sic). Afirma que no existe norma jurídica que prohíba la actividad minera, que por el contrario se trata de un acto de utilidad pública. Que la normativa que se refiere a la Quebrada de Humahuaca, respecto de la prohibición de extracción de minerales no es absoluta, sino para aquellos casos en los no se haya autorizado tal actividad. Respecto de las Ordenanzas invocadas alega que fueron dictadas con posterioridad al otorgamiento de los pedidos cuestionados y que además los municipios no tienen competencia para decidir en materia minera de acuerdo al régimen constitucional y legal vigentes.



Reiteró idénticos argumentos sobre la improcedencia por la inexistencia de daño inminente y grave, de urgencia en la demora, la improcedencia del amparo como vía apta, ofreció idéntica prueba que en la contestación de la cautelar, impugnó documental agregada por la actora, y ofreció otra causa, caratulada: “Juzgado Administrativo de Minas s/ Área Protegida Quebrada de Humahuaca Patrimonio Natural y Cultural de la Humanidad” (agregada también en copia certificada). Formuló reserva del caso federal.

El 13 de abril del 2.009 el Tribunal Contencioso Administrativo dictó sentencia para rechazar la acción de amparo, imponiendo las costas por el orden causado.

En lo medular, ponderó el Tribunal de grado que si bien comparte que al decidir cuestiones referidas a daños ambientales nunca será posible aferrarse a “estereotipos o cartabones procesales” (sic) que coarten el derecho de las partes, resaltó que los nuevos daños requieren también nuevas respuestas legales y brindar así una adecuada respuesta desde la perspectiva jurídica (citó a A. R. Sobrino en nota Lexis Nexis J.A.- Julio 2002). Entendió que ni de la prueba instrumental ofrecida por la actora, ni de la agregada por la demandada, surgía la mera posibilidad de daño.

Agregó que si bien es cierto que “respecto de los daños causados al medio ambiente resulta deber de todos coincidir en que esos daños se prevengan, ya que, una vez producidos, resultan en la práctica de una casi imposible reparación (cfr.: J.A. 11-1971-472), lo que en modo alguno releva al amparista de la acreditación de tales extremos” (sic). Que también es claro “que resulta indiscutible que el Juez en su rol actual no es el mismo que el que pudo tener décadas atrás, y que ni el proceso ni los procedimientos son los mismos porque la alta complejidad de la técnica nos ha sobrepasado y la Justicia y el Juez tercián de modo distinto en el seno de la sociedad, sin perjuicio de lo cual, no surge de las probanzas introducidas al debate, ni siquiera la mera posibilidad de la efectivización de los daños que se dicen ocurrirán” (sic).

Asimismo expresó que compartía que “el concepto de responsabilidad y culpa en la generación de estos especialísimos daños -que de ocurrir no solo comprometen a la generación actual sino y especialmente a las generaciones futuras-, y respecto de su acreditación han ocurrido grandes cambios, empezando a dejarse de lado los conceptos tradicionales, en el sentido de que únicamente debía probar la parte actora, y que incluso una parte de la doctrina desarrolló la teoría de la ‘presunción de culpa’, y la ‘teoría de las cargas probatorias dinámicas’, pero en la dinámica del onus probandi ello no exime al peticionante de ofrecer las pruebas que se encuentren a su alcance, lo que no se verifica en el sublite”. Luego razonó que “también cambios similares vienen dándose en el concepto de la relación de causalidad por ejemplo, en cuanto a daños ambientales no se exige tanta certeza, sino se apunta a la probabilidad, es decir que ante la dificultad de poder aportar la certeza absoluta se está aceptando que -por lo menos- se establezcan probabilidades (cfr.: Vázquez Moreno, Lucía: ‘Responsabilidad Civil por daño ambiental’; Goldemberg, Isidoro y Cafferata Nores, Néstor: ‘Daño Ambiental, Problemática de su determinación causal’, cit O. Sobrino, op. cit.)” (sic).

Y que tampoco escapaba a su reflexión “que la Corte Suprema de Justicia de la Nación, ha dicho que ‘La tutela del ambiente importa el cumplimiento de los deberes que cada uno de los ciudadanos tienen respecto del cuidado de los ríos, de la diversidad de la flora y la fauna, de los suelos colindantes, de la atmósfera. Estos deberes son el correlato que esos mismos ciudadanos tienen a disfrutar de un ambiente sano, para sí y para las generaciones futuras, porque el daño que un individuo causa al bien colectivo se lo está causando a sí mismo. La mejora o degradación del ambiente beneficia o perjudica a toda la población, porque es un bien que pertenece a la esfera social y transindividual, y de allí deriva la particular energía con que los jueces deben actuar para hacer efectivos estos mandatos constitucionales’. (cfr.: ‘Mendoza Beatriz S. y otro c/ Estado Nacional y otro’ del 20 de junio de 2006- Cons. 20, Cons. 18)” (sic). “Que en particular el bien jurídico a proteger está por encima de normas adjetivas determinadas, y la finalidad de la justicia no puede verse mediatizada sino atender a la más amplia protección de los derechos cobijados por la Constitución de la Nación y de la Provincia” (sic), y entendió “que en autos no

se ha acreditado ni siquiera en forma nimia la posibilidad de acaecimiento de daños ambientales por la actividad minera que se desarrolla en la Provincia, sin perjuicio de que estos fundamentos no puedan ser utilizados para negar que puedan efectivamente darse en la realidad daños ambientales de los enunciados, en un proceso donde tales cuestiones sean introducidas regularmente al debate y se acredite su existencia” (sic).

Meritó que “sin perjuicio de lo expuesto hasta aquí, de la sola lectura de los agravios expresados por la amparista y de la prueba ofrecida para respaldar sus dichos consistente en expedientes administrativos, copia de una nota presentada al Juzgado de Minas, copias de ordenanzas y decretos y tres artículos periodísticos, surge de su análisis claramente que no se acredita la posibilidad del daño que se invoca, en tanto no se prueba, ni al menos se indica con cierta precisión en que consiste el ‘daño ambiental’, omitiendo particularizar en cada uno de los casos el nexo causal entre el sujeto (actividad minera específica), los medios utilizados y la consecuencia que considera dañosa, (lo que en mi criterio solo es posible luego de la realización de peritajes, dictámenes, etc); labor profesional y de parte que no puede ser reemplazada en esta instancia, en virtud del principio de contradicción, bilateralidad y especialmente de defensa en juicio y debido proceso legal, y menos aún cuando -como ocurre en autos- la actividad de la autoridad administrativa de control resulta fundado, y no ha merecido una crítica puntual, detallada y concreta de parte de la actora...” (sic).

En contra del pronunciamiento y atribuyéndole arbitrariedad, la Dra. Alicia Chalabe en representación de de Remo Leño, Victorina Cruz, Dámaso Licantica, Víctor Hugo Valenzuela, Roger Lucein Moreau, Francisca Simona Jose, Ghislaine Fontaine y Eduardo Peloc, interpuso recurso de inconstitucionalidad.

El Estado Provincial contestó el traslado que le fue conferido. A los argumentos de ambos escritos remito en homenaje a la brevedad. El Ministerio Público Fiscal dictaminó en sentido adverso a la procedencia del recurso articulado, opinión, que adelanto desde ahora, no comparto.

Considero que la sentencia pronunciada por el Tribunal Contencioso Administrativo no constituye derivación razonada del derecho vigente y aplicable ni se ajusta a las constancias de la causa, sino que, por el contrario, adolece del vicio de arbitrariedad que se le atribuye por ser incongruente y autocontradictoria.

Es por ese motivo que entiendo que el recurso interpuesto por la parte actora, a mi modo de ver, no es una mera disconformidad con el fallo puesto en cuestión –y por eso no estoy de acuerdo con la opinión del Ministerio Público Fiscal-, sino que de lo que se trata verdaderamente es analizar de que modo el fallo del Tribunal de grado tiene en cuenta, o en todo caso, si valoriza correctamente el texto y el espíritu de normas de la Constitución Nacional (artículos 41 y 43) y artículo 22 de la Constitución Provincial.

Como tuve oportunidad de expresar in re “Asociación Civil CO.DE.S.E.D.H. c/ Ledesma S.A.A.I.” (L.A N° 49, F° 4909/4913, N° 970), en la cuestión de los daños ambientales no es posible aferrarse, como también sucede en el caso que nos ocupa, a moldes ortopédicos de ninguna naturaleza sino que es menester resaltar que los nuevos daños requieren nuevas respuestas legales y de esa forma brindar una adecuada respuesta desde la perspectiva jurídica (cit. Por O. A. R. Sobrino en nota Lexis Nexis J.A.- Julio 2002).

En efecto, expuse que “los daños causados en el medio ambiente es el gran tema del siglo veintiuno y es deber de todos coincidir en que esos daños se prevengan, ya que, una vez producidos, resultan en la práctica de una casi imposible reparación. Nuestra Suprema Corte de Justicia así lo ha expresado en el caso ‘Podestá, Santiago y otros c/ Pcia. de Buenos Aires, al decir que ‘ninguno puede tener un derecho adquirido de comprometer la salud pública y esparcir en la vecindad muerte y duelo con el uso que se haga de su propiedad y, específicamente con el ejercicio de una profesión o de una industria’ (J.A. 11-1971-472)”.

“Está claro para mí y es indiscutible que el Juez actual -y su rol- no es el mismo que el que pudo tener décadas atrás. El proceso ni los procedimientos son los mismos porque la alta complejidad de la técnica nos ha sobrepasado y la Justicia y el Juez tercián de modo distinto en el seno de la sociedad”.

“Así como ha ido evolucionando el papel del Juez y de la Justicia, el concepto de daño también se ha tornado más amplio, hasta abarcar por ejemplo aquellos que se llaman ‘daños generacionales’ es decir aquellos que por su magnitud no repercuten solo en la generación actual sino que sus efectos van a impactar en las generaciones futuras”.

Y agregué en aquella ocasión que “esto es lo que las naciones han querido prevenir mediante acuerdos internacionales, como por ejemplo el de Kioto, a cuya ratificación se han negado y niegan aún ciertas potencias que se aferran a un concepto escandalosamente economicista y empresarial”.

“También en el concepto de responsabilidad y culpa en la generación de estos daños y de la prueba han ocurrido grandes cambios, empezando a dejarse de lado los conceptos tradicionales, en el sentido de que únicamente debía probar la parte actora. Incluso merced a un efecto péndulo, una parte de la doctrina desarrolló la teoría de la ‘presunción de culpa’, especialmente en el caso de las responsabilidades profesionales, donde se producía una inversión de la carga de la prueba de la culpa’ (cfr. Gozaini -ED Universidad de Belgrano -1999)”.

“Cambios similares se vienen dando en el concepto de la relación de causalidad por ejemplo, en cuanto a daños ambientales no se exige tanta certeza, sino se apunta a la probabilidad, es decir que ante la dificultad de poder aportar la certeza absoluta se está aceptando que -por lo menos- se establezcan probabilidades (Vázquez Moreno, Lucía: “Responsabilidad Civil por daño ambiental”; Goldemberg, Isidoro y Cafferata Nores, Néstor: “Daño Ambiental, Problemática de su determinación causal” cit O. Sobrino, op. cit.)”.

“Como dijimos también la evolución y los cambios han conmovido, redimensionado y revalorado el concepto de la prueba, empezando por dejarse de lado los antiguos conceptos sobre el onus probandi”.

“Lo que vengo advirtiéndole hasta aquí me es útil para llegar a la certeza de que el fallo recurrido adolece de fundamentos concretos para haberse resuelto la cuestión como se pretende hacer. La interpretación de la prueba rendida y sobre todo su meritación -a mi modo de ver- son demasiadas ligeras, despojadas de la necesaria exigencia que debió primar...”. “... Creo que en el caso de autos -agrego ahora que también lo sostengo para el supuesto en tratamiento-, apenas se ha orillado la cuestión, sin mayor compromiso ni afán por la verdad objetiva”.

Sostuve también que “el daño ambiental en el caso que nos ocupa es sensible a las narices de cualquier persona que se desplace por la región y de allí que es menester recomendar a las autoridades provinciales y municipales que no abduquen del derecho y el deber que emana de la manda constitucional de proveer al bienestar general y afianzar la justicia”.

“La Corte Suprema de Justicia de la Nación, en el caso ‘Mendoza Beatriz S. y otro c/ Estado Nacional y otro’ del 20 de junio de 2006- Cons. 20, ha dicho que ‘La tutela del ambiente importa el cumplimiento de los deberes que cada uno de los ciudadanos tiene respecto del cuidado de los ríos, de la diversidad de la flora y la fauna, de los suelos colindantes, de la atmósfera. Estos deberes son el correlato que esos mismos ciudadanos

tienen a disfrutar de un ambiente sano, para sí y para las generaciones futuras, porque el daño que un individuo causa al bien colectivo se lo está causando a sí mismo. La mejora o degradación del ambiente beneficia o perjudica a toda la población, porque es un bien que pertenece a la esfera social y transindividual, y de allí deriva la particular energía con que los jueces deben actuar para hacer efectivos estos mandatos constitucionales (Cons. 18)’...”.

“El bien jurídico a proteger está por encima de normas adjetivas determinadas y la finalidad de la justicia no puede verse mediatizada sino atender a la más amplia protección de los derechos cobijados por la Constitución de la Nación y de la Provincia, normas por cierto superiores a los meros ordenamientos procesales....” (L.A N° 49, F° 4909/4913, N° 970, causa Asociación Civil CO.DE.S.E.D.H. c/ Ledesma S.A.A.I.).

¿Como armonizar, entonces, la necesidad de los beneficios del progreso con el cuidado del medio ambiente?

Sin duda constituye un interrogante muy común entre quienes responsablemente orientan su preocupación en una verdadera y conciente preservación del medio ambiente a través de políticas públicas y privadas que razonablemente comprendan e impliquen un desarrollo sustentable basado, como es preciso, en el cuidado especial de no caer en la contaminación del medio ambiente si no en su preservación, pues el desarrollo de los pueblos jamás podrá ser ni sustentable ni aportará ciertamente beneficios, prescindiendo de sus cuidados y cometiendo abusos irreparables.

Esto es, no podrá haber desarrollo ni crecimiento sostenible si dejamos que el medio ambiente se degrade aún cuando sea paulatinamente –como ya no sucede, sino todo lo contrario–, puesto que el paso del tiempo habrá producido mayores pérdidas que las que se trata de evitar con la explotación de actividades –cualquiera sea, no sólo la minería– que no podrán perdurar, tampoco, justamente porque no existirá medio ambiente que soporte ninguna actividad susceptible de lograr beneficios de algún tipo.

El supuesto dogma aplicado al tema en debate y que instituye que no puede estarse en contra del crecimiento generado por la tecnología, tiene sin duda su límite o contrapartida, justamente en el propio cuidado del medio ambiente. Porque si las condiciones de salubridad desaparecen, por desatención e incumplimiento a las leyes naturales y legales sobre la materia, no habrá pues actividad útil que realizar, y siendo así, sucederá a muy corto plazo, desgraciadamente.

No puede anteponerse criterios normativos formales al derecho continental de medio ambiente sano e incontaminable.

De modo que en estos casos el juez es parte, el juez es interesado y por ello se exige un “juez activo protagonista” (Conforme La Ley 2.002, “Derecho Ambiental profundizado, páginas 10, 4-5, citado en Revista de Derecho de Daños, Daño Ambiental”, Rubinzal Culzoni Editores 2.008-3, págs. 87/89).

El juez interviniente podrá (mejor dicho deberá) disponer todas las medidas necesarias, para ordenar, conducir o probar los hechos dañosos en el proceso, a fin de proteger efectivamente el interés general (Ley 25.675, artículo 32). En materia ambiental es rol irrenunciable del juez una participación activa con miras a la protección del ambiente (Capelletti, Mauro, La Protección de los intereses colectivos y de grupos, en Conferencia pronunciada en la Asamblea General de la Sociedad de Legislación Comparada, publica en Revista de la Facultad de Derecho. México, N° 106 enero-junio de 1971; idem cita anterior).

Resulta un absurdo contrasentido permitir nuevas explotaciones como las aludidas en autos, en un territorio declarado patrimonio cultural de la humanidad, acto o declaración que, como se sabe, es

revocable. Revocación que causaría seguramente daños a la infraestructura turística ya realizada, además de un papelón internacional.

Resulta por ello también muy ilustrativo el informe que obra agregado en las copias certificadas del Expte. Administrativo N° 1045, Letra J, año 2.008 (Juzgado Administrativo de Minas), caratulado: “Asunto s/ Área Protegida Quebrada de Humahuaca Patrimonio Natural y Cultural de la Humanidad”, agregado a la causa principal, pues fue acompañado por el propio Estado Provincial, efectuado por la Unidad de Gestión de la Quebrada de Humahuaca, a cargo del Arquitecto Néstor José, cuando expresa a fojas 16/17 que “...No obstante lo dicho, (se refiere a que existen especialistas en la materia) en lo que sí incumbe a esta Unidad de Gestión, es importante destacar la opinión de la UNESCO, y, en tal sentido, cabe dejar sentado que dicha Organización es muy clara en su posición respecto a la minería en los Sitios de Patrimonio Mundial. Son varios los ejemplos donde a causa de las explotaciones mineras los sitios han sido colocados en la lista de Patrimonios Mundial en Peligro, como el caso del Parque Yellowstone (Estados Unidos de América), que ha sido retirado de esta Lista por el cese de esta actividad. Pero no deja de preocupar sitios como el Parque Nacional Kakadu (Australia), Parque Nacional Lorentz (Indonesia), el Parque Nacional Huascarán (Perú), el Parque Nacional de Doñana (España) y el Parque del humedal de Santa Lucía (Sudáfrica), que de continuarse con las actividades mineras pueden perder la Declaración...”(el resaltado me pertenece) (sic).

Desde la perspectiva descripta no puede desconocerse, entonces, como lo admite el propio Tribunal de grado, que teniendo en cuenta los intereses en juego, no es posible prescindir de la preservación del derecho a un ambiente sano y no contaminado, Derecho Humano Fundamental.

Considero por ello que es inadmisibile el rechazo de la acción ejercida por no haberse arrimado prueba – según el criterio del tribunal sentenciante- cuando de acuerdo a la doctrina de las cargas probatorias dinámicas como a la posición sostenida unánimemente por doctrina y jurisprudencia, en caso de probables, posibles o bien que pueda presumirse ya provocado un daño ambiental por contaminación o cualquier otro motivo, deberá acreditar su inexistencia no sólo quien esté en mejores condiciones de hacerlo si no, y contrariamente a lo afirmado por el a-quo, quien precisamente sostiene tan ciega como concienzudamente que tal contaminación no existe y por ende, que no hubo ni acaeció daño ambiental alguno.

No hallo mejor defensa que aquella dirigida a demostrar que la razón asiste, con la prueba contundente y clara de tal afirmación respaldada así, indiscutiblemente, sobre la inexistencia de incumplimiento a las normas ambientales.

Resulta inadmisibile, entonces, que el Estado Provincial en su defensa como garante, ante todo y por sobre cualquier otro interés, de los derechos de los ciudadanos, no haya sido quien acompañe el informe técnico respectivo donde conste que –insisto, como categóricamente lo dice- en las zonas cuyo cateo y/o explotación fueron efectuados los pedidos de autorización, no se ha producido ni se producirá contaminación o algún otro medio idóneo que pudiera provocar daño al ambiente. Es decir, que era de cargo de la parte demandada la prueba positiva del resguardo del medio ambiente en territorio que, como también lo dije, tan luego fue declarado Patrimonio Natural y Cultural de la Humanidad.

Entiendo que, contrariamente a lo resuelto, no habiéndose arrimado dicha prueba ni ofrecido tampoco probar que la denuncia efectuada por los amparistas carece de sustento, es que cabe presumir, hasta tanto se demuestre lo contrario, que por lo menos existe la posibilidad o el peligro cierto de que las tareas que se realicen en la zona produzcan contaminación y conlleven daño ambiental. En consecuencia, es deber de los jueces como fue solicitado por la parte actora, proveer de inmediato al resguardo, y hacer efectiva la tutela judicial o protección de los intereses colectivos, tratándose de un derecho humano fundamental tanto de quienes allí habitan como de todos los habitantes, a un medio ambiente sano y sin contaminación,



efectuando lo que fuera menester para evitarla (Artículos 22 de la Constitución Provincial y 41 de la Nacional).

Al respecto, hace ya mucho tiempo atrás se expresó que el principio de precaución en materia ambiental plantea que la incertidumbre científica no debe ser excusa (el resaltado es nuestro) para la adopción de medidas que tiendan a evitar la posibilidad cierta de la ocurrencia de un daño ambiental grave, aunque su costo sea elevado, ni para convalidar la acción u omisión humanas potencialmente dañosas. Mas que ilustrativa resulta la Carta Mundial de la Naturaleza aprobada por la Organización de las Naciones Unidas (ONU) en 1982, cuando expone respecto al impacto ambiental que: “las actividades que puedan perturbar la naturaleza serán precedidas de una evaluación de sus consecuencias y se realizarán con suficiente antelación estudios de los efectos que pueden tener los proyectos de desarrollo sobre la naturaleza en caso de llevarse a cabo; tales actividades se planificarán y realizarán con vistas a reducir al mínimo sus posibles efectos perjudiciales” (11.c); en sentido parecido se expresó la Declaración de Río de 1992 enunciado en el principio N° 15. No menos importante es el axioma sentado también en la Carta de la Naturaleza de 1982, en cuanto a que “las actividades que puedan entrañar grandes peligros para la naturaleza serán precedidas de un examen a fondo y quienes promuevan esas actividades deberán demostrar que los beneficios previstos son mayores que los daños que puedan causar a la naturaleza y esas actividades no se llevarán a cabo cuando no se conozcan cabalmente (el remarcado nos pertenece) sus posibles efectos perjudiciales” (11, b).

Estos principios a los que aludo, fueron finalmente normatizados y constituyen derecho vigente de acuerdo al contenido de las constituciones nacional y local, como al artículo 4° de la ley N° 25.675, General del Ambiente.

Sostengo además y por estos motivos que, contrariamente a lo que entendió el Tribunal de grado, con el hecho nuevo agregado al principal por Expte N° 197.603/01/08, caratulado: “Incidente de hecho nuevo en Expte. N° 197.603/08: Leaño, Julia Rebecca... y otros c/ Estado Provincial”, expresamente se informó sobre la existencia de presuntos daños ambientales y se ofreció la prueba respectiva -el libramiento de los oficios a los juzgados federales con asiento en la Provincia de Jujuy- para que fueran giradas las actuaciones en las que supuestamente se llevaba a cabo la investigación, todo lo cual fue desatendido y olímpicamente ignorado, también, por el Tribunal sentenciante. De modo que no es verdad -tampoco- que la parte actora no ofreció prueba alguna para afirmar los hechos alegados en la demanda. Y las actuaciones que acabo de mencionar lo acreditan sobradamente.

Esto así, sin perjuicio, claro está, de lo expresado anteriormente respecto a la carga de la prueba o al onus probandi, pretendidamente invertido en el caso que tratamos, y que -reitero- más allá de las cargas probatorias dinámicas, la obligación está impuesta a quien pretende efectuar o realizar explotaciones o actividades con potencial capacidad dañina, e instrumentadas tan luego no sólo por normas internas sino además internacionales, de las cuales sólo se han mencionado algunas.

De las constancias de la causa y sus agregados, surge evidente e irrefutable que a la fecha de la interposición de la demanda, de su contestación, de la sentencia y, es de suponer, hasta la fecha -ya que con posterioridad no se presentó manifestación o informe alguno en contrario- ni existía ni se mandó producir prueba a través de estudio técnico alguno que demuestre fehaciente y preventivamente con el grado de certeza necesario, la ausencia de probabilidad de contaminación o bien, directamente, la inexistencia de daño cierto y actual a la época de la tramitación de la autorización u otorgamiento de los permisos para las prácticas de cateos y/o exploraciones y explotaciones. En consecuencia, no se dio cumplimiento con los requisitos imprescindibles e ineludibles previos a cualquier actividad con aptitud para provocar toxicidad, contaminación, etcétera, y con ello, en su caso, daño ambiental, dejando de lado así lo dispuesto por el artículo 2° de la Ley N° 25.675, en especial incisos a), d), e) g) y k).



En definitiva, considero que no resulta ni imposible ni inconciliable aprovechar las oportunidades brindadas para el progreso por medio de actividades económicas productivas sustentables, con el cuidado y protección del medio ambiente.

Estoy convencido, que así como no es posible el ejercicio absoluto de los derechos, sí puede tentarse un régimen equilibrado de los intereses en juego.

Claramente lo expresan los textos constitucionales aludidos, artículos 22 de la provincia y 41 de la Nación. “La norma ha hecho una verdadera simbiosis entre salud, equilibrio y crecimiento”, dice Hutchinson. Y agrega “la Constitución tiene una fórmula abierta pero limitada, por la cual el empleo de las actividades productivas debe hacerse siempre en el marco de la razonabilidad que no coarte el futuro de las nuevas generaciones. Ello demuestra que se intentó construir un sistema equilibrado...”. “... Esa fórmula se traduce en una ecuación entre ambiente y actividades humanas que haga posible el desarrollo y el crecimiento de la persona sin destruir su entorno. Equilibrado quiere decir proporcionado, razonable...”. “... Del segundo párrafo de la cláusula constitucional se deduce que no sólo constituyen los recursos naturales el eje natural sobre el que gira el ambiente, sino que es un conjunto de naturaleza y cultura...”, para concluir en que “... La constitución ha puesto a cargo de las autoridades la necesidad de proveer a la preservación del patrimonio natural y cultural, recepcionando en alguna medida, la preocupación esbozada en la Convención para la Protección del Patrimonio Mundial, Cultural y Natural de la UNESCO...” (Confrontar Daño Ambiental, Tomo I, Jorge Mosset Iturraspe, Tomás Hutchinson y Eduardo Alberto Donna, Edición Rubinzal Culzoni, páginas 342/345).

Ahora bien, considero como consecuencia de todo lo expuesto que, respecto al pedido de la parte actora sobre prohibición judicial absoluta, es preciso tener presente que resulta genérica y por ello escapa a las facultades de este Poder Judicial, siendo en todo caso menester la intervención de los otros poderes del Estado para legislar conforme los principios expresados en la Constitución Nacional y Provincial, las leyes, doctrina y jurisprudencia citadas, y lo expuesto en este voto.

En consecuencia, entiendo como lo adelanté, que según los antecedentes que obran agregados a las actuaciones principales a estos autos, y que han sido minuciosamente detallados en el relato de los hechos, y apartándome de los fundamentos expuestos en el dictamen del Ministerio Público que, como queda dicho, en modo alguno comparto, concluyo en que debe acogerse el recurso de inconstitucionalidad interpuesto por la Dra. Alicia Chalabe en representación de Julia Rebeca Leño; Remo Leño; Victoriana Cruz de Mamaní; Dámaso Licantica; Víctor Hugo Valenzuela, Roger Lucein Moreau, y otros, para revocar la sentencia dictada por el Tribunal Contencioso Administrativo el 13 de abril del 2.009 y hacer lugar a la demanda de amparo promovida, y en su mérito, ordenar al Estado Provincial prohíba a la autoridad administrativa pertinente, es decir, Juzgado de Minas de la Provincia, otorgar los permisos de cateo y exploración que tramitan por los Expedientes denunciados por la parte actora y solicitados por la empresa Uranio del Sur S.A., a saber: N° 721 Letra U Año 2.007 y N° 1017 Letra U Año 2.008; debiendo abstenerse en consecuencia dicha empresa o cualquier otra de realizar cateos, exploraciones, explotaciones mineras a cielo abierto y/o que utilicen sustancias químicas tóxicas en los procesos de prospección, y/o industrialización de minerales metalíferos, en especial el uranio, en la zona comprendida en los pedimentos respectivos. Las costas considero que deberá cargarlas la recurrida demandada que resulta vencida y diferirse la regulación de los honorarios profesionales para cuando se pueda aplicar el artículo 11 de la ley arancelaria local.

Así voto.

Los Dres. del Campo, Bernal, Jeneffes y González dijeron: ...

Por lo expuesto, propiciamos se revoque la sentencia cuestionada y se remitan los autos al Tribunal de origen para que, previa citación de la empresa Uranio del Sur S.A., dicte nuevo pronunciamiento, con arreglo a derecho.

Atento a la forma en que se resuelve el presente y en tanto los fundamentos expuestos no son los esgrimidos por ninguna de las partes, estimamos justo que las costas sean impuestas por el orden causado y se diferiera la regulación de los honorarios profesionales para cuando se determinen los que corresponden por la actuación en el principal.

Así votamos.

Por lo expuesto, el Superior Tribunal de Justicia de la Provincia de Jujuy, Resuelve:

- 1º) Revocar la sentencia dictada el 13 de abril de 2.009 y remitir los autos al Tribunal de origen para que, previa citación de la empresa Uranio del Sur S.A., dicte nuevo pronunciamiento, con arreglo a derecho.
- 2º) Imponer las costas por el orden causado y diferir la regulación de los honorarios profesionales.
- 3º) Registrar, agregar copia en autos y notificar por cédula.

\* \* \*

## **6. La Camaronera en la Reserva Ecológica (Corte Constitucional del Ecuador, 2015)**

*This was the first major constitutional court case interpreting the rights of nature provision, unique to Ecuador's constitution. The Court held that a judgment below violated due process because it unreasonably ruled in favor of a shrimp farmer's property rights, while ignoring the constitutionally protected rights of nature at the expense of the mangroves. The Court held that the latter provision effected a transformation of the juridical order from one in which humans were at the center, to one in which humans live harmoniously in an ecosystem. The rights of nature entail the right to restoration, which implicates recuperation and the rehabilitation of nature's functions, of her vital cycles, her structure, and her evolutionary processes. The court also referred to the human right to live in a healthy and ecologically balanced environment.*

### **I. ANTECEDENTES**

#### **Resumen de admisibilidad**

La presentación extraordinaria de protección fue interpuesta por el señor Santiago García Llore en calidad de director provincial del Ministerio del Ambiente de Esmeraldas, quien compareció el 07 de octubre de 2011 ante la Sala Única de la Corte Provincial de Justicia de Esmeraldas, la cual dictó sentencia, el 09 de septiembre de 2011, dentro de la acción de protección N.º 281-2011 or media de la providencia dictada el 17 de octubre de 2011, la Sala de Concursos de la Corte Provincial de Justicia de Esmeraldas resolvió remitir el Expediente de la Corte Constitucional....

#### **Pretensión concreta**

Con los antecedentes expuestos, el accionante solicita a esta Corte Constitucional lo siguiente:

De conformidad con el artículo 62 de la Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional, con la exposición efectuada, he referido de forma clara y concreta la violación constitucional cometida por la autoridad judicial, debiendo aclarar que dicha acción permitiera solventar la transgresión constitucional acaecida en el presente caso, a fin de establecer un precedente que nos permita ejercer a plenitud el respeto a la naturaleza y al buen vivir, siendo hoy en día de trascendencia y relevancia nacional asuntos como estos que preocupan a toda la colectividad.

### **II. CONSIDERACIONES Y FUNDAMENTO DE LA CORTE CONSTITUCIONAL**

#### **Competencia**

La Corte Constitucional es competente para conocer y resolver sobre las acciones extraordinarias de protección contra sentencias, autos definitivos y resoluciones con fuerza de sentencia de conformidad con lo previsto en los artículos 94 y 437 de la Constitución de la República en concordancia con los artículos 63 y 191 numeral 2 literal de la Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional, de acuerdo con el artículo 3 numeral 8 literal y tercer inciso del artículo 35 del Reglamento de Sustanciación de Procesos de Competencia de la Corte Constitucional....

#### **Naturaleza jurídica y objeto de la acción extraordinaria de protección**

Como ya se lo ha señalado en reiterados pronunciamientos, la Corte Constitucional, por medio de la acción extraordinaria de protección, se pronunciara respecto de dos cuestiones principales: la vulneración de derechos constitucionales o la violación de normas del debido proceso. En este orden, todos los ciudadanos, en forma individual o colectiva, podrán presentar una acción extraordinaria de protección

contra decisiones judiciales en las cuales, se hayan vulnerado derechos reconocidos en la Constitución. Mecanismo previsto para que la competencia asumida por los jueces este subordinada a los mandatos del ordenamiento supremo y ante todo respeten los derechos de las partes procesales.

La acción extraordinaria de protección procede exclusivamente en contra sentencias o autos definitivos en los que por acción o omisión, se haya violado el debido proceso o otros derechos constitucionales reconocidos en la Constitución, una vez que se hayan agotado los recursos ordinarios y extraordinarios dentro del termino legal a menos que la falta de interposición de estos recursos no fuera atribuible a la negligencia de la persona titular del derecho constitucional vulnerado, conforme lo previsto en el artículo 94 de la Constitución de la Republica.

### **Determinación y desarrollo del problema juridico**

La Corte constitucional, en el presente caso, debe determinar si la decision impugnada ha vulnerado derechos constitucionales, ante lo cual, estima necesario sistematizar su argumentación a partir del siguiente problema juridico:

**La sentencia dictada por la Sala Unica de la Corte Provincial de Justicia de Esmeraldas, el 09 de septiembre de 2011, vulnera el derecho al debido proceso en la garantía de la motivación de las resoluciones de los poderes publicos?**

En la demanda de acción extraordinaria de protección planteada por Santiago Garcia Llore en calidad de director provincial del Ministerio del Ambiente, se establece en lo principal que la sentencia dictada por la Sala Unica de la Corte Provincial de Justicia de Esmeraldas, el 09 de septiembre de 2011, carece de motivación por cuanto los jueces al aceptar la acción de protección y reconocer el aparente derecho del señor Manuel Meza Macias a mantener la camaronera de su propiedad denominada "MARMEZA" dentro de la Reserva Ecológica Manglares Cayapas-Mataje, desconocieron la declaratoria de area protegida de esta zona y por consiguiente, inobservaron las disposiciones constitucionales que consagran los derechos de la naturaleza.

En función de dichos argumentos, esta Corte pasará a analizar si la sentencia impugnada vulnera la garantía del debido proceso relacionada a la motivación de las sentencias, la misma que se encuentra consagrada en el artículo 76 numeral 7 literal I de la Constitución de la Republica que expresamente, señala:

Art. 76 - En todo proceso en el que se deterrinen derechos y obligaciones de cualquier orden, aseguran el derecho al debido proceso que incluíni las siguientes garantías básicas! (...).

7. El derecho de las personas a la defensa incluíra las siguientes garantías:

(I) Las resoluciones de los poderes publicos deben ser motivadas. No habra motivación si en la resolución no se enuncian las normas o principios juridicos en que se funda y no se explica la pertinencia de su aplicación a los antecedentes de hecho. Las resoluciones administrativas, resoluciones o fallos que no se encuentren debidamente motivados se consideraran nulos. Las servidoras o servidores responsables seran sancionados.

Partiendo de esta disposición constitucional debe entenderse a la motivación como un mecanismo que busca asegurar la racionalidad de las decisiones emanadas de los organismos que ejercen potestades publicas. Es decir, es la garantía del debido proceso que permite a quienes son los directamente afectados por una decisión o a la sociedad en general, tener la certeza de que la resolución judicial, en este caso, responde a una justificación debidamente razonada....

...Esta exigencia persigue una doble finalidad, por un lado controlar la arbitrariedad del sentenciador, pues le impone el deber de justificar el razonamiento logico que siguió para establecer una conclusión y

ademas, garantizar el ejercicio efectivo del derecho de la defensa de las partes, considerando que estas requieren conocer los motivos de la decision para determinar si estan conformes con ella....

La Corte Constitucional a través de sus pronunciamientos en sentencias anteriores, ha señalado que para verificar si una sentencia se encuentra debidamente motivada acorde a los parametros constitucionales deben concurrir tres requisitos elementales como son la razonabilidad, lógica y comprensibilidad....

En el caso que nos ocupa, el accionante argumenta la falta de motivación de la sentencia impugnada en cuanto los jueces provinciales han desconocido los derechos de la naturaleza reconocidos por la Constitución de la Republica, haciendo referenda especificamente a lo establecido en los artículos 71, 72 y 73 de la NormaI Suprema.

Ahora bien, los derechos de la naturaleza constituyen una de las innovaciones mas interdantes y relevantes de la Constitución actual, pues se aleja de la concepcion tradicional "naturaleza-objeto" que considera a la naturaleza como propiedad y enfoca su proteccion exclusivamente a través del derecho de las personas a gozar de un ambiente natural sano, para dar paso a una noción que reconoce derechos propios a favor de la naturaleza. La novedad consiste entonces en el cambio de paradigma sobre la base del cual, la naturaleza, en tanto ser vivo, es considerada un sujeto titular de derechos. En este sentido, es importante resaltar que la Constitucion de la Republica consagra una doble dimensionalidad sobre la naturaleza y al ambiente en general, al concebirla no solo bajo el tradicional paradigma de objeto de derecho, sino tambien como un sujeto, independiente y con derechos especificos o propios.

Lo anterior refleja dentro de la relacion juridica naturaleza-humanidad, una vision biocentrica en la cual, se prioriza a la naturaleza en contraposicion a la clasica concepcion antropocentrica en la que el ser humano es el centro y medida de todas las cosas donde la naturaleza era considerada una mera proveedora de recursos. Esta nueva vision adoptada a partir de la vigencia de la Constitucion de 2008, se pone de manifiesto a lo largo del texto constitucional, es así que el preambulo de la Norma Suprema establece expresamente que el pueblo soberano del Ecuador: "Celebrando a la naturaleza, la Pacha Mama, de la que somos parte y que es vital para nuestra existencia" ha decidido construir una nueva forma de convivencia ciudadana en diversidad y armonia con la naturaleza, para alcanzar el buen vivir o sumak kawsay. De esta manera el sumak kawsay constituye un fin primordial del Estado, donde esta nueva concepcion juega un papel trascendental en tanto promueve un desarrollo social y economico en armonia con la naturaleza. Es así que la importancia de la naturaleza dentro de este nuevo modelo de desarrollo se ve plasmada en el articulo 10 de la Constitucion de la Republica que consagra: "Las personas, comunidades, pueblos, nacionalidades y colectivos son titulares y gozaran de los derechos garantizados en la Constitucion y en los instrumentos internacionales. La naturaleza sera sujeto de aquellos derechos que le reconozca la Constitucion". Así, el Ecuador se convierte en el primer pais en reconocer y amparar constitucionalmente los derechos de la naturaleza.

De igual manera, la Constitucion de la Republica, dentro del Titulo VII del Regimen del Buen Vivir, en su Capitulo Segundo, recoge e incorpora una serie de instituciones y principios orientados a velar por los derechos de la naturaleza, entre los cuales se destacan, la responsabilidad objetiva y el principio de precaucion, la actuacion subsidiaria del Estado en caso de daños ambientales, la participacion ciudadana, el sistema nacional de areas protegidas entre otras.

En ese mismo sentido, el articulo 71 de la Constitucion, ubicado dentro del capitulo denominado Derechos de la Naturaleza, empieza por identificar a la naturaleza con la denominacion alterna de Pacha Mama, definiendola como el lugar donde se reproduce y realiza la vida, y reconociendole el derecho al respeto integral de su existencia y al mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos. Desde esta perspectiva, prevalece la protección de la naturaleza tanto en

el conjunto de sus elementos (integralidad) como en cada uno de ellos individualmente considerados (ciclos vitales, estructura, funciones y procesos evolutivos). La disposición constitucional en referencia, señala:

Art. 71. La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.

Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza. Para aplicar e interpretar estos derechos se observa a los principios establecidos en la Constitución, en lo que proceda.

El Estado incentiva a las personas naturales y jurídicas, y a los colectivos, para que protejan la naturaleza, y promoven el respeto a todos los elementos que forman un ecosistema.

Conforme se puede apreciar de la norma constitucional transcrita, es importante anotar que los ciudadanos cumplen un papel fundamental a la hora de proteger los derechos de la naturaleza, dado que toda persona puede exigir a las autoridades administrativas y judiciales la observancia y cumplimiento de sus derechos, para lo cual, el Estado es el llamado a promover la participación ciudadana para el ejercicio de mecanismos enfocados a su protección. En este sentido, todos los ciudadanos gozamos de legitimación activa para representar a la naturaleza cuando sus derechos estén siendo conculcados.

Bajo este contexto, el reconocimiento de la naturaleza como sujeto de derechos, incluye también el derecho de esta a la restauración, lo que implica la recuperación o rehabilitación de la funcionalidad ambiental, de sus ciclos vitales, estructura y sus procesos evolutivos, sin considerar las obligaciones adicionales de carácter económico que el responsable del daño deba cancelar a quienes dependan de los sistemas naturales afectados. Este derecho, se refiere entonces no a la reparación pecuniaria a favor de las personas perjudicadas, sino a la *restitutio in integrum*, es decir, a la plena restitución de la naturaleza mediante la reparación de los daños producidos en el medio físico hasta regresar en lo posible el ecosistema original, es decir, la restauración debe estar encaminada hacia el aseguramiento que el sistema natural vuelva a gozar de condiciones que permitan el correcto desenvolvimiento en relación a sus ciclos vitales, estructura, funciones y procesos evolutivos.

El derecho a la restauración se encuentra previsto en el artículo 72 de la Norma

Suprema, que establece:

Art. 72.- La naturaleza tiene derecho a la restauración. Esta restauración será independiente de la obligación que tienen el Estado y las personas naturales o jurídicas de indemnizar a los individuos y colectivos que dependan de los sistemas naturales afectados.

En los casos de impacto ambiental grave o permanente, incluidos los ocasionados por la explotación de los recursos naturales no renovables, el Estado establecerá los mecanismos más eficaces para alcanzar la restauración, y adoptará las medidas adecuadas para eliminar o mitigar las consecuencias ambientales nocivas.

Este derecho a la restauración, además, se encuentra relacionado con la obligación del Estado de establecer mecanismos eficaces que permitan la recuperación de los espacios naturales degradados.

De las disposiciones anotadas, se desprende claramente el cambio de concepción instaurado por el nuevo sistema constitucional ecuatoriano que a más de considerar a la naturaleza como sujeto de derechos, dota de transversalidad sobre todo el ordenamiento jurídico a los derechos reconocidos a la Pacha Mama. Es



decir, todas las actuaciones del Estado, así como de los particulares, debe hacerse en observancia y apego con los derechos de la naturaleza. Julio Prieto Mendez señala que el principio de transversalidad de los derechos de la naturaleza se encuentra plasmado expresamente en los artículos 83 numeral 6 y 395 numeral 2 de la Constitución, que establecen:

Art. 83.- Son deberes y responsabilidades de las ecuatorianas y los ecuatorianos, sin perjuicio de otros previstos en la Constitución y la ley: (...)

6. Respetar los derechos de la naturaleza, preservar un ambiente sano y utilizar los recursos naturales de modo racional, sustentable y sostenible.

Art. 395.- La Constitución reconoce los siguientes principios ambientales: (...)

2. Las políticas de gestión ambiental se aplicarán de manera transversal y serán de obligatorio cumplimiento por parte del Estado en todos sus niveles y por todas las personas naturales o jurídicas en el territorio nacional.

Así el autor resalta el carácter *erga omnes* que reviste a la obligación de respetar y velar por los derechos de la naturaleza e indica que "adicionalmente veremos que esta transversalidad se aplica no solo específicamente a las políticas en gestión ambiental ni a las obligaciones del Estado para mitigar el cambio climático, sino a las de salud, educación y otras más, dejando reflejar la manifestación de esta transversalidad en un verdadero entramado normativo. (...). En efecto, los derechos de la naturaleza, al igual que los derechos humanos reconocidos en el entramado constitucional -sin perjuicio de los que integran el bloque de constitucionalidad- son derechos constitucionales, y en esa medida deberán ser interpretados y aplicados conforme a la Constitución".

De tal manera, que el carácter constitucional reconocido a los derechos de la naturaleza, conlleva de forma implícita la obligación del Estado a garantizar su goce efectivo, recayendo, específicamente, dentro de los órganos judiciales la tarea de velar por la tutela y protección de estos, en aquellos casos sometido a su conocimiento y donde puedan resultar vulnerados.

En el caso objeto de estudio se observa que la sentencia emitida el 09 de septiembre de 2011 por la Sala Unica de la Corte Provincial de Justicia de Esmeraldas, dentro del recurso de apelación de acción de protección N.º 29.457, comienza por enunciar en su *ratio decidendi*, identificada en el considerando cuarto, que el punto en disputa se refiere por un lado, al derecho constitucional a la propiedad garantizado en el artículo 66 numeral 26 y artículo 32 de la Constitución y por otro lado, al derecho a la seguridad jurídica contenido en el artículo 821 de la Constitución de la República. Posteriormente, señala la autoridad jurisdiccional en el considerando séptimo del fallo que se examina, que de conformidad con el artículo 14 de la Declaración Americana de los Derechos y Deberes del Hombre, se garantizan los derechos al trabajo y a la remuneración. Así, concluye que la vulneración del derecho a la propiedad por parte del Ministerio del Ambiente, vulnera paralelamente las formas de organización de la producción en la economía y el derecho constitucional al trabajo del señor Manuel Meza Macías en la medida en que la camaronera constituye su fuente de ingresos.

Acto seguido, la Sala sin más reflexiones decide rechazar el recurso de apelación interpuesto y confirmar la sentencia venida en grado; esto es, la conservación de la camaronera MARMEZA dentro de la Reserva Ecológica Cayapas-Mataje. De esta manera y una vez identificados los principales argumentos que sirvieron de sustento a la *decisum* de la sentencia que se impugna, resulta evidente que la Sala Unica de la Corte Provincial de Justicia de Esmeraldas decidió el caso sometido a su conocimiento, analizando, exclusivamente, el derecho a la propiedad y el derecho al trabajo.

Planteados así los argumentos contenidos en la sentencia impugnada, se advierte que la autoridad jurisdiccional en este caso, no examinó en ningún momento la existencia o no de una vulneración a los

derechos constitucionales de la naturaleza, así como tampoco se observa ningún esfuerzo por comprobar si los derechos presuntamente vulnerados estaban en contraposición con los derechos reconocidos constitucionalmente a la naturaleza, conforme se alegó por parte de la entidad accionante al interponer el recurso de apelación. Por el contrario, la ausencia de análisis, e incluso de enunciación, respecto a los derechos que la Carta Magna consagra a favor de la naturaleza, dentro de un proceso que involucra esencialmente la protección y conservación de una reserva ecológica, revela una absoluta negación del reconocimiento de esta zona como área protegida y de forma simultánea, una negación del reconocimiento del derecho de las personas a vivir en un ambiente sano y ecológicamente equilibrado.

Esta Corte Constitucional ha sido enfática al señalar la importancia de los derechos de la naturaleza que derivan en la obligación del Estado y sus funcionarios de incentivar y promover el respeto a todos los elementos que forman parte de un ecosistema, y el derecho a que se respete a la naturaleza en su integralidad. Aspecto que evidentemente no ha sido observado por los jueces de la Sala Única de la Corte Provincial de Justicia de Esmeraldas, quienes no analizaron, a pesar de su pertinencia evidente, la existencia o no de vulneraciones a los derechos de la naturaleza dentro de un proceso en que la cuestión central constituía la conservación o no de una camaronera dentro de la Reserva Ecológica Cayapas-Mataje, esta última poseedora de un sistema de manglar con gran diversidad de especies de fauna y flora.

Bajo este contexto, el análisis de los juzgadores en arden a garantizar la tutela efectiva de los derechos de la naturaleza, esto es, el respeto integral a su existencia, mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos, debió incluir el estudio de los potenciales impactos que genera en la naturaleza el proceso de producción en la acuicultura del camarón, tanto en la ubicación, diseño y construcción de las piscinas como en la operación de las mismas, mas aún, cuando en el caso en concreto dicha actividad es realizada dentro de una zona declarada como reserva ecológica. En tal virtud, resulta extraño que escapara al razonamiento judicial en la sentencia impugnada, los significativos impactos ambientales que generan las camaroneras en ecosistemas frágiles, tales como las zonas protegidas con ecosistemas de manglar; en tanto, la operación de estas ocasiona una innegable transformación del hábitat natural a través de la intrusión de agua salada en los acuíferos de agua dulce, la introducción de nuevas especies y enfermedades en el ecosistema, las desviaciones de flujos por taponamiento de las piscinas, entre otros.

Es preciso resaltar además, que al tratarse de una reserva ecológica, el lugar donde se encuentra ubicada la camaronera MARMEZA, representa un área natural de patrimonio del Estado, cuya administración corresponde al Ministerio del Ambiente. Además, de acuerdo a la legislación que regula la materia las áreas naturales declaradas como reservas ecológicas deben conservarse inalteradas, constituyen un patrimonio inalienable e imprescriptible y no puede constituirse sobre ellas ningún derecho real. Del examen del fallo objeto de la presente acción, no se constata que la Sala haya estimado las potenciales consecuencias que podrían poner en peligro la integridad física del área protegida y/o las prohibiciones de constitución de derechos reales sobre una reserva ecológica en observancia a las normas constitucionales que consagran el respeto integral a la existencia y mantenimiento de la naturaleza.

En función de lo expuesto, esta Corte evidencia que el examen realizado por los jueces provinciales dentro del presente caso, se muestra totalmente apartado de la normativa constitucional desarrollada en torno al derecho a la naturaleza. Por lo tanto, al constatar un asistemático de los derechos alegados por el propietario de la camaronera MARMEZA, en contraposición a los derechos a la naturaleza reconocidos en la Constitución de la República, se advierte que el estudio efectuado por los jueces de la Sala Única de la Corte Provincial de Justicia de Esmeraldas desnaturaliza los postulados constitucionales que respetan integralmente a la existencia y mantenimiento de las áreas específicamente en el Capítulo VII de la Norma Suprema.

En suma, esta situación configura la ausencia de un desarrollo argumentativo ajustado a la normativa constitucional vigente; por lo que, la Corte determina que la sentencia impugnada dentro de la presente de protección, carece de **razonabilidad**.

En lo que respecta a la lógica, este elemento debe ser entendido como la interrelación de causalidad que debe existir entre los presupuestos normas jurídicas aplicadas al caso y por consiguiente, con la adoptada por los jueces. Es decir, nos referimos a lo que este ha definido como la coherencia materializada entre las premisas fácticas, premisas normativas y la conclusión obtenida. Partiendo de esta definición, en orden a determinar si la sentencia impugnada se encuentra motivada de acuerdo al parametro de la lógica, es necesario identificar los presupuestos de hecho, las normas jurídicas que han sido aplicadas por parte de los juzgadores y la decision adoptada; para así, establecer si existe una relación coherente entre estos elementos.... Finalmente, en lo que respecta a la conclusión, se evidencia que el Tribunal de Apelación determina la vulneración de los derechos a la propiedad y al trabajo, y en función de ella, confirma la sentencia subida en grado.

Luego de examinar las premisas facticas y las premisas normativas en el caso *sub júdice*, resulta notorio la ausencia de interrelacion entro estos elementos, toda vez que no se constata que los jueces al dictar la sentencia impugnada contemplen los argumentos del accionante y analicen normativa referente a los derechos de la naturaleza, como correspondia hacerlo, en orden a establecer una línea coherente de causalidad entre los presupuesto de hecho y la normativa aplicada en la decisión judicial, que por consiguiente, permita, a su vez, arribar a una conclusion consecuente a las premisas del caso. Este aspecto, hace evidente la falta de coherencia lógica de la sentencia impugnada, en cuanto no se verifica una correcta vinculación de las disposiciones normativas invocadas por los jueces de la Sala Unica de la Corte Provincial de Justicia de Esmeraldas respecto de todas las premisas facticas del caso, particularmente en lo que concierne a la alegada vulneración a los derechos de la naturaleza. Baja estas consideraciones, esta Corte determina que la sentencia objeto de la presente acción extraordinaria de protección no se encuentra debidamente motivada de acuerdo al parametro de la **lógica**.

Finalmente, en lo que tiene que ver con la **comprensibilidad**, elemento que hace referencia al uso de un lenguaje claro por parte de los jueces, que garantice a las partes procesales y al conglomerado social, comprender el contenido de las decisiones judiciales, esta Corte Constitucional considera que en el caso en análisis, la sentencia impugnada es diáfana en su contenido y utiliza un lenguaje juridico adecuado que hace comprensible lo decidido por los jueces de la Sala Unica de la Corte Provincial de Justicia de Esmeraldas. Sin embargo, de ello, y conforme señalado en los párrafos precedentes, la motivación de la el caso *sub júdice*, no obedece a los requisitos de **razonabilidad** y **lógica**.

Por las razones expuestas, este Organismo determina que la sentencia impugnada no se encuentra debidamente motivada acorde a lo establecido en el articulo 76 numeral 7 literal I de la Constitución....

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## C. Africa

### 1. *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (Federal High Court, Nigeria 2005)

*An intermediate level court held that the petroleum developers' flaring of 'waste' natural gas in the Niger Delta without the preparation of an environmental impact statement abridged the community plaintiffs' constitutionally guaranteed right to dignity. In observing that flaring activities contributes to climate change, the court held: "the inherent jurisdiction to grant leave to the applicants to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and moreover, that these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment." Accordingly, the court issued an injunction, which, unfortunately, was not enforced.*

[1.] On 21 July 2005 this Court granted leave to the applicants to apply for an order enforcing or securing the enforcement of their fundamental rights to life and dignity of human person as provided by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 vol 1, Laws of the Federation of Nigeria, 2004. By a further leave of Court I permitted the applicant to commence these proceedings for himself and as representing other members, individuals and residents of Iwherekan community in Delta State of Nigeria, in view of the copious unwieldy list of members contained in an earlier application for leave they brought in respect thereof, which was withdrawn by their counsel at the prompting of the Court.

[2.] The reliefs claimed by the applicants in their subsequent motion on notice filed on 29 July 2005 include:

1. A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean poison- free, pollution-free and healthy environment.
2. A declaration that the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their exploration and production activities in the applicant's community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria 2004.
3. A declaration that the failure of the 1st and 2nd respondents to carry out environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environment Impact Assessment Act, cap E12 vol 6 Laws of the Federation of Nigeria, 2004 and contributed to the violation of the applicant's said fundamental rights to life and dignity of human person
4. A declaration that the provisions of section 3(2)(a), (b) of the Associated Gas Re-injection Act cap A25 vol 1 Laws of the Federation of Nigeria, 2004 and Section 1 of the Associated Gas Re-Injection (continued flaring of gas) Regulations Section 1.43 of 1984, under which the continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's right to life and/or dignity of human

person enshrined in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9 vol 1<sup>[1]</sup> Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

5. An order of perpetual injunction restraining the 1st and 2nd respondents by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the applicants said community.

[3.] It is the case of the applicants, as shown in the itemized grounds upon which the above-mentioned reliefs are sought that:

a) By virtue of the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 they have a fundamental right to life and dignity of human person.

b) Also by virtue of articles 4, 16 and 24 of the African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) Act Cap A9, vol 1 Laws of Federation of Nigeria, 2004, they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development.

c) That the gas flaring activities in the community in Delta State of Nigeria by the 1st and 2nd respondents are a violation of their said fundamental rights to life and dignity of human person and to a healthy life in a healthy environment.

d) That no environmental impact assessment was carried out by the 1st and 2nd respondents concerning their gas flaring activities in the applicant's community as required by section 2(2) of the Environmental Impact Assessment Act, Cap E 12 vol 6, Laws of the Federation of Nigeria 2004, and this has contributed to the unrestrained, mindless flaring of gas by the 1st and 2nd respondents in their community in violation of their said fundamental rights.

e) That no valid ministerial gas flaring certificates were obtained by any of the 1st and 2nd respondents authorizing the gas flaring in the applicant's said community in violation of section 3(2) of the Associated Gas Re- Injection Act, Cap A25 vol 1, Laws of the Federation of Nigeria, 2004.

f) That the provisions of section 3(2) of the Associated Gas Re-Injection Act, Cap A25, vol 1, Laws of the Federation of Nigeria, 2004 and section 1 of the Associated Re-Injection (Continued Flaring of Gas) Regulations, 43 of 1984, under which gas flaring in Nigeria may be continued are inconsistent with the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria 1999 and articles 4, 16 and 24 of African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) are therefore unconstitutional, null and void.

g) That the provisions of both sections 21(1) and (2) of the Federal Environmental Protection Agency Act (FEPA) Cap F10 vol 1 Laws of the Federation of Nigeria, 2004 makes the gas flaring activities of the 1st and 2nd respondents a crime, the continuation of which should be discouraged and restrained by the Court.

[4.] It is also, in the case of the applicants (as summarised in their affidavit in verification of all the above-stated facts that they are *bona fide* citizens of the Federal Republic of Nigeria [and]

1. That the 1st and 2nd respondents are oil and gas companies in Nigeria who are engaged jointly and severally in the exploration and production of crude oil and other petroleum products in Nigeria.

2. That in further support of their rights to life and dignity of their persons they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state physical and mental health as well as right to a general satisfactory environment favourable to their development.

3. That the 1st and 2nd respondents have been engaged in massive, relentless and continuous gas



flaring in their community and that the 2nd respondent is a joint venture partner with the 1st respondent in its oil exploration and production activities, which includes gas-flaring in Nigeria.

4. That the activities of the 1st and 2nd respondents in continuing to flare gas in their community seriously pollutes the air, causes respiratory diseases and generally endangers and impairs their health.

5. That the 1st and 2nd respondents have carried on gas flaring continuously in their community without any regard to its deleterious and ruinous consequences concentrating only on pursuing their commercial interest and maximizing profit.

6. That the 1st and 2nd respondents do not like to find gas together with oil in their oil-fields (ie associated gas, AG), but prefer to find gas without it being mixed up with oil - so called non-associated gas (non AG), and that the attitude of the 1st and 2nd respondents whenever they find oil mixed with gas is to dispose of the associated gas in order to profit from the oil (which is the more lucrative component) and this process of gas flaring is unrestrained and mindless.

7. That burning of gas by flaring same in their community gives rise to the following: a. Poisons and pollutes the environment as it leads to the emission of carbon dioxide, the main green house gas; the flares contain a cocktail of toxins that affect their health, lives and livelihood. b. Exposes them to an increased risk of premature death, respiratory illness, asthma and cancer. c. Contributes to adverse climate change as it emits carbon dioxide and methane which causes warming of the environment, pollutes their food and water. d. Causes painful breathing chronic bronchitis, decreased lung function and death. e. Reduces crop production and adversely impacts on their food security. f. Causes acid rain, their corrugated house roofs are corroded by the composition of the rain that falls as a result of gas flaring saying that the primary causes of acid rain are emissions of sulphur dioxide and nitrogen oxides which combine with atmospheric moisture to form sulphuric acid and nitric acid respectively. The acidic rain consequently acidifies their lakes and streams and damages their vegetation.

8. That the emissions resulting from the 1st and 2nd respondents burning of associated gas by flaring in their community in an open uncontrolled manner is a mixture of smoke more precisely referred to as particulate matter, combustion by-products including sulphur dioxide, nitrogen dioxides and carcinogenic substances, all of which are very dangerous to human health and lives in particular.

9. That no Environmental Impact Assessment (EIA) whatsoever was undertaken by any of the 1st and 2nd respondents to ascertain the harmful consequences of their gas flaring activities in the area to the environment, health, food, water, development, lives, infrastructure etc.

10. That if the 1st and 2nd respondents had carried out environmental impact assessment in their community concerning this gas flaring as required by law, they would have known or found out that it is most dangerous to their health, life and environment and refrained from gas flaring and that they deliberately failed to do so out of their selfish economic interest.

11. That so many natives of the community have died and countless others are suffering various sicknesses occasioned by the effects of gas flaring by the 1st and 2nd defendants.

12. That their community is thereby grossly undeveloped, very poor and without adequate medical facilities to cope with the adverse and harmful effects on their health and lives occasioned by the unrestrained gas flaring activities in the area.

13. That the 1st and 2nd respondents have not bothered to consider the negative unhealthy and very damaging impact on their health, lives, and environment of their persistent gas flaring activities and have made no arrangements to provide them with adequate medical attention and facilities to cushion the adverse effects of their gas flaring activities.

14. That the constitutional guarantee of right to life and dignity of human person available to them as citizens of Nigeria includes the right to a clean, poison-free and pollution-free air and healthy



environment conducive for human beings to reside in for our development and full enjoyment of life; and that these rights to life and dignity of human person have been and are being wantonly violated and are continuously threatened with persistent violation by these gas flaring activities.

15. That unless this Court promptly intervenes their said fundamental rights being breached by the 1st and 2nd respondents will continue unabated and with impunity while its members will continue to suffer various sicknesses, deterioration of health and premature death.

16. And that the 1st and 2nd respondents have no right to continue to engage in gas-flaring in violation of their right to life and to a clean, healthy, pollution-free environment and dignity of human person.

Finally, that the 1st and 2nd respondents have no valid ministerial certificates authorizing them to flare gas in the applicant's community.

...[<sup>1</sup>][<sup>2</sup>][<sup>3</sup>][<sup>4</sup>][<sup>5</sup>][<sup>6</sup>][<sup>7</sup>][<sup>8</sup>][<sup>9</sup>][<sup>10</sup>][<sup>11</sup>][<sup>12</sup>][<sup>13</sup>][<sup>14</sup>][<sup>15</sup>][<sup>16</sup>][<sup>17</sup>][<sup>18</sup>][<sup>19</sup>][<sup>20</sup>][<sup>21</sup>][<sup>22</sup>][<sup>23</sup>][<sup>24</sup>][<sup>25</sup>][<sup>26</sup>][<sup>27</sup>][<sup>28</sup>][<sup>29</sup>][<sup>30</sup>][<sup>31</sup>][<sup>32</sup>][<sup>33</sup>][<sup>34</sup>][<sup>35</sup>][<sup>36</sup>][<sup>37</sup>][<sup>38</sup>][<sup>39</sup>][<sup>40</sup>][<sup>41</sup>][<sup>42</sup>][<sup>43</sup>][<sup>44</sup>][<sup>45</sup>][<sup>46</sup>][<sup>47</sup>][<sup>48</sup>][<sup>49</sup>][<sup>50</sup>][<sup>51</sup>][<sup>52</sup>][<sup>53</sup>][<sup>54</sup>][<sup>55</sup>][<sup>56</sup>][<sup>57</sup>][<sup>58</sup>][<sup>59</sup>][<sup>60</sup>][<sup>61</sup>][<sup>62</sup>][<sup>63</sup>][<sup>64</sup>][<sup>65</sup>][<sup>66</sup>][<sup>67</sup>][<sup>68</sup>][<sup>69</sup>][<sup>70</sup>][<sup>71</sup>][<sup>72</sup>][<sup>73</sup>][<sup>74</sup>][<sup>75</sup>][<sup>76</sup>][<sup>77</sup>][<sup>78</sup>][<sup>79</sup>][<sup>80</sup>][<sup>81</sup>][<sup>82</sup>][<sup>83</sup>][<sup>84</sup>][<sup>85</sup>][<sup>86</sup>][<sup>87</sup>][<sup>88</sup>][<sup>89</sup>][<sup>90</sup>][<sup>91</sup>][<sup>92</sup>][<sup>93</sup>][<sup>94</sup>][<sup>95</sup>][<sup>96</sup>][<sup>97</sup>][<sup>98</sup>][<sup>99</sup>][<sup>100</sup>][<sup>101</sup>][<sup>102</sup>][<sup>103</sup>][<sup>104</sup>][<sup>105</sup>][<sup>106</sup>][<sup>107</sup>][<sup>108</sup>][<sup>109</sup>][<sup>110</sup>][<sup>111</sup>][<sup>112</sup>][<sup>113</sup>][<sup>114</sup>][<sup>115</sup>][<sup>116</sup>][<sup>117</sup>][<sup>118</sup>][<sup>119</sup>][<sup>120</sup>][<sup>121</sup>][<sup>122</sup>][<sup>123</sup>][<sup>124</sup>][<sup>125</sup>][<sup>126</sup>][<sup>127</sup>][<sup>128</sup>][<sup>129</sup>][<sup>130</sup>][<sup>131</sup>][<sup>132</sup>][<sup>133</sup>][<sup>134</sup>][<sup>135</sup>][<sup>136</sup>][<sup>137</sup>][<sup>138</sup>][<sup>139</sup>][<sup>140</sup>][<sup>141</sup>][<sup>142</sup>][<sup>143</sup>][<sup>144</sup>][<sup>145</sup>][<sup>146</sup>][<sup>147</sup>][<sup>148</sup>][<sup>149</sup>][<sup>150</sup>][<sup>151</sup>][<sup>152</sup>][<sup>153</sup>][<sup>154</sup>][<sup>155</sup>][<sup>156</sup>][<sup>157</sup>][<sup>158</sup>][<sup>159</sup>][<sup>160</sup>][<sup>161</sup>][<sup>162</sup>][<sup>163</sup>][<sup>164</sup>][<sup>165</sup>][<sup>166</sup>][<sup>167</sup>][<sup>168</sup>][<sup>169</sup>][<sup>170</sup>][<sup>171</sup>][<sup>172</sup>][<sup>173</sup>][<sup>174</sup>][<sup>175</sup>][<sup>176</sup>][<sup>177</sup>][<sup>178</sup>][<sup>179</sup>][<sup>180</sup>][<sup>181</sup>][<sup>182</sup>][<sup>183</sup>][<sup>184</sup>][<sup>185</sup>][<sup>186</sup>][<sup>187</sup>][<sup>188</sup>][<sup>189</sup>][<sup>190</sup>][<sup>191</sup>][<sup>192</sup>][<sup>193</sup>][<sup>194</sup>][<sup>195</sup>][<sup>196</sup>][<sup>197</sup>][<sup>198</sup>][<sup>199</sup>][<sup>200</sup>][<sup>201</sup>][<sup>202</sup>][<sup>203</sup>][<sup>204</sup>][<sup>205</sup>][<sup>206</sup>][<sup>207</sup>][<sup>208</sup>][<sup>209</sup>][<sup>210</sup>][<sup>211</sup>][<sup>212</sup>][<sup>213</sup>][<sup>214</sup>][<sup>215</sup>][<sup>216</sup>][<sup>217</sup>][<sup>218</sup>][<sup>219</sup>][<sup>220</sup>][<sup>221</sup>][<sup>222</sup>][<sup>223</sup>][<sup>224</sup>][<sup>225</sup>][<sup>226</sup>][<sup>227</sup>][<sup>228</sup>][<sup>229</sup>][<sup>230</sup>][<sup>231</sup>][<sup>232</sup>][<sup>233</sup>][<sup>234</sup>][<sup>235</sup>][<sup>236</sup>][<sup>237</sup>][<sup>238</sup>][<sup>239</sup>][<sup>240</sup>][<sup>241</sup>][<sup>242</sup>][<sup>243</sup>][<sup>244</sup>][<sup>245</sup>][<sup>246</sup>][<sup>247</sup>][<sup>248</sup>][<sup>249</sup>][<sup>250</sup>][<sup>251</sup>][<sup>252</sup>][<sup>253</sup>][<sup>254</sup>][<sup>255</sup>][<sup>256</sup>][<sup>257</sup>][<sup>258</sup>][<sup>259</sup>][<sup>260</sup>][<sup>261</sup>][<sup>262</sup>][<sup>263</sup>][<sup>264</sup>][<sup>265</sup>][<sup>266</sup>][<sup>267</sup>][<sup>268</sup>][<sup>269</sup>][<sup>270</sup>][<sup>271</sup>][<sup>272</sup>][<sup>273</sup>][<sup>274</sup>][<sup>275</sup>][<sup>276</sup>][<sup>277</sup>][<sup>278</sup>][<sup>279</sup>][<sup>280</sup>][<sup>281</sup>][<sup>282</sup>][<sup>283</sup>][<sup>284</sup>][<sup>285</sup>][<sup>286</sup>][<sup>287</sup>][<sup>288</sup>][<sup>289</sup>][<sup>290</sup>][<sup>291</sup>][<sup>292</sup>][<sup>293</sup>][<sup>294</sup>][<sup>295</sup>][<sup>296</sup>][<sup>297</sup>][<sup>298</sup>][<sup>299</sup>][<sup>300</sup>][<sup>301</sup>][<sup>302</sup>][<sup>303</sup>][<sup>304</sup>][<sup>305</sup>][<sup>306</sup>][<sup>307</sup>][<sup>308</sup>][<sup>309</sup>][<sup>310</sup>][<sup>311</sup>][<sup>312</sup>][<sup>313</sup>][<sup>314</sup>][<sup>315</sup>][<sup>316</sup>][<sup>317</sup>][<sup>318</sup>][<sup>319</sup>][<sup>320</sup>][<sup>321</sup>][<sup>322</sup>][<sup>323</sup>][<sup>324</sup>][<sup>325</sup>][<sup>326</sup>][<sup>327</sup>][<sup>328</sup>][<sup>329</sup>][<sup>330</sup>][<sup>331</sup>][<sup>332</sup>][<sup>333</sup>][<sup>334</sup>][<sup>335</sup>][<sup>336</sup>][<sup>337</sup>][<sup>338</sup>][<sup>339</sup>][<sup>340</sup>][<sup>341</sup>][<sup>342</sup>][<sup>343</sup>][<sup>344</sup>][<sup>345</sup>][<sup>346</sup>][<sup>347</sup>][<sup>348</sup>][<sup>349</sup>][<sup>350</sup>][<sup>351</sup>][<sup>352</sup>][<sup>353</sup>][<sup>354</sup>][<sup>355</sup>][<sup>356</sup>][<sup>357</sup>][<sup>358</sup>][<sup>359</sup>][<sup>360</sup>][<sup>361</sup>][<sup>362</sup>][<sup>363</sup>][<sup>364</sup>][<sup>365</sup>][<sup>366</sup>][<sup>367</sup>][<sup>368</sup>][<sup>369</sup>][<sup>370</sup>][<sup>371</sup>][<sup>372</sup>][<sup>373</sup>][<sup>374</sup>][<sup>375</sup>][<sup>376</sup>][<sup>377</sup>][<sup>378</sup>][<sup>379</sup>][<sup>380</sup>][<sup>381</sup>][<sup>382</sup>][<sup>383</sup>][<sup>384</sup>][<sup>385</sup>][<sup>386</sup>][<sup>387</sup>][<sup>388</sup>][<sup>389</sup>][<sup>390</sup>][<sup>391</sup>][<sup>392</sup>][<sup>393</sup>][<sup>394</sup>][<sup>395</sup>][<sup>396</sup>][<sup>397</sup>][<sup>398</sup>][<sup>399</sup>][<sup>400</sup>][<sup>401</sup>][<sup>402</sup>][<sup>403</sup>][<sup>404</sup>][<sup>405</sup>][<sup>406</sup>][<sup>407</sup>][<sup>408</sup>][<sup>409</sup>][<sup>410</sup>][<sup>411</sup>][<sup>412</sup>][<sup>413</sup>][<sup>414</sup>][<sup>415</sup>][<sup>416</sup>][<sup>417</sup>][<sup>418</sup>][<sup>419</sup>][<sup>420</sup>][<sup>421</sup>][<sup>422</sup>][<sup>423</sup>][<sup>424</sup>][<sup>425</sup>][<sup>426</sup>][<sup>427</sup>][<sup>428</sup>][<sup>429</sup>][<sup>430</sup>][<sup>431</sup>][<sup>432</sup>][<sup>433</sup>][<sup>434</sup>][<sup>435</sup>][<sup>436</sup>][<sup>437</sup>][<sup>438</sup>][<sup>439</sup>][<sup>440</sup>][<sup>441</sup>][<sup>442</sup>][<sup>443</sup>][<sup>444</sup>][<sup>445</sup>][<sup>446</sup>][<sup>447</sup>][<sup>448</sup>][<sup>449</sup>][<sup>450</sup>][<sup>451</sup>][<sup>452</sup>][<sup>453</sup>][<sup>454</sup>][<sup>455</sup>][<sup>456</sup>][<sup>457</sup>][<sup>458</sup>][<sup>459</sup>][<sup>460</sup>][<sup>461</sup>][<sup>462</sup>][<sup>463</sup>][<sup>464</sup>][<sup>465</sup>][<sup>466</sup>][<sup>467</sup>][<sup>468</sup>][<sup>469</sup>][<sup>470</sup>][<sup>471</sup>][<sup>472</sup>][<sup>473</sup>][<sup>474</sup>][<sup>475</sup>][<sup>476</sup>][<sup>477</sup>][<sup>478</sup>][<sup>479</sup>][<sup>480</sup>][<sup>481</sup>][<sup>482</sup>][<sup>483</sup>][<sup>484</sup>][<sup>485</sup>][<sup>486</sup>][<sup>487</sup>][<sup>488</sup>][<sup>489</sup>][<sup>490</sup>][<sup>491</sup>][<sup>492</sup>][<sup>493</sup>][<sup>494</sup>][<sup>495</sup>][<sup>496</sup>][<sup>497</sup>][<sup>498</sup>][<sup>499</sup>][<sup>500</sup>][<sup>501</sup>][<sup>502</sup>][<sup>503</sup>][<sup>504</sup>][<sup>505</sup>][<sup>506</sup>][<sup>507</sup>][<sup>508</sup>][<sup>509</sup>][<sup>510</sup>][<sup>511</sup>][<sup>512</sup>][<sup>513</sup>][<sup>514</sup>][<sup>515</sup>][<sup>516</sup>][<sup>517</sup>][<sup>518</sup>][<sup>519</sup>][<sup>520</sup>][<sup>521</sup>][<sup>522</sup>][<sup>523</sup>][<sup>524</sup>][<sup>525</sup>][<sup>526</sup>][<sup>527</sup>][<sup>528</sup>][<sup>529</sup>][<sup>530</sup>][<sup>531</sup>][<sup>532</sup>][<sup>533</sup>][<sup>534</sup>][<sup>535</sup>][<sup>536</sup>][<sup>537</sup>][<sup>538</sup>][<sup>539</sup>][<sup>540</sup>][<sup>541</sup>][<sup>542</sup>][<sup>543</sup>][<sup>544</sup>][<sup>545</sup>][<sup>546</sup>][<sup>547</sup>][<sup>548</sup>][<sup>549</sup>][<sup>550</sup>][<sup>551</sup>][<sup>552</sup>][<sup>553</sup>][<sup>554</sup>][<sup>555</sup>][<sup>556</sup>][<sup>557</sup>][<sup>558</sup>][<sup>559</sup>][<sup>560</sup>][<sup>561</sup>][<sup>562</sup>][<sup>563</sup>][<sup>564</sup>][<sup>565</sup>][<sup>566</sup>][<sup>567</sup>][<sup>568</sup>][<sup>569</sup>][<sup>570</sup>][<sup>571</sup>][<sup>572</sup>][<sup>573</sup>][<sup>574</sup>][<sup>575</sup>][<sup>576</sup>][<sup>577</sup>][<sup>578</sup>][<sup>579</sup>][<sup>580</sup>][<sup>581</sup>][<sup>582</sup>][<sup>583</sup>][<sup>584</sup>][<sup>585</sup>][<sup>586</sup>][<sup>587</sup>][<sup>588</sup>][<sup>589</sup>][<sup>590</sup>][<sup>591</sup>][<sup>592</sup>][<sup>593</sup>][<sup>594</sup>][<sup>595</sup>][<sup>596</sup>][<sup>597</sup>][<sup>598</sup>][<sup>599</sup>][<sup>600</sup>][<sup>601</sup>][<sup>602</sup>][<sup>603</sup>][<sup>604</sup>][<sup>605</sup>][<sup>606</sup>][<sup>607</sup>][<sup>608</sup>][<sup>609</sup>][<sup>610</sup>][<sup>611</sup>][<sup>612</sup>][<sup>613</sup>][<sup>614</sup>][<sup>615</sup>][<sup>616</sup>][<sup>617</sup>][<sup>618</sup>][<sup>619</sup>][<sup>620</sup>][<sup>621</sup>][<sup>622</sup>][<sup>623</sup>][<sup>624</sup>][<sup>625</sup>][<sup>626</sup>][<sup>627</sup>][<sup>628</sup>][<sup>629</sup>][<sup>630</sup>][<sup>631</sup>][<sup>632</sup>][<sup>633</sup>][<sup>634</sup>][<sup>635</sup>][<sup>636</sup>][<sup>637</sup>][<sup>638</sup>][<sup>639</sup>][<sup>640</sup>][<sup>641</sup>][<sup>642</sup>][<sup>643</sup>][<sup>644</sup>][<sup>645</sup>][<sup>646</sup>][<sup>647</sup>][<sup>648</sup>][<sup>649</sup>][<sup>650</sup>][<sup>651</sup>][<sup>652</sup>][<sup>653</sup>][<sup>654</sup>][<sup>655</sup>][<sup>656</sup>][<sup>657</sup>][<sup>658</sup>][<sup>659</sup>][<sup>660</sup>][<sup>661</sup>][<sup>662</sup>][<sup>663</sup>][<sup>664</sup>][<sup>665</sup>][<sup>666</sup>][<sup>667</sup>][<sup>668</sup>][<sup>669</sup>][<sup>670</sup>][<sup>671</sup>][<sup>672</sup>][<sup>673</sup>][<sup>674</sup>][<sup>675</sup>][<sup>676</sup>][<sup>677</sup>][<sup>678</sup>][<sup>679</sup>][<sup>680</sup>][<sup>681</sup>][<sup>682</sup>][<sup>683</sup>][<sup>684</sup>][<sup>685</sup>][<sup>686</sup>][<sup>687</sup>][<sup>688</sup>][<sup>689</sup>][<sup>690</sup>][<sup>691</sup>][<sup>692</sup>][<sup>693</sup>][<sup>694</sup>][<sup>695</sup>][<sup>696</sup>][<sup>697</sup>][<sup>698</sup>][<sup>699</sup>][<sup>700</sup>][<sup>701</sup>][<sup>702</sup>][<sup>703</sup>][<sup>704</sup>][<sup>705</sup>][<sup>706</sup>][<sup>707</sup>][<sup>708</sup>][<sup>709</sup>][<sup>710</sup>][<sup>711</sup>][<sup>712</sup>][<sup>713</sup>][<sup>714</sup>][<sup>715</sup>][<sup>716</sup>][<sup>717</sup>][<sup>718</sup>][<sup>719</sup>][<sup>720</sup>][<sup>721</sup>][<sup>722</sup>][<sup>723</sup>][<sup>724</sup>][<sup>725</sup>][<sup>726</sup>][<sup>727</sup>][<sup>728</sup>][<sup>729</sup>][<sup>730</sup>][<sup>731</sup>][<sup>732</sup>][<sup>733</sup>][<sup>734</sup>][<sup>735</sup>][<sup>736</sup>][<sup>737</sup>][<sup>738</sup>][<sup>739</sup>][<sup>740</sup>][<sup>741</sup>][<sup>742</sup>][<sup>743</sup>][<sup>744</sup>][<sup>745</sup>][<sup>746</sup>][<sup>747</sup>][<sup>748</sup>][<sup>749</sup>][<sup>750</sup>][<sup>751</sup>][<sup>752</sup>][<sup>753</sup>][<sup>754</sup>][<sup>755</sup>][<sup>756</sup>][<sup>757</sup>][<sup>758</sup>][<sup>759</sup>][<sup>760</sup>][<sup>761</sup>][<sup>762</sup>][<sup>763</sup>][<sup>764</sup>][<sup>765</sup>][<sup>766</sup>][<sup>767</sup>][<sup>768</sup>][<sup>769</sup>][<sup>770</sup>][<sup>771</sup>][<sup>772</sup>][<sup>773</sup>][<sup>774</sup>][<sup>775</sup>][<sup>776</sup>][<sup>777</sup>][<sup>778</sup>][<sup>779</sup>][<sup>780</sup>][<sup>781</sup>][<sup>782</sup>][<sup>783</sup>][<sup>784</sup>][<sup>785</sup>][<sup>786</sup>][<sup>787</sup>][<sup>788</sup>][<sup>789</sup>][<sup>790</sup>][<sup>791</sup>][<sup>792</sup>][<sup>793</sup>][<sup>794</sup>][<sup>795</sup>][<sup>796</sup>][<sup>797</sup>][<sup>798</sup>][<sup>799</sup>][<sup>800</sup>][<sup>801</sup>][<sup>802</sup>][<sup>803</sup>][<sup>804</sup>][<sup>805</sup>][<sup>806</sup>][<sup>807</sup>][<sup>808</sup>][<sup>809</sup>][<sup>810</sup>][<sup>811</sup>][<sup>812</sup>][<sup>813</sup>][<sup>814</sup>][<sup>815</sup>][<sup>816</sup>][<sup>817</sup>][<sup>818</sup>][<sup>819</sup>][<sup>820</sup>][<sup>821</sup>][<sup>822</sup>][<sup>823</sup>][<sup>824</sup>][<sup>825</sup>][<sup>826</sup>][<sup>827</sup>][<sup>828</sup>][<sup>829</sup>][<sup>830</sup>][<sup>831</sup>][<sup>832</sup>][<sup>833</sup>][<sup>834</sup>][<sup>835</sup>][<sup>836</sup>][<sup>837</sup>][<sup>838</sup>][<sup>839</sup>][<sup>840</sup>][<sup>841</sup>][<sup>842</sup>][<sup>843</sup>][<sup>844</sup>][<sup>845</sup>][<sup>846</sup>][<sup>847</sup>][<sup>848</sup>][<sup>849</sup>][<sup>850</sup>][<sup>851</sup>][<sup>852</sup>][<sup>853</sup>][<sup>854</sup>][<sup>855</sup>][<sup>856</sup>][<sup>857</sup>][<sup>858</sup>][<sup>859</sup>][<sup>860</sup>][<sup>861</sup>][<sup>862</sup>][<sup>863</sup>][<sup>864</sup>][<sup>865</sup>][<sup>866</sup>][<sup>867</sup>][<sup>868</sup>][<sup>869</sup>][<sup>870</sup>][<sup>871</sup>][<sup>872</sup>][<sup>873</sup>][<sup>874</sup>][<sup>875</sup>][<sup>876</sup>][<sup>877</sup>][<sup>878</sup>][<sup>879</sup>][<sup>880</sup>][<sup>881</sup>][<sup>882</sup>][<sup>883</sup>][<sup>884</sup>][<sup>885</sup>][<sup>886</sup>][<sup>887</sup>][<sup>888</sup>][<sup>889</sup>][<sup>890</sup>][<sup>891</sup>][<sup>892</sup>][<sup>893</sup>][<sup>894</sup>][<sup>895</sup>][<sup>896</sup>][<sup>897</sup>][<sup>898</sup>][<sup>899</sup>][<sup>900</sup>][<sup>901</sup>][<sup>902</sup>][<sup>903</sup>][<sup>904</sup>][<sup>905</sup>][<sup>906</sup>][<sup>907</sup>][<sup>908</sup>][<sup>909</sup>][<sup>910</sup>][<sup>911</sup>][<sup>912</sup>][<sup>913</sup>][<sup>914</sup>][<sup>915</sup>][<sup>916</sup>][<sup>917</sup>][<sup>918</sup>][<sup>919</sup>][<sup>920</sup>][<sup>921</sup>][<sup>922</sup>][<sup>923</sup>][<sup>924</sup>][<sup>925</sup>][<sup>926</sup>][<sup>927</sup>][<sup>928</sup>][<sup>929</sup>][<sup>930</sup>][<sup>931</sup>][<sup>932</sup>][<sup>933</sup>][<sup>934</sup>][<sup>935</sup>][<sup>936</sup>][<sup>937</sup>][<sup>938</sup>][<sup>939</sup>][<sup>940</sup>][<sup>941</sup>][<sup>942</sup>][<sup>943</sup>][<sup>944</sup>][<sup>945</sup>][<sup>946</sup>][<sup>947</sup>][<sup>948</sup>][<sup>949</sup>][<sup>950</sup>][<sup>951</sup>][<sup>952</sup>][<sup>953</sup>][<sup>954</sup>][<sup>955</sup>][<sup>956</sup>][<sup>957</sup>][<sup>958</sup>][<sup>959</sup>][<sup>960</sup>][<sup>961</sup>][<sup>962</sup>][<sup>963</sup>][<sup>964</sup>][<sup>965</sup>][<sup>966</sup>][<sup>967</sup>][<sup>968</sup>][<sup>969</sup>][<sup>970</sup>][<sup>971</sup>][<sup>972</sup>][<sup>973</sup>][<sup>974</sup>][<sup>975</sup>][<sup>976</sup>][<sup>977</sup>][<sup>978</sup>][<sup>979</sup>][<sup>980</sup>][<sup>981</sup>][<sup>982</sup>][<sup>983</sup>][<sup>984</sup>][<sup>985</sup>][<sup>986</sup>][<sup>987</sup>][<sup>988</sup>][<sup>989</sup>][<sup>990</sup>][<sup>991</sup>][<sup>992</sup>][<sup>993</sup>][<sup>994</sup>][<sup>995</sup>][<sup>996</sup>][<sup>997</sup>][<sup>998</sup>][<sup>999</sup>][<sup>1000</sup>][<sup>1001</sup>][<sup>1002</sup>][<sup>1003</sup>][<sup>1004</sup>][<sup>1005</sup>][<sup>1006</sup>][<sup>1007</sup>][<sup>1008</sup>][<sup>1009</sup>][<sup>1010</sup>][<sup>1011</sup>][<sup>1012</sup>][<sup>1013</sup>][<sup>1014</sup>][<sup>1015</sup>][<sup>1016</sup>][<sup>1017</sup>][<sup>1018</sup>][<sup>1019</sup>][<sup>1020</sup>][<sup>1021</sup>][<sup>1022</sup>][<sup>1023</sup>][<sup>1024</sup>][<sup>1025</sup>][<sup>1026</sup>][<sup>1027</sup>][<sup>1028</sup>][<sup>1029</sup>][<sup>1030</sup>][<sup>1031</sup>][<sup>1032</sup>][<sup>1033</sup>][<sup>1034</sup>][<sup>1035</sup>][<sup>1036</sup>][<sup>1037</sup>][<sup>1038</sup>][<sup>1039</sup>][<sup>1040</sup>][<sup>1041</sup>][<sup>1042</sup>][<sup>1043</sup>][<sup>1044</sup>][<sup>1045</sup>][<sup>1046</sup>][<sup>1047</sup>][<sup>1048</sup>][<sup>1049</sup>][<sup>1050</sup>][<sup>1051</sup>][<sup>1052</sup>][<sup>1053</sup>][<sup>1054</sup>][<sup>1055</sup>][<sup>1056</sup>][<sup>1057</sup>][<sup>1058</sup>][<sup>1059</sup>][<sup>1060</sup>][<sup>1061</sup>][<sup>1062</sup>][<sup>1063</sup>][<sup>1064</sup>][<sup>1065</sup>][<sup>1066</sup>][<sup>1067</sup>][<sup>1068</sup>][<sup>1069</sup>][<sup>1070</sup>][<sup>1071</sup>][<sup>1072</sup>][<sup>1073</sup>][<sup>1074</sup>][<sup>1075</sup>][<sup>1076</sup>][<sup>1077</sup>][<sup>1078</sup>][<sup>1079</sup>][<sup>1080</sup>][<sup>1081</sup>][<sup>1082</sup>][<sup>1083</sup>][<sup>1084</sup>][<sup>1085</sup>][<sup>1086</sup>][<sup>1087</sup>][<sup>1088</sup>][<sup>1089</sup>][<sup>1090</sup>][<sup>1091</sup>][<sup>1092</sup>][<sup>1093</sup>][<sup>1094</sup>][<sup>1095</sup>][<sup>1096</sup>][<sup>1097</sup>][<sup>1098</sup>][<sup>1099</sup>][<sup>1100</sup>][<sup>1101</sup>][<sup>1102</sup>][<sup>1103</sup>][<sup>1104</sup>][<sup>1105</sup>][<sup>1106</sup>][<sup>1107</sup>][<sup>1108</sup>][<sup>1109</sup>][<sup>1110</sup>][<sup>1111</sup>][<sup>1112</sup>][<sup>1113</sup>][<sup>1114</sup>][<sup>1115</sup>][<sup>1116</sup>][<sup>1117</sup>][<sup>1118</sup>][<sup>1119</sup>][<sup>1120</sup>][<sup>1121</sup>][<sup>1122</sup>][<sup>1123</sup>][<sup>1124</sup>][<sup>1125</sup>][<sup>1126</sup>][<sup>1127</sup>][<sup>1128</sup>][<sup>1129</sup>][<sup>1130</sup>][<sup>1131</sup>][<sup>1132</sup>][<sup>1133</sup>][<sup>1134</sup>][<sup>1135</sup>][<sup>1136</sup>][<sup>1137</sup>][<sup>1138</sup>][<sup>1139</sup>][<sup>1140</sup>][<sup>1141</sup>][<sup>1142</sup>][<sup>1143</sup>][<sup>1144</sup>][<sup>1145</sup>][<sup>1146</sup>][<sup>1147</sup>][<sup>1148</sup>][<sup>1149</sup>][<sup>1150</sup>][<sup>1151</sup>][<sup>1152</sup>][<sup>1153</sup>][<sup>1154</sup>][<sup>1155</sup>][<sup>1156</sup>][<sup>1157</sup>][<sup>1158</sup>][<sup>1159</sup>][<sup>1160</sup>][<sup>1161</sup>][<sup>1162</sup>][<sup>1163</sup>][<sup>1164</sup>][<sup>1165</sup>][<sup>1166</sup>][<sup>1167</sup>][<sup>1168</sup>][<sup>1169</sup>][<sup>1170</sup>][<sup>1171</sup>][<sup>1172</sup>][<sup>1173</sup>][<sup>1174</sup>][<sup>1175</sup>][<sup>1176</sup>][<sup>1177</sup>][<sup>1178</sup>][<sup>1179</sup>][<sup>1180</sup>][<sup>1181</sup>][<sup>1182</sup>][<sup>1183</sup>][<sup>1184</sup>][<sup>1185</sup>][<sup>1186</sup>][<sup>1187</sup>][<sup>1188</sup>][<sup>1189</sup>][<sup>1190</sup>][<sup>1191</sup>][<sup>1192</sup>][<sup>1193</sup>][<sup>1194</sup>][<sup>1195</sup>][<sup>1196</sup>

take immediate steps to stop the further flaring of gas in the applicant's community

6. The Honorable Attorney-General of the Federation and Ministry of Justice, 3rd respondent in these proceedings who, regrettably, did not put up any appearance, and/or defend these proceedings is hereby ordered to immediately set into motion, after due consultation with the Federal Executive Council, necessary processes for the Enactment of a Bill for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Re-Injection Act and the Regulations made thereunder to quickly bring them in line with the provisions of chapter 4 of the Constitution, especially in view of the fact that the Associated Gas Re-Injection Act even by itself also makes the said continuous gas flaring a crime having prescribed penalties in respect thereof. Accordingly, the case as put forward by the 1st and 2nd respondents as well as their various preliminary objections are hereby dismissed as lacking merit.

7. This is the final judgment of the Court and I make no award of damages costs or compensations whatsoever.

\* \* \*

## **2. Earthlife Africa Johannesburg v Minister of Environmental Affairs (High Court of South Africa, Gauteng Division 2017).**

*An ENGO appealed the issuance of a permit to build a large coal-fired power station without having considered the climate change impacts. The Court considered the regulations and the environmental management act in light of the constitutional environmental provision and under international law. The Court held that even in the absence of an express obligation to consider climate change, the ministry is nonetheless required to consider all the relevant issues and this includes climate change and to do so before, and not after, the permit is issued.*

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 [Chief Director] in the Department of Environmental Affairs ("DEA") [pursuant to Section 24 of the National Environmental Management Act ("NEMA")]. 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 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.

### **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. ... An environmental impact assessment is meant to provide competent authorities with all relevant information on the environmental impacts of the proposed activity. Section 240(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, 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, [which provides, in clause 10.5:]

"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.

11. Earthlife relies on various [statutory provisions in arguing that the MEA's action constituted material noncompliance, that it was irrational and unreasonable and the the Minister committed material errors of law.] 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....

12. Earthlife's case centres on the proposition that section 240(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 240(1) of NEMA, read together with various provisions of the Environmental Impact Assessment Regulations, ("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. ...

13. ... [In considering an application for environmental authorisation, §240(1) requires the MEC to]

- "(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;
  - (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 240(1) of NEMA is to be read with the relevant provisions of the Regulations, which [further provide 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 which] 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 [and which require] 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. 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 240(1)(b) of NEMA then it will follow that the information is necessary for the purposes of regulation 31(2). Where relevant information is missing the environmental impact assessment report must be rejected under regulation 34(2)(b) and environmental authorisation should be refused.

...

### **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. ...

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. [After surveying the government's actions and plans regarding climate change, the Court found that] 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 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 ("NOC"), which describe the targets that they seek to achieve and the climate mitigation measures that they will pursue. South Africa's NOC 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....

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. ...



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. ...

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. 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. 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. The 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.<sup>10</sup> Climate change poses a substantial risk to

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<sup>10</sup> 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).

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 international law. Therefore, the various international agreements on climate change are relevant to the proper interpretation of section 240(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 240 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. ...

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 NOC 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 NOC. 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 NOC 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 240(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.

[In the rest of the opinion, the Court assessed whether the various levels of administrative review did in fact consider or ignore the relevant climate change impacts.]

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.  
...

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*. 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."

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 240(1) of NEMA.

101. On this basis, there was indeed non-compliance with the provisions of section 240(1) of NEMA, with the result that the impugned decisions stand to be reviewed on the grounds that the Chief Director overlooked relevant considerations. ...

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.

116. 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. [Earthlife] referred to *Communities for a Better Environment v City of Richmond*, 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."

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.

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.

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

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.

\* \* \*



## **D. Europe**

### **1. Lopez Ostra v. Spain (European Court of Human Rights, Chamber 1995)**

*Health effects of air and water pollution suffered by residents due to waste treatment plant built in response to nearby concentration of tanneries. The Court held that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. It further found that the State did not succeed in striking a fair balance between the interest of the town's economic well-being—that of having a waste-treatment plant—and the applicant's effective enjoyment of her right to respect for her home and her private and family life and therefore that there had been a violation of Article 8.*

#### **The Facts**

Mrs Gregoria López Ostra, a Spanish national, lives in Lorca (Murcia). At the material time she and her husband and their two daughters had their home in the district of “Diputación del Rio, el Lugarico”, a few hundred metres from the town centre.

#### **The circumstances of the case**

##### **Background to the case**

The town of Lorca has a heavy concentration of leather industries. Several tanneries there, all belonging to a limited company called SACURSA, had a plant for the treatment of liquid and solid waste built with a State subsidy on municipal land 12 metres away from the applicant's home.

The plant began to operate in July 1988 without the licence (licencia) from the municipal authorities required by Regulation 6 of the 1961 regulations on activities classified as causing nuisance and being unhealthy, noxious and dangerous and without having followed the procedure for obtaining such a licence (see paragraph 28 below). Owing to a malfunction, its start-up released gas fumes, pestilential smells and contamination, which immediately caused health problems and nuisance to many Lorca people, particularly those living in the applicant's district. The town council evacuated the local residents and rehoused them free of charge in the town centre for the months of July, August and September 1988. In October the applicant and her family returned to their flat and lived there until February 1992.

On 9 September 1988, following numerous complaints and in the light of reports from the health authorities and the Environment and Nature Agency (Agencia para el Medio Ambiente y la Naturaleza) for the Murcia region, the town council ordered cessation of one of the plant's activities—the settling of chemical and organic residues in water tanks (lagunaje)—while permitting the treatment of waste water contaminated with chromium to continue. There is disagreement as to what the effects were of this partial shutdown, but it can be seen from the expert opinions and written evidence of 1991, 1992 and 1993, produced before the Commission by the Government and the applicant, that certain nuisances continue and may endanger the health of those living nearby.

## **The application for protection of fundamental rights**

### **1. Proceedings in the Murcia Audiencia Territorial**

Having attempted in vain to get the municipal authority to find a solution, Mrs López Ostra lodged an application on 13 October 1988 with the Administrative Division of the Murcia Audiencia Territorial, seeking protection of her fundamental rights. She complained, *inter alia*, of an unlawful interference with her home and her peaceful enjoyment of it, a violation of her right to choose freely her place of residence, attacks on her physical and psychological integrity, and infringements of her liberty and her safety on account of the municipal authorities' passive attitude to the nuisance and risks caused by the waste-treatment plant. She requested the court to order temporary or permanent cessation of its activities.

The court took evidence from several witnesses offered by the applicant and instructed the regional Environment and Nature Agency to give an opinion on the plant's operating conditions and location. In a report of 19 January 1989 the agency noted that at the time of its expert's visit on 17 January the plant's sole activity was the treatment of waste water contaminated with chromium, but that the remaining waste also flowed through its tanks before being discharged into the river, generating foul smells. It therefore concluded that the plant had not been built in the most suitable location.

Crown Counsel endorsed Mrs López Ostra's application. However, the Audiencia Territorial found against her on 31 January 1989. It held that although the plant's operation could unquestionably cause nuisance because of the smells, fumes and noise, it did not constitute a serious risk to the health of the families living in its vicinity but, rather, impaired their quality of life, though not enough to infringe the fundamental rights claimed. In any case, the municipal authorities, who had taken measures in respect of the plant, could not be held liable. The non-possession of a licence was not an issue to be examined in the special proceedings instituted in this instance, because it concerned a breach of the ordinary law.

### **2. Proceedings in the Supreme Court**

On 10 February 1989 Mrs López Ostra lodged an appeal with the Supreme Court. She maintained that a number of witnesses and experts had indicated that the plant was a source of polluting fumes, pestilential and irritant smells and repetitive noise that had caused both her daughter and herself health problems. As regards the municipal authorities' liability, the decision of the *Audiencia Territorial* appeared to be incompatible with the general supervisory powers conferred on mayors by the 1961 regulations, especially where the activity in question was carried on without a licence.<sup>7</sup> Regard being had to Article 8(1) of the Convention, *inter alia*, the town council's attitude amounted to unlawful interference with her right to respect for her home and was also an attack on her physical integrity. Lastly, the applicant sought an order suspending the plant's operations.

...

In a judgment of 27 July 1989 the Supreme Court dismissed the appeal. The impugned decision had been consistent with the constitutional provisions relied on, as no public official had entered the applicant's home or attacked her physical integrity. She was in any case free to move elsewhere. The failure to obtain a licence could only be considered in ordinary law proceedings.

### **3. Proceedings in the Constitutional Court**

On 20 October 1989 Mrs López Ostra lodged an appeal (amparo) with the Constitutional Court, alleging violations of Article 15 (right to physical integrity), Article 18 (right to private life and to inviolability of the family home) and Article 19 (right to choose freely a place of residence) of the Constitution.

On 26 February 1990 the court ruled that the appeal was inadmissible on the ground that it was manifestly ill-founded. It observed that the complaint based on a violation of the right to respect for private life had not been raised in the ordinary courts as it should have been. For the rest, it held that the presence of fumes, smells and noise did not itself amount to a breach of the right to inviolability of the home; that the refusal to order closure of the plant could not be regarded as degrading treatment, since the applicant's life and physical integrity had not been endangered; and that her right to choose her place of residence had not been infringed as she had not been expelled from her home by any authority. ...

...

### **PROCEEDINGS BEFORE THE COMMISSION**

Mrs López Ostra applied to the Commission on 14 May 1990. She complained of the Lorca municipal authorities' inactivity in respect of the nuisance caused by a waste-treatment plant situated a few metres away from her home. Relying on Articles 8(1) and (3) of the Convention, she asserted that she was the victim of a violation of the right to respect for her home that made her private and family life impossible and the victim also of degrading treatment.

On 8 July 1992 the Commission declared the application <sup>27</sup> admissible. In its report of 31 August 1993, it expressed the unanimous opinion that there had been a violation of Article 8 but not of Article 3. The full text of the Commission's opinion contained in the report follows.

#### **Opinion**

...

#### **Points at issue**

The points at issue in this case are as follows:

Does the nuisance caused by the treatment plant situated close to the applicant's home constitute unjustified interference with her right to respect for her private and family life?

Does the fact that she is obliged to live in such an environment constitute degrading treatment within the meaning of Article 3 of the Convention?

#### **As to violation of Article 8 of the Convention**

Article 8 of the Convention provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

...

In the light of the foregoing considerations, the Commission takes the view that the respondent Government have omitted to take the necessary measures to ensure the practical and effective protection of the right to respect for private and family life guaranteed by Article 8(1) of the Convention.

### **Conclusion**

The Commission concludes, unanimously, that there has been a violation of Article 8 of the Convention.

### **The alleged violation of Article 3 of the Convention**

The applicant complains that the fact that she has been obliged to live next to a filthy sewer constitutes degrading treatment, prohibited by Article 3 of the Convention, for which the Spanish authorities are to blame on account of their inactivity. The Government take the opposite view.

The Commission considers that, although difficult, the conditions in which the applicant has been obliged to live, which are in breach of Article 8 of the Convention, do not attain such a level of severity that they can be considered treatment contrary to Article 3 of the Convention.

### **Conclusion**

The Commission concludes, unanimously, that there has been no violation of Article 3 of the Convention.

...

## **JUDGMENT**

The applicant alleged that there had been a violation of Articles 8 and 3 of the Convention on account of the smells, noise and polluting fumes caused by a plant for the treatment of liquid and solid waste sited a few metres away from her home. She held the Spanish authorities responsible, alleging that they had adopted a passive attitude.

[The Court dismissed the government's objection based on failure to exhaust domestic remedies or lack of injury.]

### **Alleged violation of Article 8 of the Convention**

Mrs López Ostra first contended that there had been a violation of Article 8 of the Convention, which provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Commission subscribed to this view, while the Government contested it.

The Government said that the complaint made to the Commission and declared admissible by it <sup>43</sup> was not the same as the one that the Spanish courts had considered in the application for protection of fundamental rights since it appeared to be based on statements, medical reports and technical experts' opinions of later date than that application and wholly unconnected with it.

This argument does not persuade the Court. The applicant had complained of a situation which had been prolonged by the municipality's and the relevant authorities' failure to act. This inaction was one of the fundamental points both in the complaints made to the Commission and in the application to the Murcia *Audiencia Territorial*. <sup>44</sup> The fact that it continued after the application to the Commission and the decision on admissibility cannot be held against the applicant. Where a situation under consideration is a persisting one, the Court may take into account facts occurring after the application has been lodged and even after the decision on admissibility has been adopted.

Mrs López Ostra maintained that, despite its partial shutdown on 9 September 1988, the plant continued to emit fumes, repetitive noise and strong smells, which made her family's living conditions unbearable and caused both her and them serious health problems. She alleged in this connection that her right to respect for her home had been infringed.

The Government disputed that the situation was really as described and as serious.

On the basis of medical reports and expert opinions produced by the Government or the applicant, the Commission noted, *inter alia*, that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby and that there could be a causal link between those emissions and the applicant's daughter's ailments.

In the Court's opinion, these findings merely confirm the first expert report submitted to the Audiencia Territorial on 19 January 1989 by the regional Environment and Nature Agency in connection with Mrs López Ostra's application for protection of fundamental rights. Crown Counsel supported this application both at first instance and on appeal. The Audiencia Territorial itself accepted that, without constituting a grave health risk, the nuisances in issue impaired the quality of life of those living in the plant's vicinity, but it held that this impairment was not serious enough to infringe the fundamental rights recognised in the Constitution.

Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.

Whether the question is analysed in terms of a positive duty on the State—to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 —, as the applicant wishes in her case, or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance.

It appears from the evidence that the waste-treatment plant in issue was built by SACURSA in July 1988 to solve a serious pollution problem in Lorca due to the concentration of tanneries. Yet as soon as it started up, the plant caused nuisance and health problems to many

local people.

Admittedly, the Spanish authorities, and in particular the Lorca municipality, were theoretically not directly responsible for the emissions in question. However, as the Commission pointed out, the town allowed the plant to be built on its land and the State subsidised the plant's construction.

The town council reacted promptly by rehousing the residents affected, free of charge, in the town centre for the months of July, August and September 1988 and then by stopping one of the plant's activities from 9 September. However, the council's members could not be unaware that the environmental problems continued after this partial shutdown. This was, moreover, confirmed as early as 19 January 1989 by the regional Environment and Nature Agency's report and then by expert opinions in 1991, 1992 and 1993.

Mrs López Ostra submitted that by virtue of the general supervisory powers conferred on the municipality by the 1961 regulations the municipality had a duty to act. In addition, the plant did not satisfy the legal requirements, in particular as regards its location and the failure to obtain a municipal licence.

On this issue the Court points out that the question of the lawfulness of the building and operation of the plant has been pending in the Supreme Court since 1991. The Court has consistently held that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law.

At all events, the Court considers that in the present case, even supposing that the municipality did fulfil the functions assigned to it by domestic law, it need only establish whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life under Article 8.

It has to be noted that the municipality not only failed to take steps to that end after 9 September 1988 but also resisted judicial decisions to that effect. In the ordinary administrative proceedings instituted by Mrs López Ostra's sisters-in-law it appealed against the Murcia High Court's decision of 18 September 1991 ordering temporary closure of the plant, and that measure was suspended as a result.

Other State authorities also contributed to prolonging the situation. On 19 November 1991 Crown Counsel appealed against the Lorca investigating judge's decision of 15 November temporarily to close the plant in the prosecution for an environmental health offence, with the result that the order was not enforced until 27 October 1993.

The Government drew attention to the fact that the town had borne the expense of renting a flat in the centre of Lorca, in which the applicant and her family lived from 1 February 1992 to February 1993.

The Court notes, however, that the family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences. They moved only when it became apparent that the situation could continue indefinitely and when Mrs López Ostra's daughter's paediatrician recommended that they do so.<sup>65</sup> Under these circumstances, the municipality's offer could not afford complete redress for the nuisance and inconveniences to which they had been subjected.

Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance



between the interest of the town's economic well-being—that of having a waste-treatment plant—and the applicant's effective enjoyment of her right to respect for her home and her private and family life.

There has accordingly been a violation of Article 8.

### **Alleged violation of Article 3 of the Convention**

Mrs López Ostra submitted that the matters for which the respondent State was criticised were of such seriousness and had caused her such distress that they could reasonably be regarded as amounting to degrading treatment prohibited by Article 3 of the Convention, which provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The Government and the Commission took the view that there had been no breach of this Article.

The Court is of the same opinion. The conditions in which the applicant and her family lived for a number of years were certainly very difficult but did not amount to degrading treatment within the meaning of Article 3.

...

For these reasons, THE COURT unanimously

1. *Dismisses* the Government's preliminary objections;
2. *Holds* that there has been a breach of Article 8 of the Convention;
3. *Holds* that there has been no breach of Article 3 of the Convention;
4. *Holds* that the respondent State is to pay the applicant within three months 4,000,000 (four million) Ptas for damage and 1,500,000 (one million five hundred thousand) Ptas, less 9,700 (nine thousand seven hundred) FF to be converted into pesetas at the exchange rate applicable on the date of delivery of this judgment, for costs and expenses;
5. *Dismisses* the remainder of the claim for just satisfaction.

\* \* \*

## **2. Guerra and Others v Italy (European Court of Human Rights, Grand Chamber 1998)**

*Residents near an agricultural chemical company object to air pollution caused by toxic releases from ordinary production cycles as well as occasional accidents, alleging violations of Articles 2, 8, and 10 of the Convention. The Court held that while Article 10 prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him, it does not impose on the government any positive obligations to collect and disseminate information on its own motion. However, the Court held that, because severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, Article 8 may impose positive obligations inherent in effective respect for private or family life, following Lopez Ostra, in part by failing to provide essential information in a timely manner.*

### **PROCEDURE**

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 September 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 14967/89) against the Italian Republic lodged with the Commission under Article 25 by forty Italian nationals on 18 October 1988.

### **AS TO THE FACTS**

#### **I. THE CIRCUMSTANCES OF THE CASE**

##### **A. The Enichem agricoltura factory**

12. The applicants all live in the town of Manfredonia (Foggia). Approximately one kilometre away is the Enichem agricoltura company's chemical factory, which lies within the municipality of Monte Sant'Angelo.

13. In 1988 the factory, which produced fertilisers and caprolactam (a chemical compound producing, by a process of polycondensation, a polyamide used in the manufacture of synthetic fibres such as nylon), was classified as "high risk" according to the criteria set out in Presidential Decree no. 175 of 18 May 1988 ("DPR 175/88"), which transposed into Italian law Directive 82/501/EEC of the Council of the European Communities (the "Seveso" directive) on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population.

14. The applicants said that in the course of its production cycle the factory released large quantities of inflammable gas – a process which could have led to explosive chemical reactions, releasing highly toxic substances – and sulphur dioxide, nitric oxide, sodium, ammonia, metal hydrides, benzoic acid and above all, arsenic trioxide. These assertions have not been disputed by the Government.

15. Accidents due to malfunctioning have already occurred in the past, the most serious one on 26 September 1976 when the scrubbing tower for the ammonia synthesis gases exploded, allowing several tonnes of potassium carbonate and bicarbonate solution, containing

arsenic trioxide, to escape. One hundred and fifty people were admitted to hospital with acute arsenic poisoning.

16. In a report of 8 December 1988 a committee of technical experts appointed by Manfredonia District Council established that because of the factory's geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia. It was noted in the report that the factory had refused to allow the committee to carry out an inspection and that the results of a study by the factory itself showed that the emission treatment equipment was inadequate and the environmental-impact assessment incomplete.

17. In 1989 the factory restricted its activity to the production of fertilisers, and it was accordingly still classified as a dangerous factory covered by *DPR 175/88*. In 1993 the Ministry for the Environment issued an order jointly with the Ministry of Health prescribing measures to be taken by the factory to improve the safety of the ongoing fertiliser production, and of caprolactam production if that was resumed (see paragraph 27 below).

18. In 1994 the factory permanently stopped producing fertiliser. Only a thermoelectric power station and plant for the treatment of feed and waste water continued to operate.

## **B. The criminal proceedings**

### *1. Before the Foggia Magistrates' Court*

19. On 13 November 1985 420 residents of Manfredonia (including the applicants) applied to the Foggia Magistrates' Court (*pretore*) complaining that the air had been polluted by emissions of unknown chemical composition and toxicity from the factory. Criminal proceedings were brought against seven directors of the impugned company for offences relating to pollution caused by emissions from the factory and to non-compliance with a number of environmental protection regulations.

Judgment was given on 16 July 1991. Most of the defendants escaped a prison sentence, either because the charges were covered by an amnesty or were time-barred, or because they had paid an immediate fine (*oblazione*). Only two directors were sentenced to five months' imprisonment and a fine of two million lire and ordered to pay damages to the civil parties, for having had waste dumps built without prior permission, contrary to the relevant provisions of *DPR 915/82* on waste disposal.

### *2. In the Bari Court of Appeal*

20. On appeals by the two directors who had been convicted and by the Public Electricity Company (*ENEL*) and Manfredonia District Council, which had both joined the proceedings as civil parties claiming damages, the Bari Court of Appeal acquitted the directors on 29 April 1992 on the ground that the offence had not been made out but upheld the remainder of the impugned decision. The court held that the errors which the directors were alleged to have made in the management of the waste were in fact attributable to delays and uncertainties in the adoption and interpretation, particularly by the Region of Apulia, of regulations implementing *DPR 915/82*. Consequently, there was no damage that gave rise to a claim for compensation.

...

## **D. Steps taken to inform the local population**

25. Articles 11 and 17 of *DPR 175/88* require the relevant mayor and prefect to inform local inhabitants of the hazards of the industrial activity concerned, the safety measures taken, the plans made for emergencies and the procedure to be followed in the event of an accident.

26. On 2 October 1992 the Coordinating Committee for Industrial Safety Measures gave its opinion on the emergency plan that had been drawn up by the prefect of Foggia, in accordance with Article 17 § 1 of *DPR 175/88*. On 3 August 1993 the plan was sent to the relevant committee of the Civil Defence Department. In a letter of 12 August 1993 the under-secretary of the Civil Defence Department assured the prefect of Foggia that the plan would be submitted promptly to the Coordinating Committee for its opinion and expressed the hope that it could be put into effect as quickly as possible, given the sensitive issues raised by planning for emergencies.

27. On 14 September 1993 the Ministry for the Environment and the Ministry of Health jointly adopted conclusions on the factory's safety report of July 1989, as required by Article 19 of *DPR 175/88*. Those conclusions prescribed a number of improvements to be made to the installations, both in relation to fertiliser production and in the event of resumed caprolactam production (see paragraph 17 above) and provided the prefect with instructions as to the emergency plan for which he was responsible and the measures required for informing the local population under Article 17 of *DPR 175/88*.

In a letter of 7 December 1995 to the European Commission of Human Rights, however, the mayor of Monte Sant'Angelo indicated that the investigation for the purpose of drawing up conclusions under Article 19 was still continuing and that he had not received any documents relating to them. He pointed out that the District Council was still awaiting direction from the Civil Defence Department before deciding what safety measures should be taken and what procedures should be followed in the event of an accident and communicated to the public. He said that if the factory resumed production, the measures for informing the public would be taken as soon as the conclusions based on the investigation were available.

...

## FINAL SUBMISSIONS TO THE COURT

37. The Government concluded their memorial by inviting the Court, as their primary submission, to dismiss the application for failure to exhaust domestic remedies and, in the alternative, to hold that there had been no violation of Article 10 of the Convention.

38. At the hearing the applicants' counsel asked the Court to hold that there had been a violation of Articles 10, 8 and 2 of the Convention and to award her clients just satisfaction.

## AS TO THE LAW

### I. SCOPE OF THE CASE

39. Before the Commission the applicants made two complaints. Firstly, the authorities had not taken appropriate action to reduce the risk of pollution by the Enichem agricoltura chemical factory at Manfredonia ("the factory") and to avoid the risk of major accidents; that situation, they asserted, infringed their right to life and physical integrity as guaranteed by Article 2 of the Convention. Secondly, the Italian State had failed to take steps to provide information about the risks and how to proceed in the event of a major accident, as they were required to do by Articles 11 § 3 and 17 § 2 of Presidential Decree no. 175/88 ("*DPR 175/88*");

as a result the applicants considered that there had been a breach of their right to freedom of information laid down in Article 10 of the Convention. ...

## II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

47. The applicants alleged that they were the victims of a violation of Article 10 of the Convention, which provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The alleged breach resulted from the authorities’ failure to take steps to ensure that the public were informed of the risks and of what was to be done in the event of an accident connected with the factory’s operation.

...

### **B. Merits of the complaint**

...

51. In the Government’s submission, that provision merely guaranteed freedom to receive information without hindrance by States; it did not impose any positive obligation. That was shown by the fact that Resolution 1087 (1996) of the Council of Europe’s Parliamentary Assembly and Directive 90/313/EEC of the Council of the European Communities on freedom of access to information on the environment spoke merely of access, not a right, to information. If a positive obligation to provide information existed, it would be “extremely difficult to implement” because of the need to determine how and when the information was to be disclosed, which authorities were responsible for disclosing it and who was to receive it.

52. Like the applicants, the Commission was of the opinion that the provision of information to the public was now one of the essential means of protecting the well-being and health of the local population in situations in which the environment was at risk. Consequently, the words “This right shall include freedom ... to receive ... information...” in paragraph 1 of Article 10 had to be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment.

Article 10 imposed on States not just a duty to make available information to the public on environmental matters, a requirement with which Italian law already appeared to comply, by virtue of section 14(3) of Law no. 349 in particular, but also a positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public. The protection afforded by Article 10 therefore had a preventive

function with respect to potential violations of the Convention in the event of serious damage to the environment and Article 10 came into play even before any direct infringement of other fundamental rights, such as the right to life or to respect for private and family life, occurred.

53. The Court does not subscribe to that view. In cases concerning restrictions on freedom of the press it has on a number of occasions recognised that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest (see, among other authorities, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, p. 30, § 59 (b), and the *Thorgeir Thorgeirson v. Iceland* judgment of 25 June 1992, Series A no. 239, p. 27, § 63). The facts of the present case are, however, clearly distinguishable from those of the aforementioned cases since the applicants complained of a failure in the system set up pursuant to *DPR 175/88*, which had transposed into Italian law Directive 82/501/EEC of the Council of the European Communities (the “Seveso” directive) on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population. Although the prefect of Foggia prepared the emergency plan on the basis of the report submitted by the factory and the plan was sent to the Civil Defence Department on 3 August 1993, the applicants have yet to receive the relevant information (see paragraphs 26 and 27 above).

The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, “basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him” (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 29, § 74). That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.

54. In conclusion, Article 10 is not applicable in the instant case.

55. In the light of what was said in paragraph 45 above, the case falls to be considered under Article 8 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

56. The applicants, relying on the same facts, maintained before the Court that they had been the victims of a violation of Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

57. The Court’s task is to determine whether Article 8 is applicable and, if so, whether it has been infringed.

The Court notes, firstly, that all the applicants live at Manfredonia, approximately a kilometre away from the factory, which, owing to its production of fertilisers and caprolactam, was classified as being high-risk in 1988, pursuant to the criteria laid down in *DPR 175/88*.



In the course of its production cycle the factory released large quantities of inflammable gas and other toxic substances, including arsenic trioxide. Moreover, in 1976, following the explosion of the scrubbing tower for the ammonia synthesis gases, several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped and 150 people had to be hospitalised on account of acute arsenic poisoning.

In addition, in its report of 8 December 1988, a committee of technical experts appointed by the Manfredonia District Council said in particular that because of the factory's geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia (see paragraphs 14–16 above).

The direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable.

58. The Court considers that Italy cannot be said to have “interfered” with the applicants' private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, p. 17, § 32).

In the present case it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by Article 8 (see the *López Ostra v. Spain* judgment of 9 December 1994, Series A no. 303-C, p. 55, § 55).

59. On 14 September 1993, pursuant to Article 19 of *DPR* 175/88, the Ministry for the Environment and the Ministry of Health jointly adopted conclusions on the safety report submitted by the factory in July 1989. Those conclusions prescribed improvements to be made to the installations, both in relation to current fertiliser production and in the event of resumed caprolactam production, and provided the prefect with instructions as to the emergency plan – that he had drawn up in 1992 – and the measures required for informing the local population under Article 17 of *DPR* 175/88.

In a letter of 7 December 1995 to the European Commission of Human Rights, however, the mayor of Monte Sant'Angelo indicated that the investigation for the purpose of drawing up conclusions under Article 19 was still continuing and that he had not received any documents relating to them. He pointed out that the District Council was still awaiting direction from the Civil Defence Department before deciding what safety measures should be taken and what procedures should be followed in the event of an accident and communicated to the public. He said that if the factory resumed production, the measures for informing the public would be taken as soon as the conclusions based on the investigation were available (see paragraph 27 above).

60. The Court reiterates that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (see, *mutatis mutandis*, the *López Ostra* judgment cited above, p. 54, § 51). In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and

their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.

There has consequently been a violation of that provision.

...

## V. APPLICATION OF ARTICLE 50 OF THE CONVENTION

63. Article 50 of the Convention provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

64. The applicants sought compensation for "biological" damage; they claimed 20,000,000,000 Italian lire (ITL).

65. In the Government's submission, the applicants had not shown that they had sustained any damage and had not even described it in detail. If the Court were to hold that there had been non-pecuniary damage, a finding of a violation would constitute sufficient just satisfaction for it.

66. The Delegate of the Commission invited the Court to award the applicants compensation that was adequate and proportionate to the considerable damage they had suffered. He suggested a sum of ITL 100,000,000 for each applicant.

67. The Court considers that the applicants did not show that they had sustained any pecuniary damage as a result of the lack of information of which they complained. As to the rest, it holds that the applicants undoubtedly suffered non-pecuniary damage and awards them ITL 10,000,000 each.

...

### C. Other claims

71. Lastly, the applicants sought an order from the Court requiring the respondent State to decontaminate the entire industrial estate concerned, to carry out an epidemiological study of the area and the local population and to undertake an inquiry to identify the possible serious effects on residents most exposed to substances believed to be carcinogenic.

...

74. The Court notes that the Convention does not empower it to accede to such a request. It reiterates that it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the Convention (see, *mutatis mutandis*, the following judgments: *Zanghì v. Italy* of 19 February 1991, Series A no. 194-C, p. 48, § 26, *Demicoli v.*

Malta of 27 August 1991, Series A no. 210, p. 19, § 45, and Yağcı and Sargın v. Turkey of 8 June 1995, Series A no. 319-A, p. 24, § 81).

\* \* \*

### **3. In the case of Hatton and Others v. the United Kingdom, European Court of Human Rights (Grand Chamber 2003).**

*There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8. The State's responsibility in environmental cases may arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention and broadly similar principles apply whether a case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority with Article 8 rights to be justified in accordance with paragraph 2 of this provision. In the circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.*

#### **PROCEDURE**

3. The applicants alleged that government policy on night flights at Heathrow Airport gave rise to a violation of their rights under Article 8 of the Convention and that they were denied an effective domestic remedy for this complaint, contrary to Article 13 of the Convention...

#### **THE FACTS**

##### **I. THE CIRCUMSTANCES OF THE CASE**

##### **A. The degree of disturbance caused to each applicant by night flights**

11. ... Between 1991 and 1997 [Ruth Hatton] lived in East Sheen with her husband and two children. According to information supplied by the Government, her house was 11.7 km from the end of the nearest runway at Heathrow and fell within a daytime noise contour where the level of disturbance from aircraft noise was between 57 and 60 dBa Leq. ...

12. According to Ms Hatton, in 1993 the level of night noise increased and she began to find noise levels to be “intolerable” at night. She believed that the noise was greater when aircraft were landing at Heathrow from the east. When this happened, Ms Hatton was unable to sleep without ear plugs and her children were frequently woken up before 6 a.m., and sometimes before 5 a.m. If Ms Hatton did not wear ear plugs, she would be woken by aircraft activity at around 4 a.m. She was sometimes able to go back to sleep, but found it impossible to go back to sleep once the “early morning bombardment” started which, in the winter of 1996/1997, was between 5 a.m. and 5.30 a.m. When she was woken in this manner, Ms Hatton tended to suffer from a headache for the rest of the day. When aircraft were landing from the west the noise levels were lower, and Ms Hatton's children slept much better, generally not waking up until after 6.30 a.m. In the winter of 1993/1994, Ms Hatton became so run down and depressed by her broken sleep pattern that her doctor prescribed anti-depressants. In October 1997, she moved with her family to Kingston-upon-Thames in order to get away from the aircraft noise at night....

27. The dBA Leq noise contour figures supplied by the Government and referred to above measure levels of annoyance caused by noise during the course of an average summer day. The Government state that it is not possible to map equivalent contours for night noise disturbance, because there is no widely accepted scale or standard with which to measure night-time annoyance caused by aircraft noise.

The Government claim that research commissioned before the 1993 review of night restrictions indicated that average outdoor sound exposure levels of below 90 dBA, equivalent to peak noise event levels of approximately 80 dBA, were unlikely to cause any measurable increase in overall rates of sleep disturbance experienced during normal sleep. The applicants, however, refer to World Health Organisation “Guidelines for Community Noise”, which gave a guideline value for avoiding sleep disturbance at night of a single noise event of 60 dBA.

### **B. The night-time regulatory regime for Heathrow Airport**

28. Heathrow Airport is the busiest airport in Europe, and the busiest international airport in the world. It is used by over 90 airlines, serving over 180 destinations world-wide. It is the United Kingdom's leading port in terms of visible trade.

29. Restrictions on night flights at Heathrow Airport were introduced in 1962 and have been reviewed periodically, most recently in 1988, 1993 and 1998....

74. A series of noise mitigation and abatement measures is in place at Heathrow Airport, in addition to restrictions on night flights. These include the following: aircraft noise certification to reduce noise at source; the compulsory phasing out of older, noisier jet aircraft; noise preferential routes and minimum climb gradients for aircraft taking off; noise abatement approach procedures (continuous descent and low power/low drag procedures); limitation of air transport movements; noise-related airport charges; noise insulation grant schemes; and compensation for noise nuisance under the Land Compensation Act 1973.

75. The DETR and the management of Heathrow Airport conduct continuous and detailed monitoring of the restrictions on night flights. Reports are provided each quarter to members of the Heathrow Airport Consultative Committee, on which local government bodies responsible for areas in the vicinity of Heathrow Airport and local residents' associations are represented.

## **II. RELEVANT DOMESTIC LAW AND PRACTICE...**

### **I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

84. The applicants complained that the government policy on night flights at Heathrow introduced in 1993 violated their rights under Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The Government denied that there had been any violation of the Convention in this case.

## A. The general principles ...

### 4. The Court's assessment

96. Article 8 protects the individual's right to respect for his or her private and family life, home and correspondence. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8. Thus, in *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172, p. 18, § 40), where the applicants had complained about disturbance from daytime aircraft noise, the Court held that Article 8 was relevant, since “the quality of [each] applicant's private life and the scope for enjoying the amenities of his home [had] been adversely affected by the noise generated by aircraft using Heathrow Airport”. Similarly, in *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C, pp. 54-55, § 51) the Court held that Article 8 could include a right to protection from severe environmental pollution, since such a problem might “affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”. In *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I), which, like *López Ostra*, concerned environmental pollution, the Court observed that “[the] direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable” (p. 227, § 57).

97. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48). ...

98. Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (see *Powell and Rayner*, p. 18, § 41, and *López Ostra* pp. 54-55, § 51, both cited above). ...

101. In other cases involving environmental issues, for example planning cases, the Court has also held that the State must be allowed a wide margin of appreciation. ...

77. The Court's task is to determine, on the basis of the above principles, whether the reasons relied on to justify the interference in question are relevant and sufficient under Article 8 § 2.”

103. The Court is thus faced with conflicting views as to the margin of appreciation to be applied: on the one hand, the Government claim a wide margin on the ground that the case



concerns matters of general policy, and, on the other hand, the applicants' claim that where the ability to sleep is affected, the margin is narrow because of the "intimate" nature of the right protected. This conflict of views on the margin of appreciation can be resolved only by reference to the context of a particular case. ...

## **B. Appraisal of the facts of the case in the light of the general principles**

### *... 4. The Court's assessment*

...119. It is clear that in the present case the noise disturbances complained of were not caused by the State or by State organs, but that they emanated from the activities of private operators. It may be argued that the changes brought about by the 1993 Scheme are to be seen as a direct interference by the State with the Article 8 rights of the persons concerned. On the other hand, the State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention. As noted above (see paragraph 98), broadly similar principles apply whether a case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority with Article 8 rights to be justified in accordance with paragraph 2 of this provision. The Court is not therefore required to decide whether the present case falls into the one category or the other. The question is whether, in the implementation of the 1993 policy on night flights at Heathrow Airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole.

120. The Court notes at the outset that in previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *López Ostra*, the waste-treatment plant at issue was illegal in that it operated without the necessary licence, and was eventually closed down (*López Ostra*, cited above, pp. 46-47, §§ 16-22). In *Guerra and Others*, the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide (*Guerra and Others*, cited above, p. 219, §§ 25-27). ...

121. In order to justify the night flight scheme in the form in which it has operated since 1993, the Government refer not only to the economic interests of the operators of airlines and other enterprises as well as their clients, but also, and above all, to the economic interests of the country as a whole. In their submission these considerations make it necessary to impinge, at least to a certain extent, on the Article 8 rights of the persons affected by the scheme. The Court observes that according to the second paragraph of Article 8 restrictions are permitted, *inter alia*, in the interests of the economic well-being of the country and for the protection of the rights and freedoms of others. It is therefore legitimate for the State to have taken the above economic interests into consideration in the shaping of its policy. ...

124. In the present case the Court first notes the difficulties in establishing whether the 1993 Scheme actually led to a deterioration of the night noise climate. The applicants contend that it did; the Government disagree. Statements in the 1998 Consultation Paper suggest that, generally, the noise climate around Heathrow may have improved during the night quota period, but probably deteriorated over the full night period (see paragraph 61 above). The Court is not able to make any firm findings on this point. It notes the dispute between the parties as to whether aircraft movements or quota counts should be employed as the appropriate yardstick

for measuring night noise. However, it finds no indication that the authorities' decision to introduce a regime based on the quota count system was as such incompatible with Article 8....

129. In these circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.

130. There has accordingly been no violation of Article 8 of the Convention.

...

## JOINT DISSENTING OPINION OF JUDGES COSTA, RESS, TÜRMEK, ZUPANČIČ AND STEINER

### I. Introduction

We regret that we cannot adhere to the majority's view that there has been no violation of Article 8 of the European Convention on Human Rights in this case. We have reached our joint dissenting standpoint primarily from our reading of the current stage of development of the pertinent case-law. In addition, the close connection between human rights protection and the urgent need for a decontamination of the environment leads us to perceive health as the most basic human need and as pre-eminent. After all, as in this case, what do human rights pertaining to the privacy of the home mean if, day and night, constantly or intermittently, it reverberates with the roar of aircraft engines?

1. It is true that the original text of the Convention does not yet disclose an awareness of the need for the protection of environmental human rights. In the 1950s, the universal need for environmental protection was not yet apparent. Historically, however, environmental considerations are by no means unknown to our unbroken and common legal tradition whilst, thirty-one years ago, the Declaration of the United Nations Conference on the Human Environment stated as its first principle:

“... Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being ...

The European Union's Charter of Fundamental Rights (even though it does not at present have binding legal force) provides an interesting illustration of the point. Article 37 of the Charter provides:

“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

These recommendations show clearly that the member States of the European Union want a high level of protection and better protection, and expect the Union to develop policies aimed at those objectives. On a broader plane the Kyoto Protocol makes it patent that the question of environmental pollution is a supra-national one, as it knows no respect for the boundaries of national sovereignty. This makes it an issue *par excellence* for international law – and a fortiori for international jurisdiction. In the meanwhile, many supreme and

constitutional courts have invoked constitutional vindication of various aspects of environmental protection – on these precise grounds. We believe that this concern for environmental protection shares common ground with the general concern for human rights.

## II. Development of the case-law

2. As the Court has often underlined: “The Convention is a living instrument, to be interpreted in the light of present-day conditions” (see, among many other authorities, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26, and *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 26-27, § 71). This “evolutive” interpretation by the Commission and the Court of various Convention requirements has generally been “progressive”, in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the “European public order”. In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.

3. In previous cases concerning protection against aircraft noise the Commission did not hesitate to rule that Article 8 was applicable and declared complaints of a violation of that provision admissible – in *Arrondelle* and *Baggs*, for example. In *Arrondelle v. the United Kingdom* (no. 7889/77, Commission decision of 15 July 1980, Decisions and Reports (DR) 19, p. 186) the applicant's house was just over one and a half kilometres from the end of the runway at Gatwick Airport. In *Baggs v. the United Kingdom* (no. 9310/81, Commission decision of 16 October 1985, DR 44, p. 13) the applicant's property was 400 metres away from the south runway of Heathrow Airport. These two applications, which were declared admissible, ended with friendly settlements. While that does not mean that there was a violation of the Convention, it does show that the respondent Government accepted at that time that there was a real problem. And it was for purely technical reasons that the Court itself, in *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172), which also concerned flights in and out of Heathrow, refused to look into the Article 8 issue.

4. The Court has given clear confirmation that Article 8 of the Convention guarantees the right to a healthy environment: it found violations of Article 8, on both occasions unanimously, in *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C) and *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I). The first of those cases concerned nuisances (smells, noise and fumes) caused by a waste-water treatment plant close to the applicant's home which had affected her daughter's health. The other concerned harmful emissions from a chemical works which presented serious risks to the applicants, who lived in a nearby municipality.

5. The Grand Chamber's judgment in the present case, in so far as it concludes, contrary to the Chamber's judgment of 2 October 2001, that there was no violation of Article 8, seems to us to deviate from the above developments in the case-law and even to take a step backwards. It gives precedence to economic considerations over basic health conditions in qualifying the applicants' “sensitivity to noise” as that of a small minority of people (see paragraph 118 of the judgment). The trend of playing down such sensitivity – and more specifically concerns about noise and disturbed sleep – runs counter to the growing concern over environmental issues all over Europe and the world. A simple comparison of the above-mentioned cases (*Arrondelle*,

*Baggs* and *Powell and Rayner*) with the present judgment seems to show that the Court is turning against the current.

### III. The positive obligation of the State

6. The Convention protects the individual against direct abuses of power by the State authorities. Typically, the environmental aspect of the individual's human rights is not threatened by direct government action. Indirectly, however, the question is often whether the State has taken the necessary measures to protect health and privacy. Even assuming it has, direct State action may take the form of permitting, as here, the operation of an airport under certain conditions. The extent of permissible direct State interference and of the State's positive obligations is not easy to determine in such situations, but these difficulties should not undermine the overall protection which the States have to ensure under Article 8.

7. Thus, under domestic law, the regulatory power of the State is involved in protecting the individual against the macroeconomic and commercial interests that cause pollution. The misleading variation in this indirect juxtaposition of the individual and the State therefore derives from the fact that the State is under an obligation to act and omits to do so (or does so in violation of the principle of proportionality). In this respect, we have come a long way from the situation considered by this Court in *Powell and Rayner* (cited above, pp. 9-10, § 15), in which the Noise Abatement Act specifically exempted aircraft noise from its protection. The issue in the context of domestic law is, therefore, whether the State has done anything or enough.

8. At least since *Powell and Rayner* (p. 18, § 41), the key issue has been the positive obligation of the State.

9. The majority tries to distinguish the present case from *Dudgeon v. the United Kingdom* (judgment of 22 October 1981, Series A no. 45), which dealt with the sexual intimacy aspect of the applicant's private life. In *Dudgeon* (p. 21, § 52) it is said: "The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8." The majority judgment differentiates this case from *Dudgeon* by saying: "the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation" (see paragraph 123 of the judgment).

10. It is logical that there be an inverse relationship between the importance of the right to privacy in question on the one hand and the permissible intensity of the State's interference on the other hand. It is also true that sexual intimacy epitomises the innermost concentric circle of private life where the individual should be left in peace unless he interferes with the rights of others. However, it is not logical to infer from this that the proportionality doctrine of inverse relationship between the importance of the right to privacy and the permissible interference should be limited to sexual intimacy. Other aspects of privacy, such as health, may be just as "intimate", albeit much more vital.

11. Privacy is a heterogeneous prerogative. The specific contours of privacy can be clearly distinguished and perceived only when it is being defended against different kinds of encroachments. Moreover, privacy is an aspect of the person's general well-being and not necessarily only an end in itself. The intensity of the State's permissible interference with the

privacy of the individual and his or her family should therefore be seen as being in inverse relationship with the damage the interference is likely to cause to his or her mental and physical health. The point, in other words, is not that the sexual life of the couple whose home reverberates with the noise of aircraft engines may be seriously affected. The thrust of our argument is that “health as a state of complete physical, mental and social well-being” is, in the specific circumstances of this case, a precondition to any meaningful privacy, intimacy, etc., and cannot be unnaturally separated from it. To maintain otherwise amounts to a wholly artificial severance of privacy and of general personal well-being. Of course, each case must be decided on its own merits and by taking into account the totality of its specific circumstances. In this case, however, it is clear that the circles of the protection of health and of the safeguarding of privacy do intersect and do overlap.

12. We do not agree with the majority's position taken in paragraph 123 of the Grand Chamber judgment and especially not with the key language *in fine* where the majority considers: “Whilst the State is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance.” When it comes to such intimate personal situations as the constant disturbance of sleep at night by aircraft noise there is a positive duty on the State to ensure as far as possible that ordinary people enjoy normal sleeping conditions. It has not been demonstrated that the applicants are capricious, and even if their “sensitivity to noise” and “disposition to be disturbed by noise” may be called “subjective”, the Court agreed that they were affected in their ability to sleep “considerably ... by the scheme at issue” (see paragraph 118 of the judgment)....

17. Although we might agree with the judgment when it states: “the Court must consider whether the State can be said to have struck a fair balance between those interests [namely, the economic interests of the country] and the conflicting interests of the persons affected by noise disturbances” (see paragraph 122 of the judgment), the fair balance between the rights of the applicants and the interests of the broader community must be maintained. The margin of appreciation of the State is narrowed because of the fundamental nature of the right to sleep, which may be outweighed only by the real, pressing (if not urgent) needs of the State. Incidentally, the Court's own subsidiary role, reflected in the use of the “margin of appreciation”, is itself becoming more and more marginal when it comes to such constellations as the relationship between the protection of the right to sleep as an aspect of privacy and health on the one hand and the very general economic interest on the other hand.

18. As stated above, reasons based on economic arguments referring to “the country as a whole” without any “specific indications of the economic cost of eliminating specific night flights” (see paragraph 126 of the judgment) are not sufficient. Moreover, it has not been demonstrated by the respondent State how and to what extent the economic situation would in fact deteriorate if a more drastic scheme – aimed at limiting night flights, halving their number or even halting them – were implemented.

\* \* \*



#### **4. Kyrtatos v. Greece (European Court of Human Rights, First Section 2003)**

*The Court rejected the applicants' claim that that urban development in the southeastern part of Tinos near the applicants' seasonal home on the Ayia Kiriaki-Apokofto Peninsula by the coast of Ayios Yianni, resulted in loss of wetland habitat and species sufficient to violate Article 8 of the Convention, which provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."*

##### **I. THE CIRCUMSTANCES OF THE CASE**

8. The applicants were born in 1921 and 1953 respectively and live in Munich. The first applicant is the second applicant's mother.

9. The applicants own real property in the southeastern part of the Greek island of Tinos, where they spend part of their time. The first applicant is the co-owner of a house and a plot of land on the Ayia Kiriaki-Apokofto Peninsula, which is adjacent to a swamp by the coast of Ayios Yiannis.

...

##### **B. Civil proceedings against M.**

16. On 31 January 1991 the first applicant and others instituted civil proceedings against a neighbour, M., in the Syros Court of First Instance. They claimed that he had unlawfully taken over part of their land in Ayios Yiannis. On 14 February 1992 the court found in favour of the plaintiffs.

...

##### **C. Threatened demolition of the applicants' house**

21. On 23 June 1993 the applicants received a notice to the effect that their house in Ayia Kiriaki-Apokofto had been built without authorisation and should be demolished. The applicants appealed to the competent administrative board. Their appeal was dismissed on 28 September 1994.

22. On 6 October 1994 they applied to the Supreme Administrative Court for judicial review of the decision of the administrative board. On a request by the applicants, the Supreme Administrative Court decided to suspend the demolition of the applicants' house (decision no. 790/1994).

23. At first the hearing was set down for 28 November 1995, but it was repeatedly postponed.

24. In 1999 a new law (no.2721/1999) changed the rules of jurisdiction and the case was referred to the Piraeus Court of Appeal, which heard the case on 27 June 2000. The proceedings are still pending.

##### **THE LAW**



...

### III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. The applicants contended that urban development in the south eastern part of Tinos had led to the destruction of their physical environment and had affected their life. They relied on Article 8 of the Convention, which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

#### **A. Arguments of the parties**

##### *1. The applicants*

45. The applicants asserted that, regardless of the danger to one's health, the deterioration of the environment fell to be examined under Article 8 of the Convention where it adversely affected one's life. They agreed that Article 8 was not violated every time environmental deterioration occurred. They understood the importance of urban development and the economic interests associated with it. They also understood that States had discretion in making decisions about urban planning. On the other hand, the applicants had no doubt that any State interference with the environment should strike a fair balance between the competing interests of the individuals and the community as a whole. In the present case the issue of the fair balance was rather simple. In its decisions nos. 3955/1995 and 3956/1995 the Supreme Administrative Court had itself tipped the balance in favour of the swamp and against urban development. Consequently, the Greek authorities were obliged to abide by their own choice. However, in failing to comply with the above-mentioned decisions, they had allowed the destruction of the swamp.

46. In this respect, the applicants pointed out that the area had lost all of its scenic beauty and had changed profoundly in character from a natural habitat for wildlife to a tourist development. Part of the swamp had been reclaimed so as to create, in addition to the buildings, a car park and a road. There were noises and lights on all night and a great deal of environmental pollution from the activities of the businesses in the vicinity. The applicants argued that they were under no obligation to tolerate this deterioration since it was the direct result of the State's illegal activity.

47. The applicants concluded that the State authorities had not only failed to fulfil their positive duty to take reasonable and appropriate measures to secure their rights under Article 8, but had also, by their own activity, illegally affected the enjoyment of these rights.

##### *2. The Government*

48. The Government submitted that the applicants' complaint mainly concerned the protection of the swamp. That and not the protection of their home or their private life was the reason why they had applied to the Supreme Administrative Court. There could therefore be no issue under Article 8, all the more so as the competent authorities had taken all appropriate measures to protect the environment in the area concerned.

49. Even assuming that Article 8 applied in the present case, the Government stressed that the applicants' house was the only one at the upper end of the peninsula and that the other buildings of the settlement were located a certain distance away from it. Thus, there could not possibly be any serious disturbance from the applicants' neighbours. In this connection, the Government expressed the view that what the applicants were really claiming was the right to be the only ones to possess a house in the area. That was not feasible. In any event, the Government considered that any nuisance that the applicants might have suffered on account of the construction of the new buildings and the general organisation of the social character of the region had to be tolerated as an inevitable and contemporary consequence of the urban way of life.

50. The Government concluded that, had there been any interference with the applicants' rights guaranteed by paragraph 1 of Article 8, it was clearly justified under paragraph 2.

## **B. The Court's assessment**

51. The Court notes that the applicants' complaint under Article 8 of the Convention may be regarded as comprising two distinct limbs. Firstly, they complained that urban development had destroyed the swamp which was adjacent to their property and that the area where their home was had lost all of its scenic beauty. Secondly, they complained about the environmental pollution caused by the noise and nightlights generated by the activities of the businesses operating in the area.

52. With regard to the first limb of the applicants' complaint, the Court notes that, according to its established case-law, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *Lopez Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, pp. 54-55, § 51). Yet the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.

53. In the present case, even assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might

have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being. To conclude, the Court cannot accept that the interference with the conditions of animal life in the swamp constitutes an attack on the private or family life of the applicants.

54. As regards the second limb of the complaint, the Court is of the opinion that the disturbances coming from the applicants' neighbourhood as a result of the urban development of the area (noise, night lights, etc.) have not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8.

55. Having regard to the foregoing, the Court considers that there has been no lack of respect for the applicants' private and family life. There has accordingly been no violation of Article 8 of the Convention.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention 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."

...

#### FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 of the Convention for failure to comply with the court decisions;
2. *Holds* unanimously that there has been a violation of Article 6 of the Convention as regards the length of the two sets of proceedings;
3. *Holds* by six votes to one that there has been no violation of Article 8 of the Convention.

\* \* \*

## 5. **Fadeyeva v. Russia (European Court of Human Rights, First Section 2005)**

*The European Court of Human Rights found that the Russian Federation's operation of a steel plant near the complainant's home endangered her health and well-being in violation of Article 8 of the European Convention on Human Rights, which provides: "Everyone has the right to respect for his private and family life, his home, and his correspondence [except in] accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Accordingly, the court ordered the Russian Federation to pay plaintiff for damages.*

### PROCEDURE

1. The case originated in an application (no. 55723/00) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Nadezhda Mikhaylovna Fadeyeva ("the applicant"), on 11 December 1999.

3. The applicant alleged, in particular, that the operation of a steel plant in close proximity to her home endangered her health and well-being. She relied on Article 8 of the Convention.

### THE FACTS

#### I. THE CIRCUMSTANCES OF THE CASE

##### A. Background

10. The applicant was born in 1949 and lives in the town of Cherepovets, an important steel-producing centre approximately 300 kilometres north-east of Moscow. In 1982 her family moved to a flat situated at 1 Zhukov Street, approximately 450 metres from the site of the Severstal steel plant ("the plant"). . . .

11. The plant was built during the Soviet era and was owned by the Ministry of Black Metallurgy of the Russian Soviet Federative Socialist Republic (RSFSR). The plant was, and remains, the largest iron smelter in Russia and the main employer for approximately 60,000 people. In order to delimit the areas in which the pollution caused by steel production might be excessive, the authorities established a buffer zone around the Severstal premises – "the sanitary security zone". This zone was first delimited in 1965. It covered a 5,000-metre-wide area around the site of the plant. Although this zone was, in theory, supposed to separate the plant from the town's residential areas, in practice thousands of people (including the applicant's family) lived there. . . .

12. In 1990 the government of the RSFSR adopted a programme "On improving the environmental situation in Cherepovets". The programme stated that "the concentration of toxic substances in the town's air exceed[ed] the acceptable norms many times" and that the morbidity rate of Cherepovets residents was higher than the average. It was noted that many people still lived within the steel plant's sanitary security zone. Under the programme, the steel plant was required to reduce its toxic emissions to safe levels by 1998. The programme listed a number of specific technological measures to attain this goal. The steel plant was also ordered to finance the construction of 20,000

square metres of residential property every year for the resettlement of people living within its sanitary security zone.

13. By Municipal Decree no. 30 of 18 November 1992, the boundaries of the sanitary security zone around the plant were redefined. The width of the zone was reduced to 1,000 metres.

14. In 1993 the steel plant was privatised and acquired by Severstal PLC. In the course of the privatisation the blocks of flats owned by the steel plant that were situated within the zone were transferred to the municipality.

15. On 3 October 1996 the government of the Russian Federation adopted Decree no. 1161 on the special federal programme “Improvement of the environmental situation and public health in Cherepovets” for the period from 1997 to 2010” . . . . The second paragraph of this programme stated:

“The concentration of certain polluting substances in the town's residential areas is twenty to fifty times higher than the maximum permissible limits (MPLs)[<sup>111</sup>]...The biggest 'contributor' to atmospheric pollution is Severstal PLC, which is responsible for 96% of all emissions. The highest level of air pollution is registered in the residential districts immediately adjacent to Severstal's industrial site. The principal cause of the emission of toxic substances into the atmosphere is the operation of archaic and ecologically dangerous technologies and equipment in metallurgic and other industries, as well as the low efficiency of gas-cleaning systems. The situation is aggravated by an almost complete overlap of industrial and residential areas of the city, in the absence of their separation by sanitary security zones.”

The decree further stated that “the environmental situation in the city ha[d] resulted in a continuing deterioration in public health”. In particular, it stated that over the period from 1991 to 1995 the number of children with respiratory diseases increased from 345 to 945 cases per thousand, those with blood and haematogenic diseases from 3.4 to 11 cases per thousand, and those with skin diseases from 33.3 to 101.1 cases per thousand. The decree also noted that the high level of atmospheric pollution accounted for the increase in respiratory and blood diseases among the city's adult population and the increased number of deaths from cancer. . . .

## **B. The applicant's attempt to be resettled outside the zone**

### *1. First set of court proceedings*

20. In 1995 the applicant, with her family and various other residents of the block of flats where she lived, brought a court action seeking resettlement outside the zone. The applicant claimed that the concentration of toxic elements and the noise levels in the sanitary security zone exceeded the maximum permissible limits established by Russian legislation. The applicant alleged that the environmental situation in the zone was hazardous for humans, and that living there was potentially dangerous to health and life. . . .

21. On 17 April 1996 the Cherepovets City Court examined the applicant's action. . . . Referring to the ministerial decree of 1974, the court found that the authorities ought to have resettled all of the zone's residents but that they had failed to do so. In view of those findings, the court accepted the applicant's claim in principle, stating that she had the right in domestic law to be resettled.

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<sup>111</sup> MPLs are the safe levels of various polluting substances, as established by Russian legislation (предельно допустимые концентрации – ПДК).

However, no specific order to resettle the applicant was given by the court in the operative part of its judgment. Instead, the court stated that the local authorities must place her on a “priority waiting list” to obtain new local authority housing. The court also stated that the applicant's resettlement was conditional on the availability of funds. . . .

24. The first-instance court issued an execution warrant and transmitted it to a bailiff. However, the decision remained unexecuted for a certain period of time. In a letter of 11 December 1996, the deputy mayor of Cherepovets explained that enforcement of the judgment was blocked, since there were no regulations establishing the procedure for the resettlement of residents outside the zone.

25. On 10 February 1997 the bailiff discontinued the enforcement proceedings on the ground that there was no “priority waiting list” for new housing for residents of the sanitary security zone.

## *2. Second set of court proceedings*

26. In 1999 the applicant brought a fresh action against the municipality, seeking immediate execution of the judgment of 17 April 1996. The applicant claimed, inter alia, that systematic toxic emissions and noise from Severstal PLC's facilities violated her basic right to respect for her private life and home, as guaranteed by the Russian Constitution and the European Convention on Human Rights. She asked to be provided with a flat in an ecologically safe area or with the means to purchase a new flat.

27. On 27 August 1999 the municipality placed the applicant on the general waiting list for new housing. She was no. 6,820 on that list.

28. On 31 August 1999 the Cherepovets City Court dismissed the applicant's action. It noted that there was no “priority waiting list” for the resettlement of residents of sanitary security zones, and no council housing had been allocated for that purpose. It concluded that the applicant had been duly placed on the general waiting list. The court held that the judgment of 17 April 1996 had been executed and that there was no need to take any further measures. That judgment was upheld by the Vologda Regional Court on 17 November 1999.

## **C. Pollution levels at the applicant's place of residence**

30. It appears that the basic data on air pollution, whether collected by the State monitoring posts or Severstal, are not publicly available. Both parties produced a number of official documents containing generalised information on industrial pollution in the town. The relevant parts of these documents are summarised in the following paragraphs and in the appendix to this judgment.

### **1. Information referred to by the applicant**

31. The applicant claimed that the concentration of certain toxic substances in the air near her home constantly exceeded and continues to exceed the safe levels established by Russian legislation. Thus, in the period from 1990 to 1999 the average annual concentration of dust in the air in the Severstal plant's sanitary security zone was 1.6 to 1.9 times higher than the MPL, the concentration of carbon disulphide was 1.4 to 4 times higher and the concentration of formaldehyde was 2 to 4.7 times higher (data reported by the Cherepovets Centre for Sanitary Control). . . .

### **2. Information referred to by the respondent Government**



36. In June 2004 the Government submitted a report entitled “The environmental situation in Cherepovets and its correlation with the activity of [Severstal PLC] during the period until 2004”, prepared by the Cherepovets municipality.

37. According to the report, the environmental situation in Cherepovets has improved in recent years: thus, gross emissions of pollutants in the town were reduced from 370.5 thousand tonnes in 1999 to 346.7 thousand tonnes in 2003 (by 6.4%). Overall emissions from the Severstal PLC facilities were reduced during this period from 355.3 to 333.2 thousand tonnes (namely by 5.7%), and the proportion of unsatisfactory testing of atmospheric air at stationary posts fell from 32.7% to 26% in 2003.

38. The report further stated that, according to data received from four stationary posts of the State Agency for Hydrometeorology, a substantial decrease in the concentration of certain hazardous substances was recorded in the period from 1999 to 2003 . . . .

39. According to the report, pollution in the vicinity of the applicant's home was not necessarily higher than in other districts of the town. . . .

#### **D. Effects of pollution on the applicant**

44. Since 1982 Ms Fadeyeva has been supervised by the clinic at Cherepovets Hospital no. 2. According to the Government, the applicant's medical history in this clinic does not link the deterioration in her health to adverse environmental conditions at her place of residence.

45. In 2001 a medical team from the clinic carried out regular medical check-ups on the staff at the applicant's place of work. As a result of these examinations, the doctors detected indications of an occupational illness in five workers, including the applicant. In 2002 the diagnosis was confirmed: a medical report drawn up by the Hospital of the North-West Scientific Centre for Hygiene and Public Health in St Petersburg on 30 May 2002 stated that she suffered from various illnesses of the nervous system, namely occupational progressive/motor-sensory neuropathy of the upper extremities with paralysis of both middle nerves at the level of the wrist channel (primary diagnosis), osteochondrosis of the spinal vertebrae, deforming arthrosis of the knee joints, moderate myelin sheath degeneration, chronic gastroduodenitis, hypermetropia first grade (eyes) and presbyopia (associated diagnoses). Whilst the causes of these illnesses were not expressly indicated in the report, the doctors stated that they would be exacerbated by “working in conditions of vibration, toxic pollution and an unfavourable climate”.

46. In 2004 the applicant submitted a report entitled “Human health risk assessment of pollutant levels in the vicinity of the Severstal facility in Cherepovets”. This report, commissioned on behalf of the applicant, was prepared by Dr Mark Chernaik. Dr Chernaik concluded that he would expect the population residing within the zone to suffer from above-average incidences of odour annoyance, respiratory infections, irritation of the nose, coughs and headaches, thyroid abnormalities, cancer of the nose and respiratory tract, chronic irritation of the eyes, nose and throat, and adverse impacts on neurobehavioral, neurological, cardiovascular and reproductive functions. . . .

## **II. RELEVANT DOMESTIC LAW AND PRACTICE**

### **C. Background to the Russian housing provisions**

59. During the Soviet era, the majority of housing in Russia belonged to various public bodies or State-owned companies. The population lived in these dwellings as life-long tenants. In the 1990s extensive privatisation programmes were carried out. In certain cases, property that had not been privatised was transferred to local authorities.

60. To date, a certain part of the Russian population continues to live as tenants in local council houses on account of the related advantages. In particular, council house tenants are not required to pay property taxes, the amount of rent they pay is substantially lower than the market rate and they have full rights to use and control the property. Certain persons are entitled to claim new housing from the local authorities, provided that they satisfy the conditions established by law.

61. From a historical standpoint, the right to claim new housing was one of the basic socio-economic rights enshrined in Soviet legislation. Under the Housing Code of the RSFSR of 24 June 1983, which was still valid in Russia at the time of the relevant events, every tenant whose living conditions did not correspond to the required standards was eligible to be placed on a local authority waiting list in order to obtain new council housing. The waiting list establishes the priority order in which housing is attributed once it is available.

62. However, being on a waiting list does not entitle the person concerned to claim any specific conditions or time-frame from the State for obtaining new housing. Certain categories of persons, such as judges, policemen or handicapped persons are entitled to be placed on a special “priority waiting list”. However, it appears that Russian legislation does not guarantee a right to be placed on this special list solely on the ground of serious ecological threats.

63. Since Soviet times, hundreds of thousands of Russians have been placed on waiting lists, which become longer each year on account of a lack of resources to build new council housing. At present, the fact of being on a waiting list represents an acceptance by the State of its intention to provide new housing when resources become available. The applicant submits, for example, that the person who is first on the waiting list in her municipality has been waiting for new council housing since 1968. She herself became no. 6,820 on that list in 1999.

## **THE LAW**

### **I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

64. The applicant alleged that there had been a violation of Article 8 of the Convention on account of the State's failure to protect her private life and home from severe environmental nuisance arising from the industrial activities of the Severstal steel plant.

65. Article 8 of the Convention reads as follows:

“1. Everyone has the right to respect for his private and family life, his home, and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

#### **A. Applicability of Article 8 in the present case**

*1. Nature and extent of the alleged interference with the applicant's rights*

66. Both parties agreed that the applicant's place of residence was affected by industrial pollution. Neither was it disputed that the main cause of pollution was the Severstal steel plant, operating near the applicant's home.

67. The Court observes, however, that the degree of disturbance caused by Severstal and the effects of pollution on the applicant are disputed by the parties. Whereas the applicant insists that the pollution seriously affected her private life and health, the respondent Government assert that the harm suffered by the applicant as a result of her home's location within the sanitary security zone was not such as to raise an issue under Article 8 of the Convention. In view of the Government's contention, the Court has first to establish whether the situation complained of by the applicant falls to be examined under Article 8 of the Convention.

*(a) General principles*

68. Article 8 has been relied on in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI). Thus, in order to raise an issue under Article 8 the interference must directly affect the applicant's home, family or private life.

69. The Court further points out that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.

70. Thus, in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained.

*(d) The Court's assessment*

80. . . . [T]he Court observes that, in the applicant's submission, her health has deteriorated as a result of living near the steel plant. The only medical document produced by the applicant in support of this claim is a report drawn up by a clinic in St Petersburg (see paragraph 45 above). The Court finds that this report did not establish any causal link between environmental pollution and the applicant's illnesses. The applicant presented no other medical evidence which would clearly connect her state of health to high pollution levels at her place of residence.

81. The applicant also submitted a number of official documents confirming that, since 1995 (the date of her first recourse to the courts), environmental pollution at her place of residence has constantly exceeded safe levels (see paragraphs 31 et seq. above). According to the applicant, these documents proved that any person exposed to such pollution levels inevitably suffered serious damage to his or her health and well-being.

82. With regard to this allegation, the Court bears in mind, firstly, that the Convention came into force with respect to Russia on 5 May 1998. Therefore, only the period after this date can be taken

into consideration in assessing the nature and extent of the alleged interference with the applicant's private sphere.<sup>83</sup> According to the materials submitted to the Court, since 1998 the pollution levels with respect to a number of rated parameters have exceeded the domestic norms. . . .

84. The Court observes further that the figures produced by the Government reflect only annual averages and do not disclose daily or maximum pollution levels. According to the Government's own submissions, the maximum concentrations of pollutants registered near the applicant's home were often ten times higher than the average annual concentrations (which were already above safe levels). The Court also notes that the Government have not explained why they failed to produce the documents and reports sought by the Court (see paragraph 43 above), although these documents were certainly available to the national authorities. Therefore, the Court concludes that the environmental situation could, at certain times, have been even worse than it appears from the available data.

85. The Court notes further that on many occasions the State recognised that the environmental situation in Cherepovets caused an increase in the morbidity rate for the city's residents (see paragraphs 12, 15, 34 and 47 above). The reports and official documents produced by the applicant, and, in particular, the report by Dr Mark Chernaik (see paragraph 46), described the adverse effects of pollution on all residents of Cherepovets, especially those who lived near the plant. Thus, according to the data provided by both parties, during the entire period under consideration the concentration of formaldehyde in the air near the applicant's home was three to six times higher than the safe levels. . . .

86. Finally, the Court pays special attention to the fact that the domestic courts in the present case recognised the applicant's right to be resettled. . . . Therefore, it can be said that the existence of interference with the applicant's private sphere was taken for granted at the domestic level.

87. In summary, the Court observes that over a significant period of time the concentration of various toxic elements in the air near the applicant's home seriously exceeded the MPLs. The Russian legislation defines MPLs as safe concentrations of toxic elements (see paragraph 49 above). Consequently, where the MPLs are exceeded, the pollution becomes potentially harmful to the health and well-being of those exposed to it. This is a presumption, which may not be true in a particular case. The same may be noted about the reports produced by the applicant: it is conceivable that, despite the excessive pollution and its proved negative effects on the population as a whole, the applicant did not suffer any special and extraordinary damage.

88. In the instant case, however, the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.

## *2. Attribution of the alleged interference to the State*

89. The Court notes that, at the material time, the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be

said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry. Accordingly, the applicant's complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8 § 1 of the Convention. In these circumstances, the Court's first task is to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights.

90. The Court observes in this respect that the Severstal steel plant was built by and initially belonged to the State. The plant malfunctioned from the start, releasing gas fumes and odours, contaminating the area, and causing health problems and nuisance to many people in Cherepovets. Following the plant's privatisation in 1993, the State continued to exercise control over the plant's industrial activities by imposing certain operating conditions on the plant's owner and supervising their implementation. . . . [T]he municipal authorities were aware of the continuing environmental problems and applied certain sanctions in order to improve the situation.

91. The Court further observes that the Severstal steel plant was and remains responsible for almost 95% of overall air pollution in the city. In contrast to many other cities, where pollution can be attributed to a large number of minor sources, the main cause of pollution in Cherepovets was easily definable. The environmental nuisances complained of were very specific and fully attributable to the industrial activities of one particular undertaking. This is particularly true with respect to the situation of those living in close proximity to the Severstal steel plant.

92. The Court concludes that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention.<sup>93</sup> It remains to be determined whether the State, in securing the applicant's rights, has struck a fair balance between the competing interests of the applicant and the community as a whole, as required by paragraph 2 of Article 8.

## **B. Justification under Article 8 § 2**

### *1. General principles*

94. The Court reiterates that whatever analytical approach is adopted – the breach of a positive duty or direct interference by the State – the applicable principles regarding justification under Article 8 § 2 as to the balance between the rights of an individual and the interests of the community as a whole are broadly similar.

95. Direct interference by the State with the exercise of Article 8 rights will not be compatible with paragraph 2 unless it is “in accordance with the law”. The breach of domestic law in these cases would necessarily lead to a finding of a violation of the Convention.

96. However, where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure “respect for private life”, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. Therefore, in those cases the criterion “in accordance with the law” of the justification test cannot be applied in the same way as in cases of direct interference by the State.

98. . . . [I]n cases where an applicant complains about the State's failure to protect his or her Convention rights, domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the State has struck a "fair balance" in accordance with Article 8 § 2.

## *2. Legitimate aim*

99. Where the State is required to take positive measures in order to strike a fair balance between the interests of an individual and the community as a whole, the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers only to "interferences" with the right protected by the first paragraph – in other words, it is concerned with the negative obligations flowing therefrom.

100. The Court observes that the essential justification offered by the Government for the refusal to resettle the applicant was the protection of the interests of other residents of Cherepovets who were entitled to free housing under the domestic legislation. In the Government's submissions, since the municipality had only limited resources to build new housing for social purposes, the applicant's immediate resettlement would inevitably breach the rights of others on the waiting list.

101. Further, the Government referred, at least in substance, to the economic well-being of the country (see paragraph 111 below). Like the Government, the Court considers that the continuing operation of the steel plant in question contributed to the economic system of the Vologda region and, to that extent, served a legitimate aim within the meaning of paragraph 2 of Article 8 of the Convention. It remains to be determined whether, in pursuing this aim, the authorities have struck a fair balance between the interests of the applicant and those of the community as a whole.

## *3. "Necessary in a democratic society"*

### *(a) General principles*

105. It remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors in this sphere. However, the complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary one. The Court must first examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8, and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities.

### *(d) The Court's assessment*

#### *(i) The alleged failure to resettle the applicant*

116. The Court notes at the outset that the environmental consequences of the Severstal steel plant's operation are not compatible with the environmental and health standards established in the relevant Russian legislation. In order to ensure that a large undertaking of this type remains in operation, Russian legislation, as a compromise solution, has provided for the creation of a buffer zone around the undertaking's premises in which pollution may officially exceed safe levels.



Therefore, the existence of such a zone is a condition *sine qua non* for the operation of an environmentally hazardous undertaking – otherwise it must be closed down or significantly restructured.

117. . . . [I]t would only be possible for the Severstal plant to operate in conformity with the domestic environmental standards if this zone, separating the undertaking from the residential areas of the town, continued to exist and served its purpose.

119. The Government further submitted that the pollution levels attributable to the metallurgic industry were the same if not higher in other districts of Cherepovets than those registered near the applicant's home (see paragraph 39 above). However, this proves only that the Severstal steel plant has failed to comply with domestic environmental norms and suggests that a wider sanitary security zone should perhaps have been required. In any event, this argument does not affect the Court's conclusion that the applicant lived in a special zone where the industrial pollution exceeded safe levels and where any housing was in principle prohibited by the domestic legislation.

120. It is material that the applicant moved to this location in 1982 knowing that the environmental situation in the area was very unfavourable. However, given the shortage of housing at that time and the fact that almost all residential buildings in industrial towns belonged to the State, it is very probable that the applicant had no choice other than to accept the flat offered to her family. Moreover, due to the relative scarcity of environmental information at that time, the applicant may have underestimated the seriousness of the pollution problem in her neighbourhood. It is also important that the applicant obtained the flat lawfully from the State, which could not have been unaware that the flat was situated within the steel plant's sanitary security zone and that the ecological situation was very poor. Therefore, it cannot be claimed that the applicant herself created the situation complained of or was somehow responsible for it.

121. It is also relevant that it became possible in the 1990s to rent or buy residential property without restrictions, and the applicant has not been prevented from moving away from the dangerous area. In this respect the Court observes that the applicant was renting the flat at 1 Zhukov Street from the local council as a life-long tenant. The conditions of her rent were much more favourable than those she would find on the free market. Relocation to another home would imply considerable financial outlay which, in her situation, would be almost unfeasible, her only income being a State pension plus payments related to her occupational disease. The same may be noted regarding the possibility of buying another flat, mentioned by the respondent Government. Although it is theoretically possible for the applicant to change her personal situation, in practice this would appear to be very difficult. Accordingly, this point does not deprive the applicant of the status required in order to claim to be a victim of a violation of the Convention within the meaning of Article 34, although it may, to a certain extent, affect the scope of the Government's positive obligations in the present case.

122. The Court observes that Russian legislation directly prohibits the building of any residential property within a sanitary security zone. However, the law does not clearly indicate what should be done with those persons who already live within such a zone. The applicant insisted that the Russian legislation required immediate resettlement of the residents of such zones and that resettlement should be carried out at the expense of the polluting undertaking. However, the national courts interpreted the law differently. The Cherepovets City Court's decisions of 1996 and 1999 established that the polluting undertaking is not responsible for resettlement; the legislation provides only for placing the residents of the zone on the general waiting list. The same court dismissed the applicant's claim for reimbursement of the cost of resettlement. In the absence of any direct requirement of immediate resettlement, the Court does not find this reading of the law absolutely unreasonable. Against the above background, the Court is ready to accept that the only solution proposed by the national law in this situation was to place the applicant on a waiting list. Thus, the Russian legislation as applied by the domestic courts and national authorities makes no difference between those persons who are entitled to new housing, free of charge, on a welfare basis (war veterans, large families, etc.) and those whose everyday life is seriously disrupted by toxic fumes from a neighbouring plant.

123. The Court further notes that, since 1999, when the applicant was placed on the waiting list, her situation has not changed. Moreover, as the applicant rightly pointed out, there is no hope that this measure will result in her resettlement from the zone in the foreseeable future. The resettlement of certain families from the zone by Severstal PLC is a matter of the plant's good faith, and cannot be relied upon. Therefore, the measure applied by the domestic courts makes no difference to the applicant: it does not give her any realistic hope of being removed from the source of pollution.

*(ii) The alleged failure to regulate private industry*

124. Recourse to the measures sought by the applicant before the domestic courts (urgent resettlement or reimbursement of the resettlement costs) is not necessarily the only remedy to the situation complained of. The Court points out that “the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring 'respect for private life', and the nature of the States obligation will depend on the particular aspect of private life that is at issue” (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 12, § 24). In the present case the State had at its disposal a number of other tools capable of preventing or minimising pollution, and the Court may examine whether, in adopting measures of a general character, the State complied with its positive duties under the Convention.

125. In this respect the Court notes that, according to the Government's submissions, the environmental pollution caused by the steel plant has been significantly reduced over the past twenty years. . . .

126. At the same time, the Court observes that the implementation of the 1990 and 1996 federal programmes did not achieve the expected results: in 2003 the concentration of a number of toxic substances in the air near the plant still exceeded safe levels. . . .

131. The Court considers that it is not possible to make a sensible analysis of the Government's policy vis-à-vis Severstal because they have failed to show clearly what this policy consisted of. In these circumstances, the Court has to draw an adverse inference. In view of the materials before it, the Court cannot conclude that, in regulating the steel plant's industrial activities, the authorities gave due weight to the interests of the community living in close proximity to its premises.

132. In sum, the Court finds the following. The State authorised the operation of a polluting plant in the middle of a densely populated town. Since the toxic emissions from this plant exceeded the safe limits established by the domestic legislation and might endanger the health of those living nearby, the State established through legislation that a certain area around the plant should be free of any dwelling. However, these legislative measures were not implemented in practice.

133. It would be going too far to assert that the State or the polluting undertaking were under an obligation to provide the applicant with free housing and, in any event, it is not the Court's role to dictate precise measures which should be adopted by the States in order to comply with their positive duties under Article 8 of the Convention. In the present case, however, although the situation around the plant called for a special treatment of those living within the zone, the State did not offer the applicant any effective solution to help her move away from the dangerous area. Furthermore, although the polluting plant in issue operated in breach of domestic environmental standards, there is no indication that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels.

134. The Court concludes that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Article 8 of the Convention. . . .

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;
2. Holds

- (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
- (b) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
- (i) EUR 6,500 (six thousand five hundred euros) in respect of costs and expenses incurred by her Russian lawyers and their fees, to be converted into Russian roubles at the rate applicable at the date of settlement, less EUR 1,732 (one thousand seven hundred and thirty-two euros), already paid to Mr Koroteyev in legal aid;
- (ii) GBP 5,540 (five thousand five hundred and forty pounds sterling) in respect of costs and expenses incurred by her British lawyers and advisers and their fees;
- (iii) any tax that may be chargeable on the above amounts;
- (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points . . . .

\* \* \*

## 6. Hamer v. Belgium (European Court of Human Rights, Second Section, 2007)

*A homeowner who had inherited property that had been built in a forested area and without a permit and who had subsequently renovated it, was ordered to demolish the house in order to restore the site to its original condition. This was deemed a civil penalty and therefore consistent with a simple finding of guilt. There was no violation of Article 1 of Protocol No. 1 even though the home was a "possession," because a fair balance (ie a reasonable relationship of proportionality) was struck between the demands of the general interest (protection of the forest area) and the requirements of the protection of the individual's fundamental rights and no other remedy was appropriate. The Court awards damages of EUR 5,000, because of the violation of Article 6 § 1 of the Convention in that the investigation period lasted more than 5 years between the initial police report of the violation and the enforcement proceeding.*

### PROCEDURE

...

1. The applicant complained of the unreasonable length of the proceedings instituted against her (Article 6 § 1) for maintaining a holiday home erected without planning permission and illegally felling various trees. She complained further of discrimination in comparison with neighbouring property owners who had not been prosecuted (Articles 6 § 1 and 14 taken together) and of disproportionate interference with her property rights (Article 1 of Protocol No. 1) and her right to respect for her home (Article 8).

### THE FACTS

#### I. THE CIRCUMSTANCES OF THE CASE

[The applicant inherited a holiday home in Belgium which had been built in 1967 by her parents. She subsequently ... carried out renovations on the house costing 50,000 euros (EUR) and had the trees on the adjoining land felled; in 1994, the water supply company connected the house to the drainage and water supply systems.]

2. On 27 January 1994 a report was drawn up by a police officer who noted that trees had been felled on the property in breach of Article 81, paragraph 3, of the Flemish forestry decree of 13 June 1990.

3. On 22 February 1994 a report was drawn up by a police officer who noted that the holiday home had been erected in 1967 without planning permission and that it was located in a forested area in which no such permission could be issued. The report also noted that the exterior and roof of the house had been renovated....

4. The Court of Appeal found that a deed of partition drawn up in 1986 and signed by the applicant established that the holiday home had been built in 1967 and concurred furthermore with the findings contained in the report drawn up on 22 February 1994. The Court of Appeal considered that the applicant knew or should have known that the building had been erected without planning permission. As a reasonable and prudent citizen, and even taking account of the attitude of the

authorities as she had described it, the applicant could not have inferred that the situation was totally legal and that no proceedings would be brought against her. The Court of Appeal found that the applicant had acted most imprudently by proceeding to renovate the premises after the death of her father. It also found that the fact that four other dwellings had also been erected in the same forested area without planning permission and without their owners being prosecuted did not amount to discrimination.

5. With regard, more particularly, to compliance with the reasonable-time requirement, the Court of Appeal found that the length of the criminal proceedings had been unreasonable but that this did not alter the fact that the offence had been established and that the applicant had, since 1994, been liable to prosecution. Considering, firstly, that overrunning the reasonable time did not cause the proceedings to become time-barred and, secondly, that account should be taken of the specific circumstances of the case, and in particular of the fact that the applicant had no criminal record, the Court of Appeal merely pronounced a finding of guilt against the applicant.

6. Referring to the planning inspector's application lodged pursuant to Articles 149 et seq. of the above-mentioned decree of 18 May 1999, which it deemed to be reasonable, the Court of Appeal ordered the applicant to restore the site to its former condition and to demolish the building within one year of the judgment becoming final, with a fine of EUR 125 per day's delay. It also authorised the municipal council or the planning inspector to enforce the order at the expense of the applicant in the event of non-compliance with the demolition order. The applicant was also ordered to pay the costs and expenses of the proceedings.

7. The applicant appealed on points of law.

8. By a judgment of 7 January 2003, the Court of Cassation dismissed the appeal. ...

9. The Court of Cassation responded that restoration of the site to its original condition did not constitute a penalty but a civil measure, in the same way as the payment of the full costs of the proceedings at the fixed rate, and that consequently these measures were not inconsistent with a simple finding of guilt.

10. The court also dismissed the ground based on Article 8 of the Convention and Article 1 of Protocol No. 1 whereby the applicant alleged that after a thirty-year period during which they had tolerated the situation, thus creating an apparently lawful situation, the authorities could no longer rely on the public interest to justify interference with the peaceful enjoyment of her property rights and respect for her private life.

11. The Court of Cassation found that the Court of Appeal had held, in its unfettered discretion, that the applicant had been most imprudent in maintaining the house without planning permission, that the measure sought by the planning inspector was reasonable and that, consequently, that ground of appeal was inadmissible.

12. The house was demolished in July 2004 pursuant to an enforcement order. According to an expert, the value of the house at the material time was EUR 62,635. The demolition costs amounted to EUR 3,025.

... THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION



13. The applicant complained that the reasonable time had been exceeded. She pointed out that even though the house had been built in 1967 at the latest, that she had inherited it in 1993 and that the report recording the offence had been drawn up in 1994, she had not been convicted until 2002. She considered that, once the Court of Appeal had found that the reasonable period had been exceeded in the instant case, it should have concluded that the criminal proceedings were time-barred. She submitted further that the order to restore the site to its original condition and to pay the costs of the proceedings was inconsistent with a mere finding of guilt against her. She relied on Article 6 § 1 of the Convention, the relevant parts of which read as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time, by [a] ... tribunal ...”

14. The Court considers it necessary in the first place to single out the following facts for particular consideration.

15. As regards the offence of maintaining a building erected without planning permission, the Court of Appeal, bearing in mind that the reasonable time under Article 6 of the Convention had been exceeded, made a mere finding of guilt against the applicant under Article 21 *ter* of the Code of Criminal Procedure. According to that provision, the court may, if the reasonable time has been exceeded, make a simple finding of guilt or impose a penalty lower than the minimum penalty provided for by law.

16. In addition, the Court of Appeal ordered the applicant to restore the site to its former condition and accordingly to demolish the impugned building.

17. This “remedial measure”, consisting of restoring the site to its original condition, is provided for in Article 149 of the decree of 18 May 1999 (see paragraph 38 above), which stipulates that in addition to the “penalty” the criminal court shall order the site to be restored to its original condition upon an application by the planning inspector. The court is not empowered to take the initiative in this regard (it cannot therefore order the measure of its own motion); it can review the lawfulness of the measure but not the appropriateness. Furthermore, the measure may only be ordered as a result of a contravention of planning law and is therefore dependent on the outcome of the criminal proceedings.

18. In the instant case, although the Court of Appeal had held that the reasonable time within the meaning of Article 6 of the Convention had been exceeded, it drew no conclusion from that as regards the remedial measure for which the competent planning inspector had applied to the public prosecutor in June 1995, and ordered the demolition of the house in issue....

19. Having regard to the foregoing considerations, the Court considers that the demolition measure can be regarded as a “penalty” for the purposes of the Convention.

20. Although the length of the proceedings on the merits (a little over three and a half years for three levels of jurisdiction between May 1999 and January 2003) does not in itself appear to be unreasonable, the police report recording the unlawful nature of the building dates from February 1994. It is on the basis of that finding that the continuing offence consisting of maintaining a building erected without planning permission was established and the applicant was subject to criminal proceedings and thus charged within the meaning of the case-law. Therefore, the reasonable time commenced as of the date of that report (see *Hozee v. the Netherlands*, 22 May 1998, § 43, *Reports* 1998-III, and *Wloch v. Poland*, no. 27785/95, § 144, ECHR 2000-XI).

Considered as a whole, the proceedings therefore lasted between eight and nine years for three levels of jurisdiction, including more than five years at the investigation stage, which, however, was not particularly complex.

21. Furthermore, the Court sees no evidence to show that at any stage of the proceedings the applicant hindered the smooth running of the investigation. In these circumstances, the Court cannot deem a period of more than five years merely for the investigation phase to be reasonable.

22. There has therefore been a violation of Article 6 § 1 of the Convention....

### III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

71. The applicant complained of a violation of her property rights guaranteed by Article 1 of Protocol No. 1:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”...

72. The Court reiterates its case-law according to which the concept of “possessions” in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law. The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Zwierzynski v. Poland*, no. 34049/96, § 63, ECHR 2001-VI). Certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II, and *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I). “Possessions” can be “existing possessions” or assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and “legitimate expectation” of obtaining effective enjoyment of a property right (see, for example, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 83, ECHR 2001-VIII, and *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII).

73. In the instant case, the impugned building had been in existence for twenty-seven years before the domestic authorities recorded the offence. Recording breaches of the town and country planning legislation and allocating the necessary resources to do so is undeniably the responsibility of the authorities. The authorities could even be considered to have been aware of the existence of the building in issue since the applicant had paid taxes on the building, just as her father had done before her. In this regard, the Belgian State cannot properly rely on its internal organisation and a distinction between the town and country planning authorities and the tax authorities. It must therefore be considered that the authorities tolerated the situation for twenty-seven years (1967-94) and continued to tolerate it for ten years after the offence had been established (1994-2004, the year in which the house was demolished). After such a long period had elapsed, the applicant’s proprietary interest in the enjoyment of her holiday home had been sufficiently established and weighty to amount to a substantive interest and therefore a “possession” within the meaning of the

rule expressed in Article 1 of Protocol No. 1. Furthermore, the applicant had a “legitimate expectation” of being able to continue to enjoy that possession.

74. The Court observes that the applicant’s house was demolished on the orders of the domestic authorities. This was undeniably an interference with the applicant’s “possession”. That interference was in accordance with the law (the decree of 18 May 1999). It was also intended to control the use of property in accordance with the general interest since it involved bringing the property into conformity with a land-use plan establishing a forested zone in which no building was permitted. The debate therefore centres on the proportionality of this interference. In this regard, the Court must ascertain whether a fair balance was struck between the demands of the general interest and the requirements of the protection of the individual’s fundamental rights. The search for this balance is reflected in the structure of Article 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 75, ECHR 1999-III). The requisite balance will be upset if the person concerned has had to bear “an individual and excessive burden” (see, in particular, *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98).

75. The Court notes that this case concerns rules applicable to town and country planning and environmental protection, areas in which the States enjoy a wide margin of appreciation.

76. It reiterates that while none of the Articles of the Convention is specifically designed to provide general protection of the environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI), in today’s society the protection of the environment is an increasingly important consideration (see *Fredin v. Sweden (no. 1)*, 18 February 1991, § 48, Series A no. 192). The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.

77. Thus, restrictions on property rights may be allowed on condition, naturally, that a fair balance is maintained between the individual and collective interests concerned (see, *mutatis mutandis*, *Fotopoulou v. Greece*, no. 66725/01, 18 November 2004).

78. The Court therefore has no doubt as to the legitimacy of the aim pursued by the impugned measure: the protection of a forested area in which no building is permitted.

79. It remains to be determined whether the benefit for proper town and country planning and protection of the forested area in which the applicant’s house was located can be considered proportionate to the inconvenience caused to her. In this regard, various factors must be taken into consideration.

80. Firstly, the Court notes that a great deal of time had elapsed since the offence occurred. The applicant, and her father before her, had had peaceful and uninterrupted enjoyment of the holiday home for a total of thirty-seven years. The deed of partition drawn up on 6 January 1986 between the applicant and her father had been registered with the Mortgage Registrar at the Ministry of

Finance and a registration fee had been paid (see paragraph 8 above). On the death of the applicant's father in 1993, the notarised deed of distribution specifically referred to the house as a holiday home and the applicant paid the inheritance tax. Since then, the applicant had been paying an annual property tax and second-residence tax on the house (see paragraph 9 above). The water-supply company carried out works to connect the house to the water and drainage system with no reaction from the authorities (see paragraph 11 above). Furthermore, when the offence was established, after twenty-seven years, the authorities then allowed a further five years to elapse before instituting criminal proceedings, thus treating the matter with no particular urgency. It is therefore clear that the authorities knew or should have known of the existence of the applicant's house for a long time. However, notwithstanding the provisions of the relevant legislation, they failed to take the appropriate action to ensure compliance. They thus contributed to the continuation of a situation which could only be detrimental to the protection of the forested area which that legislation sought to protect.

81. The Court observes, secondly, that Articles 107 and 158 of the decree of 18 May 1999, taken together, make general provision for an application to be made to render compliant a building without planning permission. However, the provisions of Article 158 clearly indicate that a building erected in contravention of a land-use plan (see paragraph 38 above) cannot be rendered compliant. The applicant's house was located in a forested area and, under Article 12 of the royal decree of 28 December 1972, that area could incorporate only buildings necessary for the exploitation and monitoring of the timber, as well as hunting and fishing shelters, provided that the latter could not be used as a residence, even on a temporary basis (see paragraph 41 above).

82. In addition, the fact that the applicant had not been the owner of the property when the house was built and that the authorities had failed to react for a protracted period of time could not give the applicant the impression that proceedings could not be brought against her, since under Belgian law the offence was not subject to limitation and the public prosecutor could decide to apply the law at any time.

83. Lastly, the Court cannot see what measure other than restoration of the site could have been sought by the planning inspector in this particular case, particularly as none of the measures set out in Article 149 § 1 of the decree of 18 May 1999 (order to cease all adverse use, order to carry out building works, payment of the capital gain acquired by the property subsequent to the contravention – see paragraph 38 above) appeared appropriate in the particular circumstances of the case, which concerned an undeniable interference with the integrity of a forested area in which no building was permitted.

84. As a secondary consideration, the Court distinguishes this case from the “Turkish coast” cases (see, among many others, *N.A. and Others v. Turkey*, no. 37451/97, ECHR 2005-X). In those cases, the applicants' property had been registered in the land register and the parties concerned had obtained from the Ministry of Culture and Tourism a tourist-investment certificate with a view to building a hotel on the land, and the State Planning Agency had awarded them an investment-incentive certificate with a view to building the hotel. Those cases did not therefore involve the merely implicit consent of the authorities, as in the instant case, where the house in issue had been erected without permission by the applicant's parents.

85. All the above leads the Court to conclude that the applicant has not suffered disproportionate interference with her property rights.

86. Accordingly, there has been no violation of Article 1 of Protocol No. 1....

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Under Article 41 of the Convention,

“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.”

### A. Damage

... 95. The Court points out that the violation found relates to the fact that the reasonable time was exceeded. It does not however see any causal link between that violation and the alleged pecuniary damage. It therefore dismisses this head of the claim.

96. As to non-pecuniary damage, the Court considers that the unreasonable length of the investigation in issue caused prolonged uncertainty as to the fate of the house. This situation of uncertainty justifies an award of compensation. Ruling on an equitable basis, as required by Article 41, the Court awards the applicant EUR 5,000 for the non-pecuniary damage thus incurred....

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;...

3. *Holds* that there has been no violation of Article 1 of Protocol No. 1;...

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;...

6. *Dismisses* the remainder of the applicant’s claim for just satisfaction.

\* \* \*

## **7. Borysiewicz v. Poland (European Court of Human Rights, Fourth Section 2008)**

*Resident complained of state's failure to respond to noise and other nuisances from the adjoining workshop. After reviewing the relevant caselaw, the Court held that in the circumstances of the case, it had not been established that the noise levels complained of were so serious as to reach the high threshold established in cases dealing with environmental issues and that the complaint was manifestly ill-founded.*

### **PROCEDURE ...**

97. The case originated in an application (no. 71146/01) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Ms Krystyna Borysiewicz (“the applicant”), on 1 February 2001. ...

98. The applicant complained under Article 8 of the Convention that the State had failed to protect her home from nuisance arising from the operation of a workshop run by her neighbour. ...

### **THE FACTS**

#### **I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant ... owns a semi-detached house located in a residential area. A tailoring workshop employing about 20 people was located in the other half of the building.

6. [T]he applicant made an application to the City Council for a ban on the operation of the workshop or at least for measures to be taken to reduce the level of noise it generated....

#### **II. THE LAW**

##### **I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

44. The applicant complained that the State had failed to protect her home from nuisance arising from the operation of the workshop run by her neighbour. She relied on Article 8 of the Convention which, in so far as relevant, provides as follows:

“1. Everyone has the right to respect for his ... home ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” ...

48. The Court has recognised in its case-law that the individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person’s home, but also include those that are not concrete or



physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 96, ECHR 2003-VIII).

49. Thus in *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172, p. 18, § 40) the Court declared Article 8 applicable because “[i]n each case, albeit to greatly differing degrees, the quality of the applicant’s private life and the scope for enjoying the amenities of his home ha[d] been adversely affected by the noise generated by aircraft using Heathrow Airport”. In *López Ostra* (cited above, pp. 54-55, § 51), which concerned pollution caused by the noise and odours generated by a waste-treatment plant, the Court stated that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”. In *Surugiu v. Romania* (no. 48995/99, 20 April 2004), which concerned various acts of harassment by third parties who entered the applicant’s yard and dumped several cartloads of manure in front of the door and under the windows of the house, the Court found that the acts constituted repeated interference with the applicant’s right to respect for his home and that Article 8 of the Convention was applicable.

50. Article 8 may apply in environmental cases, whether the pollution is directly caused by the State or whether State responsibility arises from failure to regulate private-sector activities properly. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant’s rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (see *Powell and Rayner*, p. 18, § 41, and *López Ostra*, pp. 54-55, § 51, both cited above).

51. However, as demonstrated by the above-mentioned cases, in order to raise an issue under Article 8, the . The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects (see *Fadeyeva v. Russia*, no. 55723/00, §§ 68-69, ECHR 2005-IV and *Fägerskiöld v. Sweden* (dec.), no. 37664/04).

52. Turning to the present case, the Court accepts that the applicant and her family might have been affected by the operation of the workshop in her neighbour’s house. However, the Court must also establish whether it has been shown that this nuisance reached the minimum level of severity set by its case-law.

53. In this connection, the Court observes that in the course of the proceedings noise evaluation tests were carried out at an unspecified date before February 2003 and again in 2003. The Court is aware that the applicant criticised the procedure by which these tests had been carried out before the domestic authorities and that the administrative court accepted her arguments (see paragraphs 28, 31 and 32 above). In these circumstances it is not wholly implausible that the results of those tests were not fully reliable. However, the Court notes that the applicant has not submitted the results of those tests to the Court. Nor has she submitted, either in the domestic proceedings or in the proceedings before the Court, any alternative noise tests which would have allowed the noise levels in her house to be ascertained, and for it to be determined whether they exceeded the norms

set either by domestic law or by applicable international environmental standards, or exceeded the environmental hazards inherent in life in every modern town (see, in this connection, *Fadeyeva v. Russia*, cited above, § 69).

54. The Court further observes that the applicant has not submitted, either to the national authorities or to the Court itself, any documents to show that her health or that of her family had been negatively affected by the noise emitted by the workshop.

55. In the absence of such findings it cannot be established that the State failed to take reasonable measures to secure the applicant's rights under Article 8 of the Convention (compare and contrast the Court's findings in noise pollution cases such as *Moreno Gómez v. Spain*, no. 4143/02, §§ 59-62, ECHR 2004-X; *Ashworth and Others v. the United Kingdom*, 20 January 2004 (dec.), no. 39561/98,).

56. Having regard to the above considerations and its case-law, the Court finds that it has not been established that the noise levels complained of in the present case were so serious as to reach the high threshold established in cases dealing with environmental issues. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4. ...

\* \* \*

## **8. International Federation for Human Rights v. Greece (European Committee of Social Rights, 2013)**

*After an extensive review of the applicable environmental law at the international, regional (European), and national level, and after applying the precautionary principle, the Committee held that the Greek State has failed to take appropriate measures to remove as far as possible the causes of ill-health and to prevent as far as possible diseases and that these deficiencies constitute a violation of Article 11§§1 and 3 of the Charter. The Committee further held that the public information initiatives were not only initiated too late, but also, in most cases, sporadic and insufficiently co-ordinated, in violation of Article 11§2 of the Charter. In the follow-up assessment, the Committee found that efforts at providing public information brought Greece into compliance with Article 11§2 of the Charter.*

### **PROCEDURE**

... 7. [The International Federation of Human Rights Leagues (“FIDH”)] alleges that large-scale environmental pollution of the water of the River Asopos – including both surface and groundwater - in the catchment area of the River Asopos and near the industrial area of Oinofyta (“the region of Oinofyta”) due to the discharge of industrial liquid waste has harmful effects on the health of the people concerned and therefore gives rise to a violation of Article 11 of the Charter. According to FIDH, Greek authorities have not taken enough steps to eliminate or reduce the harmful impact of the above-mentioned pollution on the health of the people living in the region of Oinofyta and to ensure that these persons can fully enjoy their right to protection of health.

8.As regards the issue of the competence *ratione temporis* of the Committee, the complainant organisation maintains that the environmental pollution of the region of Oinofyta has continued without interruption after the start of the industrial area in the region. As a result, the population concerned has been exposed to polluted water for several decades. For some people the effects of the long term exposure to pollution was immediately detectable, whereas for others it arose several years after exposure. With this in mind, after recalling the dates of accession of Greece to both the Charter and the Protocol, as well as some Committee’s past decisions, FIDH is of the opinion that the latter is competent to consider facts prior to the entry into force of the Protocol in respect of Greece.

### **2 – The Government**

9.Having regard to the information provided with respect to the initiatives taken by the Greek authorities, at central, regional and local level to remedy the pollution of the Asopos River and the related health problems, the Government asks the Committee to rule that there is no violation of Article 11 of the Charter by Greece.

### **RELEVANT LAW AND CASE-LAW**

#### **INTERNATIONAL LEVEL**

## **Aarhus Convention of 25 June 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters**

10. The Aarhus Convention establishes a number of rights of the public (individuals and their associations) with regard to the environment. The Parties are required to make the necessary provisions so that public authorities (at national, regional or local level) will contribute to these rights to become effective.

11. More particularly, the Aarhus Convention provides for:

- the right of everyone to receive environmental information that is held by public authorities ("access to environmental information"). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;

- the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("public participation in environmental decision-making");

- the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").

12. Greece ratified the Aarhus Convention by Act No. 3422/2005.

## **International Covenant on Economic, Social and Cultural Rights**

13. In the framework of its monitoring responsibilities, the United Nations Committee on Economic, Social and Cultural Rights stated that:

- "The water required for each personal or domestic use must be safe, therefore free from ... chemical substances... that constitute a threat to a person's health" (General Comment No. 15: the Right to Water - Articles 11 and 12 of the Covenant, paragraph 12 – as adopted at the Twenty-ninth Session of the Committee, 20 January 2003. Document E/C.12/2002/11);

- "The improvement of all aspects of environmental and industrial hygiene" (art. 12.2 (b)) comprises, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as (...) harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health" (cf. General Comment No. 14: the right to the highest attainable standard of health - Article 12 of the Covenant, paragraph 15 as adopted at the Twenty-second session of the Committee on 25 April-12 May 2000. Document E/C.12/2000/4).

14. Greece acceded to the Covenant by Act No. 1532/1983.

## **The Treaty on European Union (“The EU”)**

### **15. Article 21§2**

“The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;...”.

## **Relevant directives of the EU**

### Environmental management

16. Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

The Directive establishes a framework for environmental liability based on the "polluter pays" principle, with a view to preventing and remedying environmental damage. Under the terms of the Directive, environmental damage is *inter alia* defined as direct or indirect damage to the aquatic environment covered by Community water management legislation. The principle of liability applies to environmental damage and imminent threat of damage resulting from, *inter alia*, dangerous or potentially dangerous occupational activities - including industrial activities requiring a licence under the Directive on integrated pollution prevention and control, activities which discharge heavy metals into water or the air, installations producing dangerous chemical substances, waste management activities - where it is possible to establish a causal link between the damage and the activity in question. Where there is an imminent threat of environmental damage, the competent authority designated by each Member State may: require the operator (the potential polluter) to take the necessary preventive measures; or take the necessary preventive measures and then recover the costs incurred. Where environmental damage has occurred, the competent authority may: require the operator concerned to take the necessary restorative measures; or take the necessary restorative measures and then recover the costs incurred. Environmental damage may be remedied in different ways depending on the type of damage: for damage affecting water, the Directive is aimed at restoring the environment to how it was before it was damaged.

17. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)

This Directive confirms a Europe-wide procedure to ensure that environmental consequences of projects are identified and assessed before authorisation is given. The public can give its opinion and all results are taken into account in the authorisation procedure of the project. The public is informed of the decision afterwards. It has become an integral and vital part of the planning of development projects, and requires the submission of an EIA with the application for

development consent. The planning authority is required to review the application. The review and all necessary comments must be published and must identify any likely challenges of the application are further accommodated through judicial reviews. All these must be taken on board before development consent can be granted and which must also be published.

#### Application and control of environmental law

18. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

Further to its acceptance, EU legislation must be compatible with the Aarhus Convention. Accordingly, the purpose of this Directive aims is to ensure that environmental information is systematically available and distributed to the public. Member States must ensure that public authorities make environmental information held by or for them available to any applicant, whether a natural or a legal person, on request and without the applicant having to state an interest. They must also ensure that: officials assist the public in seeking access to information; lists of public authorities are publicly accessible; the right of access to environmental information can be effectively exercised; that all information held by the public authorities relating to imminent threats to human health or the environment is immediately distributed to the public likely to be affected; that any applicant who considers that his request for information has not been handled in accordance with the provisions of the Directive has access to a procedure of administrative reconsideration or review. Any such procedure must be expeditious and inexpensive, and must be carried out by an independent body.

19. Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law

This Directive aims at obliging Member States to impose criminal penalties on certain behaviour which is seriously detrimental to the environment. This minimum threshold for harmonisation will allow environmental legislation to be better applied, in line with the objective for the protection of the environment laid down in Article 174 of the Treaty establishing the European Community (EC Treaty).

#### Waste management

20. Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives

This Directive establishes a legal framework for the treatment of waste (any substance or object which the holder discards or intends or is required to discard) within the Community. It aims at protecting the environment and human health through the prevention of the harmful effects of waste generation and waste management. In order to better protect the environment, the Member States should take measures for the treatment of their waste in line with the following hierarchy which is listed in order of priority: prevention; preparing for reuse; recycling; other recovery, notably energy recovery; disposal. Member States should ensure that waste management does not endanger human health and is not harmful to the environment. Dangerous waste must be stored and treated in conditions that ensure the protection of health and the



environment. The competent authorities must establish one or more management plans to cover the whole territory of the Member State concerned. These plans contain, notably, the type, quantity and source of waste, existing collection systems and location criteria. Prevention programmes must also be drawn up, with a view to breaking the link between economic growth and the environmental impacts associated with the generation of waste.

21. Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control

This Directive (“the IPPC Directive”) requires industrial and agricultural activities with a high pollution potential to have a permit. In order to receive a permit an industrial or agricultural installation must comply with certain basic obligations. In particular, it must: use all appropriate pollution-prevention measures, namely the best available techniques (which produce the least waste, use less hazardous substances, enable the substances generated to be recovered and recycled, etc.); prevent all large-scale pollution; prevent, recycle or dispose of waste in the least polluting way possible; use energy efficiently; ensure accident prevention and damage limitation; return sites to their original state when the activity is over. All permit applications must be sent to the competent authority of the Member State concerned. Its decision to license or reject a project, the arguments on which this decision is based and possible measures to reduce the negative impact of the project must be made public. The Member States must, in accordance with their relevant national legislation, make provision for interested parties to challenge this decision in the courts. The Member States are responsible for inspecting industrial installations and ensuring they comply with the Directive.

#### Water management

22. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy

The European Union (EU) has established a framework directive for the protection of inland surface waters; groundwater; transitional waters; and coastal waters. Its ultimate objective is to achieve “good ecological and chemical status” for all Community waters by 2015. Member States have to identify all the river basins lying within their national territory and to assign them to individual river basin districts. River basins covering the territory of more than one Member State will be assigned to an international river basin district. Member States are to designate a competent authority for the application of the rules provided for in this Framework-Directive within each river basin district. In 2009, management plans must be published for each river basin district, taking account of the results of the analyses and studies carried out. These plans cover the period 2009-2015. They shall be revised in 2015 and then every six years thereafter. The management plans must be implemented in 2012. They aim to: prevent deterioration, enhance and restore bodies of surface water, achieve good chemical and ecological status of such water by 2015 at the latest and to reduce pollution from discharges and emissions of hazardous substances; protect, enhance and restore the status of all bodies of groundwater, prevent the pollution and deterioration of groundwater, and ensure a balance between groundwater abstraction and replenishment; preserve protected areas.

23. Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration

This Directive is designed to prevent and combat groundwater pollution. Its provisions include: criteria for assessing the chemical status of groundwater; criteria for identifying significant and sustained upward trends in groundwater pollution levels, and for defining starting points for reversing these trends; preventing and limiting indirect discharges (after percolation through soil or subsoil) of pollutants into groundwater. Groundwater is considered to have a good chemical status when the concentration of pollutants conforms to the definition of good chemical status as set out in Annex V to the Water Framework Directive; if a value set as a quality standard or a threshold value is exceeded, an investigation confirms, among other things, that this does not pose a significant environmental risk. Member States must set a threshold value for each pollutant identified in any of the bodies of groundwater within their territory considered to be at risk. For each pollutant on the list, information (as defined in Annex III to this Directive) must be provided on the groundwater bodies characterised as being at risk, as well as on how the threshold values were set. These threshold values must be included in the River Basin District Management Plans provided for under the Water Framework Directive. Member States must identify any significant and sustained upward trend in levels of pollutants found in bodies of groundwater. In order to do so, they must establish a monitoring programme in conformity with Annex IV to this Directive.

24. Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption

Member States shall ensure that such drinking water: does not contain any concentration of any substance which constitutes a potential human health risk; meets the minimum requirements (microbiological and chemical parameters and those relating to radioactivity) laid down by the Directive. They will take any other action needed in order to guarantee the healthiness and purity of water intended for human consumption. Member States shall lay down the parametric values corresponding at least to the values set out in the Directive. The directive obliges EU member States to set values for additional parameters where the protection of human health so requires and to regularly monitor the quality of water intended for human consumption. Where the parametric values are not attained the Member States concerned shall ensure that the corrective action needed is taken as quickly as possible in order to restore water quality. Member States shall prohibit the distribution of drinking water or shall restrict its use and shall take any action needed where that water constitutes a potential human health hazard. Consumers shall be informed of any such action. Exemptions from the parametric values up to a maximum value are only possible when: they do not constitute a human health hazard; there is no other reasonable means of maintaining the distribution of drinking water in the area concerned; exemptions must be as restricted in time and must be accompanied by a detailed justification except if the Member State concerned feels that failure to meet the limit value is not serious and may be quickly remedied. Water sold in bottles or containers may not be exempted. Any Member State granting an exemption must inform the following thereof the population affected. The directive sets a parametric value for total chromium (50 µg/l = 0,05 mg/l), but not for Cr-6.

### **Judgments of the Court of Justice of the EU**

25. In the judgment of 19 April 2012 - European Commission v Hellenic Republic (Case C-297/11 / OJ C 238, 13.8.2011), the Court declared that:

“By having failed to draw up, by 22 December 2009, the river basin management plans for both river basins located entirely within its own territory and international river basins, and by having failed to send copies of those plans, by 22 March 2010, to the European Commission, the Hellenic Republic has failed to fulfil its obligations under Articles 13(1) to (3) and (6) and 15(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy and, in addition, by having failed to institute, by 22 December 2008, the public information and consultation procedure regarding the draft river basin management plans, the Hellenic Republic has failed to fulfil its obligations under Article 14(1)(c) of that directive”.

26. The report from the European Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) River Basin Management Plans (COM(2012) 670 final) of 14 November 2012 confirms that in Greece “no plans have yet been adopted or reported”.

27. In the judgment of 2 December 2010 - European Commission v Hellenic Republic (Case C-534/09 / OJ C 37, 13.2.2010), the Court declared that:

“By failing to take the necessary measures to ensure that the competent national authorities see to it, by means of permits in accordance with Articles 6 and 8 of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version) or, as appropriate, by reconsidering and, where necessary, by updating the conditions, that existing installations operate in accordance with the requirements of Articles 3, 7, 9, 10 and 13, Article 14(a) and (b) and Article 15(2) of that directive, not later than 30 October 2007, without prejudice to specific Community legislation, the Hellenic Republic has failed to fulfil its obligations under Article 5(1) of that directive”.

28. In the judgment of 10 September 2009 - Commission of the European Communities v Hellenic Republic (Case C-286/08 / OJ C 223, 30.08.2008), the Court declared that:

“By failing:

- to draw up and adopt within a reasonable period a hazardous-waste management plan that accords with the requirements of the relevant Community legislation, and by failing to establish an integrated and adequate network of disposal installations for hazardous waste characterised by the most appropriate methods in order to ensure a high level of protection for the environment and public health, and,

- to take all the necessary measures to ensure, as regards the management of hazardous waste, compliance with Articles 4 and 8 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste and Articles 3(1), 6 to 9, 13 and 14 of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, the Hellenic Republic has failed to fulfil its obligations under, first, Articles 1(2) and 6 of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, read in conjunction with Articles 5(1) and (2) and 7(1) of Directive 2006/12, second, Article 1(2) of Directive 91/689, read in conjunction with the provisions of Articles 4 and 8 of Directive 2006/12, and, third, Articles 3(1), 6 to 9, 13 and 14 of Directive 1999/31”.

29. As indicated by the Government, in all three cases mentioned above, a letter of formal notice was recently sent to the Greek authorities from the European Commission.

30. In this context, it should be noted that the European Commission has opened an infringement case relating to the pollution of the Asopos river (No. 2007/2370). This case has been used as an example in the framework of the case C-286/08 (see paragraph 28 above). In the beginning of 2010, the European Commission took the decision to treat case No. 2007/2370 under the horizontal case C-286/08, for which a Court ruling has already been delivered. The European Commission confirmed that it will, therefore, continue to closely monitor the situation and ensure that Greece complies with the ruling as soon as possible.

(cf. European Parliament document - Notice to Members on Petition 1684/2009, on pollution of the Greek River Asopos – ref. CM\822469EN.doc – PE/445/603)

## NATIONAL LEVEL

### **General obligations**

31. The Constitution, as amended in 2001, contains two articles relating to the environment and health protection, i.e.:

#### Article 21

(...) 3. The State shall care for the health of citizens and shall adopt special measures for the protection of young, elderly and disabled people and for the relief of the needy.

#### Article 24

The protection of the natural and cultural environment is the State's duty and everyone's right. The State is required to adopt special preventive or enforcement measures for the preservation of the environment in accordance with the principle of sustainability (...).

32. Environmental Protection Act No. 1650/1986 (Official Journal A 160 16/10/1986), as amended by Act No. 3010/2002 (Official Journal A 91 (25/04/2002)). This act is the first general law governing environmental matters in Greece. The aim of the Act is to establish fundamental rules, criteria and mechanisms for the protection of the environment so that everyone, as an individual and a member of society, can live in a high quality environment, which protects his or her health and fosters his or her personal development.

[Survey of Greek law omitted]

## **OTHER SOURCES**

### **World Health Organization's Guidelines for drinking-water quality**

42. The fourth edition of the WHO Guidelines on drinking water (2011) relates inter alia to: drinking-water safety, including minimum procedures and specific guideline values and how these are intended to be used; approaches used in deriving the Guidelines, including guideline values; microbial hazards; chemical contaminants in drinking-water; those key chemicals responsible for large-scale health effects through drinking water exposure, including arsenic,

fluoride, lead, nitrate, selenium and uranium, providing guidance on identifying local priorities and on management; the important roles of many different stakeholders in ensuring drinking-water safety. As far as hexavalent chromium (“Cr-6”) is concerned, it is pointed out that the guideline provided for total chromium (0.05 mg/l = 50 µg/l) is designated as “provisional” because of uncertainties in the toxicological database.

### **International Agency for Research on Cancer (IARC)**

43. The expert opinions expressed in the framework of IARC, which has classified Cr-6 in Group 1 (carcinogenic to humans). In the publication on *Arsenic, metals, fibres, and dusts volume 100 C - A review of human carcinogens* (2012 - Chapter on Chromium compounds, pp. 147-164) IARC confirms that the general population residing in the vicinity of anthropogenic sources of Cr-6 may be exposed through inhalation of ambient air or ingestion of contaminated drinking-water and there has been concern about possible hazards related to the ingestion of Cr-6 in drinking-water. In particular, it is indicated in the above-mentioned publication that there is a slightly elevated risk of stomach cancer in which drinking-water was heavily polluted by a ferrochromium plant.

### **US Department of Health and Human Services - Public Health Service Agency for Toxic Substances and Disease Register**

44. The US Department of Health and Human Services - Public Health Service Agency for Toxic Substances and Disease Registry indicates that “Exposure to chromium occurs from ingesting contaminated food or drinking water or breathing contaminated workplace air. Chromium (VI) at high levels can damage the nose and cause cancer. Ingesting high levels of chromium (VI) may result in anemia or damage to the stomach or intestines”. (Information available on the following web page: <http://www.atsdr.cdc.gov/toxfaqs/tfacts7.pdf>).

### **European Union**

45. As regards the situation of the Asopos River, in November 2010, in its answer to a question by Mr Konstantinos Poupakis (PPE), European Parliament’s member, the European Commission specifically indicated that:

“(…) The Commission is aware of such pollution inter alia in the municipality of Oinofyta (Boeotia prefecture, Greece), with chromium pollution having affected waters and the quality of drinking water in the municipality. (...) As regards the water quality of the Asopos river and the groundwater at Oinofyta, elevated concentrations of pollutants including chromium led to the obligation to take the necessary remedial measures within the plans and programmes under the Water Framework Directive. (...) Consequently, the Commission has in 2010 commenced a legal infringement procedure against Greece (see paragraphs 25 and 30 above). (...) As regards the quality standards for drinking water, the Commission is closely following developments in scientific knowledge and evidence on drinking water quality parameters emerging in particular from the work within the World Health Organisation. It is regularly reviewing the parameters set out in the Drinking Water

Directive, including those for chromium compounds, and will where appropriate propose amendments to Parliament and the Council.

(Answer given by Mr Potočnik on behalf of the European Commission of 5 November 2010 to written question No. E-7572/2010).

## **THE LAW**

### **PRELIMINARY OBSERVATIONS...**

#### **Scope of the complaint in relation to the right to protection of health**

49. As regards the right to a healthy environment, the Committee recalls that... it takes into account:

- - “(...) the growing link that States party to the Charter and other international bodies (...) make between the protection of health and a healthy environment, and has interpreted Article 11 of the Charter (right to protection of health) as including the right to a healthy environment”;

- - “(...) the principles established in the case-law of other human rights supervisory bodies (...)”;

- - and “In view of the scale and level of detail of the European Union's body of law governing matters covered by the complaint (...), of judgments of the Court of Justice of the European Union”.

(Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint No.30/2005 / decision on the merits of 6 December 2006, §§195-196).

50. With this in mind, as far as the right to health is concerned, the Committee recalls that:

“(...) The right to protection of health guaranteed in Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights - as interpreted by the European Court of Human Rights - by imposing a range of positive obligations designed to secure its effective exercise. This normative partnership between the two instruments is underscored by the Committee's emphasis on human dignity. In Collective Complaint FIDH v. France (No. 14/2003) it stated that "human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and [that] health care is a prerequisite for the preservation of human dignity” (Conclusions 2005, Statement of Interpretation on Article 11, §5).

51. The Committee considers that the right to protection of health guaranteed in Article 11 of the Charter also complements Article 8 (Right to respect for private and family life) of the European Convention on Human Rights as interpreted by the European Court of Human Rights. The latter recalled that severe environmental pollution may adversely affect individuals' well-being and can therefore constitute a violation of Art 8. The Court held that the state must take



appropriate regulatory measures as well as monitoring activities to ensure compliance of regulation by the companies concerned. Where there are risks to health from environmental pollution, persons who are affected have a right to obtain information about these risks from the relevant authorities (see for example *López Ostra v. Spain* of 9.12.1994, *Guerra and Others v. Italy* of 19.02.1998, and *Ledyayeva, Dobrokhotova, Zolotareva and others, Romashina v. Russia* of 26.10.2006).

### **Responsibility for implementing the Charter**

52.The Committee notes that a number of other considerations formulated in the framework of its supervisory responsibilities with respect to the responsibilities for implementing the Charter are applicable, *mutatis mutandis*, to the present complaint. In this respect, the Committee considers that the allegations concerning the violation of the Charter due to actions / omissions by regional and/or local authorities must necessarily come within the scope of responsibility of the State. Consequently, the Committee holds that, as a State Party to the Charter, the Greek State must ensure that the obligations arising from the Charter are complied with... (*International Federation of Human Rights v. Belgium*, Complaint No. 62/2010, decision on the merits of 21 March 2012, § 51; *European Roma Rights Centre (ERRC) v. Greece*, Complaint No. 15/2003, decision on the merits of 8 December 2004, § 29).

### **ALLEGED VIOLATION OF ARTICLE 11 OF THE CHARTER**

53.Article 11 of the Charter reads as follows:

#### **Article 11 –The right to protection of health**

Part I: “Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.”

Part II: “With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

1to remove as far as possible the causes of ill-health;

2to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health

3to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.”

### **A – Arguments of the parties**

#### **1 – The complainant organisation**

#### **Origins, extent and impact of the pollution**

54.The complainant organisation maintains that the pollution is due to the discharge of industrial liquid waste into the River Asopos and the groundwater in the region of Oinofyta. This pollution started when industries began to be established in the region from 1968 onwards, without the Greek authorities conducting any prior planning or introducing any regional development measures. Nowadays, more than a thousand heavy and light industry units operate in the greater area of Asopos River....

56.The complainant organisation refers to scientific surveys indicating that in several places of the area concerned the concentrations of certain hydrochemical parameters are so great that the water is unfit for human consumption. FIDH emphasizes that the polluted water is unsuitable for any purpose, whether it be drinking, cooking or personal and domestic hygiene. It is argued that the polluted water is also unsuitable for irrigating agricultural land.

... 58.Furthermore, FIDH provides detailed information on the following aspects: chemical substances causing the pollution; effects of the pollution on human health; effects of pollution on food production and industry; acts / omissions by the responsible authorities with respect to the pollution and the related health risks over the time; judicial procedures concerning the pollution of the Asopos River.

### **Chemical substances leading to the pollution**

59.Several surveys carried out in various municipalities have shown that the water in the River Asopos (surface water and groundwater) contains heavy metals such as Cr-6, cobalt, nickel, barium, manganese and arsenic. ...

### **Effects of pollution on human health**

66.The complainant organisation reports that: “Over the last fifteen years, the proportion of deaths in Oinofyta caused by cancer has risen from 6% to 30%. A study on mortality in Oinofyta carried out in 2010, by the NGO the Oinofyta Health Monitor, and financed by the Disease Control and Prevention Centre, covered six thousand people over the period from 1999 to 2009 and compared them with the inhabitants of Boeotia as a whole. It showed that cancer is the principal cause of death in Oinofyta”.

67.In this context, FIDH points out that the latest results show the effect of air pollution on the health of children living in the Asopos region and even more, whose parents work in the industries of the region. More specifically, the dust particles of heavy metals-including-borne clothes and hair industry employees are inhaled by children when their parents come home after work. Thus, the study finds that children living in Oinofyta and aged 11-12 are twice as likely to exhibit respiratory disorders such as asthma compared to children living in the region Makrakomi (150 km north of Oinofyta). Children whose parents work in an industry are ten times more likely to have asthma compared to children whose parent has another job, and twice as likely to have pathological findings in spirometry (measure of lung function).

68.The complainant organisation points out that the studies carried out confirm that over the period from 1999 to 2009 the cancer mortality rate was 14% higher in Oinofyta than in the region of Boeotia. In 2009, there were 90% more deaths as a result of cancer than in the rest of the

region, which is statistically significant. There has also been a major, statistically significant increase in the number of liver, lung and kidney cancer as well as bladder cancer among women living in Oinofyta.

### **Effects of pollution on food production and industry**

... 70. The water in the Asopos is unfit for the irrigation of agricultural land as the heavy metals contained in the water are transferred to food products – and in this specific case to root vegetables.

71. Moreover, FIDH indicates that the water is also used by food industries in the region to manufacture drinks and that the risk is not confined to the River Asopos valley, as the products grown and produced by the food industry are sold not only in local shops but also and for the most part in shops throughout Attica – as witnessed by the fact that samples were taken from supermarkets in Athens – and are exported to other parts of Greece and abroad. ...

## **B – Assessment of the Committee**

### **General considerations**

127. The Committee considers that the present case gives rise to a complex situation. This is due to several factors, such as the seriousness of the pollution and the related health risks and consequences, the number of people and interests concerned, the various levels of public administration involved and the resources needed to remove the causes of ill-health and prevent diseases.

128. As alleged by FIDH and acknowledged by the Government, the problems of pollution and their harmful effects on health have been known for a long time. In this respect, it should be stressed that the Greek authorities have been inactive during more than 40 years. The above-mentioned problems and effects have been addressed by public authorities, as they have admitted, with excessive delay.

129. Having regard to these findings, the Committee recalls that:

- “Admittedly, overcoming pollution is an objective that can only be achieved gradually. Nevertheless, States party must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal – see, *mutatis mutandis*, *Autism Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 53” (*Marangopoulos Foundation for Human Rights (MFHR) c. Greece*, complaint No. 30/2005, aforementioned decision, §204).

- “When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as

well as for others persons affected” (Autism Europe v. France, Complaint No. 13/2002, aforementioned decision, §53).

- “In the absence of any commitment to or means of measuring the practical impact of measures taken, the rights specified in the Charter are likely to remain ineffective (...). In connection with timetabling (...) it is essential for reasonable deadlines to be set that take account not only of administrative constraints but also of the needs of groups that fall into the urgent category. At all events, achievement of the goals that the authorities have set themselves cannot be deferred indefinitely” (International Movement ATD Fourth world v. France, complaint No 33/2006, decision on the merits of 5 December 2007, § 65-66).

130. With this in mind, the Committee considers that the delay with which the Greek authorities have: acknowledged the seriousness of the pollution of Asopos River and its negative effects on the health of the population, and have started taking initiatives to remedy the problems at stake has exacerbated the causes of ill-health and hampered the prevention of diseases in the region of Oinofyta. These circumstances are taken into account by the Committee in the assessment concerning the alleged violation of paragraphs 1, 2 and 3 of the Charter.

### **Alleged violation of Article 11 §§ 1 and 3**

131. The Committee notes that a specific regulation on “The establishment of environmental quality standards for Asopos River and threshold values for the emission of liquid industrial waste into the Asopos catchment basin” has been adopted in 2010 (Joint Ministerial Decision No. 20488/2010 - see paragraph 41 above).

132. The Committee considers that this document represents a positive contribution to remedy the problems at stake. However, it notes that Joint Ministerial Decision No. 20488/2010 is not fully implemented. In particular, for the time being, not all enterprises concerned have requested a review of their environmental terms, while according to the said decision the procedure for allocating new environmental terms had to be completed during 2011. The Committee also notes that the ‘Oinofyta Environmental Inspectors Office’ has not yet been established.

133. In view of this information, the Committee recalls that:

- “In connection with means of ensuring steady progress towards achieving the goals laid down by the Charter, (...) the implementation of the Charter requires state parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein” (International Movement ATD Fourth world v. France, complaint No 33/2006, aforementioned decision, § 61).

- “In order to fulfill their obligations, national authorities must (...) ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery” (...) (Marangopoulos Foundation for Human Rights (MFHR) c. Greece, complaint No. 30/2005, aforementioned decision, §203)....

136. The Committee considers that even though some efforts are being made by the Greek authorities to improve the co-ordination of administrative responsibilities and related activities, it has not been demonstrated that these efforts have improved the situation in the areas concerned. In practice and as conceded by the Greek Government, these shortcomings in the administrative

co-ordination are likely to further delay the removal of the causes of ill-health and the prevention of diseases in the region.

137.The Committee further notes that the Oinofyta region is not established as an “industrial zone” by law and that it operates with several shortages in infrastructure. It holds that the lack of spatial planning in the areas concerned (notably within the Municipality of Tanagra) hamper the adoption of suitable measures to eliminate or reduce the pollution as well as its negative effects on health. In this respect, the Committee recalls that “(...) national authorities must (...) develop and regularly update sufficiently comprehensive environmental legislation and regulations (...) (Marangopoulos Foundation for Human Rights (MFHR) c. Greece, complaint No. 30/2005, aforementioned decision, §203).

138.The Committee also recalls that it “assesses the efforts made by states with reference to their national legislation and regulations and undertakings entered into with regard to the European Union and the United Nations (Conclusions XV-2, Italy, Article 11§3), and in terms of how the relevant law is applied in practice.” (Marangopoulos Foundation for Human Rights (MFHR) c. Greece, complaint No. 30/2005, aforementioned decision, §204).

139.With this in mind [the Committee noted that the Court of Justice of the European Union had declared that Greece had failed to fulfill its obligations as regards water management in 2012 and as regards waste management in 2009, and as regards pollution control in 2010]. ...

... 144.The Committee recalls that “under Article 11§1 of the Charter, health systems must respond appropriately to avoidable health risks, i.e. ones that can be controlled by human action, and states must guarantee the best possible results in line with the available knowledge.” (Conclusions XV-2, Denmark).

145.The Committee also considers that according to Art 11§3 of the Charter, the Greek Government has to undertake appropriate measures to prevent as far as possible activities which are detrimental to human health (diseases and accidents). The Committee is of the view that where there are threats of serious damage to human health, lack of full scientific certainty should not be used as a reason for postponing appropriate measures.

146.The Committee also recalls that: “Under Article 11 of the Charter, everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable” (Marangopoulos Foundation for Human Rights ((MFHR) v. Greece, Complaint n° 30/2005, aforementioned decision, §202) and that: in order to fulfill their obligations, national authorities must take specific steps, such as introducing threshold values for emissions (see, *mutatis mutandis*, Conclusions 2005, Moldova, Article 11§3)....

149.The Committee considers that, in view of the threats of damage to human health of the local inhabitants, according to Article 11§§1 and 3, appropriate measures aimed at removing and preventing all causes of ill-health and diseases in the region of Oinofyta should have been implemented by the Greek authorities at the time of the development of the industrial zone or, at the latest, immediately after acknowledging that:

“the serious and complex problem of pollution in the Asopos valley and the groundwater in this area by hexavalent chromium, other polluting heavy metals and alloys has spread and increased as a result of the unpardonable indifference of the Greek state in recent years and, in particular, since 2007, when hexavalent chromium was detected in

drinking water and groundwater” (see declaration by Minister of the Environment, Energy and Climate Change of 2010, paragraph 75 above).

150. As far as the implementation of the right to protection of health is concerned, the Committee considers that, when a preliminary scientific evaluation indicates that there are reasonable grounds for concern regarding potentially dangerous effects on human health, the State must take precautionary measures consistent with the high level of protection established by Article 11. Where required, these measures must be taken in accordance to relevant decisions adopted by national jurisdictions.

151. More specifically, such measures should have included regular analyses of the surface and ground water in the region of Oinofyta, scientific investigation of possible threats to human health linked to heavy metals (including Cr-6) and comprehensive epidemiological studies. In this framework, given the scientific uncertainty related to the health problems caused by the ingestion of Cr-6, the Greek authorities should also have taken urgent measures, including - at least for the areas directly concerned by the pollution - the setting of maximum contaminant levels concerning Cr-6 in drinking water and water for agricultural use.

152. In this connection, the Committee notes the following judgments of the Court of Justice and the Court of First Instance of the European Union regarding precautionary measures in view of health risks:

- In the Case C-157/96 of 5 May 1998 - *The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers' Union, David Burnett and Sons Ltd, R. S. and E. Wright Ltd, Anglo Beef Processors Ltd, United Kingdom Genetics, Wyjac Calves Ltd, International Traders Ferry Ltd, MFP International Ltd, Interstate Truck Rental Ltd and Vian Exports Ltd*, the Court of Justice held: "Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent." (cf. paragraph 63);

- In the Case T-13/99 of 11 September 2002 - *Pfizer Animal Health SA v Council of the European Union*, the Court of First Instance held: "Unless the precautionary principle is to be rendered nugatory, the fact that it is impossible to carry out a full scientific risk assessment does not prevent the competent public authority from taking preventive measures, at very short notice if necessary, when such measures appear essential given the level of risk to human health which the authority has deemed unacceptable for society." (cf. Summary of the Judgment).

153. In summary, the Committee considers that the Greek State has failed to take appropriate measures to remove as far as possible the causes of ill-health and to prevent as far as possible diseases on the basis of: the delay mentioned in paragraph 130 above; the deficiencies in the implementation of existing regulations and programmes regarding the pollution of Asopos River and its negative effects on health; the difficulties encountered in the co-ordination of the relevant administrative activities by competent bodies at national, regional and local level; the shortcomings regarding spatial planning; the poor management of water resources and waste; the problems in the control of industrial emissions and the lack of appropriate initiatives with respect to the presence of Cr-6 in the water.

154. The Committee therefore holds that these deficiencies constitute a violation of Article 11§§1 and 3 of the Charter.



## **Alleged violation of Article 11 § 2**

155. The Committee notes the information provided by the Government with respect to the initiatives taken in recent years by the central administration to inform the population about the environmental problems in the region of Oinofyta and, more particularly, the public consultation process started in 2012 in the framework of the “Project for the Integrated Management of the Environmental Crisis of Asopos”. The Committee acknowledges these initiatives represent a step towards the implementation of Article 11§2 of the Charter.

156. However, the Committee notes that no information is provided by the Government in response to the following factual allegations made by the complainant organisation: in some cases, local authorities only informed the inhabitants of the pollution problems belatedly, leaving them to drink water that was unfit for consumption; in other cases, those authorities refused to give access to information on the environment to citizens who had requested it from the relevant services; and that the responsible prefectural authorities have never taken any measures (such as holding information meetings or producing leaflets) to inform the inhabitants or the general public about the environmental issues raised by the Asopos situation such as the pollution of the water by heavy metals or the impact of this pollution at all relevant levels. These allegations are confirmed by judicial decisions requesting that more information be given to inhabitants about the risks of using the municipal water supply network, which was in bad repair and full of Cr-6 (see paragraph 86 above).

157. With this in mind, the Committee considers the public information initiatives described by the Government in its reply to the Committee were not only initiated too late, but also, in most cases, sporadic and insufficiently co-ordinated. In this respect, the Committee considers that the scale of the pollution of the Oinofyta region and its effects on human health, as well as the fact that these problems have been known and acknowledged by the competent Greek authorities for a long time, should have required the design and implementation of a systematic information and awareness-raising programme for the population concerned, with the active and regular contribution of all the administrative institutions concerned (at national, regional and local level).

158. In this respect, the Committee recalls its previous decisions to the effect that:

- “Informing the public, particularly through awareness-raising campaigns, must be a public health priority. The precise extent of these activities may vary according to the nature of the public health problems in the countries concerned” (Conclusions XV-2, Belgium).
- “States must demonstrate through concrete measures that they implement a public health education policy in favour of (...) population groups affected by specific problems” (Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint No.30/2005, aforementioned decision, §§ 216 and 219).

159. As a result, the Committee considers that the Greek authorities did not take appropriate measures to provide advisory and educational facilities for the promotion of health in the present case.

160. The Committee therefore holds that these deficiencies constitute a violation of Article 11§2 of the Charter.

## **CONCLUSION**

For these reasons, the Committee concludes unanimously:

- that there is a violation of Article 11§§1 and 3 of the 1961 Charter;
- that there is a violation of Article 11§2 of the 1961 Charter.

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### **Assessment of the follow-up: International Federation of Human Rights Leagues (FIDH) v. Greece, Collective Complaint No. 72/2011**

#### **A. Violation of Article 11§§1 and 3**

....

#### **3. Assessment of the follow-up**

[Taking note of measures that have been undertaken by the Greek government, the Committee] observes like in its decision on the merits that the Joint Ministerial Decision No. 20488/2010 is still not fully implemented. In particular, for the time being, not all enterprises concerned have requested a review of their environmental terms, while according to the said decision the procedure for allocating new environmental terms had to be completed during 2011.

Moreover, a research project on LIFE + “Chromium in Asopos Groundwater System: Remediation Technologies and Measures” is currently in progress. However, the Committee stressed in its decision that given the scientific uncertainty related to the health problems caused by the ingestion of hexavalent chromium (Cr-6), the authorities should have already taken urgent measures, including - at least for the areas directly concerned by the pollution - the setting of maximum contaminant levels concerning Cr-6 in drinking water and water for agricultural use.

The Committee asks for information on the follow-up given to decisions that will be submitted in October 2017 on the implementation of all the measures that are currently being implemented in order to remedy the situation.

The Committee finds that the situation has not been brought into conformity with the 1961 Charter.

#### **B. Violation of Article 11§2**

##### **1. Decision of the Committee on the merits of the complaint**

The Committee concluded that there was a violation of Article 11§2 of the 1961 Charter on the ground that in view of the pollution of the Asopos River the authorities did not take appropriate measures to provide advisory and educational facilities for the promotion of health.

## 2. Information provided by the Government

The Government indicates in the [information](#) registered on 28 August 2015 that information to the public and local authorities is a constituent element in addressing the issue. This information requirement is fulfilled by the Ministry of the Environment, Energy and Climate Change (YPEKA) both *via* established consultation procedures on the River Basin Management Plans for the respective Water District and *via* an open consultation with the public as well as scientific updating.

In January 2011 YPEKA organized an international Conference on this issue where it was concluded that there was a need for a review of the legislation on drinking water and the establishment of a limit for hexavalent chromium.

Actions relevant to the dissemination of information to the public with regard to the River Basin Management Plan for the Water District of Eastern Sterea Ellada were initiated on 13 January 2012 and were completed on 21 November 2012.

The research team of National Technical University of Athens, in cooperation with the Special Secretariat for Waters and the Region of Sterea Ellada-Regional Unit of Boeotia, organize frequent open Project Meetings aimed at advising all stakeholders on the actions, the progress and the results of the project: LIFE+ “Chromium in Asopos Groundwater System: Remediation technologies and measures” (CHARM).

At regular intervals, the YPEKA informs the public via Press Releases and/or interviews of its political leadership, and the Parliamentary Committee for the Environment.

In the education system, the information indicates that in Boeotia, environmental programmes for the Asopos river have been set up in 2013-2014, such as water in nature- the pollution of Asopos river /Junior High School of Asopia and environmental routes for the waters of Asopos /General Senior High School of Schimatari.

## 3. Assessment of the follow-up

The Committee takes note of all these measures designed to inform the public and educational facilities. It asks the next report to continue to provide such information.

The Committee finds that the situation has been brought into conformity with the 1961 Charter.

\* \* \*

## **9. Jugheli and Others v. Georgia (European Court of Human Rights Fifth Section, 2017)**

*The Court found a violation of Article 8 where the government had operated a power plant only metres from the residential housing block where applicants lived for decades. The Court summarizes its environmental jurisprudence under Article 8 and finds that the virtual absence of a regulatory framework applicable to the plant's dangerous activities before and after its privatisation and the failure to address the resultant air pollution that negatively affected the applicants' rights under Article 8 of the Convention. Notably, the Court reiterated that the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community. However, the Court issued an award in respect of non pecuniary damage only for the period between accession to the EU and the termination of the plant's operations.*

### **PROCEDURE**

1. The case originated in an application (no. [38342/05](#)) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Georgian nationals, Mr Ivane Jugheli ("the first applicant"), Mr Otar Gureshidze ("the second applicant") and Ms Liana Alavidze ("the third applicant"), on 3 March 2005....

3. The applicants alleged that a thermal power plant in close proximity to their homes had endangered their health and well-being....

### **THE FACTS**

#### **I. THE CIRCUMSTANCES OF THE CASE**

##### **A. Background to the case**

7. The applicants [at the material time] lived in different flats in a residential block... in the city centre, in close proximity (approximately 4 metres) to the "Tboelectrocentrali" thermal power plant ("the plant"). The plant was constructed in 1911 and reconstructed at a later date. It started operations in 1939. For several decades it burned coal to generate power, before replacing it with natural gas. The plant provided the adjacent residential areas with electricity and heat.

9. Several accidents have been reported throughout the plant's history. An accident on 10 April 1996 rendered it inoperative for more than thirty days. An expert report concerning the incident disclosed that the main reason behind the accident was the fact that no major repairs had been carried out there since 1986.

10. On 2 November 1999 Presidential Decree No. 613 was issued, stating that the plant was to be privatised and sold directly to a private company. The privatisation agreement between the Government and the company was concluded on 6 April 2000.

11. On 2 February 2001 the plant partially ceased generating power owing to financial problems. However, it continued to use some of the generators.

12. According to the applicants, while operational the plant's dangerous activities were not subject to the relevant regulations, as a result of which, in addition to some other alleged nuisances, it emitted various toxic substances into the atmosphere negatively affecting their well-being. ...

### **B. Domestic proceedings**

[In the domestic proceedings, applicants claimed compensation for pecuniary and non-pecuniary damage for the harm caused to their health and well-being by the air, noise and electromagnetic pollution and water leakage emanating from the plant. They relied on privately commissioned independent expert opinions in support of their complaints.]

## **II. RELEVANT DOMESTIC LAW**

### **A. The 1995 Constitution**

41. Article 37 of the Constitution reads as follows:

#### **Article 37**

“3. Everyone has a right to live in a healthy environment and to use the natural and cultural environment. Everyone has a duty to protect the natural and cultural environment.

4. Taking into consideration the interests of current and future generations, the State shall guarantee the protection of the environment and the rational use of the natural resources as well as a sustainable development of the country in line with the economic and ecological interests of the society in order to create a safe environment for human health.”

**B. Environmental regulations.** [The Court summarized the National Environmental Protection Act of 1996 and other relevant legislation]

THE LAW ...

## **II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

50. The second and third applicants (“the applicants”) complained that the State had failed to protect them from the air pollution as well as noise and electromagnetic pollution emanating from the thermal power plant located in the immediate vicinity of their homes. This had resulted in a severe disturbance to their environment and a risk to their health in violation of Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

...

### **B. Admissibility**

60. The Court notes at the outset that the applicants' complaints under Article 8 of the Convention relating to the noise and electromagnetic pollution allegedly emanating from the plant were not corroborated by any of the relevant expert examinations commissioned by the domestic courts (see paragraphs 25-28 above) and were accordingly rejected as manifestly ill-founded by the latter. In this connection, the Court, for its part, does not consider itself to be in a position to draw a conclusion on the issue, and reiterates that it cannot substitute its own findings of fact for those of the domestic courts, which are better placed to assess the evidence adduced before them (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. [60654/00](#), §§ 89-90, ECHR 2007-I, and *Murray v. the United Kingdom*, 28 October 1994, § 66, Series A no. 300-A). The Court thus finds that these complaints are manifestly ill-founded and should be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

61. As concerns the complaint under Article 8 of the Convention concerning the State's alleged failure to protect the applicants from the air pollution emanating from the thermal power plant in the immediate vicinity of their homes, the Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## C. Merits

### 1. General principles

62. The Court reiterates at the outset that Article 8 is not violated every time an environmental pollution occurs. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (see *Hatton and Others v. the United Kingdom* [GC], no. [36022/97](#), § 96, ECHR 2003-VIII; *Kyrtatos v. Greece*, no. [41666/98](#), § 52, ECHR 2003-VI; and *Fadeyeva v. Russia*, no. [55723/00](#), § 68, ECHR 2005-IV). Furthermore, the adverse effects of the environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (see, among other authorities, *López Ostra v. Spain*, 9 December 1994, § 51, Series A no. 303-C). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or psychological effects. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city (see *Dzemyuk v. Ukraine*, no. [42488/02](#), § 78, 4 September 2014). Conversely, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *López Ostra*, cited above, § 51, and *Tătar v. Romania*, no. [67021/01](#), § 85, 27 January 2009).

63. The Court notes that it is often impossible to quantify the effects of serious industrial pollution in each individual case and to distinguish them from the influence of other relevant factors such as age, profession or personal lifestyle. The same concerns possible worsening of the quality of life caused by the industrial pollution. "Quality of life" is a subjective characteristic which hardly lends itself to a precise definition (see *Ledyayeva and Others v. Russia*, nos. [53157/99](#), 53247/99, 53695/00 and 56850/00, § 90, 26 October 2006, and *Dubetska and Others v. Ukraine*,



no. [30499/03](#), § 79, 10 February 2011). It follows that, taking into consideration the evidentiary difficulties involved, the Court will have regard primarily, although not exclusively, to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case. As a basis for the analysis it may use, among other things, individual decisions taken by the authorities with respect to the applicants' particular situation and the environmental studies commissioned by the authorities (see *Dubetska and Others*, cited above, § 107, with further references). However, the Court cannot rely blindly on the decisions of the domestic authorities, especially if they are obviously inconsistent or contradict each other. In such situations it has to assess the evidence in its entirety (see *Ledyayeva and Others*, cited above, § 90).

64. The Court further points out that Article 8 does not merely compel the State to abstain from arbitrary interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in the effective respect for private or family life (see *Guerra and Others v. Italy*, 19 February 1998, § 58, *Reports of Judgments and Decisions* 1998-I). Whether the question is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8 § 1 or in terms of an "interference by a public authority" to be justified in accordance with Article 8 § 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see *Hatton and Others*, cited above, § 98, and *López Ostra*, cited above, § 51).

## 2. Application of the above principles to the present case

### (a) Applicability of Article 8

65. The Court bears in mind that, in the instant case, the Convention came into force with respect to Georgia on 20 May 1999. It follows that only the period after this date can be taken into consideration in assessing the nature and extent of the alleged interference with the applicants' private lives. It is further noted that the thermal power plant in question suspended most of its activities on 2 February 2001. The Court finds that the period of slightly less than a year and nine months during which the applicants were exposed to the alleged harmful emissions from the plant was sufficient to trigger the application of Article 8 of the Convention.

66. The Court notes at the outset that the activities of the thermal power plant in question, as expressly acknowledged by the relevant municipal authority, were classified as "first category" under domestic law (see paragraph 15 above) as they "could by their scale, location and substance cause serious negative and irreversible impact upon the environment, natural resources and human health" (see paragraphs 43-44 above). The Court is also mindful of the fact that the plant in question was located in the city centre and in the immediate vicinity of the applicants' homes, with a distance of only 4 metres between the plant and the building.

67. As regards the alleged impact of the plant's activities and the resultant air pollution upon the life and health of the applicants, the Court notes that the expert opinions commissioned by the domestic judicial authorities and produced by the competent State entities confirmed in unambiguous terms that the absence of a buffer zone between the plant and the building coupled with the absence of filters or other purification equipment over the plant's chimneys to minimise

the potential negative impact of the hazardous substances emitted into the air created a real risk to the residents of the building (see paragraphs 19 and 22 above). The Court further notes that according to the IEP:

“Considering the fact that the plant does not have a buffer zone and is immediately adjacent to a residential building ..., taking into account the direction of the wind, a whole bouquet of emissions is reaching into the homes ... negatively affecting the population living in the adjacent area.”

It was further concluded that the concentrated toxicity of various substances emitted by the plant was twice the norm (see paragraphs 22-23 above).

68. Furthermore, the plant’s technical compliance document was found to be defective, incorrectly indicating the height of the plant’s chimneys, thus misleadingly decreasing the possible pollution indicators (see paragraph 21 above). The Court notes that, according to the Institute of Scientific Research in Sanitation and Hygiene at the Ministry of Labour, Health and Social Affairs, diseases potentially caused by prolonged exposure to excessive concentrations in the air of substances such as SO<sub>2</sub>, CO, NO<sub>2</sub>, smoke and black dust include mucocutaneous disorders, conjunctivitis, bronchitis, bronchopulmonary and other pulmonary diseases, allergies, different types of cardiovascular disease and low oxygen levels in the blood, which could lead to other serious disorders (see paragraph 24 above).

69. The Court takes further note of the findings of the Forensic Medical Examination Centre at the Ministry of Labour, Health and Social Affairs with respect to the health conditions of several claimants at domestic level (see paragraphs 29-30 above). According to the medical examination report, the persons concerned, including the second applicant, suffered from largely similar health conditions such as neurasthenia and asthenic syndrome. The experts concluded that the medical conditions in question could have been caused “by the prolonged and combined effect of being exposed to harmful factors” (see paragraph 30 above).

70. As regards the third applicant’s alleged refusal to participate in the medical examination (see paragraph 33 above), it cannot be denied, in the Court’s opinion, that she lived in identical conditions as the claimants participating in the examination and was subjected to the same environmental nuisances and health risks emanating from the plant’s activities and that she pursued the relevant proceedings at domestic level until their completion. The Court further reiterates in this connection that, in any event, Article 8 has been found to apply to severe environmental pollution affecting individuals’ well-being and preventing them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *López Ostra*, cited above, § 51).

71. Against this background, the Court concludes that even assuming that the air pollution did not cause any quantifiable harm to the applicants’ health, it may have made them more vulnerable to various illnesses (see paragraphs 30 and 68 above). Moreover, there can be no doubt that it adversely affected their quality of life at home (see *Fadeyeva*, cited above, § 88). The Court therefore finds that there has been an interference with the applicants’ rights that reached a sufficient level of severity to bring it within the scope of Article 8 of the Convention.

72. Lastly, the Court finds that despite settling in the building built in 1952 voluntarily, at a time when the thermal power plant had been operational since 1939, the applicants may not have been able to make an informed choice at the time or possibly were not even in a position to reject the housing offered by the State during Soviet times (see *Fadeyeva*, § 120, and *Ledyayeva and Others*, § 97, both cited above). It therefore cannot be claimed that the applicants themselves created the situation complained of or were somehow responsible for it. ....

**(b) Compliance with Article 8**

73. The Court reiterates that Article 8 may apply in environmental cases whether the pollution is directly caused by the State or where the State responsibility arises from a failure to regulate private industry properly (see *Hatton and Others*, cited above, § 98). The thermal power plant in the instant case was initially owned and operated by the State until it transferred ownership to a private company by means of a privatisation agreement signed on 6 April 2000. However, the Court reiterates in this connection that whether the present case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8 § 1 or in terms of an interference by a public authority to be justified in accordance with Article 8 § 2, the applicable principles are broadly similar (see paragraph 64 above). In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.

74. The Court notes that on the one hand the pertinent regulatory framework, including the obligation to submit an environmental impact assessment study and obtain the relevant environmental permit, was not applicable to the plant's activities until 1 January 2009 (see paragraph 45 above). On the other hand, the activities of the thermal power plant in question were potentially dangerous, as confirmed by the domestic legislation in force at the material time that designated such activities as those which "could by their scale, location and substance cause serious negative and irreversible impact upon the environment, natural resources and human health" (see paragraphs 43-44 above). Their dangerous nature was further expressly confirmed by the Tbilisi City Hall (see paragraph 15 above). The Court observes that such dangerous industrial activities were effectively left in a legal vacuum at the material time.

75. Against this background, the Court considers that the crux of the matter is the virtual absence of a regulatory framework applicable to the plant's dangerous activities before and after its privatisation and the failure to address the resultant air pollution that negatively affected the applicants' rights under Article 8 of the Convention. In the context of dangerous activities in particular, States have an obligation to set in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks (see *Di Sarno and Others v. Italy*, no. [30765/08](#), § 106, 10 January 2012, and *Tătar*, cited above, § 88). The Court notes in this connection that the virtual absence of any legislative and administrative framework applicable to the potentially dangerous activities of the plant in the present case enabled it to operate in the immediate vicinity of the applicants' homes without the necessary safeguards to avoid or at least minimise the air pollution and its negative impact upon the applicants' health and well-being, as confirmed by the expert examinations commissioned by the domestic courts (see paragraphs 18-24 and 29-30 above).

76. The Court reiterates that it is not its task to determine what exactly should have been done in the present situation to reduce the impact of the plant's activities upon the applicants in a more efficient way. However, it is within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests.

In this respect the Court reiterates that the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community (see *Fadeyeva*, cited above, § 128). Looking at the present case from this perspective, the Court notes that the Government did not present to the Court any relevant environmental studies or documents informative of their policy towards the plant and the air pollution emanating therefrom that had been affecting the applicants during the period concerned.

77. The Court further notes that the situation complained of in the instant case was not a result of sudden turn of events, but constituted a longstanding problem of which the relevant authorities were certainly aware (see paragraph 13 above). Yet, despite ordering the plant to install the relevant filtering and purification equipment to minimise the impact of toxic substances emitted into the air upon the residents of the building, no effective steps were taken by the competent authorities to follow up on that instruction (see paragraph 14 above). Furthermore, the applicants' alleged failure to explicitly request the domestic courts to order the implementation of various protection measures in respect of the plant's activities and the emissions emanating therefrom (see paragraph 38 above) did not, in the Court's opinion, absolve the domestic judicial authorities from the obligation to consider the complaint in view of the State's positive obligations under Article 8 of the Convention and to remedy the situation accordingly. In other words, whereas the regulatory framework proved defective in that virtually no environmental regulation was applicable to the plant's activities as it had commenced its operations before the adoption of the relevant rules, the situation was further exacerbated by the passive attitude adopted by the Government in the face of the resultant air pollution emanating from the plant, despite acknowledging the ecological discomfort suffered by the population affected on several occasions (see paragraphs 13-15 above).

78. Having regard to the foregoing and notwithstanding the margin of appreciation available to the national authorities in cases involving environmental issues, the Court considers that the respondent State did not succeed in striking a fair balance between the interests of the community in having an operational thermal power plant and the applicants' effective enjoyment of their right to respect for their home and private life.

There has accordingly been a violation of Article 8 of the Convention....

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention 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."

##### **A. Damage**

83. The second and third applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

84. The Government stated that the claim was manifestly ill-founded and excessive.

85. The Court accepts that the applicants suffered distress and frustration on account of the violation of their rights under Article 8 of the Convention. The resulting non-pecuniary damage would not be adequately compensated for by the mere finding of the breach. Taking into account

the circumstances of the case and making an assessment on an equitable basis in accordance with Article 41, the Court awards the applicants EUR 4,500 each in respect of non-pecuniary damage. [Judgment in relation to costs and expenses, and default interest omitted.]

\* \* \*

## 10. O’Sullivan McCarthy Mussel Development Ltd v. Ireland (European Court of Human Rights, Chamber 2018)

*The Court rejected applicants’ claim that Ireland’s imposition of a moratorium on mussel seed fishing in Castlemaine Harbour in County Kerry resulted in uncompensated economic loss in violation of rights under Article 1 of Protocol No. 1 of the Law of the European Union, which provides: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” The Court determined that Ireland’s decision to engage in environmentally protective practices “were due a wide margin of appreciation” even though one type of activity (mussel seed fishing) was prohibited while another similar activity (the harvesting of mature mussels) was not.*

### PROCEDURE

99. The case originated in an application (no. 44460/16) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Irish company, O’Sullivan McCarthy Mussel Development Ltd (“the applicant company”), on 25 July 2016.

...

100. The applicant company alleged in particular that there had been a violation of its rights under Article 1 of Protocol No. 1 due to economic loss for which it held the domestic authorities responsible and for which it had received no compensation. It raised the same complaint under Article 8. It further alleged a violation of its right to an effective remedy under Article 13, and, under Article 6, that the duration of the domestic proceedings had been excessive.

### THE FACTS

#### I. THE CIRCUMSTANCES OF THE CASE

101. The applicant company is engaged in the cultivation of mussels in Castlemaine harbour in Co. Kerry, one of several sites in Ireland where this commercial activity is exercised. Its business involves fishing for mussel seed (i.e. immature mussels) within the harbour each year and transporting them for cultivation in another part of the harbour. It has conducted this activity at Castlemaine harbour since the late 1970s.

102. In Ireland, mussel seed fishing takes place during the summer period, the exact dates being determined each year by statutory instrument. This activity is subject to obtaining the relevant leases, licences, authorisations and permits (see under “Relevant domestic law” below). The competent authority in this respect is the Minister for Agriculture, Food and the Marine (hereinafter “the Minister”, and “the Department” for the corresponding Government Department). In order to engage in this activity, operators must be in possession of an aquaculture licence, which has a validity of ten years. A sea-fishing boat licence is required, and the boat used must be entered



in the Register of Fishing Boats. Operators must also hold an authorisation to fish for mussel seed, issued annually by the Minister (see under “Relevant domestic law” below).

103. Subsequent to the facts giving rise to this application, an additional requirement was introduced pursuant to EU law. Where mussel fishing is carried out in an environmentally protected area, a “Natura permit” must also be obtained (see paragraph 20 below).

104. According to the Government, a total of 41 authorisations were issued in 2008 to Irish sea-fishing boats to fish for mussel seed, four of which operated in Castlemaine harbour on behalf of six mussel aquaculture operators.

105. In 1993, the competent authorities published a notice in the national press announcing the intention to classify twelve sites, including Castlemaine harbour, as a special protection area (SPA) within the meaning of the domestic legislation transposing Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (“the Birds Directive”, OJ 1979 L 103, p. 1). The notice indicated that it was not envisaged that this would change the usage of the sites concerned. The harbour’s SPA classification took effect in 1994. The applicant company continued its activities each year, obtaining the necessary licences and permits.

106. In 2000, the domestic authorities designated Castlemaine harbour a special area of conservation (SAC) within the meaning of the domestic legislation transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”, OJ 1992 L 206, p. 7). As it was now subject to the two EU directives, it had the status of a “Natura 2000” site.

#### **A. Infringement proceedings against the respondent and several other EU Member States**

107. Dating back to the late 1990s, the European Commission was of the view that Ireland and several other then EC Member States were not fulfilling their obligations under EC environmental law, and specifically in relation to the two directives referred to above (references hereafter will generally be to EU and not EC law). ...

108. On 13 December 2007 the Court of Justice of the European Union (hereinafter “the CJEU”) delivered its judgment in *Commission v. Ireland* (C-418/04, EU:C:2007:780), declaring that Ireland had failed to fulfil its obligations under the aforementioned directives in a number of respects. ...

109. At or around the same time, the CJEU found that the Netherlands, France, Finland, Italy, Spain, Greece and Portugal had similarly violated their EU obligations.

#### **B. Measures adopted by the respondent State following the CJEU judgment**

110. In view of the judgment, the Minister considered that it was not legally possible to permit commercial activity in the sites concerned until the necessary assessments had been completed. Accordingly, when granting authorisation for mussel seed fishing for the period 9 June to 1 July 2008, he prohibited it in 24 locations around the Irish coast, including Castlemaine harbour ... The applicant company was informed of the situation by an official of the Department on 6 June 2008. It wrote to the *Taoiseach* (Prime Minister) that same day to underline the threat to the livelihood of those affected. It recalled the terms of the notice published in 1993 ... and explained that it had just purchased a new boat at a cost of 1 million euros. The applicant company received a reply from the Department dated 2 July 2008. This explained that baseline data for the area had to be

gathered in order to perform the assessment required by the Habitats Directive, as interpreted by the CJEU. It indicated that Castlemaine harbour had been given priority for the exercise and that work had already begun to collect the necessary data. It added that the authorities would be seeking the agreement of the European Commission to allow aquaculture to resume on an interim basis.

...

111. The appropriate assessment of Castlemaine harbour was completed in April 2011 by the Marine Institute. Running to over 130 pages, it assessed the effects on the site of the different types of aquaculture carried out there and concluded that there was no reason to anticipate any environmental disturbance from mussel fishing. This was one of multiple assessments which the respondent State had to undertake in light of the CJEU judgment. ...

### III. RELEVANT EU LAW

...

#### THE LAW

##### I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

112. The applicant company complained under Article 8 of the Convention and Article 1 of Protocol No. 1 of the impact on its right to earn a livelihood arising out of the temporary prohibition on mussel seed fishing imposed in 2008.

113. The Government contested that argument.

...

114. Article 1 of Protocol No. 1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

...

#### 2. *The Court’s assessment*

##### **(b) Whether the complaint is within the scope of Article 1 of Protocol No. 1**

115. The Court will next consider the Government’s objection that the applicant company’s complaint does not engage Article 1 of Protocol No. 1 at all, i.e. that it is incompatible *ratione materiae* with this provision.

116. It recalls in this respect that the concept of “possession” within the meaning of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision. The issue that needs to be examined is normally whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive

interest protected by that provision (see, among many authorities, *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 65, 29 March 2010)....

117. It follows that this complaint is not incompatible *ratione materiae* with Article 1 of Protocol No. 1. Nor can it be considered manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, or inadmissible on any other grounds. It must therefore be declared admissible.

## **B. Merits**

...

### *2. The Court's assessment*

#### **(a) Interference**

118. As previously stated, the impugned activities of the respondent State disclose an interference with the applicant company's right to the peaceful enjoyment of its possessions (see paragraph 90 above). As to the nature of that interference, the nature of the applicant company's possession being very particular, the Court does not agree with the applicant company's argument that it was akin to a *de facto* expropriation. Rather, the interference must be considered a "control of the use of property", which falls under the second paragraph of Article 1 of Protocol No. 1 (see for example ... As stated above ... in assessing that interference the Court will bear in mind that the applicant company's activities were conducted subject to the conditions stipulated by the Minister each year when issuing the mussel seed authorisation, and that in 2008 the authorisation was not withdrawn or revoked but subject to temporary restriction.

#### **(b) Compliance with the requirements of the second paragraph**

##### *(i) Lawfulness and purpose of the interference*

119. Concerning the lawfulness of the interference, the Court refers to the findings of the majority of the Supreme Court according to which the temporary closure of the harbour for the purpose of mussel seed fishing was effected by valid secondary legislation, in order to comply with the State's obligations under EU law ...

120. However, the applicant company argued that Statutory Instruments Nos. 347 and 395 of 2008 failed to comply with the principle of legal certainty inasmuch as they were not, in its view, sufficiently clear in their wording. It also pointed to the fact that the official publication of the first of these instruments came about two weeks after it entered into force.

121. As the Court has often stated, when speaking of "law", Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention. It follows that, in addition to being in accordance with the domestic law of the Contracting State, the legal norms upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application. As to the notion of "foreseeability", its scope depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed....

122. Notwithstanding the applicant company's criticisms, it does not appear to the Court that it was in fact left in any uncertainty about the nature and scope of the restrictions that were applied to the harbour in 2008, nor about their legal basis. As already noted (see paragraph 14 above), the applicant company was in direct contact with the Department, and was immediately informed of

the Minister's decision that it was not possible to open the harbour for mussel seed fishing from 9 June onwards. As for the other aspects of its activities that were not covered by the restriction, the applicant company did not suggest that these were in fact hindered by any legal uncertainty. On the contrary, it can be inferred from the information in the case-file about the applicant company's income in 2008 that it continued to operate normally that year. As for the fact that Statutory Instrument No. 347 was formally published in the official gazette about two weeks after it entered into force, the Court also infers from the information in the case file that the applicant company was fully aware of the continuing closure of the harbour, given that it protested the situation to the Department by letter dated 28 August 2008. Moreover, having regard to the general legal context of the case, including secondary legislation, primary legislation, the EU directives and the CJEU judgment, the Court does not consider that a relatively short delay in publishing Statutory Instrument No. 347 is sufficient reason to call the "lawfulness" of the interference in this case into question. As indicated previously, it is not contested that the applicant company had continuing contact with the Department and that it was informed of all relevant developments. As an economic operator active for many years in the aquaculture sector, it has not been claimed that the applicant company was not aware of the protracted pre-contentious phase of the legal proceedings involving the European Commission and the respondent State, or of the infringement judgment of 13 December 2007, which specifically addressed aquaculture.

123. Regarding the purpose of the interference, it is clear that its aim was the protection of the environment. As the Court has often stated, this is an increasingly important consideration in today's society, having become a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities ... Public authorities assume a responsibility which should in practice result in their intervention at the appropriate time to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective ... In addition, in the instant case the impugned measures taken were adopted to ensure the respondent State's compliance with its obligations under EU law, which the Court has also recognised as a legitimate general-interest objective of considerable weight ...

*(ii) Proportionality of the interference*

*(a) Applicability of the Bosporus presumption*

124. The Court must first consider whether, as argued by the Government, it should be presumed that the respondent State respected the requirements of Article 1 of Protocol No. 1, i.e. whether the *Bosporus* case-law should apply in the circumstances of the present case. It reiterates that the application of the presumption of equivalent protection in the legal system of the EU is subject to two conditions. The first is that the impugned interference must have been a matter of strict international legal obligation for the respondent State, to the exclusion of any margin of manoeuvre on the part of the domestic authorities. The second condition is the deployment of the full potential of the supervisory mechanism provided for by EU law, which the Court has recognised as affording equivalent protection to that provided by the Convention ...

125. Regarding the first condition, the Court recalls that it has, in its case-law, adverted to the difference in the EU legal system between a Regulation, binding in its entirety on and directly applicable in all the Member States, and a Directive, binding as to the result to be achieved while leaving to the Member States the choice of form and methods ...

126. In the present case, the obligation on the respondent State derived principally from Article 6(3) of the Habitats Directive. Ireland's failure to fulfil its obligation thereunder was established in infringement proceedings, entailing a duty on the State to comply with the CJEU's judgment and the secondary legislation examined in the context of those proceedings. While it was therefore clear that the respondent State had to comply with the directive and, with immediacy, the CJEU judgment, both were results to be achieved and neither mandated how compliance was to be effected. The respondent State was therefore not wholly deprived of a margin of manoeuvre in this respect. On the contrary, the domestic authorities retained some scope to negotiate with the Commission regarding the steps to be taken (see paragraphs 22-27 above). This included, at the proposal of the respondent State, both priority treatment and particular interim measures for Castlemaine harbour that were implemented with the agreement of the Commission. As the Court has previously stated, the presence of some margin of manoeuvre is capable of obstructing the application of the presumption of equivalent protection ... The Court leaves open the question whether a CJEU judgment under Article 258 TFEU could in other circumstances be regarded as leaving no margin of manoeuvre to the Member State in question, but finds in the circumstances of the present case in relation to the need to comply with the relevant EU directive that the *Bosphorus* presumption did not apply.

127. Moreover, when referring to the legitimate need in this case to fulfil environmental objectives and comply, in this regard, with EU law, the respondent Government itself referred to its wide margin of appreciation.

128. The Court is therefore required to determine whether the interference with the applicant company's right to the peaceful enjoyment of its possessions was justified under Article 1 of Protocol No. 1.

(β) Justification of the interference

129. According to well-established case-law, the second paragraph of Article 1 of Protocol No. 1 is to be read in the light of the principle enunciated in the first sentence of this provision. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden ...

130. The Court will first have regard to the consequences for the applicant company of the temporary restrictions applied to the harbour in 2008. In this regard, it must be borne in mind that the applicant company is engaged in a commercial activity that is subject to strict and detailed regulation by the domestic authorities, and, as regards the fishing of mussel seed, operates in accordance with the conditions stipulated in the authorisations granted to it from year to year. This includes the condition, expressly stated in the authorisation granted to it in August 2008, that it was not permitted to fish for mussel seed in an area where such activity had been prohibited by the



Minister. Furthermore, it is not without relevance to the Court's assessment that the Supreme Court was unanimous in finding that there was no legal basis for the applicant company to entertain a legitimate expectation of being permitted to operate as usual in 2008, following the finding by the CJEU that Ireland had failed to fulfil its relevant obligations under EU law (see paragraph 42 above). In the words of that court, as events unfolded, it became clear that the Minister did not have the legal authority, as a matter of EU law, to allow for the uninterrupted continuance of traditional activities in protected areas.

131. The Court would further observe that while the applicant company argued that it had had virtually no notice of the closure of the harbour for mussel seed fishing in June 2008, it is a commercial operator and therefore cannot disclaim all knowledge of relevant legal provisions and developments. Rather, it can be expected to display a high degree of caution in the pursuit of its activities, and to take special care in assessing the risks that may attach to those activities ... As stated previously, at least from the date of the CJEU judgment in this case (13 December 2007) – and arguably from the bringing of the infringement proceedings by the Commission in 2004 – making express reference to the aquaculture sector, the Court considers that the applicant company should have been aware of a possible risk of interruption of, or at least some consequences for, its usual commercial activities. The extent and consequences of any infringement judgment could not be foreseen ... but the risk of some interruption could clearly not be excluded. This factor cannot be disregarded when assessing the burden on the applicant company. In this respect, the Court notes that the applicant company purchased its new boat in May 2008, notwithstanding the risk referred to above. While neither party addressed the point before this Court, the applicant company indicated to the High Court that had it known that there would be restrictions on fishing for mussel seed in 2008 it would have considered other options, such as renting a vessel that year.

132. As for the applicant company's loss of profits, the parties disagreed over whether that loss could have been avoided or at least mitigated. The Government maintained throughout that the applicant company could have purchased mussel seed from other operators. The applicant company disputed this. It pointed to the acceptance by the High Court that the purchase of mussel seed had been previously attempted and proven to be unviable, not least due to the additional cost involved, and submitted that this finding had not been overturned in the Supreme Court. For its part, the Court has noted the finding of the High Court on this particular point. As for the Supreme Court, while it is true that that finding was not expressly reversed, it lost its legal significance in light of the reasoning of the majority. The Court further notes that while the minority Supreme Court judgment adverted to the High Court's finding in this respect, it also referred to difficulties with the evidence and figures, and referred to the fact that the applicant company's 2008 accounts recorded significant expenditure on mussel seed, for which different and contrasting explanations were given in the High Court. The minority therefore conceded that, had liability been established, it would have been impossible for the Supreme Court to assess the damages properly attributable to the applicant company.

133. There was further disagreement between the parties over whether it would have been feasible for the applicant company to fish mussel seed at some other location, as its authorisation would have allowed it to do. The respondent State pointed to authorisations received by other Castlemaine operators to fish seed outside the harbour. It appears that this particular point was not raised before the domestic courts, which did not consider it in their reasoning.



134. In light of the above, while the impugned interference had an appreciable adverse impact on the applicant company's business, the Court is not in a position to find, as an established fact, that the applicant company's loss of profits in 2010 was the inevitable and immitigable consequence of the temporary closure of the harbour in 2008.

135. It must also be recalled that the applicant company's activities were not completely interrupted in 2008. The transplanting and harvesting of mussels within the harbour were permitted to continue, with the result that the applicant company's profits in 2008 were not affected.

136. The Court further observes that while it appears that the State did not bring the situation at Castlemaine harbour fully into compliance with the Directive until at least 2011, when the appropriate assessment for the site was completed, it succeeded, following sustained negotiations, in obtaining the agreement of the Commission to allow mussel seed fishing to resume at a much earlier stage, namely from 5 October 2008. While this did not avoid the delayed loss in relation to 2008, the following year the applicant company was able to resume its usual activities, and, as shown in the accounts submitted as part of its claim for just satisfaction, to earn a normal level of profit in 2011. As already noted, the difficulties with mussel seed fishing that it encountered in 2010 had another cause, namely the failure to acquire the necessary permit on time ... They do not form part of the present complaint.

137. The burden borne by the applicant company must be weighed against the general interest of the community.

138. The Court has already accepted that the aims pursued by the impugned interference were legitimate (see paragraph 109 above). As it has often stated in its case-law, environmental protection policies, where the community's general interest is pre-eminent, confer on the State a margin of appreciation that is greater than when exclusively civil rights are at stake ... In implementing such policies, the State may, in particular, have to intervene in the sphere of public property and even, in certain circumstances, foresee a lack of compensation in a number of situations falling within the control of the use of property ... As the Court has held, where a measure controlling the use of property is in issue, the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved but is not of itself sufficient to constitute a violation of Article 1 of Protocol No. 1 ...

139. The applicant company blamed the domestic authorities for not having correctly apprehended their obligations under Article 6(3) of the Habitats Directive. In the Court's view, however, the fact that the respondent State was found not to have fulfilled its obligations under EU law should not be taken, for the purposes of Article 1 of Protocol No. 1, as diminishing the importance of the aims of the impugned interference, or as lessening the weight to be attributed to them. The Court refers in this respect to the remarks made in the two majority judgments of the Supreme Court underlining that the Minister had an overarching legal duty to comply with EU law, and that the Minister's duty of care was owed to the wider community to protect the environment (see paragraphs 45 and 48 above). Furthermore, while the introduction of infringement actions against several EU Member States by the European Commission in its capacity as guardian of the EU Treaties might have been a sign that the finding of some form of infringement might have been expected in relation to the respondent State, the fact remains that the burden of proof lay with the Commission, that in several respects the infringement alleged was highly contested, with two other Member States intervening in support of the respondent State,

and that as regards certain allegations the Commission did not succeed. Until the CJEU handed down its judgment it is difficult to see how the respondent State could have known of the extent and consequences of the infringement thereby established. It also emerges from the infringement judgment that as from the pre-contentious phase of the proceedings the respondent State had sought to embark upon an SPA classification and reclassification programme ...

140. Although the applicant company maintained that it should have been possible to secure permission to open the harbour in August 2008, the Court points out that in September 2008 both the Commission and the NPWS still considered that additional studies and clarifications were needed ... It can therefore be inferred that, contrary to the view of the applicant company, the studies and documents in existence at that point in time were not sufficient to allay concerns. The Court sees no basis to second-guess the technical assessment of these qualified authorities. Nor does it see how the possibility of making representations, which the applicant company complained had been denied to it, could have led to a more favourable or speedier outcome. As indicated by the Government, the domestic authorities, who were aware of the particular difficulties at Castlemaine harbour, prioritised that site, using it as a pilot to develop interim procedures that were accepted by the Commission and then applied more widely. Thus it was the only affected sea-based site that was permitted to open for mussel seed fishing in 2008. Due to the continuing efforts of the domestic authorities towards the end of 2008 and in 2009, and to the commitments given about further steps towards compliance, the Commission agreed to the opening of the harbour in that second year, which, as noted above, enabled the applicant company to operate at its normal level.

141. The applicant company also contended that the environmental assessments eventually carried out in compliance with the respondent State's EU obligations demonstrated that the type of blanket ban that was imposed in the summer of 2008 was not necessary. However, as the unanimous Supreme Court judgment on the absence of legitimate expectation found, the Minister was required, as a matter of EU law, to be concerned not with unproven risk but rather with proven absence of risk ...

142. While the applicant company was thus critical of the compliance strategy pursued by the domestic authorities, it must also be recalled that the repercussions of the CJEU judgment were not limited to the applicant company and to Castlemaine harbour. One of the Supreme Court judges in the majority on the question of operational negligence referred to approximately 150 Natura surveys that needed to be carried out in the period 2008-2010. Another mentioned 140 sites around the State where traditional activities of different kinds were being carried out in breach of EU law, including about forty sea-based sites. In June 2008, Castlemaine was one of twenty-four sites where mussel seed fishing was temporarily prohibited. The situation, affecting a State with a 7,100 km coastline (see case C-418/04, at paragraph 68) was thus national in dimension, and needed to be addressed at that level. Achieving compliance on this wide scale, and within an acceptable timeframe, with the respondent State's obligations under EU environmental law can certainly be regarded as a matter of general interest of the community, attracting a wide margin of appreciation for the domestic authorities.

143. Although the applicant company saw an anomaly, and even arbitrariness, in the fact that one type of activity (mussel seed fishing) was prohibited while another similar activity (the harvesting of mature mussels) was not, the Court considers that it was first and foremost for the domestic authorities, within their margin of appreciation, to decide the nature and extent of the measures

required. It was clear from the CJEU judgment that the previous practice in the aquaculture sector was not, without the appropriate assessments which the CJEU had decided had to be prior assessments, in compliance with EU law. The Court would add that the fact that a partial restriction was applied to commercial activities in the harbour, as opposed to a total one, was to the benefit rather than the detriment of the applicant company.

*(iii) Conclusion*

144. The essential grievance in this case is that the loss of profit incurred by the applicant company in 2010 went uncompensated. As pointed out by the Supreme Court, the alleged tort the applicant complained of did not derive from a *Francovich* breach of EU law. Before this Court, however, it sought to establish via Article 1 of Protocol No. 1 State liability for damage allegedly caused by measures adopted to correctly, albeit belatedly, implement EU law. The Court has taken into consideration the fact that the applicant company was not required to cease all of its operations in 2008, and that in 2009 it was able to resume its usual level of business activity, thanks to the concessions that the authorities had obtained from the Commission by that stage. It has recognised the weight of the objectives pursued, and the strength of the general interest in the respondent State in achieving full and general compliance with its obligations under EU environmental law. It is not persuaded that the impugned interference in this case constituted an individual and excessive burden for the applicant company, or that the respondent State failed in its efforts to find a fair balance between the general interest of the community and the protection of individual rights.

145. Consequently, there has not been a violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Article 1 of Protocol No. 1 and Article 6 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 1.

\* \* \*

## **11. Bursa Barosu Başkanlığı and Others v. Turkey (European Court of Human Rights, Chamber, 2018).**

*The following is from the Press Release, issued by the Registrar of the Court, ECHR 221 (2018) 19.06.2018.*

In today's **Chamber** judgment in the case of **Bursa Barosu Başkanlığı and Others v. Turkey** (application no. 25680/05) the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 6 § 1 (right to a fair hearing)** of the European Convention on Human Rights. The case concerned the failure to enforce numerous judicial rulings setting aside administrative decisions authorising the construction and operation of a starch factory on farmland in Orhangazi (a district of Bursa) by a US company (Cargill). The Court declared the application admissible for only six of the applicants. The Court found in particular that, by refraining for several years from taking the necessary measures to comply with a number of final and enforceable judicial decisions, the national authorities had deprived the applicants of effective judicial protection

### **Principal facts**

The applicants are Bursa Barosu Başkanlığı (Bursa Bar Association) and the Association for the Protection of Nature and the Environment (based in Bursa, Turkey), together with 21 individuals, Turkish nationals, who were born between 1947 and 1980 and who live in Bursa.

The company Cargill obtained an investment authorisation in 1997, then in June 1998 a building permit for the construction of a starch factory on farmland. In parallel the authorities amended the land-use plan on a number of occasions to allow the factory to be built. Other building permits were issued, together with an authorisation for waste production and management which was cancelled in 2004.

Between 1998 and 2000 the starch factory was built, in spite of the annulment by the Bursa Administrative Court and the Supreme Administrative Court of the numerous amendments to the land-use plan, as well as the suspension and/or annulment of various building permits issued by the Council of Ministers. Those decisions, which followed appeals by some of the applicants, were not enforced by the authorities. Currently the factory, which started production in 2000, is still operating.

In 2005 some of the applicants brought an action for damages for failure to enforce the judicial decisions. They partly won their case in April 2009 when the District Court ordered the Mayor of Gemlik to pay them compensation for non-pecuniary damage. That court, however, dismissed the applicants' claims against the Prime Minister and the Civil Works Minister. The applicants appealed to the Court of Cassation, which found that the Administrative Court judgments had not been duly enforced, even though the Prime Minister, the Civil Works Minister and the Mayor could have seen to this. But the District Court refused, a number of times, to follow the Court of Cassation's ruling. Those proceedings are still pending.

In 2007 and 2008 two legislative amendments to the Land Protection and Use Bill were tabled by the Government in the National Assembly to rectify the situation of farmland used for non-agricultural activities. The Constitutional Court validated the second amendment (adopted on 26 March 2008). That enabled Cargill to continue its activities in spite of the final court decisions delivered since 1998 and still not enforced to date.

### **1) Complaints, procedure and composition of the Court**

Relying on Article 2 (right to life) of the Convention and Article 13 (right to an effective remedy), the applicants complained of the failure to enforce the decisions of the domestic courts and the length of the proceedings. The Court decided to examine those complaints under Article 6 (right to a fair hearing) alone. They also complained of a breach of their rights under Article 2 (right to life) and Article 8 (right to respect for private and family life).

The application was lodged with the European Court of Human Rights on 1 July 2005.

### **2) Decision of the Court**

#### **a) Article 6 § 1 (right to a fair hearing)**

**1. Admissibility:** The Court found that the application was admissible in respect of six applicants (Ali Arabacı, Ali Rahmi Beyreli, Nadir Erol, Levent Geçelli, Mustafa Özçelik and Yahya Şimşek), who had participated actively in the domestic proceedings seeking the annulment of the impugned administrative decisions and could claim to be victims, within the meaning of Article 34 (right of individual application) of the Convention, of the alleged violations of the Convention.

**2. Whether Article 6 of the Convention was applicable:** The Court took the view that Article 6 was applicable in the present case, as the dispute raised by the applicants had a sufficient connection with a “civil right” which they were entitled to claim. They had relied, among other things, on arguments concerning the harmful effects of the factory in question for the environment and the Court of Cassation, in its judgment of 26 May 2008, had acknowledged that they had a civil right.

#### **3. Merits**

**The Court found that at least from 12 January 1999 onwards and until 21 November 2008**, when the Governor of Bursa issued Cargill with a fresh permit to continue its operations, the judgments of the administrative courts had genuinely not been enforced. It noted in particular that the Court of Cassation, in its judgment of 21 November 2009, had found that the Prime Minister, the Civil Works Minister and the Mayor of Gemlik had not enforced the administrative court judgments even though they could have done so.

**As to the phase subsequent to the legislative amendment of 26 March 2008**, which gave rise to the possibility of rectifying the situation of farmland used for non-agricultural purposes, the applicants had brought an action for annulment in the administrative courts, but the Court found that it was not necessary to speculate on the outcome of those proceedings. Nevertheless, the Court observed that the Court of Cassation had criticised the letter signed by the Prime Minister informing the company Cargill that fresh attempts had been made to establish an administrative and legal basis for the pursuit of its operations, in spite of the subsequent invalidation, with final effect, of the investment authorisation in respect of the factory. The amendment in question also meant that the factory had been able to carry on under fresh authorisations issued on this new basis. In this connection, the Court reiterated that one of the fundamental elements of the rule of law was

the principle of legal certainty, whereby a final judicial solution to any dispute should not be called into question. The legislative amendment made it possible to render devoid of effect many final judicial decisions which had not yet been enforced. Consequently, the Court found that, in refraining for several years from taking the necessary measures to comply with a number of final and enforceable judicial decisions, the national authorities had deprived the applicants of effective judicial protection. **There had therefore been a violation of Article 6 § 1.**

**a. Other Articles**

The Court found, by six votes to one, that it did not need to examine the admissibility and merits of the complaints under Articles 2 (right to life) or 8 (right to respect for private and family life).

**1) Article 41 (just satisfaction)**

No award by way of just satisfaction had been sought at the time when notice of the application was given to the Government.

**3. Separate opinion**

Judge Lemmens expressed a separate opinion (partly dissenting and partly concurring) which is annexed to the judgment.

\* \* \*



## 12. Netherlands v. Urgenda Foundation, (The Hague Court of Appeal, 2018).

*The Court upheld a lower court judgment ordering the State to achieve a level of reduction of greenhouse gas emissions by end-2020 that is more ambitious than envisioned by the State in its policy. The Court provides a useful overview of legal efforts made at the national, regional, and international levels to mitigate and/or adapt to climate change. The Court concluded that the State had failed to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end-2020 and that, given the clear indications that the current measures will be insufficient to prevent a dangerous climate change, even leaving aside the question whether the current policy will actually be implemented, measures have to be chosen, also based on the precautionary principle, that are safe, or at least as safe as possible. The Court held that although the State did not enjoy a margin of appreciation on the question of whether to adopt a policy of emissions reductions of at least 25% by end-2020, it does have this margin in choosing the measures it takes to achieve the target.*

Disclaimer: The translation of this judgment on appeal is solely intended to provide information. The text of the translation is an unofficial translation. Liability cannot be claimed for possible errors and/or omissions in this translation. The Dutch text of the judgment is the only authentic and formal text (ECLI-number: [ECLI:NL:GHDHA:2018:2591](#))

### ... ASSESSMENT OF THE APPEAL

#### *Introduction of the dispute and the factual framework*

1. In brief, the proceedings on appeal in this climate case concern Urgenda's claim to order the State to achieve a level of reduction of greenhouse gas emissions by end-2020 that is more ambitious than envisioned by the State in its policy.
3. ... (3.1) Urgenda ('Urgent Agenda') is a citizens' platform with members from various domains in society. The platform is involved in the development of plans and measures to prevent climate change. Urgenda is a foundation whose purpose, according to its by-laws, is to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands.

[Scientific history of climate change omitted]. ...

(3.6) It follows from the above that the worldwide community acknowledges that something needs to be done to reduce the emission of greenhouse gases and of CO<sub>2</sub> in particular. However, the urgency of this is assessed differently within the global community. In this context, various treaties, agreements and arrangements have been drawn up in the UN context, within the EU and by the Netherlands, the principal of which are extensively formulated in the contested judgment in legal grounds 2.34 through to 2.78. Global warming can be prevented or reduced by ensuring that less greenhouse gases are emitted into the atmosphere. This is known as 'mitigation'. In addition, measures can be taken to counter the consequences of climate change, including raising dikes to protect low-lying areas. This is called 'adaptation'.

(3.7) The State supports the goal of drastically reducing CO<sub>2</sub> emissions and, eventually, ending such emissions entirely. The European Council has decided that the EU must achieve a

reduction of greenhouse gas emissions of 20% by 2020, of at least 40% in 2030 and 80-95% in 2050, *each relative to 1990*. For the Netherlands, this translates to a minimum reduction target of 16% for the non-ETS sector and 21% for the ETS sector by 2020 (ETS = European Emissions Trading System), see legal ground 4.26 of the contested judgment and legal ground 17 of this ruling. During the plea hearing in the first instance, the State declared that it expected both sectors to have achieved a reduction of 14% to 17% by 2020, relative to 1990. In its most recent Coalition Agreement (2017), the State announced to pursue a national emission reduction of at least 49% in 2030 relative to 1990. In 2017, CO<sub>2</sub> emissions in the Netherlands had declined by 13% relative to 1990.

(3.8) Urgenda is of the opinion that the reduction efforts, at least those covering the period up to 2020, are not ambitious enough and claimed in the first instance – among other things – that the State be ordered to achieve a reduction so that the cumulative volume of the greenhouse gas emissions will have been reduced by 40%, or at least by 25%, by end-2020, relative to 1990.

(3.9) In brief, the district court ordered a reduction of at least 25% as of end-2020 relative to 1990 and rejected all other claims of Urgenda. Urgenda did not put forward grounds of appeal against the rejection of the other claims nor against the rejection of a reduction of more than 25%. This means that in these appeal proceedings, a reduction of more than at least 25% by 2020 cannot be awarded and that the other claims of Urgenda are no longer in dispute.

### ***Treaties, international agreements, policy proposals and actual situation***

#### **Global level**

##### *Background*

4. In 1972, the United Nations Conference on the Human Environment was held in Stockholm, which culminated into the Declaration of the United Nations Conference on the Human Environment, which laid down the basic principles of international environmental policy and environmental law. As a result of this conference, the United Nations Environment Program (UNEP) was established. The UNEP and the World Meteorological Organisation (WMO) set up the Intergovernmental Panel on Climate Change (IPCC) in 1988, under the auspices of the UN. The IPCC aims to gain insight into the various aspects of climate change based on published scientific research. The IPCC publishes a report on current climate science and climate developments. The Court shall discuss two IPCC reports, AR4 and AR5, below.

##### *The UN Framework Convention on Climate Change*

5. In 1992, the United Nations Framework Convention on Climate Change was concluded, which has since entered into force and has been ratified by the majority of the worldwide community, including the Netherlands. The Convention seeks to protect the Earth's eco-systems and mankind and envisions a sustainable development for the protection of current and future generations. The preamble contains the following underlying consideration, among other things: "Determined to protect the climate system for present and future generations".

6. Article 2 of this Convention reads as follows:

*"The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to*

*climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”*

7. Article 3 mentions several principles (the principle of equity, the precautionary principle and the sustainability principle) by which the parties are guided in achieving this objective.

8. In brief, the parties to the convention undertake:

- to protect the climate system, also in the interest of future generations, based on the principle of equity and in accordance with their responsibilities and capabilities, giving full consideration to developing countries that are particularly vulnerable to climate change or that would have to bear a disproportionate burden under the Convention;
- to take precautionary measures to anticipate the causes of climate change and to prevent these causes as much as possible, and not to postpone such measures citing a lack of full scientific certainty as a reason.

9. In Article 4, the Convention parties are divided into two groups, the so-called Annex I countries (the developed countries, including the Netherlands) and the Annex II countries (the developing countries). Taking into account their per capita emissions, the long history of their emissions and their resource bases, the Annex I countries must take the lead in fighting climate change and its adverse effects. They have committed to reducing greenhouse gas emissions. They must periodically report on the measures they have taken with which they aim to return, either individually or jointly, to the 1990 level of greenhouse gas emissions. A group of independent experts shall judge these reports.

10. In Article 7, the Conference of the Parties (hereinafter: COP) is established, which generally convenes every year (the so-called Climate Conference). The COP is the supreme decision-making body of the Convention, although the COP decisions are not always legally binding.

11. Several COPs (Climate Conferences) have been held, such as:

- \* in 1997 in **Kyoto** (COP 3), during which the Kyoto Protocol was adopted, an agreement between a number of Annex I countries, including all then EU Member States (**Kyoto Protocol**), containing, among other things, the agreed on emission reductions for each Annex I country for the period up to 2012;
- \* in 2007 in **Bali** (COP 13), during which the **Bali Action Plan** was adopted which laid the basis for agreements relating to mitigation, adaptation, technological cooperation and financial support. The plan recognises the need for drastic reductions for the Annex I countries with detailed references to AR4, including to a table which states that the Annex I countries have to achieve an emission reduction of 25-40% by 2020 relative to 1990 in order to stay below the 2° C warming target;
- \* in 2009 in **Copenhagen** (COP 15), during which no agreement could be reached about a follow up to or continuation of the Kyoto Protocol;
- \* in 2010 in **Cancún** (COP 16), which included a recognition based on the scientific findings in the IPCC reports – including, among other things, a reference in the preamble to the urgency of a drastic emission reduction – of the long-term target for global warming not exceeding 2° C, with a possible strengthening of the goal to 1.5 °C. The COP also expressed that the Annex I countries should continue to lead the way in fighting climate change and that this requires Annex I countries to reduce their greenhouse gas emissions, *en groupe*, by 25-40% in 2020 relative to 1990. The COP also urged the Annex I countries to step up their level of ambition, either

individually or jointly, relative to the earlier commitments of the Annex I countries (the so-called **Cancún pledges**). For the EU, the Cancún pledges signified a reduction of 20% by 2020 relative to 1990, with the offer to achieve a reduction target of 30% if the other developed countries would commit to similar reduction targets, among other things.

\* in 2011 in **Durban** (COP 17) with a joint statement about the substantial difference between mitigation plans of the countries involved and about scenarios with a ‘likely’ (> 66%) chance of achieving the 2° C/1.5° C target and an agreement to conclude a new, legally binding climate treaty or protocol no later than in 2015, making *inter alia* a reference to the desired reductions for Annex I countries by 2020 of 25-40% .

\* in 2012 in **Doha** (COP 18), during which Annex I countries were called upon to increase their reduction targets to at least 25-40% for 2020. During this COP, the **Doha Amendment** was adopted, as a follow-up to the Kyoto Protocol, with emission reduction obligations up to 2020. The EU once again committed to a reduction of 20% by 2020, with the offer to achieve a reduction target of 30% by 2020 provided that – in brief – the other developed countries do the same. This condition has not been met and the Doha Amendment has not entered into force (yet);

\* in 2013: in **Warsaw** (COP 19), with a call to raise the target in the period up to 2020, and for Annex I countries to align their reduction targets with the target of 25-40% by 2020 as reconfirmed in Doha;

\* in 2015: in **Paris** (COP 21) (the Paris Climate Conference), which led to the **Paris Agreement** (see also legal ground 15);

\* in 2016: in **Marrakech**, with a call for more ambition and a more intensive cooperation to close the gap between the current emission targets and the Paris Agreement targets as well as for further climate actions well before 2020;

\* in 2017: in **Bonn** (COP 23), where the need for ‘enhanced action’ in the period up to 2020 was acknowledged.

### *The IPCC*

12. In the context of these proceedings, the following IPCC reports are particularly important:

AR4 (IPCC Fourth Assessment Report, 2007):

This report describes that global warming of more than 2° C results in a dangerous and irreversible climate change. To have a chance of more than 50% (‘more likely than not’) that the 2° C threshold is not exceeded, the report states that the concentration of greenhouse gases in the atmosphere must stabilise at a level of about 450 ppm in 2100 (hereinafter: the ‘450 scenario’). Following an analysis of several reduction scenarios, the IPCC arrives at the conclusion in this report (see Box 13.7) that in order to achieve the 450 scenario, the total emission of greenhouse gases by Annex I countries, including the Netherlands, in 2020 must be 25-40% lower than in 1990. This report also describes that mitigation is generally better than adaptation.

AR5 (IPCC Fifth Assessment Report, 2013-2014):

According to this report, there is a ‘likely’ (> 66%) chance that the rise of the global temperature can stay below 2° C when the concentration of greenhouse gases in the atmosphere in 2100 stabilises at about 450 ppm. This scenario seems more advantageous than the projection of AR4, in which the chances of achieving the 2° C target at a concentration level of 450 ppm is assessed at ‘more likely than not’ (> 50%). However, it should be noted that in 87% of the scenarios

included in the AR5 assessment assumptions have been included with respect to negative emissions, that is to say the extraction of CO<sub>2</sub> from the atmosphere. AR4 does not assume negative emissions. Stabilisation at about 500 ppm in 2100 gives a more than 50% chance ('more likely than not') to achieve the 2° C target. Only a limited number of studies has looked at scenarios that lead to a limitation of global warming to 1.5° C. Such scenarios assume concentrations of less than 430 ppm in 2100.

### *The UNEP*

13. Since 2010, the UNEP has issued annual reports about the so-called 'emissions gap', the difference between the desired emission level in a certain year and the reduction targets to which the countries concerned committed. In the 2013 report, UNEP notes, for the third time running, that commitments are falling short and that the emission of greenhouse gases increases rather than decreases. The UNEP concludes that the emission targets of the Annex I countries combined are not enough to achieve the 25-40% reduction in 2020, deemed necessary in AR4, and that therefore it is becoming less likely that by 2020 the emissions will be low enough to achieve the 2° C target at the least cost. Although later reduction actions might be enough to eventually achieve the same temperature targets, they would at least be more difficult, more expensive and more risky, according to the UNEP (see quotes in the judgment, legal grounds 2.29 through to 2.31).

14. The 2017 UNEP report states that, in light of the Paris Agreement, increased pre-2020 mitigation actions are more urgent than ever. The UNEP also remarks that if the emissions gap is not bridged by 2030, achieving the 2° C target is extremely unlikely. Even if the reduction targets underlying the Paris Agreement are fully implemented, 80% of the carbon budget corresponding with the 2° C target will be used up by 2030. Starting from a 1.5 ° C target means that the carbon budget will be completely used up by then, which is why the UNEP calls for more ambitious targets for 2020.

### *The Paris Agreement*

15. The Paris Agreement, which was signed on 22 April 2016 and entered into force on 4 November 2016 and covering the period from 2020 onwards, applies another system than the UN Climate Change Convention. Each country is brought to account regarding their individual responsibility (bottom-up approach). The Convention parties no longer strive to conclude global emission agreements. In brief, the following was laid down:

- Global warming must remain well below the 2° C limit relative to pre-industrial levels, while aiming for a limit of 1.5 ° C.

- The parties have to draw up national climate plans, or nationally determined contributions (NDCs), which have to be ambitious and whose ambition level must be raised with each new plan.

- The parties have expressed grave concerns that the current NDCs are insufficient to limit the average temperature rise to 2° C relative to pre-industrial levels.

- The parties call for an intensification and strengthening of reduction efforts up to 2020 in order to achieve the 2030 targets (40% reduction).

- The use of fossil fuels must be ceased soon, as this is a major cause of excessive CO<sub>2</sub> emissions.



- Rich countries are expected to financially support developing countries in reducing their emissions.
- From 2020 onwards, there will no longer be a distinction between Annex I and Annex II countries.

### **The European Union (EU)**

16. Article 191 TFEU contains the environmental objectives of the EU (cited in legal ground 2.53 of the judgment). In order to implement its environmental policy, the EU has established many directives, including the so-called 2003 ETS Directive (Directive 2003/87/EC), subsequently amended (see legal ground 2.58 ff. of the contested judgment).

17. When the ETS Directive was amended in 2009, the European Council communicated its objective of achieving “*an overall reduction of more than 20%, in particular in view of the European Council’s objective of a 30% reduction* [Court: of EU emissions of greenhouse gases relative to 1990] *by 2020, which is considered scientifically necessary to avoid dangerous climate change (...)*”. This objective is detailed in the Directive, in which the reduction commitment of 30% by 2020 is linked to the condition – put briefly – that other countries join in. In broad terms, the ETS system can be described as follows. Companies in the EU that fall under the ETS system, meaning energy-intensive companies such as those in the energy sector, may only emit greenhouse gases if they surrender emission allowances. Such allowances may be purchased, sold or stored. The total amount of greenhouse gases ETS companies are permitted to emit in the 2013-2020 period will decrease annually by 1.74% until a reduction of 21% has been achieved by 2020, relative to 2005.

18. Since then, the EU has committed to an emission reduction of 20% for 2020, of at least 40% for 2030 and of 80-95% for 2050, each relative to 1990, as has also been found in legal ground 3.7. The EU has decided, based on the 2009 Effort Sharing Decision (Decision 406/2009/EC), that the 20% reduction for 2020 has the effect for the non-ETS sectors that the Netherlands will have to achieve an emission reduction of 16% relative to 2005. As has been noted, the ETS sector must adhere to the EU-wide reduction of 21% relative to 2005. According to the current forecasts, the EU as a whole is expected to achieve an emission reduction of 26-27% in 2020, relative to 1990.

[Extensive survey of the situation in the Netherlands omitted]

### ***Urgenda’s claim and its basis (in brief)***

... 28. ... Urgenda believes that the State is doing too little to limit greenhouse gas emissions and that it should assume its responsibility. Urgenda believes that much is at stake (dangerous climate change) and that without swift intervention the world is headed for a planet that will largely be inhabitable for a substantial portion of the world population, and which cannot or hardly be made inhabitable due to inertia in the climate system. In this context, Urgenda refers to authoritative publications, mainly AR4 and AR5 of the IPCC, which have been extensively set out in the judgment.

Urgenda acknowledges that this is a global problem, that the State can only intervene in the emissions from Dutch territory and that in absolute terms the Dutch emissions are minor and that



the reduction it has claimed represents a drop in the ocean on a global scale, considering that the climate problem is a worldwide issue. On the other hand, or so Urgenda continues to argue, the Netherlands is a rich and developed country, an Annex I country in terms of the UN Climate Convention, that has profited from the use of fossil energy sources since the Industrial Revolution, and continues to profit from them today, that the Netherlands is one of the countries with the highest per capita greenhouse gas emissions in the world — mainly of dangerous CO<sub>2</sub>, which lingers long in the atmosphere — and that the signing and ratification of the UN Climate Convention by the Netherlands should not be a mere formality. For reasons of equity, the Convention stipulates that the developed countries should take the lead (Article 3) at a national level. Furthermore, Urgenda points out that up to 2011 the Netherlands had taken as a starting point its own formulated reduction target of 30% by end-2020. This was then reduced to an – EU-wide – reduction target of only 20% by end-2020, apparently due to tough political decision-making. However, the State failed to specify any scientific (climate science) arguments for this reduction. Meanwhile, the Paris Agreement has been established, in which the Netherlands has committed to achieve a reduction of greenhouse gas emissions in order to stay well below the 2° C limit for global warming. The Netherlands also expressed its intention to aim for a global warming limit of 1.5° C and called for a strengthening of reduction efforts up to 2020. The State cannot shirk its responsibility with the argument that in absolute terms its emissions are minor. Considering the major risks associated with uncontrollable climate change, the duty of care of the State requires it to take measures forthwith.

29. In view of all of the above, and particularly the State's 'procrastination', meaning its failure to commit to a greater emission reduction by end-2020, Urgenda is of the opinion that the State has acted unlawfully towards it, because such conduct violates proper social conduct and is contrary to the positive and negative duty of care expressed in Articles 2 (the right to life) and 8 ECHR (the right to family life, which also covers the right to be protected from harmful environmental influences of a nature and scope this serious).

...

#### ***Assessment:***

#### ***Articles 2 and 8 ECHR and the State's plea of (partial) inadmissibility***

34. The Court shall first assess Urgenda's ground of appeal in the cross-appeal. In conjunction with this, the Court shall also consider the State's plea of Urgenda's inadmissibility, explained in ground of appeal 1 in the appeal on the main issue, insofar as Urgenda also acts on behalf of individuals and future generations outside the Netherlands. Both issues are related to the extent that their assessment relies on regulations of a predominately procedural nature, namely Article 34 ECHR and Book 3 Section 305a of the Dutch Civil Code, respectively.

35. ... The ECtHR has explained [Article 34] as follows (in brief), namely that 'public interest actions' are not permitted and that only the claimant whose interest has been affected has access to the ECtHR. The ECtHR has not given a definite answer about access to the Dutch courts. This is not possible, as this falls within the scope of the Dutch judges. This means that Article 34 ECHR cannot serve as a basis for denying Urgenda the possibility to rely on Articles 2 and 8 ECHR in these proceedings.

36. Dutch law is decisive in determining access to the Dutch courts – in the case of Urgenda in these proceedings Book 3 Section 305a of the Dutch Civil Code in particular, which provides for class actions of interest groups. As individuals who fall under the State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda may

also do so on their behalf under Book 3 Section 305a of the Dutch Civil Code. Urgenda's ground of appeal in the cross-appeal is therefore well-founded....

***Assessment:***

***The asserted unlawfulness***

39. Urgenda has based its assertion that the State has acted unlawfully towards it on Book 6 Section 162 of the Dutch Civil Code and Articles 2 and 8 ECHR. The Court shall first assess Urgenda's invocation of Articles 2 and 8 ECHR.

**Articles 2 and 8 ECHR**

40. The interest protected by Article 2 ECHR is the right to life, which includes environment-related situations that affect or threaten to affect the right to life. Article 8 ECHR protects the right to private life, family life, home and correspondence. Article 8 ECHR may also apply in environment-related situations. The latter is relevant if (1) an act or omission has an adverse effect on the home and/or private life of a citizen and (2) if that adverse effect has reached a certain minimum level of severity.

41. Under Articles 2 and 8 ECHR, the government has both positive and negative obligations relating to the interests protected by these articles, including the positive obligation to take concrete actions to prevent a future violation of these interests (in short: a duty of care). A future infringement of one or more of these interests is deemed to exist if the interest concerned has not yet been affected, but is in danger of being affected as a result of an act/activity or natural event. As regards an impending violation of an interest protected under Article 8 ECHR, it is required that the concrete infringement will exceed the minimum level of severity (see, among other examples, *Öneryildiz/Turkey* (ECtHR 30 November 2004, no. 48939/99), *Budayeva et al./Russia* (ECtHR 20 March 2008, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), *Kolyadenko et al./Russia* (ECtHR 28 February 2012, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05), and *Fadeyeva/ Russia* (ECtHR 9 June 2005, no. 55723/00).

42. Regarding the positive obligation to take concrete actions to prevent future infringements – which according to the claim is applicable here – the European Court of Human Rights has considered that Articles 2 and 8 ECHR have to be explained in a way that does not place an 'impossible or disproportionate burden' on the government. This general limitation of the positive obligation, which applies here, has been made concrete by the European Court of Human Rights by ruling that the government only has to take concrete actions which are reasonable and for which it is authorised in the case of a real and imminent threat, which the government knew or ought to have known. The nature of the (imminent) infringement is relevant in this. An effective protection demands that the infringement is to be prevented as much as possible through early intervention of the government. The government has a 'wide margin of appreciation' in choosing its measures.

43. In short, the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial

activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. In light of this, the Court shall assess the asserted (imminent) climate dangers.

### **Dangerous climate change? Severity of the situation.**

44. The Court takes as a starting point the facts and circumstances, some of which detailed above, established in the proceedings. For the sake of clarity, the Court lists the most important elements below:

- There is a direct, linear link between anthropogenic emissions of greenhouse gases, partially caused by combusting fossil fuels, and global warming. Emitted CO<sub>2</sub> lingers in the atmosphere for hundreds of years, if not longer.
- Since pre-industrial times, the Earth has warmed by about 1.1° C. Between 1850 and 1980, the level of global warming was about 0.4° C. Since then and in under 40 years' time, the Earth has warmed further by 0.7 ° C, reaching the current level of 1.1° C (see the diagram 'Global warming 1880-2017 (NASA)', the third slide shown by Urgenda during its oral arguments). This global warming is expected to accelerate further, mainly because emitted greenhouse gases reach their full warming effect only after 30 or 40 years.
- If the Earth warms by a temperature of substantially more than 2° C, this will cause more flooding due to rising sea levels, heat stress due to more intensive and longer periods of heat, increasing prevalence of respiratory diseases due to worsened air quality, droughts (accompanied by forest fires), increasing spread of infectious diseases and severe flooding as a result of heavy rainfall, disruption in the food production and potable water supply. Ecosystems, flora and fauna will also be affected, and biodiversity loss will occur. The State failed to challenge Urgenda's assertions (by stating reasons) regarding these issues nor did it contest Urgenda's assertion that an inadequate climate policy in the second half of this century will lead to hundreds of thousands of victims in Western Europe alone.
- As global warming continues, not only the severity of its consequences will increase. The accumulation of CO<sub>2</sub> in the atmosphere may cause the climate change process to reach a 'tipping point', which may result in abrupt climate change, for which neither mankind nor nature can properly prepare. The risk of reaching such 'tipping points' increases 'at a steepening rate' with a temperature rise of between 1 and 2 °C (AR5 p. 72).
- On a global scale, greenhouse gas emissions continue to rise. See, among other things, slide 2 shown by Urgenda during its oral arguments: European Database for Global Atmospheric Research (EDGAR) 2017, '*Global greenhouse gas emissions, per type of gas and sources, including LULUCF*').
- The emission of CO<sub>2</sub> in the Netherlands also remains as high as ever. The slight decline in greenhouse gas emissions in the Netherlands can only be attributed to the drop in emissions of other, less harmful, greenhouse gases (see slide 16 shown by Urgenda in its oral arguments). CO<sub>2</sub> is the main greenhouse gas and is responsible for 85% of all greenhouse gas emissions in the Netherlands.
- Even between the parties there is a consensus that the global temperature rise must at least be kept well below 2° C while a 'safe' temperature rise should not exceed 1.5° C, each relative to pre-industrial levels.
- In order to achieve the 2° C target, the concentration of greenhouse gases in the atmosphere may not exceed 450 ppm. To achieve the 1.5° C target (as set in the Paris Agreement), the global

concentration of greenhouse gases must be substantially lower, namely less than 430 ppm. The current concentration is about 401 ppm. This means that the concentration of greenhouse gases in the atmosphere may only rise slightly. Chances of reaching the 1.5° C target are now slim. Keeping global warming to well below 2° C, to which the Netherlands has also committed with the signing of the Paris Agreement, will at least require a considerable amount of effort.

- The longer it takes to achieve the necessary emission reduction, the greater the total amount of emitted CO<sub>2</sub> and the sooner the remaining carbon budget will have been used up (see also legal ground 4.32 of the contested judgement and the diagrams contained therein).

45. As is evident from the above, the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.

### **Is the State acting unlawfully by not reducing by at least 25% by end-2020?**

46. The end goal is clear and is not disputed between the parties. By the year 2100, global greenhouse gas emissions must have ceased entirely. Nor do the parties hold differing opinions as to the required interim target of 80-95% reduction relative to 1990 by 2050. And Urgenda endorses the reduction target of 49% relative to 1990 by 2030, as established by the government. The dispute between the parties focuses on the question if the State can be required to achieve a reduction of at least 25% relative to 1990 by end-2020. Urgenda is of the opinion that such a reduction is necessary to protect the citizens of the Netherlands against the real and imminent threats of climate change. But the State does not want to commit to more than the 20% reduction relative to 1990 by 2020, as agreed at the EU level. It has to be examined whether the State is acting unlawfully towards Urgenda by not reducing by at least 25% by end-2020 despite the real and imminent threats mentioned above. The following considerations are relevant in this context.

47. In the first place, the Court takes as a point of departure that the emission of all greenhouse gases combined in the Netherlands had dropped by 13%, relative to 1990, in 2017. Even if the new calculation method was not used for this (see legal ground 21 of this ruling), a significant effort will have to be made between now and 2030 to reach the 49% target in 2030; much more efforts than the limited efforts the Netherlands has undertaken so far. It is also an established fact that it is desirable to start the reduction efforts at as early a stage as possible in order to limit the total emissions in this period. Delaying the reduction will lead to greater risks for the climate. A delay would, after all, allow greenhouse gas emissions to continue in the meantime; greenhouse gases which linger in the atmosphere for a very long time and further contribute to global warming. In that context, the Court would like to point out to the warnings issued by the UNEP, cited in legal grounds 2.29 through to 2.31 of the judgment. See also the report of the PBL of 9 October 2017 (Exhibit 77 of the State) p. 60, where the PBL remarks that achieving the climate targets of the Paris Agreement not necessarily concerns achieving a low emission level in 2050, but rather and particularly achieving low cumulative emissions, considering the fact that each megaton of CO<sub>2</sub> which is emitted into the atmosphere in the short term contributes to global warming. An even distribution of reduction efforts over the period up to 2030 would mean that the State should achieve a substantially higher reduction in 2020 than 20%. An even distribution is also the starting point of the State for its reduction target of 49% by 2030, which has been derived in a linear fashion from the 95% target for 2050. If extrapolated to

the present, this would result in a 28% reduction by 2020, as confirmed by the State in answering the Court's questions.

48. In AR4, the IPCC concluded that a concentration level not exceeding 450 ppm in 2100 is admissible to keep the 2° C target within reach. The IPCC then concluded, following an analysis of the various reduction scenarios (in Box 13.7), that in order to reach this concentration level, the total greenhouse gas emissions in 2020 of Annex I countries, of which the Netherlands is one, must be 25-40% lower than 1990 levels. In AR5, the IPCC also assumes that a concentration level of 450 ppm may not be exceeded in order to achieve the 2° C target.

49. The State has argued that in AR5 multiple emission reduction pathways are presented with which this target may be reached. Based on this, the State is of the opinion that the district court was wrong to take a 25-40% reduction by 2020, as mentioned in AR4, as a starting point. The Court does not endorse the position of the State in this. As has been stated above by the Court (see legal ground 12), 87% of the scenarios presented in AR5 are based on the existence of negative emissions. In the report of the European Academies Science Advisory Council ('Negative emission technologies: What role in meeting Paris Agreement targets?'), entered into evidence by Urgenda as Exhibit 164, the following is noted about negative emissions:

*"(...)We conclude that these technologies [Court: negative emission technologies, or NETs] offer only limited realistic potential to remove carbon from the atmosphere and not at the scale envisaged in some climate scenarios (...)" (p. 1) "Figure 1 shows not only the dramatic reductions required, but also that there remains the challenge of reducing sources that are particularly difficult to avoid (these include air and marine transport, and continued emissions from agriculture). Many scenarios to achieve Paris Agreement targets have thus had to hypothesise that there will be future technologies which are capable of removing CO2 from the atmosphere." (p. 5)*

*"(...) the inclusion of CDR [Court: removal of CO2 from the atmosphere] in scenarios is merely a projection of what would happen if such technologies existed. It does not imply that such technologies would either be available, or would work at the levels assumed in the scenario calculations. As such, it is easy to misinterpret these scenarios as including some judgment on the likelihood of such technologies being available in the future." (p. 5)*

The State has failed to contest this by not providing adequate substantiation. Therefore, the Court assumes that the option to remove CO2 from the atmosphere with certain technologies in the future is highly uncertain and that the climate scenarios based on such technologies are not very realistic considering the current state of affairs. AR5 might thus have painted too rosy a picture, and it cannot be assumed outright that the 'multiple mitigation pathways' listed by the IPCC in AR5 (p. 20) can lead to the 2° C target. Furthermore, as asserted by Urgenda and not contested by the State by stating reasons, it is plausible that no reduction percentages as of 2020 were included in AR5, because in 2014 the focus of the IPCC was on targets for 2030. In this respect too, the report does not give cause to assume that the reduction scenario in AR4, which does not take account of negative emissions, is superseded and that today a reduction of less than 25-40% by 2020 would be sufficient to achieve the 2° C target. In order to assess whether the State has met its duty of care, the Court shall take as a starting point that an emission reduction of 25-40% in 2020 is required to achieve the 2° C target.

50. Incidentally, the 450-scenario only offers a more than 50% ('more likely than not') chance to achieve the 2° C target. A real risk remains, also with this scenario, that this target cannot be achieved. It should also be noted here that climate science has meanwhile



acknowledged that a safe temperature rise is 1.5° C rather than 2° C. This consensus has also been expressed in the Paris Agreement, in which it was agreed that global warming should be limited to well below 2° C, with an aim for 1.5° C. The ppm level corresponding with the latter target is 430, which is lower than the level of 450 ppm of the 2° C target. The 450-scenario and the identified need to reduce CO<sub>2</sub> emissions by 25-40% by 2020 are therefore not overly pessimistic starting points when establishing the State's duty of care.

51. The State has known about the reduction target of 25-40% for a long time. The IPCC report which states that such a reduction by end-2020 is needed to achieve the 2° C target (AR4) dates back to 2007. Since that time, virtually all COPs (in Bali, Cancun, Durban, Doha and Warsaw) have referred to this 25-40% standard and Annex I countries have been urged to align their reduction targets accordingly. This may not have established a legal standard with a direct effect, but the Court believes that it confirms the fact that at least a 25-40% reduction of CO<sub>2</sub> emissions as of 2020 is required to prevent dangerous climate change.

52. Finally, it is relevant noting that up to 2011 the Netherlands had adopted as its own target a reduction of 30% in 2020 (see legal ground 19 of this ruling). That was, as evidenced by the letter from the Minister of Housing, Spatial Planning and the Environment dated 12 October 2009, because the 25-40% reduction was necessary '*to stay on a credible track to keep the 2 degrees objective within reach*'. No other conclusion can be drawn from this than that the State itself was convinced that a scenario in which less than that would be reduced by 2020 was not feasible. The Dutch reduction target for 2020 was subsequently adjusted downwards. But a substantiation based on climate science was never given, while it is an established fact that postponing (higher) interim reductions will cause continued emissions of CO<sub>2</sub>, which in turn contributes to further global warming. More specifically, the State failed to give reasons why a reduction of only 20% by 2020 (at the EU level) should currently be regarded as credible, for instance by presenting a scenario which proves how – in concert with the efforts of other countries – the currently proposed postponed reduction could still lead to achieving the 2° C target. The EU itself also deemed a reduction of 30% for 2030 necessary to prevent dangerous climate change (see legal ground 17 of this ruling).

53. The Court is of the opinion that a reduction obligation of at least 25% by end-2020, as ordered by the district court, is in line with the State's duty of care. However, the State has put forward several arguments – almost all of which are summarised in legal ground 30 of this ruling – based on which it is of the opinion that it is nevertheless not obliged to take further reduction measures other than those it currently proposes. Insofar as not discussed above, the Court shall now assess these arguments.

### **Defences of the State**

54. The argument of the State that the ETS system stands in the way of the Netherlands taking measures to further reduce CO<sub>2</sub> emissions fails. The starting point is that Article 193 TFEU states that protective measures adopted under Article 192 TFEU do not prevent a Member State from maintaining and adopting more ambitious protection measures, provided that such measures are in line with the Treaties. ...

56. [The State's] argument falsely assumes that other EU Member States will make maximum use of the available emission allocation under the ETS system. Like the Netherlands, the other EU Member States have an individual responsibility to limit CO<sub>2</sub> emissions as far as possible. It cannot be assumed beforehand that other Member States will take less far-reaching



measures than the Netherlands. On the contrary, compared to Member States such as Germany, the United Kingdom, Denmark, Sweden and France the Dutch reduction efforts are lagging far behind. Moreover, Urgenda has argued, supported by reasons and on submission of various reports, including a report of the Danish Council on Climate Change (Exhibit U131), that it is impossible for a waterbed effect to occur before 2050 owing to the surplus of ETS allowances and the dampening effect over time of the ‘market stability reserve’. The State has failed to provide reasoning to contest these reports.

57. The State also pointed out the risk of ‘carbon leakage’, which the State understands to be the risk that companies will move their production to other countries with less strict greenhouse gas reduction obligations. The State has failed to substantiate that this risk will actually occur if the Netherlands were to increase its efforts to reduce greenhouse gas emissions before 2020. The same applies to the related assertion of the State that more ambitious emission reductions will undermine the ‘level playing field’ for Dutch companies. The State should have provided substantiation for these assertions, especially considering that other EU Member States are pursuing a stricter climate policy (see legal ground 26). Moreover, in light of among other things Article 193 TFEU, it is difficult to envisage without further substantiation, which is lacking, that not maintaining a ‘level playing field’ for Dutch companies would constitute a violation of a particular legal rule.

58. In this context, it is worth noting that the State itself has committed to reduce emissions by 49% in 2030, in other words, by a higher percentage than the one to which the EU has committed, for which these arguments are apparently not decisive.

59. The State has also argued that adaptation and mitigation are complementary strategies to limit the risks of climate change and that Urgenda has failed to appreciate the adaptation measures that the State has taken or will take. This argument also fails. Although it is true that the consequences of climate change can be cushioned by adaptation, but it has not been made clear or plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented with adaptation. ...

61. The State has also put forward that the Dutch greenhouse gas emissions, in absolute terms and compared with global emissions, are minimal, that the State cannot solve the problem on its own, that the worldwide community has to cooperate, that the State cannot be deemed the party liable/causer (‘primary offender’) but as secondary injuring party (‘secondary offender’), and this concerns complex decisions for which much depends on negotiations.

62. These arguments are not such that they warrant the absence of more ambitious, real actions. The Court, too, acknowledges that this is a global problem and that the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change.

63. The precautionary principle, a generally accepted principle in international law included in the United Nations Framework Convention on Climate Change and confirmed in the case-law of the European Court of Human Rights (*Tătar/Romania*, ECtHR 27 January 2009, no. 67021/01 section 120), precludes the State from pleading that it has to take account of the uncertainties of climate change and other uncertainties (for instance in ground of appeal 8). Those uncertainties could after all imply that, due to the occurrence of a ‘tipping point’ for instance, the situation could become much worse than currently envisioned. The circumstance that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking

therefore does not mean that the State is entitled to refrain from taking further measures. High plausibility, as described above, suffices.

64. The State's defence of the lack of a causal link also fails. First of all, these proceedings concern a claim for imposing an order and not a claim for damages, so that causality only plays a limited role. In order to give an order it suffices (in brief) that there is a real risk of the danger for which measures have to be taken. It has been established that this is the case. Moreover, if the opinion of the State were to be followed, an effective legal remedy for a global problem as complex as this one would be lacking. After all, each state held accountable would then be able to argue that it does not have to take measures if other states do not so either. That is a consequence that cannot be accepted, also because Urgenda does not have the option to summon all eligible states to appear in a Dutch court.

65. Regarding the plea of a lack of the required relativity within the meaning of Book 6 Section 163 of the Dutch Civil Code, the Court states first and foremost that these proceedings constitute an action for an order and not an action for damages. The violated standards (Articles 2 and 8 ECHR) do seek to protect Urgenda and its supporters. For this reason alone, the plea is dismissed.

66. Insofar as the State wanted to assert that the remaining available time (until end-2020) is very short, this argument is rejected. Not only is the judgment (declared provisionally enforceable) over three years old, but the foregoing has shown that the State has known about the severity of the climate problem for a long time and that up to 2011 the State had focused its policy on a reduction of 30%. In this respect, it deserves further attention that the Netherlands, as a highly developed country, has profited from fossil fuels for a long time and still ranks among the countries with the highest per capita greenhouse gas emissions in the world. It is partly for this reason that the State should assume its responsibility, a sentiment that was also expressed in the United Nations Framework Convention on Climate Change and the Paris Agreement.

67. Incidentally, the Court acknowledges that, especially in our industrialised society, measures to reduce CO<sub>2</sub> emissions are drastic and require financial and other sacrifices but there is also much at stake: the risk of irreversible changes to the worldwide ecosystems and liveability of our planet. The State argues that for this reason the system of the separation of powers should not be interfered with, because it is not up to the courts but to the democratically legitimised government as the appropriate body to make the attendant policy choices. This argument is rejected in this case, also because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order.

68. In this context, the State also argues that limiting the cumulated volume of Dutch emissions, as ordered by the district court, can only be achieved by adopting legislation, by parliament or lower government bodies, , that this means that from a substantive point of view the order constitutes an order to create legislation and that the court is not in the position to impose such an order on the State. However, the district court correctly considered that Urgenda's claim is not intended to create legislation, either by parliament or lower government bodies, and that the State retains complete freedom to determine how it will comply with the order. Even if it were correct to hold that compliance with the order can only be achieved through creating legislation by parliament or lower government bodies, the order in no way prescribes the content of such legislation. For this reason alone, the order is not an 'order to create legislation'. Moreover, the State has failed to substantiate, supported by reasons, why

compliance with the order can only be achieved through creating legislation by parliament or lower government bodies. Urgenda has argued, by pointing out the Climate Agreement (to be established) among other things, that there are many options to achieve the intended result under the order that do not require the creation of legislation by parliament or lower government bodies. The State has failed to refute this argument with sufficient substantiation.

69. The State also relied on the *trias politica* and on the role of the courts in our constitution. The State believes that the role of the court stands in the way of imposing an order on the State, as was done by the district court. This defence does not hold water. The Court is obliged to apply provisions with direct effect of treaties to which the Netherlands is party, including Articles 2 and 8 ECHR. After all, such provisions form part of the Dutch jurisdiction and even take precedence over Dutch laws that deviate from them.

70. In short, the Court finds the defences of the State unconvincing.

### **Conclusion**

71. To summarise, from the foregoing it follows that up till now the State has done too little to prevent a dangerous climate change and is doing too little to catch up, or at least in the short term (up to end-2020). Targets for 2030 and beyond do not take away from the fact that a dangerous situation is imminent, which requires interventions being taken now. In addition to the risks in that context, the social costs also come into play. The later actions are taken to reduce, the quicker the available carbon budget will diminish, which in turn would require taking considerably more ambitious measures at a later stage, as is acknowledged by the State (Statement of Appeal 5.28), to eventually achieve the desired level of 95% reduction by 2050. In this context, the following excerpt from AR5 (cited in legal ground 2.19 of the judgment) is also worth noting: “(...) *Delaying mitigation efforts beyond those in place today through 2030 is estimated to substantially increase the difficulty of transition to low-longer-term emissions levels and narrow the range of options consistent with maintaining temperature change below 2° C relative to pre-industrial levels.*”

72. Neither can the State hide behind the reduction target of 20% by 2020 at the EU level. First of all, also the EU deems a greater reduction in 2020 necessary from a climate science point of view. In addition, the EU as a whole is expected to achieve a reduction of 26-27% in 2020; substantially more than the agreed on 20%. The Court has also taken into consideration that in the past the Netherlands, as an Annex I country, acknowledged the severity of the climate situation time and again and, mainly based on arguments from climate science, for years assumed a reduction of 20-45% by 2020, with a concrete policy objective of 30% by that year. After 2011, this policy objective was adjusted downwards to 20% by 2020 at the EU level, without any scientific substantiation and despite the fact that more and more became known about the serious consequences of greenhouse gas emissions for global warming.

73. Based on this, the Court is of the opinion that the State fails to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end-2020. A reduction of 25% should be considered a minimum, in connection with which recent insights about an even more ambitious reduction in connection with the 1.5° C target have not even been taken into consideration. In forming this opinion, the Court has taken into consideration that based on the current proposed policy the Netherlands will have reduced 23% by 2020. That is not far from 25%, but a margin of uncertainty of 19-27% applies. This margin of uncertainty means that there is real chance that the reduction will be (substantially) lower than 25%. Such a margin of uncertainty is unacceptable. Since moreover there are clear indications

that the current measures will be insufficient to prevent a dangerous climate change, even leaving aside the question whether the current policy will actually be implemented, measures have to be chosen, also based on the precautionary principle, that are safe, or at least as safe as possible. The very serious dangers, not contested by the State, associated with a temperature rise of 2° C or 1.5° C – let alone higher – also preclude such a margin of uncertainty. Incidentally, the percentage of 23% has become more favourable because of the new calculation method of the 2015 NEV, which assumes higher greenhouse gas emissions in 1990 than those which the district court has taken into consideration. This means that the theoretical reduction percentage can be achieved sooner, although in reality the situation is much more serious (see also legal ground 21 of this ruling).

74. On these grounds, the State's reliance on its wide 'margin of appreciation' also fails. The Court furthermore points out that the State does have this margin in choosing the measures it takes to achieve the target of a minimum reduction of 25% in 2020.

75. The other defences of the State need not be discussed. As has been considered above in legal ground 3.9, a reduction of more than at least 25% by 2020 cannot be awarded, so that the Court shall leave it at this.

#### ***Final statement***

76. All of the above leads to the conclusion that the State is acting unlawfully (because in contravention of the duty of care under Articles 2 and 8 ECHR) by failing to pursue a more ambitious reduction as of end-2020, and that the State should reduce emissions by at least 25% by end-2020. The State's grounds of appeal pertaining to the district court's opinion about the hazardous negligence doctrine need no discussion under these state of affairs. The judgment is hereby upheld. The grounds of appeal in the appeal on the main issue need no separate discussion. They have been discussed in the foregoing insofar as these grounds of appeal are relevant to the assessment of the cross-appeal. As the unsuccessful party in the appeal, the State is ordered to pay the costs of the appeal on the main issue as well as of the cross-appeal.

#### **DECISION**

The Court:

- upholds the judgment of The Hague District Court of 24 June 2015 delivered in the case between the parties;

- -orders the State to pay the costs of the proceedings in the appeal on the main issue and of the cross-appeal, on the part of Urgenda estimated up to this ruling at € 711 in court fees, € 16,503 in attorney fees in the appeal on the main issue and € 8,256 in attorney fees in the cross-appeal, and orders the State to pay these costs within fourteen days following this ruling, failing which statutory interest within the meaning of Book 6 Section 119 of the Dutch Civil Code is payable as at the end of the aforementioned term until the date on which payment is made in full;
- -declares this judgment provisionally enforceable.

\* \* \*

## E. North America

### 1. **Juliana v. United States (United States Federal District Court for the District of Oregon 2016)**

*In this case, the court held that the plaintiffs had a legally cognizable cause of action in to assert that the U.S. government's collective actions and inactions concerning greenhouse gas emissions deprived them of a "right to a stable climate" under the Due Process Clause of the 5<sup>th</sup> Amendment. The U.S. government found this decision so problematic that it took the extraordinary step of asking the 9<sup>th</sup> Circuit Court of Appeals take the case away from the lower court, and dismiss it without further proceedings. Oral argument occurred in December 2017. A ruling from the appellate court is pending.*

Plaintiffs in this civil rights action are a group of young people between the ages of eight and nineteen ("youth plaintiffs"); Earth Guardians, an association of young environmental activists; and defendants the United States, President Barack Obama, and numerous executive agencies. Plaintiffs allege defendants have known for more than fifty years that the carbon dioxide ("CO<sub>2</sub>;) produced by burning fossil fuels was destabilizing the climate system in a way that would "significantly endanger plaintiffs, with the damage persisting for millenia." Despite that knowledge, plaintiffs assert defendants, "[b]y their exercise of sovereign authority over our country's atmosphere and fossil fuel resources, ... permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion unprecedented in human history[.]"

Although many different entities contribute to greenhouse gas emissions, plaintiffs aver defendants bear "a higher degree of responsibility than any other individual, entity, or country" for exposing plaintiffs to the dangers of climate change. Plaintiffs argue defendants' actions violate their substantive due process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations.

Plaintiffs assert there is a very short window in which defendants could act to phase out fossil fuel exploitation and avert environmental catastrophe. They seek (1) a declaration their constitutional and public trust rights have been violated and (2) an order enjoining emissions.

Defendants moved to dismiss this action for lack of subject matter jurisdiction and failure to state a claim. Intervenor the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute moved to dismiss on the same grounds. [Following the election of President Donald Trump, industry-intervenor withdrew from the case.] After oral argument, Magistrate Judge Coffin issued his Findings and Recommendation ("F&R") and recommended denying the motions to dismiss. ... For the reasons set forth below, I adopt Judge Coffin's F&R as elaborated in this opinion and deny the motions to dismiss.

#### Background

This is no ordinary lawsuit. Plaintiffs challenge the policies, acts, and omissions of the President of the United States, the Council on Environmental Quality, the Office of Management and Budget, the Office of Science and Technology Policy, the Department of Energy, the Department of the Interior, the Department of Transportation ("DOT"), the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of State, and the Environmental Protection Agency ("EPA"). This lawsuit challenges decisions defendants have made across a vast set of topics - decisions like whether and to what extent to regulate CO<sub>2</sub> emissions from power plants and whether to permit fossil fuel extraction and development to take place on federal lands, how much to charge for use of those lands, whether to give tax breaks to the fossil fuel industry, whether to subsidize or directly fund that industry, whether to fund the construction of fossil fuel infrastructure such as natural gas pipelines at home and



abroad, whether to permit the export and import of fossil fuels from and to the United States, and whether to authorize new marine coal terminal projects. Plaintiffs assert defendants' decisions on these topics have substantially caused the planet to warm and the oceans to rise. They draw a direct causal line between defendants' policy choices and floods, food shortages, destruction of property, species extinction, and a host of other harms.

This lawsuit is not about proving that climate change is happening or that human activity is driving it. For the purposes of this motion, those facts are undisputed. The questions before the Court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants' climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine.

[In omitted portions of the opinion, the court held that neither the political question nor the standing doctrine precludes judicial review, and that the plaintiffs also pled a cognizable claim under the public trust doctrine.]

### Due Process Claims

The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of "life, liberty, or property" without "due process of law." U.S. Const. amend. V. Plaintiffs allege defendants have violated and dangerously interfere with a stable climate system required alike by our nation and Plaintiffs[.]" First Am. Comp! 279; "knowingly endanger[ing] Plaintiffs' health and welfare by approving and promoting fossil fuel development, including exploration, extraction, production, transportation, importation, exportation, and combustion," *id.* 280; and, "[a]fter knowingly creating this dangerous situation for Plaintiffs, . . . continu[ing] to knowingly enhance that danger by allowing fossil fuel production, consumption, and combustion at dangerous levels," *id.* 284.

Defendants and intervenors challenge plaintiffs' due process claims on two grounds. First, they assert any challenge to defendants' affirmative actions (*i.e.* leasing land, issuing permits) cannot proceed because plaintiffs have failed to identify infringement of a fundamental right or discrimination against a suspect class of persons. Second, they argue plaintiffs cannot challenge defendants' inaction (*i.e.*, failure to prevent third parties from emitting CO<sub>2</sub> at dangerous levels because defendants have no affirmative duty to protect plaintiffs from climate change.

#### *A. Infringement of a Fundamental Right.*

When a plaintiff challenges affirmative government action under the due process clause, the threshold inquiry is the applicable level of judicial scrutiny. *Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008). The default level of scrutiny is rational basis, which requires a reviewing court to uphold the challenged governmental action so long as it "implements a rational means of achieving a legitimate governmental end[.]" *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997) (quotation marks omitted). When the government infringes a "fundamental right," however, a reviewing court applies strict scrutiny. *Witt*, 527 F.3d at 817. Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original). It appears undisputed by plaintiffs, and in any event is clear to this Court, that defendants' affirmative actions would survive rational basis review. Resolution of this part of the motions to dismiss therefore hinges on whether plaintiffs have fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) "deeply rooted in this Nation's history and tradition" or (2) "fundamental to our scheme of ordered liberty[.]" *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (internal citations, quotations, and emphasis omitted). The Supreme Court has cautioned that federal courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into" judicial



policy preferences. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation and quotation marks omitted).

This does not mean that "new" fundamental rights are out of bounds, though. When the Supreme Court broke new legal ground by recognizing a constitutional right to same-sex marriage, Justice Kennedy wrote that:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights ... did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

*Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). Thus, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution ... [that] has not been reduced to any formula." *Id.* (citation and quotation marks omitted). In determining whether a right is fundamental, courts must exercise "reasoned judgment," keeping in mind that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id.* The genius of the Constitution is that its text allows "future generations [to] protect ... the right of all persons to enjoy liberty as we learn its meaning." *Id.*

Often, an unenumerated fundamental right draws on more than one Constitutional source.

The idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated. In *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), the Court exhaustively chronicled the jurisprudential history of the fundamental right to privacy - another right not mentioned in the text of the Constitution. *Roe's* central holding rests on the Due Process Clause of the Fourteenth Amendment. *Id.* at 153. But the Court also found "roots" of the right to privacy in the First Amendment, the Fourth Amendment, the Fifth Amendment, the penumbras of the Bill of Rights, and the Ninth Amendment. *Id.* at 152. Similarly, in *Obergefell*, the Court's recognition of a fundamental right to many was grounded in an understanding of marriage as a right underlying and supporting other vital liberties. *See* 135 S. Ct. at 2599 ("[I]t would be contradictory to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is at the foundation of the family in our society." (citation and quotation marks omitted)); *id.* at 2601 ("[M]arriage is a keystone of our social order.").

Exercising my "reasoned judgment," *id.* at 2598, I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the "foundation of the family," a stable climate system is quite literally the foundation "of society, without which there would be neither civilization nor progress." *Id.* (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)); *cf.* *Minors Oposa v. Sec'y of the Dep't of Env't'l & Natural Res.*, G.R. No. 101083, 33 I.L.M. 173, 187-88 (S.C., Jul. 30, 1993) (Phil.) (without "a balanced and healthful ecology," future generations "stand to inherit nothing but parched earth incapable of sustaining life.").

In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand the phrase "capable of sustaining human life" should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation. In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way 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, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right. In sum: plaintiffs allege defendants played a unique and central role in the creation of our current climate crisis; that they contributed to the crisis with knowledge of the significant and unreasonable risks posed by climate change; at the Due Process Clause therefore imposes a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions. Accepting the allegations of the complaint as true plaintiffs have adequately alleged a danger creation claim. This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions - whether or not they violate any specific statutory duty - have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty.

"A strong and independent judiciary is the cornerstone of our liberties." These words spoken by Oregon Senator Mark O. Hatfield, are etched into the walls of the Portland United States courthouse for the District of Oregon. The words appear on the first floor, a daily reminder that is "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.

Where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way 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, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.

Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.\* \* \*

## **2. Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 161 A.3d 911 (Supreme Court of Pennsylvania 2017)**

*In this case, the Pennsylvania Supreme Court held (4-1-1) that a state constitutional provision (The Environmental Rights Amendment of 1971) providing that “The people have a right to clean air, pure water, and ... values of the environment” is self-executing and enforceable. Moreover, the same constitutional provision impels the state government and its local agents as “trustee,” to manage state lands in public trust, including use of proceeds from the leasing of lands for oil and gas development.*

Opinion by: Donohue, J.:

In 1971, by a margin of nearly four to one, the people of Pennsylvania ratified a proposed amendment to the Pennsylvania Constitution’s Declaration of Rights, formally and forcefully recognizing their environmental rights as commensurate with their most sacred political and individual rights. Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. In this case, we examine the contours of the Environmental Rights Amendment in light of a declaratory judgment action brought by the Pennsylvania Environmental Defense Foundation (“Foundation”), an environmental advocacy entity, challenging, inter alia, the constitutionality of statutory enactments relating to funds generated from the leasing of state forest and park lands for oil and gas exploration and extraction. Because state parks and forests, including the oil and gas minerals therein, are part of the corpus of Pennsylvania’s environmental public trust, we hold that the Commonwealth, as trustee, must manage them according to the plain language of Section 27, which imposes fiduciary duties consistent with Pennsylvania trust law. We further find that the constitutional language controls how the Commonwealth may dispose of any proceeds generated from the sale of its public natural resources. After review, we reverse in part, and vacate and remand in part, the Commonwealth Court’s order granting summary relief to the Commonwealth and denying the Foundation’s application for summary relief.

### I. History and Enactment of the Environmental Rights Amendment

Section 27 contains an express statement of the rights of the people and the obligations of the Commonwealth with respect to the conservation and maintenance of our public natural resources. In *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013) (plurality), a plurality of this Court carefully reviewed the reasons why the Environmental Rights Amendment was necessary, the history of its enactment and ratification, and the mischief to be remedied and the object to be attained. At the outset of this opinion, we reiterate this historical background, which serves as an important reminder as we address the issues presented in the present case:

It is not a historical accident that the Pennsylvania Constitution now places citizens’ environmental rights on par with their political rights. Approximately three and a half centuries ago, white pine, Eastern hemlock, and mixed hardwood forests covered about 90 percent of the Commonwealth’s surface of over 20 million acres. Two centuries later, the state experienced a lumber harvesting industry boom that, by 1920, had left much of Pennsylvania barren. “Loggers moved to West Virginia and to the lake states, leaving behind thousands of devastated treeless acres,” abandoning sawmills and sounding the death knell for once vibrant towns. Regeneration of our forests (less the diversity of species) has taken decades.

Similarly, by 1890, “game” wildlife had dwindled “as a result of deforestation, pollution and unregulated hunting and trapping.” As conservationist John M. Phillips wrote, “In 1890, the game had practically disappeared from our state.... We had but few game laws and those were supposed to be enforced by township constables, most of whom were politicians willing to trade with their friends the lives of our

beasts and birds in exchange for votes.” In 1895, the General Assembly created the Pennsylvania Game Commission and, two years later, adopted a package of new game laws to protect endangered populations of deer, elk, waterfowl, and other game birds. Over the following decades, the Game Commission sought to restore populations of wildlife, by managing and restocking species endangered or extinct in Pennsylvania, establishing game preserves in state forests, and purchasing state game lands. Sustained efforts of the Game Commission over more than a century (coupled with restoration of Pennsylvania’s forests) returned a bounty of wildlife to the Commonwealth.

The third environmental event of great note was the industrial exploitation of Pennsylvania’s coalfields from the middle of the nineteenth well into the twentieth century. During that time, the coal industry and the steel industry it powered were the keystone of Pennsylvania’s increasingly industrialized economy. The two industries provided employment for large numbers of people and delivered tremendous opportunities for small and large investors. “[W]hen coal was a reigning monarch,” the industry operated “virtually unrestricted” by either the state or federal government. The result, in the opinion of many, was devastating to the natural environment of the coal-rich regions of the Commonwealth, with long-lasting effects on human health and safety, and on the esthetic beauty of nature. These negative effects include banks of burning or non-burning soft sooty coal and refuse; underground mine fires; pollution of waters from acid mine drainage; subsidence of the soil; and landscapes scarred with strip mining pits and acid water impoundments. In the mid-1960s, the Commonwealth began a massive undertaking to reclaim over 250,000 acres of abandoned surface mines and about 2,400 miles of streams contaminated with acid mine drainage, which did not meet water quality standards. The cost of projects to date has been in the hundreds of millions of dollars, and the Department of Environmental Protection has predicted that an estimated 15 billion dollars is in fact necessary to resolve the problem of abandoned mine reclamation alone. *Id.*

The overwhelming tasks of reclamation and regeneration of the Commonwealth’s natural resources, along with localized environmental incidents (such as the 1948 Donora smog tragedy in which twenty persons died of asphyxiation and 7,000 persons were hospitalized because of corrosive industrial smoke; the 1959 Knox Mine disaster in which the Susquehanna River disappeared into the Pittston Coal Vein; the 1961 Glen Alden mine water discharge that killed more than 300,000 fish; and the Centralia mine fire that started in 1962, is still burning, and led to the relocation of all residents in 1984) has led to the gradual enactment of statutes protecting our environment. The drafters of the Environmental Rights Amendment recognized and acknowledged the shocks to our environment and quality of life:

We seared and scarred our once green and pleasant land with mining operations. We polluted our rivers and our streams with acid mine drainage, with industrial waste, with sewage. We poisoned our ‘delicate, pleasant and wholesome’ air with the smoke of steel mills and coke ovens and with the fumes of millions of automobiles. We smashed our highways through fertile fields and thriving city neighborhoods. We cut down our trees and erected eyesores along our roads. We uglified our land and we called it progress.

1970 Pa. Legislative Journal—House at 2270 (quoting anonymous 1698 description of Penn’s Woods air).

With these events in the recent collective memory of the General Assembly, the proposed Environmental Rights Amendment received the unanimous assent of both chambers during both the 1969–1970 and 1971–1972 legislative sessions. Pennsylvania voters ratified the proposed amendment of the citizens’ Declaration of Rights on May 18, 1971, with a margin of nearly four to one, receiving 1,021,342 votes in favor and 259,979 opposed.

The decision to affirm the people’s environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law. In addition to Pennsylvania, Montana and Rhode Island are the only other states of the Union to do so. *See* Pa. Const. art. I, § 27 (1971); Mt. Const. art. II, § 3 (1889); R.I. Const. art. I, § 17 (1970). Three other states—Hawaii, Illinois, and Massachusetts—articulate and protect their citizens’ environmental rights in separate articles of their

charters. *See* Hi. Const. art. XI, §§ 1, 9 (1978); Ill. Const. art. XI, §§ 1, 2 (1971–72); Ma. Const. amend. 49 (1972). Of these three states, Hawaii and Illinois, unlike Pennsylvania, expressly require further legislative action to vindicate the rights of the people. By comparison, other state charters articulate a “public policy” and attendant directions to the state legislatures to pass laws for the conservation or protection of either all or enumerated natural resources. *See, e.g.*, Ak. Const. art. VIII, §§ 1–18 (1959); Colo. Const. art. XXVII, § 1 (1993); La. Const. art. IX, § 1 (1974); N.M. Const. art. XX, § 21 (1971); N.Y. Const. art. XIV, §§ 1–5 (1941); Tx. Const. art. XVI, § 59 (1917); Va. Const. art. XI, §§ 1–4 (1971). Some charters address the people’s rights to fish and hunt, often qualified by the government’s right to regulate these activities for the purposes of conservation. *See, e.g.*, Ky. Const. § 255A (2012); Vt. Const. Ch. II, § 67 (1777); Wi. Const. art. I, § 26 (2003). Still other state constitutions simply authorize the expenditure of public money for the purposes of targeted conservation efforts. *See, e.g.*, Or. Const. art. IX–H, §§ 1–6 (1970); W.V. Const. art. VI, §§ 55, 56 (1996). Finally, many of the remaining states do not address natural resources in their organic charters at all. *See, e.g.*, Nv. Const. art. I, § 1 *et seq.*

That Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth’s experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens’ quality of life. Later generations paid and continue to pay a tribute to early uncontrolled and unsustainable development financially, in health and quality of life consequences, and with the relegation to history books of valuable natural and esthetic aspects of our environmental inheritance. The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people’s rights and the government’s duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations. Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people’s rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.

*Id.* at 960–63 (footnotes and some citations omitted).

## II. Factual and Procedural Background of the Present Case

While the issues in this case arise from the recent leasing of Commonwealth forest and park lands for Marcellus Shale gas extraction, the Commonwealth has a history of leasing its land to private parties for oil and gas exploration dating back to 1947. *Pa. Envtl. Def. Found. v. Com.*, 108 A.3d 140, 143 (Pa. Cmwlth. 2015) (“*PEDF*”); *see also* Prelim. Inj. Hr’g Ex. R–8 at 35 (Governor’s Marcellus Shale Advisory Commission Report dated July 22, 2011). In 1955, the Legislature enacted the Oil and Gas Lease Fund Act (“Lease Fund Act”), 71 P.S. §§ 1331–1333, requiring “[a]ll rents and royalties from oil and gas leases” of Commonwealth land to be deposited in the “Oil and Gas Lease Fund” (“Lease Fund”) to be “exclusively used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes.” 71 P.S. § 1331. When enacted, the Lease Fund Act further provided the Secretary of Forests and Waters with the discretion “to determine the need for and the location of any project authorized.” 71 P.S. § 1332. Additionally, the Lease Fund Act provided that “[a]ll the moneys from time to time paid” into the Fund “are specifically appropriated to the Department of Forests and Waters to carry out the purposes of this act.” 71 P.S. § 1333.

In 1995, the Legislature enacted the Conservation and Natural Resources Act (“CNRA”), which created the Pennsylvania Department of Conservation and Natural Resources (“DCNR”) as a “cabinet-level advocate” for the State parks, forests, and other natural resources. 71 P.S. § 1340.101(b)(1). Referencing the Environmental Rights Amendment, Article I, Section 27, of the Pennsylvania Constitution, the CNRA indicates that the prior “structure of the Department of Environmental Resources impede[d] the Secretary



of Environmental Resources from devoting enough time, energy and money to solving the problems facing our State parks and forests,” such that the state parks and forests had “taken a back seat to other environmental issues ....” 71 P.S. § 1340.101(a)(7), (8).

The CNRA sets forth the DCNR’s primary mission as follows:

[T]o maintain, improve and preserve State parks, to manage State forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania’s ecological and geologic resources and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.

71 P.S. § 1340.101(b)(1). To pursue this mission, the DCNR is “empowered to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests” if the DCNR determines that it “would be for the best interests of this Commonwealth.” 71 P.S. § 1340.302(a)(6). Moreover, the DCNR replaced the Department of Forests and Waters as the relevant entity for purposes of the Lease Fund. 71 P.S. § 1340.304. Accordingly, the CNRA altered the Lease Fund to provide that “all moneys” paid in to the Lease Fund were “specifically appropriated to” the DCNR. 71 P.S. § 1333.

In August 2008, after conducting an environmental review, DCNR began its first foray into the Marcellus Shale natural gas play by approving a lease sale of 74,000 acres (“2008 Leases”). *PEDF*, 108 A.3d at 143–44. The leases generated funds in the form of rents and royalties. The rents were comprised of annual rental fees, an example of which ranged from \$20–35 per acre, in addition to large initial “bonus payments” ranging in the millions of dollars. *Id.* at 144 (citing Prelim. Inj. Hr’g Ex. R–1). In addition, the leases further provided for royalties when gas is extracted, with the payment based upon the amount of marketable gas extracted. *Id.* The Marcellus Shale leases dramatically increased the money flowing into the Lease Fund. Indeed, the cumulative proceeds from Commonwealth oil and gas leases from 1947–2008 totaled \$165 million, where the oil and gas proceeds in 2009 alone exceeded \$167 million, the bulk of which derived from the initial bonus payments (which are categorized under the lease terms as rental payments) from the 2008 Leases. Prelim. Inj. Hr’g Ex. R–14 at 200–201 (“2014 Shale Gas Monitoring Report”).

Following the 2008 Leases, the DCNR “decided not to enter into further leases for natural gas extraction on State lands pending study of the ‘Marcellus play’ and development within the 660,000 acres of land already leased within the Marcellus Shale region,” which included previously leased mineral rights and lands that were not owned by the Commonwealth. *PEDF*, 108 A.3d at 144. The former head of the DCNR testified that “we felt strongly that[,] until we could further develop and monitor what was going on [,] ... we believed there should be no further gas leasing because we were going to be watching a tremendous amount of gas activity on the state forest for the next 50 years.” Prelim. Inj. Hr’g. Notes of Testimony, 5/28/2015, at 36. Notwithstanding this concern, the DCNR received substantial pressure, as described below, between 2008 and 2014 from the executive and legislative branches to lease more state land as a means to reduce the substantial shortfalls in Pennsylvania’s general budgets.

During the 2009–10 budget process, the Legislature added Article XVI–E to the Fiscal Code addressing Marcellus Shale leasing (“2009 Fiscal Code Amendments”). Following a definitional section, the article addresses appropriations to the Lease Fund:

Notwithstanding any other provision of law and except as provided in section 1603–E [providing for an annual appropriation to DCNR of up to \$50 million of royalties], no money in the [Lease Fund] from royalties may be expended unless appropriated or transferred to the General Fund by the General Assembly from the fund. In making appropriations, the General Assembly shall consider the adoption of an allocation to municipalities impacted by a Marcellus well.



72 P.S. § 1602–E. This provision wrought a dramatic change in the flow of royalties from the Lease Fund. While Section 1333 of the Lease Fund Act previously provided for the automatic appropriation of “all moneys” (which would include both rents and royalties) paid into the Lease Fund to be appropriated to the DCNR, the newly enacted Section 1602–E granted the General Assembly authority over the royalties in the Lease Fund (other than Section 1603–E’s \$50 million annual appropriation to the DCNR) by providing that the “royalties may not be expended unless appropriated or transferred to the General Fund by the General Assembly.” *Id.*

The next provision of the 2009 Fiscal Code Amendments, Section 1603–E, limits the DCNR’s annual allocation of royalties to an amount “up to \$50 million.” While \$50 million was substantially greater than any pre–2009 royalty receipts, it was not guaranteed and also functions to limit the percentage of the Lease Fund royalties directed to the DCNR, which is particularly relevant as the DCNR had anticipated receiving the full amount of the rents and royalties to allow it to oversee the rapid expansion of drilling on state land when it decided to enter into the 2008 Leases. Additionally, while the Lease Fund Act requires that the funds generated by leasing be “exclusively used for conservation, recreation, dams, or flood control or to match [related] Federal grants,” 71 P.S. § 1331, the newly-enacted Section 1603–E designates that preference be given instead “to the operation and maintenance of State parks and forests.” 72 P.S. § 1603–E.

Section 1604–E of the 2009 Fiscal Code Amendments also required a transfer of \$60 million in fiscal year 2009–2010 from the Lease Fund to the General Fund, which was not restricted to conservation purposes. 72 P.S. § 1604–E. Finally, the Supplemental General Appropriations Act of 2009 directed a transfer of \$143 million from the Lease Fund to the General Fund. Act of Oct. 9, 2009, P.L. 779, No. 10A, § 1912.

Thereafter, the DCNR abandoned its self-imposed moratorium on leasing additional state land for Marcellus Shale development “as a direct result of certain line items contained within the budget agreement and fiscal code for FY 2009–10.” Prelim. Inj. Hr’g Ex. R–6 at 5 (unnumbered) (FY 2009–2010 Oil & Gas Lease Sale State Forest Environmental Review). After again conducting an environmental review, the DCNR leased approximately 32,000 acres of state forest land in January 2010 (“January 2010 Leases”). Although, prior to the lease sale, the DCNR Secretary expressed significant concern regarding further leasing, the DCNR, in its published environmental review, concluded that “the impending [lease] sale still meets the Bureau’s management guidelines and protocols.” *Id.*

Again, following the January 2010 leases, the DCNR intended to halt any further leasing to allow study of the current leases and to avoid overextending its ability to manage them. Nevertheless, due to pressure from the Governor and pending budget transfers, the DCNR leased an additional 33,000 acres in May 2010 (“May 2010 Leases”) to generate funds after conducting an environmental review. A few months later, the General Assembly enacted an appropriation for Fiscal Year 2010–2011 transferring \$180 million from the Lease Fund to the General Fund.<sup>10</sup>

Just before leaving office in January 2011, Governor Rendell signed an executive order imposing a moratorium on future leasing of state forest and park lands for oil and gas development, finding that further leasing would “jeopardize DCNR’s ability to fulfill its duty to conserve and maintain this public natural resource.” Prelim. Inj. Hr’g Ex. P–8 at 2.

For the first three years of Governor Corbett’s administration, the Fiscal Code was not amended to provide transfers from the Lease Fund to the General Fund. Instead, the General Appropriations Act for 2011 and 2012 provided appropriations to the DCNR from both the General Fund and the Lease Fund (specifically from royalties), in addition to the up to \$50 million in royalties provided annually by Section 1603–E of the 2009 Fiscal Code Amendments and the continued flow of all rental fees from oil and gas leases pursuant to Section 1333 of the Lease Fund Act. *PEDF*, 108 A.3d at 148–49. The 2013 General Appropriations Act decreased the appropriation to the DCNR from the General Fund and increased the

appropriation from the Lease Fund to the DCNR, resulting in a larger portion of monies from the Lease Fund being used to pay for the DCNR's operational expenses, which had previously been funded by the General Fund, and thus reduced the amount of monies available for the DCNR's conservation activities. *Id.* at 149.

Although the first few years of the Corbett administration did not witness appropriations from the Lease Fund directly to the General Fund, Act 13 of 2012, which amended the Lease Fund Act, required other transfers from the Lease Fund. Specifically, Act 13 created the Marcellus Legacy Fund, which was funded in part by fees on unconventional wells but also by annual appropriations from the Lease Fund in increasing amounts beginning with \$20 million in 2013 and rising to \$50 million for all years after 2015. 58 Pa.C.S. §§ 2315(a.1), 2505. The monies in the Marcellus Legacy Fund are earmarked for the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund, providing capital for projects not controlled by the DCNR. *Id.*

In May 2014, Governor Corbett modified the moratorium banning the leasing of State lands and instead forbade any leasing that “would result in additional surface disturbances on state forest or state park lands.” Prelim. Inj. Hr’g Ex. P-8 at 3. The order further provided that the royalties from the additional leasing would be used to repair the infrastructure of the forest and park lands, to acquire lands of “high conservation value or ecological importance,” and to acquire private oil, gas, and mineral rights currently owned by private parties under state surface lands. *Id.*

The 2014–2015 General Appropriations Act again included increased appropriations of royalties from the Lease Fund to the DCNR that were mirrored by decreased appropriations from the General Fund to the DCNR. *PEDF*, 108 A.3d at 151. In 2014, the Fiscal Code was amended again to address Marcellus Shale leasing (“2014 Fiscal Code Amendments”). Specifically, Section 1605–E of the Fiscal Code was amended to provide for an appropriation of \$95 million from the Lease Fund to the General Fund. 72 P.S. § 1605–E(b).<sup>12</sup>

The 2014 Fiscal Code Amendments also added specific legislative findings in support of the increased leasing of state land and the transfers of capital from the Lease Fund. These findings postulate that Marcellus Shale leasing “is necessary to obtain the revenue necessary to effectuate the ... General Appropriations Act of 2014.” 72 P.S. § 1601.1–E(1). Additionally, the findings state that “[t]he fund is not a constitutional trust.” 72 P.S. § 1601.1–E(6). After recognizing that the increase in the Fund was due to the Marcellus Shale development, the Legislature indicates that “[t]he Commonwealth’s role as trustee of the public’s natural resources is broader and more comprehensive than just conserving the State forest and parks.” 72 P.S. § 1601.1–E(7), (8). It further affirmatively instructs that “it is in the best interest of the Commonwealth to lease oil and gas rights in State forests and parks” if the DCNR employs lease protections and best management practices and “maintains a balance of money in the [Lease Fund] to carry out [DCNR’s] obligation to protect State forest and park land and other environmental activities.” 72 P.S. § 1601.1–E(9)(iii). Finally, the statute provides that transfers from the Fund to the General Fund are permissible if the balance of money in the Fund is “adequate to achieve the purposes” of paragraph nine, 72 P.S. § 1601.1–E(10), which directs the DCNR to make state forest and park land leasing decisions based on all the Commonwealth’s interests. 72 P.S. § 1601.1–E(9).

Distinguished Professor John C. Dernbach of the Widener University Law School Environmental Law and Sustainability Center recently summarized the significance of Fiscal Code amendments for purposes of the claims at bar:

Three legislative amendments to the state fiscal code between 2008 and 2014 redirected a total of \$335 million that would have been used for conservation purposes under the [Lease Fund Act] to the general fund, where it is appropriated for a variety of state government purposes. In addition, the Legislature prevented DCNR from spending any [Lease Fund Act] royalties without prior legislative authorization. Finally, the Legislature

began using [Lease Fund] revenue to support the overall budget of DCNR, rather than obtaining that budget money from the general fund and using [Lease Fund] money for conservation purposes related to oil and gas extraction

John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 *Envtl. L.* 463, 488 (2015) (footnotes omitted)).

Acknowledging the structural changes in the source of the funding, the Commonwealth nevertheless emphasizes that the total annual appropriations to the DCNR from the various sources ranged between \$69 million in 2012–2013 to \$122 million in 2014–2015 and further observes that the DCNR received approximately fifty percent of the over \$926 million in total oil and gas lease revenues accumulated from Fiscal Year 2008–2009 through Fiscal Year 2014–2015 (then-projected). Commonwealth’s Brief at 18 (citing Respondent’s Cross–Motion for Summary Relief, Exhibit M (Governor’s Budget Office Oil and Gas Leasing Revenue and Uses Information dated August 21, 2014)).

### III. Commonwealth Court Proceedings

[Omitted]

### IV. Analysis

The Foundation filed a direct appeal as of right from the final order of the Commonwealth Court, pursuant to 42 Pa.C.S. § 723(a), raising ten issues. We entertained oral argument to examine the following two overarching issues:

1. The proper standards for judicial review of government actions and legislation challenged under the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, in light of *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013) (plurality);
2. Constitutionality under Article I, [Section] 27 of Section 1602–E and 1603–E of the Fiscal Code and the General Assembly’s transfers/appropriations from the Lease Fund.

Given that we are reviewing the Commonwealth Court’s decision on cross-motions for summary relief pursuant to Pa.R.A.P. 1532(b), we may grant relief only if no material questions of fact exist and the right to relief is clear. *See Jubelirer*, 953 A.2d at 521. Additionally, as challenges to the constitutionality of statutes present pure questions of law, our standard of review is de novo, and our scope of review is plenary. *See Robinson Twp.*, 83 A.3d at 943. As with any constitutional challenge to legislation, the challenger bears the heavy burden of demonstrating that the statute “clearly, plainly, and palpably violates the Constitution,” as we presume that our sister branches act in conformity with the Constitution. *Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 939 (2006). In interpreting constitutional language, “the fundamental rule of construction which guides [this Court] is that the Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 925 (2004). As with our interpretation of statutes, if the language of a constitutional provision is unclear, we may be informed by “the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.” *Robinson Twp.*, 83 A.3d at 945 (citing 1 Pa.C.S. §§ 1921, 1922).

#### A. Proper Standard of Judicial Review

The parties, various amici, and the plurality in *Robinson Township* all reject the three-part test developed by the Commonwealth Court in *Payne I* as the appropriate standard for examining Section 27 challenges. The Commonwealth observes that the *Payne I* test has been criticized as “ill-fitted” to the language of Section 27 and as frustrating the development of a “coherent environmental rights jurisprudence.” Commonwealth’s Brief at 25 (citing *Robinson Township*, 83 A.3d at 964). Similarly, the Foundation

urges “the issues in this case do not fit the mold of the *Payne* test crafted by the Commonwealth Court.” Foundation’s Reply Brief at 5 (discussing the *Robinson Township* plurality’s three part criticism of the *Payne* test). [24]

We agree. The *Payne I* test, which is unrelated to the text of Section 27 and the trust principles animating it, strips the constitutional provision of its meaning. *See Robinson Twp.*, 83 A.3d at 967; *see also* Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 *Envtl. L.* 463, 499 (2015). Accordingly, we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges.

Instead, when reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment. We must therefore carefully examine the contours of the Environmental Rights Amendment to identify the rights of the people and the obligations of the Commonwealth guaranteed thereunder.

#### B. The Contours of Section 27

This is not the first time we have been called upon to address the rights and obligations set forth in the Environmental Rights Amendment. We did so in *Robinson Twp.*, and we rely here upon the statement of basic principles thoughtfully developed in that plurality opinion.[25] To start, the General Assembly derives its power from Article III of the Pennsylvania Constitution which grants broad and flexible police powers to enact laws for the purposes of promoting public health, safety, morals, and the general welfare. *Id.* at 946. These powers, however, are expressly limited by fundamental rights reserved to the people in Article I of our Constitution. *Id.* at 946. Specifically, Section 1 affirms, among other things, that all citizens “have certain inherent and inalienable rights.” *Id.* at 948 (quoting Pa. Const. art. I, § 1). As forcefully pronounced in Section 25, the rights contained in Article I are “excepted out of the general powers of government and shall forever remain inviolate.” *Id.* (quoting Pa. Const. art. I, § 25).

Among the “inherent and inalienable” rights in Article I of the Pennsylvania Constitution are the rights set forth in the Environmental Rights Amendment, which we quote again for ease of discussion:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. This constitutional provision grants two separate rights to the people of this Commonwealth. The first right is contained in the first sentence, which is a prohibitory clause declaring the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. *Robinson Twp.*, 83 A.3d at 951. This clause places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional. *Id.*

The second right reserved by Section 27, set forth in its second sentence, is the common ownership by the people, including future generations, of Pennsylvania’s public natural resources. *Id.* at 954. The “public natural resources” referenced in this second sentence include the state forest and park lands leased for oil and gas exploration and, of particular relevance in this case, the oil and gas themselves. *Id.* at 955; *see also* Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2271–75 (1970). In a statement offered to the General Assembly in connection with the proposed Environmental Rights Amendment, Professor Robert Broughton explained that the provision was initially drafted as “Pennsylvania’s natural resources, including the air, waters, fish, wildlife, and the public lands and property of the Commonwealth ....” but was revised to remove the enumerated list and thereby discourage courts from limiting the scope of



natural resources covered. Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2274 (1970) (Broughton Analysis).[26]

The third clause of Section 27 establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries.[27] *Robinson Twp.*, 83 A.3d at 955–56. The terms “trust” and “trustee” carry their legal implications under Pennsylvania law at the time the amendment was adopted. *See Appeal of Ryder*, 365 Pa. 149, 74 A.2d 123, 124 (1950) (providing that “words having a precise and well-settled legal meaning must be interpreted” accordingly); *see also Robinson Twp.*, 83 A.3d at 956 (citing Pa.C.S. § 1903). Notably, Professor Broughton explained that the Commonwealth’s role was plainly intended to be that of a “trustee,” as opposed to “proprietor.” *See* Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2269, 2273 (1970) (Broughton Analysis). As a trustee, the Commonwealth must deal “with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.” *Id.* Under Section 27, the Commonwealth may not act as a mere proprietor, pursuant to which it “deals at arms['] length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations.” *Id.*

The *Robinson Township* plurality aptly described the Commonwealth’s duties as the trustee of the environmental trust created by the people of Pennsylvania as follows:

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. *See* Pa. Const. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

*Robinson Twp.*, 83 A.3d at 956–57.

Under Pennsylvania trust law, the duty of prudence requires a trustee to “exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” *In re Mendenhall*, 484 Pa. 77, 398 A.2d 951, 953 (1979) (quoting Restatement (Second) of Trusts § 174). The duty of loyalty imposes an obligation to manage the corpus of the trust so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries. *See Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 220 Pa. 535, 69 A. 1037, 1038 (1908); *see also In re Hartje’s Estate*, 345 Pa. 570, 28 A.2d 908, 910 (1942) (citing Restatement (Second) of Trusts § 186 for the proposition that “the trustee can properly exercise such powers and only such powers as (a) are conferred upon him in specific words by the terms of the trust, or (b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust”). The duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust. 20 Pa.C.S. § 7773; *Estate of Sewell*, 487 Pa. 379, 409 A.2d 401, 402 (1979) (citing Restatement (Second) of Trusts § 183).

Pennsylvania’s environmental trust thus imposes two basic duties on the Commonwealth as the trustee. First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. *Robinson Twp.*, 83 A.3d at 957. Second, the Commonwealth must act affirmatively via legislative action to protect the environment. *Id.* at 958 (citing *Geer v. Connecticut*, 161 U.S. 519, 534, 16 S.Ct. 600, 40 L.Ed. 793 (1896) (trusteeship for the benefit of state’s people implies legislative duty “to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state”)). Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee’s fiduciary duties, and does not equate “to mere subjective judgment.” *Id.* at 978 (citing *Struthers Coal & Coke Co. v.*

*Union Trust Co.*, 227 Pa. 29, 75 A. 986, 988 (1910); *In re Sparks' Estate*, 328 Pa. 384, 196 A. 48, 57 (1938)). The trustee may use the assets of the trust “only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.” *Id.* (citing *Metzger*, 69 A. at 1038); *see also Hartje's Estate*, 28 A.2d at 910 (“giving of [an] unrestricted bond” was “neither ‘necessary’ nor ‘appropriate’ to the carrying out of the purposes of the trust; hence, the existence of [trustee’s] power to do so by inference must be denied”).

The Commonwealth argues that the revenue obtained from the disposition of trust assets need not be returned to the corpus of the trust or otherwise dedicated to trust purposes, for two reasons. First, the Commonwealth contends that the Environmental Rights Amendment is “silent” as to the use of proceeds from the sale of natural resources, and “addresses neither the appropriations process nor funding for conservation purposes.” *See* Commonwealth’s Brief at 39. This is plainly inaccurate, as Section 27 expressly creates a trust, and pursuant to Pennsylvania law in effect at the time of enactment, proceeds from the sale of trust assets are part of the corpus of the trust. *See, e.g., McKeown's Estate*, 263 Pa. 78, 106 A. 189, 190 (1919) (“Being a sale of assets in the corpus of the trust, presumptively all the proceeds are principal....”). The unavoidable result is that proceeds from the sale of oil and gas from Section 27’s public trust remain in the corpus of the trust.

Second, the Commonwealth insists that the concluding phrase of Section 27, “for the benefit of all the people,” confers discretion upon the General Assembly to direct the proceeds from oil and gas development toward any uses that benefit all the people of the Commonwealth, even if those uses do nothing to “conserve and maintain” our public natural resources. Commonwealth’s Brief at 41 (citing *PEDF*, 108 A.3d at 168). We are wholly unconvinced. The phrase “for the benefit of all of the people” may not be read in isolation and does not confer upon the Commonwealth a right to spend proceeds on general budgetary items. Pa. Const. art I, § 27. The Commonwealth’s fiduciary duty to “conserve and maintain” our public natural resources is a duty owed to the beneficiaries of the public trust, namely “the people, including generations yet to come,” as set forth in the second sentence of Section 27. *Id.* The “people,” in turn, are those endowed with “a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment,” as set forth in the first sentence of Section 27. *Id.*

Accordingly, the Environmental Rights Amendment mandates that the Commonwealth, as a trustee, “conserve and maintain” our public natural resources in furtherance of the people’s specifically enumerated rights. Thus understood in context of the entire amendment, the phrase “for the benefit of all the people” is unambiguous and clearly indicates that assets of the trust are to be used for conservation and maintenance purposes. *See Robinson Twp.*, 83 A.3d at 957 (holding that the “explicit terms of the trust require the government to ‘conserve and maintain’ the corpus of the trust”). Only within those parameters, clearly set forth in the text of Section 27, does the General Assembly, or any other Commonwealth entity, have discretion to determine the public benefit to which trust proceeds—generated from the sale of trust assets—are directed.

By arguing that proceeds obtained from the sale of our natural resources are not part of the corpus of the trust, the Commonwealth improperly conceives of itself as a mere proprietor of those public natural resources, rather than as a trustee. In the Commonwealth’s view, it may dispose of our public natural resources as it so chooses and for any purpose it so conceives, so long as such disposition broadly benefits the public (apparently without regard to “generations yet to come”). *See* Commonwealth’s Brief at 45. As such, it urges us to substantially diminish its fiduciary obligation to prevent and remedy the degradation of our natural resources. We decline to do so.

The Foundation contends that all revenues generated by oil and gas leases remain in the corpus of the trust. We are without sufficient advocacy to rule on the correctness of this proposition. We note again that



Pennsylvania trust law dictates that proceeds from the sale of trust assets are trust principal and remain part of the corpus of the trust. *McKeown's Estate*, 106 A. at 190. When a trust asset is removed from the trust, all revenue received in exchange for the trust asset is returned to the trust as part of its corpus. *See Bolton v. Stillwagon*, 410 Pa. 618, 190 A.2d 105, 109 (1963) (explaining that when “the relation of trustee and [beneficiary] has once been established as to certain property in the hands of the trustee, no mere change of trust property from one form to another will destroy the relation”). As a result, royalties—monthly payments based on the gross production of oil and gas at each well—are unequivocally proceeds from the sale of oil and gas resources. *See* Petitioner’s Brief for Summary Judgment, Pet. Ex. X. They are part of the corpus of the trust and the Commonwealth must manage them pursuant to its duties as trustee.

Conversely, it is less clear how to categorize other revenue streams. *See generally In re Rosenblum's Estate*, 459 Pa. 201, 328 A.2d 158, 163 (1974) (in a case not involving oil and gas leases, holding that rents from realty held by a trust have traditionally been treated as income (and payable directly to the trust’s beneficiaries) rather than principal). *See also In re McKeown's Estate*, 106 A. at 190; Restatement (Second) of Trusts § 233; 20 Pa.C.S. § 8145. For example, the record on appeal is undeveloped regarding the purpose of up-front bonus bid payments, and thus no factual basis exists on which to determine how to categorize this revenue. While we recognize that the leases designate these payments, among others, as “rental payments,” such a classification does not shed any light on the true purpose of the payment, e.g., rental of a leasehold interest in the land, payment for the natural gas extracted, or some other purpose. In construing Sections 1604–E and 1605–E, to the extent that the lease agreements reflect the generation of revenue streams for amounts other than for the purchase of the oil and gas extracted, it is up to the Commonwealth Court, in the first instance and in strict accordance and fidelity to Pennsylvania trust principles, to determine whether these funds belong in the corpus of the Section 27 trust.

In this regard, it must be remembered that the Commonwealth, as trustee, has a constitutional obligation to negotiate and structure leases in a manner consistent with its Article 1, Section 27 duties. Oil and gas leases may not be drafted in ways that remove assets from the corpus of the trust or otherwise deprive the trust beneficiaries (the people, including future generations) of the funds necessary to conserve and maintain the public natural resources.

On remand, the parties should be given the opportunity to develop arguments concerning the proper classification, pursuant to trust law, of any payments called “rental payments” under the lease terms. To the extent such payments are consideration for the oil and gas that is extracted, they are proceeds from the sale of trust principal and remain in the corpus. These proceeds remain in the trust and must be devoted to the conservation and maintenance of our public natural resources, consistent with the plain language of Section 27.

### C. Need for Implementing Legislation

The Foundation contends that Section 27 is self-executing, based in part on the plurality opinion in *Robinson Township*. Foundation’s Brief at 49–50. While the Commonwealth does not take a position on this issue, the Republican Caucus, as amicus, argues that Section 27 is not self-executing. Republican Caucus’ Brief at 48–60. It analyzes decisions from other states regarding their environmental rights amendments and observes that, while a few states have specific language dictating that the amendment is self-executing, no state has read the language of the amendment as self-executing when the language does not explicitly so provide. *Id.* at 56–60.

The plurality in *Robinson Township* recognized that our prior case law has not resolved the issue of whether Section 27 is self-executing or whether it requires implementing legislation to be effective, at least in regard to an attempt to enforce the people’s rights against owners of private property.[28] *Robinson Township*, 83 A.3d at 964–65; *see also* Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 *Envtl. L.* at 474–75.

Although refusing to speak to whether the right was self-executing for purposes of enforcement against private property, this Court in *Payne II*, nevertheless concluded that the trust provisions in the second and third sentences of Section 27 do not require legislative action in order to be enforced against the Commonwealth in regard to public property. In *Payne II*, we stated:

There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the [A]mendment does so by its own *ipse dixit*.

*Payne II*, 361 A.2d at 272.

Former Chief Justice Castille echoed this concept in the *Robinson Township* plurality, concluding that the Commonwealth's obligations as trustee "create a right in the people to seek to enforce the obligations." *Robinson Township*, 83 A.3d at 974. Accordingly, we re-affirm our prior pronouncements that the public trust provisions of Section 27 are self-executing.[29]

#### D. Foundation's Challenges

In the Commonwealth Court, the Foundation sought declarations that the Commonwealth has certain duties as constitutional trustee and that various acts or decisions by the Governor and General Assembly violated those constitutional duties. As noted, the challenged acts and decisions primarily relate to the propriety of the Commonwealth's use of revenue generated from oil and gas leases for purposes not authorized by Section 27. Also implicated is the propriety of the Commonwealth's decision-making process with respect to leasing state land. *See* Foundation's Reply Brief at 13 (arguing that leasing and selling the state park and forest land, and the oil and gas thereon for the purpose of generating revenue for the General Fund is improper because balancing the budget "is not one of the purposes of the trust"). Having determined that proceeds representing payment for extracted oil and gas remain as part of the corpus of our environmental public trust, and that royalties are unquestionably such proceeds, we are able to make specific rulings with respect to only some of the challenged legislation.

Sections 1602-E and 1603-E relate exclusively to royalties. On their face, these amendments lack any indication that the Commonwealth is required to contemplate, let alone reasonably exercise, its duties as the trustee of the environmental public trust created by the Environmental Rights Amendment. The Commonwealth itself readily acknowledges that revenue generated by oil and gas leases is now spent in a multitude of ways entirely unrelated to the conservation and maintenance of our public natural resources. *See* Commonwealth's Brief at 46. Section 1602-E merely requires the General Assembly to "consider" allocating these funds to municipalities impacted by a Marcellus well. Section 1603-E limits DCNR's allocation from the Lease Fund to "up to \$50,000,000" from royalties and requires DCNR to "give preference to the operation and maintenance of State parks and forests" rather than to conservation purposes. Again, however, there is no indication that the General Assembly considered the purposes of the public trust or exercised reasonable care in managing the royalties in a manner consistent with its Section 27 trustee duties.

We hold, therefore, that sections 1602-E and 1603-E, relating to royalties, are facially unconstitutional. They plainly ignore the Commonwealth's constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, *inter alia*, preventing and remedying the degradation, diminution and depletion of our public natural resources. *See Robinson Twp.*, 83 A.3d at 957. Without any question, these legislative enactments permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee's fiduciary obligations. *Id.* at 978 ("[T]he trustee may use the assets of the trust

only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.”); *see also* 20 Pa.C.S. § 7780 (providing that the duty to administer a trust with prudence involves “considering the purposes” of the trust and “the exercise of reasonable care, skill, and caution”). To the extent the remainder of the Fiscal Code amendments transfer proceeds from the sale of trust assets to the General Fund, they are likewise constitutionally infirm.

Based on its conclusion that no revenue from the leasing and sale of trust assets is part of the corpus of the trust as well as its interpretation of Section 27’s plain language, including the Commonwealth’s fiduciary obligations that arise therefrom, the Commonwealth Court denied the Foundation’s application for summary relief. It erroneously concluded that all of the General Assembly’s transfers and appropriations from the Lease Fund were wholly proper because they appeared generally to benefit all the people of the Commonwealth and “there is no constitutional mandate that monies derived from the leasing of State lands for oil and gas development be reinvested into the conservation and maintenance of the Commonwealth’s natural resources.” *PEDF*, 108 A.3d at 169.

Having established, to the contrary, that all proceeds from the sale of our public natural resources are part of the corpus of our environmental public trust and that the Commonwealth must manage the entire corpus according to its fiduciary obligations as trustee, the Commonwealth Court’s decision cannot stand. In light of our specific holding that sections 1602–E and 1603–E are facially unconstitutional, the pre–2008 appropriations scheme as set forth in the Lease Fund Act and the CNRA again controls, with all monies in the Lease Fund specifically appropriated to the DCNR. As to the remaining acts and decisions the Foundation challenges, we clarify that their constitutionality depends upon whether they result from the Commonwealth’s faithful exercise of its fiduciary duties vis a vis our public natural resources and any proceeds derived from the sale thereof. For example, the Governor’s ability to override decisions by the DCNR regarding leasing is contingent upon the extent to which he does so in a manner that is faithful to his trustee obligations, not his various other obligations.

We also clarify that the legislature’s diversion of funds from the Lease Fund (and from the DCNR’s exclusive control) does not, in and of itself, constitute a violation of Section 27. As described herein, the legislature violates Section 27 when it diverts proceeds from oil and gas development to a non-trust purpose without exercising its fiduciary duties as trustee. The DCNR is not the only agency committed to conserving and maintaining our public natural resources, and the General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating Section 27. By the same token, the Lease Fund is not a constitutional trust fund and need not be the exclusive repository for proceeds from oil and gas development. However, if proceeds are moved to the General Fund, an accounting is likely necessary to ensure that the funds are ultimately used in accordance with the trustee’s obligation to conserve and maintain our natural resources.

The Commonwealth (including the Governor and General Assembly) may not approach our public natural resources as a proprietor, and instead must at all times fulfill its role as a trustee. Because the legislative enactments at issue here do not reflect that the Commonwealth complied with its constitutional duties, the order of the Commonwealth Court with respect to the constitutionality of 1602–E and 1603–E is reversed, and the order is otherwise vacated in all respects. The case is remanded to the Commonwealth Court for further proceedings consistent with this Opinion.

#### CONCURRING AND DISSENTING OPINION

JUSTICE BAER

Through today’s decision, this Court takes several monumental steps in the development of the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution. I agree with many of the Majority’s holdings, including Part IV.A.’s dismantling of the Commonwealth Court’s *Payne*

test, which stood for nearly fifty years, the confirmation that the public trust provisions of the amendment are self-executing in Part IV.C., and the recognition in footnote 23 that all branches of the Commonwealth are trustees of Pennsylvania’s natural resources. These holdings solidify the jurisprudential sea-change begun by Chief Justice Castille’s plurality in *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 950–51 (2013) (plurality), which rejuvenated Section 27 and dispelled the oft-held view that the provision was merely an aspirational statement. With this, I am in full agreement.

Nevertheless, I dissent from the primary holding of the case declaring various fiscal enactments unconstitutional or potentially unconstitutional based upon the Majority’s conclusion that the proceeds from the sale of natural resources are part of the “trust corpus” protected by Section 27. Maj. Op. at 933. I reject my colleagues’ reading of Section 27, which I find to be unmoored from the amendment’s language and purpose. As discussed below, the current decision imposes upon our sister branches of government private trust principles that are absent from the constitutional language and tangential to the forces motivating the adoption of Section 27.

[Remainder of Justice Baer’s opinion omitted.]

### DISSENTING OPINION

#### CHIEF JUSTICE SAYLOR

I join the central analysis of the dissenting opinion authored by Justice Baer, based on the recognition that the Environmental Rights Amendment is an embodiment of the public trust doctrine.

[End]

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[24] In *Robinson Township*, the plurality explained the significant drawbacks of the Commonwealth Court’s *Payne* test:

[T]he test poses difficulties both obvious and critical. First, the *Payne* test describes the Commonwealth’s obligations—both as trustee and under the first clause of Section 27—in much narrower terms than the constitutional provision. Second, the test assumes that the availability of judicial relief premised upon Section 27 is contingent upon and constrained by legislative action. And, finally, the Commonwealth Court’s *Payne* decision and its progeny have the effect of minimizing the constitutional duties of executive agencies and the judicial branch, and circumscribing the abilities of these entities to carry out their constitutional duties independent of legislative control.

*Robinson Twp.*, 83 A.3d at 967.

[25] In *Robinson Township*, this Court considered the constitutionality of portions of Act 13 of 2012, which amended the Pennsylvania Lease Fund Act with substantial benefits to the natural gas industry in response to the Marcellus Shale boom. Notably, some of the Foundation’s challenges in the case at bar were triggered by separate provisions of Act 13, specifically those provisions that created the Marcellus Legacy Fund. *See* 58 Pa.C.S. §§ 2315(a.1), 2505.

[26] The sentence was also amended to include the term “public” to indicate that it did not apply to purely private property rights. However, Representative Kury opined that the trust nevertheless applied to “resources owned by the Commonwealth and also to those resources not owned by the Commonwealth, which involve a public interest.” Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2271–72 (1970) (statement by Rep. Kury).

[27] Trustee obligations are not vested exclusively in any single branch of Pennsylvania’s government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a

fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality. *See Robinson Twp.*, 83 A.3d at 956–57; *see also* Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2269, 2271 (1970).

Importantly, in addition to its trustee obligations, the DCNR also has a statutory responsibility “to maintain, improve and preserve State parks, to manage State forest lands to assure their long-term health, sustainability and economic use.” *See* 71 P.S. § 1340.101. To pursue this mission, the DCNR is empowered with exclusive authority “to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests” when, and only when, the DCNR determines that doing so is in the best interests of the Commonwealth. 71 P.S. § 1340.302(a)(6).

[28] This question, regarding whether Section 27 was self-executing in regard to private property, divided the Court in *Commonwealth v. National Gettysburg Battlefield*, 454 Pa. 193, 311 A.2d 588 (1973), where the Commonwealth attempted to enjoin the owners of property adjoining the Gettysburg battlefield from constructing an observation tower claiming that the tower would violate the people’s right to the historic and aesthetic values of the site. In a plurality opinion, two justices concluded that the Section 27 claim should be dismissed because the provision required legislative action to be effective, *id.* at 595; one justice concurred with the dismissal without opinion, *id.*; two justices found that the Commonwealth’s claim failed on the merits, while acknowledging the Commonwealth’s ability to act as trustee (presumably without further legislative action), *id.* at 595–96; and two justices would have granted the injunction based on Section 27, specifically finding the provision to be self-executing, *id.* at 597. As noted in *Robinson Township*, this Court previously misstated that a plurality of the justices in *Gettysburg* concluded that the Section 27 was not self-executing in *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612, 620 (1993), when in fact only two justices specifically found it to require legislative action. *Robinson Twp.*, 83 A.3d at 940.

[29] We additionally find support in Section 27’s legislative history, in which Professor Broughton opined that the Amendment “would immediately create rights to prevent the government (state, local, or an authority) from taking positive action which unduly harms environmental quality.” Legislative Journal–House at 2281 (Broughton Analysis).

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[26] In addition to the substantive right to a clean and healthful environment, article XI, section 9 also includes a private right of enforcement of the right to a clean and healthful environment. *See* Haw. Const. art. XI, § 9 (“Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”); *Ala Loop*, 123 Hawai‘i at 409, 235 P.3d at 1121 (distinguishing between the substantive right and procedural component of article XI, section 9).

[27] Indeed, by acknowledging that article XI, section 9 provides Sierra Club with the procedural right to bring a private declaratory action to enforce HRS Chapter 269, Dissent at ———, ——— P.3d at ———, ———, the dissent also implicitly acknowledges that there is a substantive right—and thus a property interest—that would be vindicated through such a private action.

[28] It is noted that such environmental laws may be enacted pursuant to article IX, section 8, which empowers the State to pass environmental regulations “to promote and maintain a healthful environment.”

[29] Thus, contrary to the dissent’s characterization, Dissent at ———, ——— P.3d at ———, the protectable interest in this case for the purpose of constitutional due process is not the abstract aesthetic and

environmental interests of Sierra Club's members; it is the right to a clean and healthful environment guaranteed by article XI, section 9 of the Hawai'i Constitution and particularized by HRS Chapter 269. This decision does not encompass all general environmental and aesthetic interests.



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## **Section II: Reports**

### **A. United Nations: Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.**

#### **Human Rights Council**

#### **Thirty-seventh session**

26 February–23 March 2018

Agenda item 3

**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

**Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment**

#### **Note by the Secretariat**

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, in which he presents framework principles on human rights and the environment, addresses the human right to a safe, clean, healthy and sustainable environment and looks ahead to the next steps in the evolving relationship between human rights and the environment.

## **Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment**

### **I. Introduction**

1. The present report is the final report of the Special Rapporteur to the Human Rights Council. It presents framework principles on human rights and the environment, addresses the human right to a healthy environment and looks forward to the next steps in the evolving relationship between human rights and the environment.

2. The mandate was established in March 2012 by the Council in its resolution 19/10, in which it decided to appoint an independent expert with a mandate to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and to identify and promote best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking. John H. Knox was appointed to the position in August 2012. In his first report, presented to the Council in March 2013, he emphasized that human rights and the environment are interdependent (A/HRC/22/43). A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of a vast range of human rights, including the rights to life, health, food, water and development. At the same time, the exercise of human rights, including the rights to information, participation and remedy, is vital to the protection of the environment.

3. Over the first two years of the mandate, the Independent Expert sought to map the human rights obligations relating to the environment in more detail. He held a series of regional consultations around the world and, with the help of attorneys and academics working pro bono, reviewed hundreds of statements of treaty bodies, regional human rights tribunals, special procedure mandate holders and other human rights authorities that had applied human rights norms to environmental issues. He described the statements in 14 reports, each of which addressed one source or set of sources. He found that despite the diversity of the sources, their views on the relationship of human rights law and the environment were remarkably coherent. His second report, presented in March 2014, summarized these views (A/HRC/25/53). Virtually every source reviewed identified human rights whose enjoyment was infringed or threatened by environmental harm, and agreed that States had obligations under human rights law to protect against such harm. The obligations included procedural obligations (such as duties to provide information, facilitate participation and provide access to remedies), substantive obligations (including to regulate private actors) and heightened obligations to those in particularly vulnerable situations.

4. On the basis of his research and regional consultations, the Independent Expert also identified good practices in the use of these obligations, and in his next report to the Council, presented in March 2015, he described more than 100 such good practices (A/HRC/28/61). He published more detailed descriptions of each of the good practices on the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), and made them available in a searchable database at <http://environmentalrightsdatabase.org/>.

5. In March 2015, in its resolution 28/11, the Human Rights Council decided to extend the mandate of John H. Knox as a special rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment for a period of three years. The Council encouraged him to continue to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and to identify and promote good practices relating to those obligations. He has submitted reports on specific aspects of that relationship, including a report on climate change and human rights in 2016 (A/HRC/31/52), a report on biodiversity and human rights in 2017 (A/HRC/34/49), and a report on children's rights and the environment to the current session of the Council (A/HRC/37/58).

6. In resolution 28/11, the Council also encouraged the Special Rapporteur to promote and report on the realization of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, to disseminate his findings by continuing to give particular emphasis to practical solutions with regard to their implementation and to work on identifying challenges and obstacles to the full realization of such obligations. The Special Rapporteur presented a report in March 2016 with specific recommendations on implementation of the human rights obligations relating to the environment (A/HRC/31/53). In his second term, he has promoted implementation of the obligations in many ways, including by partnering with the United Nations Environment Programme on a series of judicial workshops on constitutional rights to a healthy environment, supporting the United Nations Institute for Training and Research in the development of an online course on human rights and the environment and working with the Universal Rights Group to develop a website for environmental human rights defenders, <https://www.environment-rights.org/>, as well as by undertaking country visits and receiving communications on violations.

## **II. Framework principles on human rights and the environment**

7. To facilitate implementation of the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the Special Rapporteur was urged to develop and disseminate guidance that clearly describes the relevant norms and is easy to understand and apply (see A/HRC/31/53, para. 69). In October 2017, the Special Rapporteur published draft guidelines on human rights and the environment and invited written comments. He also held a public consultation and an expert seminar, which included representatives of Governments, international organizations, civil society organizations and academics. He took into account the input received at the consultation and the seminar, as well as more than 50 written comments, in preparing the framework principles on human rights and the environment that are annexed to the present report.

8. The 16 framework principles set out basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. Each framework principle has a commentary that elaborates on it and further clarifies its meaning. The framework principles and commentary do not create new obligations. Rather, they reflect the application of existing human

rights obligations in the environmental context. As the Special Rapporteur stated in the mapping report (A/HRC/25/53), he understands that not all States have formally accepted all of these norms. While many of the obligations described in the framework principles and commentary are based directly on treaties or binding decisions from human rights tribunals, others draw on statements of human rights bodies that have the authority to interpret human rights law but not necessarily to issue binding decisions.<sup>12</sup>

9. The coherence of these interpretations, however, is strong evidence of the converging trends towards greater uniformity and certainty in the understanding of human rights obligations relating to the environment. These trends are further supported by State practice, including in international environmental instruments and before human rights bodies. As a result, the Special Rapporteur believes that States should accept the framework principles as a reflection of actual or emerging international human rights law. He is confident that, at a bare minimum, States will see them as best practices that they should move to adopt as expeditiously as possible.

10. After consideration, the Special Rapporteur chose the name “framework principles” because he thought that it best reflected the nature of the document. The framework principles and commentary provide a sturdy basis for understanding and implementing human rights obligations relating to the environment, but they are in no sense the final word. The relationship between human rights and the environment has countless facets, and our understanding of it will continue to grow for many years to come. These framework principles do not purport to describe all of the human rights obligations that can be brought to bear on environmental issues today, much less attempt to predict those that may evolve in the future. The goal is simply to describe the main human rights obligations that apply in the environmental context, in order to facilitate their practical implementation and further development. To that end, the Special Rapporteur urges States, international organizations and civil society organizations to disseminate and publicize the framework principles, and to take them into account in their own activities.

### **III. The human right to a safe, clean, healthy and sustainable environment**

11. An unusual aspect of the development of human rights norms relating to the environment is that they have not relied primarily on the explicit recognition of a human right to a safe, clean, healthy and sustainable environment — or, more simply, a human right to a healthy environment. Although this right has been recognized, in various forms, in regional agreements and in most national constitutions, it has not been adopted in a human rights agreement of global

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<sup>12</sup> To avoid making the document too long and unwieldy, the framework principles and commentary do not cite all of the human rights sources on which they rely. A more complete list of sources is available on the OHCHR website. Although the framework principles and commentary do not attempt to restate obligations in areas other than human rights law, they do take into account relevant international environmental sources, such as the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (the Bali Guidelines), adopted by the Governing Council of the United Nations Environment Programme in 2010.

application, and only one regional agreement, the African Charter on Human and Peoples' Rights, provides for its interpretation in decisions by a review body.

12. Treaty bodies, regional tribunals, special rapporteurs and other international human rights bodies have instead applied human rights law to environmental issues by “greening” existing human rights, including the rights to life and health. As the mapping report explained and the framework principles demonstrate, this process has been quite successful, creating an extensive jurisprudence on human rights and the environment. In retrospect, this development is not as surprising as it may have seemed when it first began, over two decades ago. Environmental harm interferes with the full enjoyment of a wide spectrum of human rights, and the obligations of States to respect human rights, to protect human rights from interference and to fulfil human rights apply in the environmental context no less than in any other.

13. Explicit recognition of the human right to a healthy environment thus turned out to be unnecessary for the application of human rights norms to environmental issues. At the same time, it is significant that the great majority of the countries in the world have recognized the right at the national or regional level, or both. Based on the experience of the countries that have adopted constitutional rights to a healthy environment, recognition of the right has proved to have real advantages. It has raised the profile and importance of environmental protection and provided a basis for the enactment of stronger environmental laws. When applied by the judiciary, it has helped to provide a safety net to protect against gaps in statutory laws and created opportunities for better access to justice. Courts in many countries are increasingly applying the right, as is illustrated by the interest in the regional judicial workshops held by the United Nations Environment Programme and the Special Rapporteur.

14. On the basis of this experience, the Special Rapporteur recommends that the Human Rights Council consider supporting the recognition of the right in a global instrument. A model could be the rights to water and sanitation, which, like the right to a healthy environment, are not explicitly recognized in United Nations human rights treaties but are clearly necessary to the full enjoyment of human rights. In 2010, in its resolution 64/292, the General Assembly recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”. The General Assembly could adopt a similar resolution that recognizes the right to a safe, clean, healthy and sustainable environment, another right that is essential for the full enjoyment of life and all human rights.<sup>13</sup>

15. States may be understandably reluctant to recognize a “new” human right if its content is uncertain. To be sure that a right will be taken seriously, it is important to be clear about its implications. The Special Rapporteur notes that one of the primary goals of his work on the mandate has been to clarify what

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<sup>13</sup> A resolution by the General Assembly is not the only possible instrument through which a right to a healthy environment could be formally recognized. The Special Rapporteur notes that at the seventy-second session of the General Assembly, the Government of France presented for consideration a Global Pact for the Environment, article 1 of which indicates that “Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment”. However, a resolution may be adopted more quickly and easily than an international agreement.

human rights law requires with respect to environmental protection, including through the mapping project and these framework principles. As a result, the “human right to a healthy environment” is not an empty vessel waiting to be filled; on the contrary, its content has already been clarified, through recognition by human rights authorities that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of the human rights to life, health, food, water, housing and so forth. Here, too, the right is similar to the rights to water and sanitation, whose content had been addressed in detail by the Committee on Economic, Social and Cultural Rights and Catarina de Albuquerque, the first Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, before the General Assembly acted in 2010.

16. Even without formal recognition, the term “the human right to a healthy environment” is already being used to refer to the environmental aspects of the entire range of human rights that depend on a safe, clean, healthy and sustainable environment. The use of the term in this way — and, for that matter, the adoption of a resolution recognizing the right — does not change the legal content of obligations that are based on existing human rights law. Nevertheless, it has real advantages. It raises awareness that human rights norms require protection of the environment and highlights that environmental protection is on the same level of importance as other human interests that are fundamental to human dignity, equality and freedom. It also helps to ensure that human rights norms relating to the environment continue to develop in a coherent and integrated manner. Recognition of the right in a General Assembly resolution would further strengthen all of these benefits.

#### **IV. Looking forward**

17. Although the relationship of human rights and the environment has evolved rapidly over the past two decades, and even more so over the past five years, much remains to be done to clarify and implement the human rights obligations relating to a safe, clean, healthy and sustainable environment. The Special Rapporteur encourages the Human Rights Council to continue to be actively involved in the development of this relationship, including by renewing the mandate.

18. For example, more work is necessary to clarify how human rights norms relating to the environment apply to specific areas, including issues of gender and other types of discrimination, the responsibilities of businesses in relation to human rights and the environment, the effects of armed conflict on human rights and the environment, and obligations of international cooperation in relation to multinational corporations and transboundary harm.

19. More work, too, can be done to institutionalize support for capacity-building, including by instituting an annual forum on human rights and environmental issues; holding conferences for national human rights institutions on environmental matters; continuing to hold judicial workshops on human rights and the environment; instituting similar workshops for officials at environmental, mining and other agencies; strengthening accountability mechanisms for human rights violations in connection with conservation activities; and mainstreaming



human rights into the work of international institutions working on development and environmental issues. In this last respect, the Special Rapporteur applauds the recent announcement by the United Nations Environment Programme of a new “environmental rights initiative”, designed in part to support environmental human rights defenders. He encourages OHCHR and the United Nations Environment Programme to continue to build on their partnership.

20. As Victor Hugo famously said, it is impossible to resist an idea whose time has come. The interdependence of human rights and the environment is an idea whose time is here. Over the past five years, the Special Rapporteur has made over 50 trips, to approximately 25 countries. Everywhere he has gone, he has met people who are bringing human rights to bear on environmental threats, often at great personal risk. From attorneys in Mexico to park rangers in Mongolia, from professors in China to community activists in Madagascar, from a mother who founded an environmental organization in Kenya to conservationists in Sweden to judges in Costa Rica, from indigenous leaders in Brazil to climate negotiators in Paris to international civil servants in Geneva and Nairobi, people in every country are striving for a world in which everyone can enjoy the human rights that depend upon a safe, clean, healthy and sustainable environment. It has been a great honour to support them in their efforts.

## **Annex**

### **Framework principles on human rights and the environment**

1. Human beings are part of nature, and our human rights are intertwined with the environment in which we live. Environmental harm interferes with the enjoyment of human rights, and the exercise of human rights helps to protect the environment and to promote sustainable development.
2. The framework principles on human rights and the environment summarize the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. They provide integrated and detailed guidance for practical implementation of these obligations, and a basis for their further development as our understanding of the relationship of human rights and the environment continues to evolve.
3. The framework principles are not exhaustive: many national and international norms are relevant to human rights and environmental protection, and nothing in the framework principles should be interpreted as limiting or undermining standards that provide higher levels of protection under national or international law.

## **Framework principle 1**

**States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.**

## **Framework principle 2**

**States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.**

### *Commentary on framework principles 1 and 2*

4. Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights, including the rights to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation, to housing, to participation in cultural life and to development, as well as the right to a healthy environment itself, which is recognized in regional agreements and most national constitutions.<sup>14</sup> At the same time, the exercise of human rights, including rights to freedom of expression and association, to education and information, and to participation and effective remedies, is vital to the protection of the environment.

5. The obligations of States to respect human rights, to protect the enjoyment of human rights from harmful interference,<sup>15</sup> and to fulfil human rights by working towards their full realization<sup>16</sup> all apply in the environmental context. States should therefore refrain from violating human rights through causing or allowing environmental harm; protect against harmful environmental interference from other sources, including business enterprises, other private actors and natural causes; and take effective steps to ensure the conservation and sustainable use of the ecosystems and biological diversity on which the full enjoyment of human rights depends. While it may not always be possible to prevent all environmental harm that interferes with the full enjoyment of human rights, States should undertake due diligence to prevent such harm and reduce it to the extent possible, and provide for remedies for any remaining harm.

6. At the same time, States must fully comply with their obligations in respect of human rights, such as freedom of expression, that are exercised in relation to the environment. Such obligations not only have independent bases in human rights law; they are also required in order to respect, protect and fulfil the human

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<sup>14</sup> See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 1; African Charter on Human and Peoples' Rights, art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11; Arab Charter on Human Rights, art. 38; and ASEAN Human Rights Declaration, art. 28. More than 100 States have recognized the right at the national level.

<sup>15</sup> See, for example, Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 5.

<sup>16</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 33.

rights whose enjoyment depends on a safe, clean, healthy and sustainable environment.

### **Framework principle 3**

**States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.**

#### *Commentary*

7. The obligations of States to prohibit discrimination and to ensure equal and effective protection against discrimination<sup>17</sup> apply to the equal enjoyment of human rights relating to a safe, clean, healthy and sustainable environment. States therefore have obligations, among others, to protect against environmental harm that results from or contributes to discrimination, to provide for equal access to environmental benefits and to ensure that their actions relating to the environment do not themselves discriminate.

8. Discrimination may be direct, when someone is treated less favourably than another person in a similar situation for a reason related to a prohibited ground, or indirect, when facially neutral laws, policies or practices have a disproportionate impact on the exercise of human rights as distinguished by prohibited grounds of discrimination.<sup>18</sup> In the environmental context, direct discrimination may include, for example, failing to ensure that members of disfavoured groups have the same access as others to information about environmental matters, to participation in environmental decision-making, or to remedies for environmental harm (framework principles 7, 9 and 10). In the case of transboundary environmental harm, States should provide for equal access to information, participation and remedies without discriminating on the basis of nationality or domicile.

9. Indirect discrimination may arise, for example, when measures that adversely affect ecosystems, such as mining and logging concessions, have disproportionately severe effects on communities that rely on the ecosystems. Indirect discrimination can also include measures such as authorizing toxic and hazardous facilities in large numbers in communities that are predominantly composed of racial or other minorities, thereby disproportionately interfering with their rights, including their rights to life, health, food and water. Like directly

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<sup>17</sup> For example, International Covenant on Civil and Political Rights, arts. 2 (1) and 26; International Covenant on Economic, Social and Cultural Rights, art. 2 (2); International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2 and 5; Convention on the Elimination of All Forms of Discrimination against Women, art. 2; Convention on the Rights of the Child, art. 2; Convention on the Rights of Persons with Disabilities, art. 5. The term “discrimination” here refers to any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. Human Rights Committee, general comment No. 18 (1989) on non-discrimination, para. 7.

<sup>18</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 10.

discriminatory measures, such indirect differential treatment is prohibited unless it meets strict requirements of legitimacy, necessity and proportionality.<sup>19</sup> More generally, to address indirect as well as direct discrimination, States must pay attention to historical or persistent prejudice against groups of individuals, recognize that environmental harm can both result from and reinforce existing patterns of discrimination, and take effective measures against the underlying conditions that cause or help to perpetuate discrimination.<sup>20</sup> In addition to complying with their obligations of non-discrimination, States should take additional measures to protect those who are most vulnerable to, or at particular risk from, environmental harm (framework principles 14 and 15).

#### **Framework principle 4**

**States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.**

##### *Commentary*

10. Human rights defenders include individuals and groups who strive to protect and promote human rights relating to the environment (see A/71/281, para. 7). Those who work to protect the environment on which the enjoyment of human rights depends are protecting and promoting human rights as well, whether or not they self-identify as human rights defenders. They are among the human rights defenders most at risk, and the risks are particularly acute for indigenous peoples and traditional communities that depend on the natural environment for their subsistence and culture.

11. Like other human rights defenders, environmental human rights defenders are entitled to all of the rights and protections set out in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), including the right to be protected in their work and the right to strive for the protection and realization of human rights at the national and international levels. To that end, States must provide a safe and enabling environment for defenders to operate free from threats, harassment, intimidation and violence. The requirements for such an environment include that States: adopt and implement laws that protect human rights defenders in accordance with international human rights standards;<sup>21</sup> publicly recognize the contributions of human rights defenders to society and ensure that their work is not criminalized or stigmatized; develop, in consultation with human rights defenders, effective programmes for protection and early warning; provide appropriate training for security and law enforcement officials; ensure the prompt and impartial investigation of threats and violations and the prosecution of alleged

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<sup>19</sup> Ibid., para. 13.

<sup>20</sup> Ibid., para. 8.

<sup>21</sup> See Model Law for the Recognition and Protection of Human Rights Defenders, at [www.ishr.ch/sites/default/files/documents/model\\_law\\_full\\_digital\\_updated\\_15june2016.pdf](http://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf).

perpetrators; and provide for effective remedies for violations, including appropriate compensation (see A/71/281, A/66/203 and A/HRC/25/55, paras. 54–133).

## **Framework principle 5**

### **States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.**

#### *Commentary*

12. The obligations of States to respect and protect the rights to freedom of expression, association and peaceful assembly<sup>22</sup> encompass the exercise of those rights in relation to environmental matters. States must ensure that these rights are protected whether they are being exercised within structured decision-making procedures or in other forums, such as the news or social media, and whether or not they are being exercised in opposition to policies or projects favoured by the State.

13. Restrictions on the exercise of these rights are permitted only if they are provided by law and necessary in a democratic society to protect the rights of others, or to protect national security, public order, or public health or morals. These restrictions must be narrowly tailored to avoid undermining the rights. For example, blanket prohibitions on protests surrounding the operations of mining, forestry or other resource extraction companies are unjustifiable (see A/HRC/29/25, para. 22). States may never respond to the exercise of these rights with excessive or indiscriminate use of force, arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance, the misuse of criminal laws, stigmatization or the threats of such acts. States should never hinder the access of individuals or associations to international bodies, or their right to seek, receive and use resources from foreign as well as domestic sources.<sup>23</sup> When violence occurs in an otherwise peaceful assembly or protest, States have a duty to distinguish between peaceful and non-peaceful demonstrators, take measures to de-escalate tensions and hold the violent individuals — not the organizers — to account for their actions. The potential for violence is not an excuse to interfere with or disperse otherwise peaceful assemblies (see A/HRC/29/25, para. 41).

14. States must also protect the exercise of these rights from interference by businesses and other private actors. States must ensure that civil laws relating to defamation and libel are not misused to repress the exercise of these rights. States should protect against the repression of legitimate advocacy by private security enterprises, and States may not cede their own law enforcement responsibilities to such enterprises or other private actors.

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<sup>22</sup> See Universal Declaration of Human Rights, arts. 19–20; International Covenant on Civil and Political Rights, arts. 19 and 21–22.

<sup>23</sup> See Declaration on Human Rights Defenders, arts. 9 (4) and 13.

## Framework principle 6

### **States should provide for education and public awareness on environmental matters.**

#### *Commentary*

15. States have agreed that the education of the child shall be directed to, among other things, the development of respect for human rights and the natural environment.<sup>24</sup> Environmental education should begin early and continue throughout the educational process. It should increase students' understanding of the close relationship between humans and nature, help them to appreciate and enjoy the natural world and strengthen their capacity to respond to environmental challenges.

16. Increasing the public awareness of environmental matters should continue into adulthood. To ensure that adults as well as children understand environmental effects on their health and well-being, States should make the public aware of the specific environmental risks that affect them and how they may protect themselves from those risks. As part of increasing public awareness, States should build the capacity of the public to understand environmental challenges and policies, so that they may fully exercise their rights to express their views on environmental issues (framework principle 5), understand environmental information, including assessments of environmental impacts (framework principles 7 and 8), participate in decision-making (framework principle 9) and, where appropriate, seek remedies for violations of their rights (framework principle 10). States should tailor environmental education and public awareness programmes to the culture, language and environmental situation of particular populations.

## Framework principle 7

### **States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.**

#### *Commentary*

17. The human right of all persons to seek, receive and impart information<sup>25</sup> includes information on environmental matters. Public access to environmental information enables individuals to understand how environmental harm may undermine their rights, including the rights to life and health, and supports their exercise of other rights, including the rights to expression, association, participation and remedy.

18. Access to environmental information has two dimensions. First, States should regularly collect, update and disseminate environmental information, including information about: the quality of the environment, including air and water;

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<sup>24</sup> See Convention on the Rights of the Child, art. 29.

<sup>25</sup> See Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 19.



pollution, waste, chemicals and other potentially harmful substances introduced into the environment; threatened and actual environmental impacts on human health and well-being; and relevant laws and policies. In particular, in situations involving imminent threat of harm to human health or the environment, States must ensure that all information that would enable the public to take protective measures is disseminated immediately to all affected persons, regardless of whether the threats have natural or human causes.

19. Second, States should provide affordable, effective and timely access to environmental information held by public authorities, upon the request of any person or association, without the need to show a legal or other interest. Grounds for refusal of a request should be set out clearly and construed narrowly, in light of the public interest in favour of disclosure. States should also provide guidance to the public on how to obtain environmental information.

### **Framework principle 8**

**To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.**

#### *Commentary*

20. Prior assessment of the possible environmental impacts of proposed projects and policies is generally required by national laws, and the elements of effective environmental assessment are widely understood: the assessment should be undertaken as early as possible in the decision-making process for any proposal that is likely to have significant effects on the environment; the assessment should provide meaningful opportunities for the public to participate, should consider alternatives to the proposal, and should address all potential environmental impacts, including transboundary effects and cumulative effects that may occur as a result of the interaction of the proposal with other activities; the assessment should result in a written report that clearly describes the impacts; and the assessment and the final decision should be subject to review by an independent body. The procedure should also provide for monitoring of the proposal as implemented, to assess its actual impacts and the effectiveness of protective measures.<sup>26</sup>

21. To protect against interference with the full enjoyment of human rights, the assessment of environmental impacts should also examine the possible effects of the environmental impacts of proposed projects and policies on the enjoyment of all relevant rights, including the rights to life, health, food, water, housing and culture. As part of that assessment, the procedure should examine whether the proposal will comply with obligations of non-discrimination (framework principle 3), applicable domestic laws and international agreements (framework principles 11 and 13) and the obligations owed to those who are particularly

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<sup>26</sup> United Nations Environment Programme, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (2004), p. 42.

vulnerable to environmental harm (framework principles 14 and 15). The assessment procedure itself must comply with human rights obligations, including by providing public information about the assessment and making the assessment and the final decision publicly available (framework principle 7), facilitating public participation by those who may be affected by the proposed action (framework principle 9), and providing for effective legal remedies (framework principle 10).

22. Business enterprises should conduct human rights impact assessments in accordance with the Guiding Principles on Business and Human Rights, which provide that businesses “should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships”, include “meaningful consultation with potentially affected groups and other relevant stakeholders”, “integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action” (see Guiding Principles 18–19).

### **Framework principle 9**

**States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.**

#### *Commentary*

23. The right of everyone to take part in the government of their country and in the conduct of public affairs<sup>27</sup> includes participation in decision-making related to the environment. Such decision-making includes the development of policies, laws, regulations, projects and activities. Ensuring that these environmental decisions take into account the views of those who are affected by them increases public support, promotes sustainable development and helps to protect the enjoyment of rights that depend on a safe, clean, healthy and sustainable environment.

24. To be effective, public participation must be open to all members of the public who may be affected and occur early in the decision-making process. States should provide for the prior assessment of the impacts of proposals that may significantly affect the environment, and ensure that all relevant information about the proposal and the decision-making process is made available to the affected public in an objective, understandable, timely and effective manner (see framework principles 7 and 8).

25. With respect to the development of policies, laws and regulations, drafts should be publicly available and the public should be given opportunities to comment directly or through representative bodies. With respect to proposals for specific projects or activities, States should inform the affected public of their opportunities to participate at an early stage of the decision-making process and

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<sup>27</sup> See Universal Declaration of Human Rights, art. 21; International Covenant on Civil and Political Rights, art. 25.

provide them with relevant information, including information about: the proposed project or activity and its possible impacts on human rights and the environment; the range of possible decisions; and the decision-making procedure to be followed, including the time schedule for comments and questions and the time and place of any public hearings.

26. States must provide members of the public with an adequate opportunity to express their views, and take additional steps to facilitate the participation of women and of members of marginalized communities (framework principle 14). States must ensure that the relevant authorities take into account the expressed views of the public in making their final decisions, that they explain the justifications for the decisions and that the decisions and explanations are made public.

### **Framework principle 10**

#### **States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.**

##### *Commentary*

27. The obligations of States to provide for access to judicial and other procedures for effective remedies for violations of human rights<sup>28</sup> encompass remedies for violations of human rights relating to the environment. States must therefore provide for effective remedies for violations of the obligations set out in these framework principles, including those relating to the rights of freedom of expression, association and peaceful assembly (framework principle 5), access to environmental information (framework principle 7) and public participation in environmental decision-making (framework principle 9).

28. In addition, in connection with the obligations to establish, maintain and enforce substantive environmental standards (framework principles 11 and 12), each State should ensure that individuals have access to effective remedies against private actors, as well as government authorities, for failures to comply with the laws of the State relating to the environment.

29. To provide for effective remedies, States should ensure that individuals have access to judicial and administrative procedures that meet basic requirements, including that the procedures: (a) are impartial, independent, affordable, transparent and fair; (b) review claims in a timely manner; (c) have the necessary expertise and resources; (d) incorporate a right of appeal to a higher body; and (e) issue binding decisions, including for interim measures, compensation, restitution and reparation, as necessary to provide effective remedies for violations. The procedures should be available for claims of imminent and foreseeable as well as past and current violations. States should ensure that decisions are made public and that they are promptly and effectively enforced.

30. States should provide guidance to the public about how to seek access to these procedures, and should help to overcome obstacles to access such as language,

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<sup>28</sup> See, for example, Universal Declaration of Human Rights, art. 8; International Covenant on Civil and Political Rights, art. 2 (3).

illiteracy, expense and distance. Standing should be construed broadly, and States should recognize the standing of indigenous peoples and other communal landowners to bring claims for violations of their collective rights. All those pursuing remedies must be protected against reprisals, including threats and violence. States should protect against baseless lawsuits aimed at intimidating victims and discouraging them from pursuing remedies.

### **Framework principle 11**

**States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.**

#### *Commentary*

31. To protect against environmental harm and to take necessary measures for the full realization of human rights that depend on the environment, States must establish, maintain and enforce effective legal and institutional frameworks for the enjoyment of a safe, clean, healthy and sustainable environment. Such frameworks should include substantive environmental standards, including with respect to air quality, the global climate, freshwater quality, marine pollution, waste, toxic substances, protected areas, conservation and biological diversity.

32. Ideally, environmental standards would be set and implemented at levels that would prevent all environmental harm from human sources and ensure a safe, clean, healthy and sustainable environment. However, limited resources may prevent the immediate realization of the rights to health, food, water and other economic, social and cultural rights. The obligation of States to achieve progressively the full realization of these rights by all appropriate means<sup>29</sup> requires States to take deliberate, concrete and targeted measures towards that goal, but States have some discretion in deciding which means are appropriate in light of available resources.<sup>30</sup> Similarly, human rights bodies applying civil and political rights, such as the rights to life and to private and family life, have held that States have some discretion to determine appropriate levels of environmental protection, taking into account the need to balance the goal of preventing all environmental harm with other social goals.<sup>31</sup>

33. This discretion is not unlimited. One constraint is that decisions as to the establishment and implementation of appropriate levels of environmental protection must always comply with obligations of non-discrimination (framework principle 3). Another constraint is the strong presumption against retrogressive measures in relation to the progressive realization of economic, social and cultural rights.<sup>32</sup> Other factors that should be taken into account in

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<sup>29</sup> See International Covenant on Economic, Social and Cultural Rights, art. 2 (1).

<sup>30</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations.

<sup>31</sup> See, for example, European Court of Human Rights, *Hatton and others v. United Kingdom* (application No. 36022/97), judgment of 8 July 2003, para. 98. See also Rio Declaration on Environment and Development, principle 11.

<sup>32</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 3, para. 9.

assessing whether environmental standards otherwise respect, promote and fulfil human rights include the following:

(a) The standards should result from a procedure that itself complies with human rights obligations, including those relating to the rights of freedom of expression, freedom of association and peaceful assembly, information, participation and remedy (framework principles 4–10);

(b) The standard should take into account and, to the extent possible, be consistent with all relevant international environmental, health and safety standards, such as those promulgated by the World Health Organization;

(c) The standard should take into account the best available science. However, the lack of full scientific certainty should not be used to justify postponing effective and proportionate measures to prevent environmental harm, especially when there are threats of serious or irreversible damage.<sup>33</sup> States should take precautionary measures to protect against such harm;

(d) The standard must comply with all relevant human rights obligations. For example, in all actions concerning children, the best interests of the child must be a primary consideration;<sup>34</sup>

(e) Finally, the standard must not strike an unjustifiable or unreasonable balance between environmental protection and other social goals, in light of its effects on the full enjoyment of human rights.<sup>35</sup>

## **Framework principle 12**

### **States should ensure the effective enforcement of their environmental standards against public and private actors.**

#### *Commentary*

34. Governmental authorities must comply with the relevant environmental standards in their own operations, and they must also monitor and effectively enforce compliance with the standards by preventing, investigating, punishing and redressing violations of the standards by private actors as well as governmental authorities. In particular, States must regulate business enterprises to protect against human rights abuses resulting from environmental harm and to provide for remedies for such abuses. States should implement training programmes for law enforcement and judicial officers to enable them to understand and enforce environmental laws, and they should take effective steps to prevent corruption from undermining the implementation and enforcement of environmental laws.

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<sup>33</sup> See Rio Declaration on Environment and Development, principle 15.

<sup>34</sup> See Convention on the Rights of the Child, art. 3 (1).

<sup>35</sup> For example, a decision to allow massive oil pollution in the pursuit of economic development could not be considered reasonable in light of its disastrous effects on the enjoyment of the rights to life, health, food and water. See African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, communication No. 155/96 (2001).

35. In accordance with the Guiding Principles on Business and Human Rights, the responsibility of business enterprises to respect human rights includes the responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm, to address such impacts when they occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships. Businesses should comply with all applicable environmental laws, issue clear policy commitments to meet their responsibility to respect human rights through environmental protection, implement human rights due diligence processes (including human rights impact assessments) to identify, prevent, mitigate and account for how they address their environmental impacts on human rights, and enable the remediation of any adverse environmental human rights impacts they cause or to which they contribute.

### **Framework principle 13**

**States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.**

#### *Commentary*

36. The obligation of States to cooperate to achieve universal respect for, and observance of, human rights<sup>36</sup> requires States to work together to address transboundary and global threats to human rights. Transboundary and global environmental harm can have severe effects on the full enjoyment of human rights, and international cooperation is necessary to address such harm. States have entered into agreements on many international environmental problems, including climate change, ozone depletion, transboundary air pollution, marine pollution, desertification and the conservation of biodiversity.

37. The obligation of international cooperation does not require every State to take exactly the same actions. The responsibilities that are necessary and appropriate for each State will depend in part on its situation, and agreements between States may appropriately tailor their commitments to take account of their respective capabilities and challenges. Multilateral environmental agreements often include different requirements for States in different economic situations, and provide for technical and financial assistance from developed States to other States.

38. Once their obligations have been defined, however, States must comply with them in good faith. No State should ever seek to withdraw from any of its international obligations to protect against transboundary or global environmental harm. States should continually monitor whether their existing international obligations are sufficient. When those obligations and commitments prove to be inadequate, States should quickly take the necessary steps to strengthen them, bearing in mind that the lack of full scientific certainty should not be used to

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<sup>36</sup> See Charter of the United Nations, arts. 55–56; International Covenant on Economic, Social and Cultural Rights, art. 2 (1).



justify postponing effective and proportionate measures to ensure a safe, clean, healthy and sustainable environment.

39. States must also comply with their human rights obligations relating to the environment in the context of other international legal frameworks, such as agreements for economic cooperation and international finance mechanisms. For example, they should ensure that agreements facilitating international trade and investment support, rather than hinder, the ability of States to respect, protect and fulfil human rights and to ensure a safe, clean, healthy and sustainable environment. International financial institutions, as well as State agencies that provide international assistance, should adopt and implement environmental and social safeguards that are consistent with human rights obligations, including by: (a) requiring the environmental and social assessment of every proposed project and programme; (b) providing for effective public participation; (c) providing for effective procedures to enable those who may be harmed to pursue remedies; (d) requiring legal and institutional protections against environmental and social risks; and (e) including specific protections for indigenous peoples and those in vulnerable situations.

#### **Framework principle 14**

**States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.**

##### *Commentary*

40. As the Human Rights Council has recognized, while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations.<sup>37</sup> Persons may be vulnerable because they are unusually susceptible to certain types of environmental harm, or because they are denied their human rights, or both. Vulnerability to environmental harm reflects the “interface between exposure to the physical threats to human well-being and the capacity of people and communities to cope with those threats”.<sup>38</sup>

41. Those who are at greater risk from environmental harm for either or both reasons often include women, children, persons living in poverty, members of indigenous peoples and traditional communities, older persons, persons with disabilities, ethnic, racial or other minorities and displaced persons.<sup>39</sup> The many examples of potential vulnerability include the following:

(a) In most households, women are primarily responsible for water and hygiene. When sources of water are polluted, they are at greater risk of exposure, and if they travel longer distances to find safer sources, they are at

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<sup>37</sup> See Human Rights Council resolution 34/20.

<sup>38</sup> United Nations Environment Programme, *Global Environment Outlook 3* (2002), p. 302.

<sup>39</sup> Many persons are vulnerable and subject to discrimination along more than one dimension, such as children living in poverty or indigenous women.

greater risk of assault (see A/HRC/33/49). Nevertheless, they are typically excluded from decision-making procedures on water and sanitation;

(b) Children are vulnerable for many reasons, including that they are developing physically and that they are less resistant to many types of environmental harm. Of the approximately 6 million deaths of children under the age of 5 in 2015, more than 1.5 million could have been prevented through the reduction of environmental risks. Moreover, exposure to pollution and other environmental harms in childhood can have lifelong consequences, including by increasing the likelihood of cancer and other diseases (see A/HRC/37/58);

(c) Persons living in poverty often lack adequate access to safe water and sanitation, and they are more likely to burn wood, coal and other solid fuels for heating and cooking, causing household air pollution;

(d) Indigenous peoples and other traditional communities that rely on their ancestral territories for their material and cultural existence face increasing pressure from Governments and business enterprises seeking to exploit their resources. They are usually marginalized from decision-making processes and their rights are often ignored or violated;

(e) Older persons may be vulnerable to environmental harm because they are more susceptible to heat, pollutants and vector-borne diseases, among other factors;

(f) The vulnerability of persons with disabilities to natural disasters and extreme weather is often exacerbated by barriers to receiving emergency information in an accessible format, and to accessing means of transport, shelter and relief;

(g) Because racial, ethnic and other minorities are often marginalized and lack political power, their communities often become the sites of disproportionate numbers of waste dumps, refineries, power plants and other polluting facilities, exposing them to higher levels of air pollution and other types of environmental harm;

(h) Natural disasters and other types of environmental harm often cause internal displacement and transboundary migration, which can exacerbate vulnerabilities and lead to additional human rights violations and abuses (see A/66/285 and A/67/299).

42. To protect the rights of those who are particularly vulnerable to or at risk from environmental harm, States should ensure that their laws and policies take into account the ways that some parts of the population are more susceptible to environmental harm, and the barriers some face to exercising their human rights related to the environment.

43. For example, States should develop disaggregated data on the specific effects of environmental harm on different segments of the population, conducting additional research as necessary, to provide a basis for ensuring that their laws and policies adequately protect against such harm. States should take effective measures to raise the awareness of environmental threats among those persons who are most at risk. In monitoring and reporting on environmental issues, States should provide detailed information on the threats to, and status of, the most

vulnerable. Assessments of the environmental and human rights impacts of proposed projects and policies must include a careful examination of the impacts on the most vulnerable, in particular. In the case of indigenous peoples and local communities, assessments should be in accord with the guidelines adopted by the Conference of Parties to the Convention on Biological Diversity.<sup>40</sup>

44. States should develop environmental education, awareness and information programmes to overcome obstacles such as illiteracy, minority languages, distance from government agencies and limited access to information technology, in order to ensure that everyone has effective access to such programmes and to environmental information in forms that are understandable to them. States should also take steps to ensure the equitable and effective participation of all affected segments of the population in relevant decision-making, taking into account the characteristics of the vulnerable or marginalized populations concerned.

45. States should ensure that their legal and institutional frameworks for environmental protection effectively protect those who are in vulnerable situations. They must comply with their obligations of non-discrimination (framework principle 3), as well as any other obligations relevant to specific groups. For example, any environmental policies or measures that may affect children's rights must ensure that the best interests of children are a primary consideration.<sup>41</sup>

46. In developing and implementing international environmental agreements, States should include strategies and programmes to identify and protect those vulnerable to the threats addressed in the agreements.<sup>42</sup> Domestic and international environmental standards should be set at levels that protect against harm to vulnerable segments of the population, and States should use appropriate indicators and benchmarks to assess implementation. When measures to safeguard against or mitigate adverse impacts are impossible or ineffective, States must facilitate access to effective remedies for violations and abuses of the rights of those most vulnerable to environmental harm.

### **Framework principle 15**

**States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:**

- (a) Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;**
- (b) Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;**

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<sup>40</sup> The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

<sup>41</sup> See Convention on the Rights of the Child, art. 3 (1).

<sup>42</sup> See, for example, Minamata Convention on Mercury, art. 16 (1) (a), annex C.

(c) **Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;**

(d) **Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.**

*Commentary*

47. Indigenous peoples are particularly vulnerable to environmental harm because of their close relationship with the natural ecosystems on their ancestral territories. The United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), as well as other human rights and conservation agreements, set out obligations of States in relation to the rights of indigenous peoples. Those obligations include, but are not limited to, the four highlighted here, which have particular relevance to the human rights of indigenous peoples in relation to the environment.

48. Traditional (sometimes called “local”) communities that do not self-identify as indigenous may also have close relationships to their ancestral territories and depend directly on nature for their material needs and cultural life. Examples include the descendants of Africans brought to Latin America as slaves, who escaped and formed tribal communities. To protect the human rights of the members of such traditional communities, States owe them obligations as well. While those obligations are not always identical to those owed to indigenous peoples, they should include the obligations described below (see A/HRC/34/49, paras. 52–58).

49. First, States must recognize and protect the rights of indigenous peoples and traditional communities to the lands, territories and resources that they have traditionally owned, occupied or used, including those to which they have had access for their subsistence and traditional activities.<sup>43</sup> The recognition of the rights must be conducted with due respect for the customs, traditions and land tenure systems of the peoples or communities concerned.<sup>44</sup> Even without formal recognition of property rights and delimitation and demarcation of boundaries, States must protect against actions that might affect the value, use or enjoyment of the lands, territories or resources, including by instituting adequate penalties against those who intrude on or use them without authorization.<sup>45</sup>

50. Second, States must ensure the full and effective participation of indigenous peoples and traditional communities in decision-making on the entire spectrum of matters that affect their lives. States have obligations to consult with them when considering legislative or administrative measures which may affect them directly, before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands or territories and when considering their capacity to alienate their lands or territories or otherwise transfer

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<sup>43</sup> See ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), arts. 14–15; United Nations Declaration on the Rights of Indigenous Peoples, arts. 26–27.

<sup>44</sup> See United Nations Declaration on the Rights of Indigenous Peoples, art. 26 (3).

<sup>45</sup> See ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 18.

their rights outside their own community.<sup>46</sup> States should assess the environmental and social impacts of proposed measures and ensure that all relevant information is provided to them in understandable and accessible forms (framework principles 7–8). Consultations with indigenous peoples and traditional communities should be in accordance with their customs and traditions, and occur early in the decision-making process (framework principle 9).

51. The free, prior and informed consent of indigenous peoples or traditional communities is generally necessary before the adoption or implementation of any laws, policies or measures that may affect them, and in particular before the approval of any project affecting their lands, territories or resources, including the extraction or exploitation of mineral, water or other resources, or the storage or disposal of hazardous materials.<sup>47</sup> Relocation of indigenous peoples or traditional communities may take place only with their free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return.<sup>48</sup>

52. Third, States should respect and protect the knowledge and practices of indigenous peoples and traditional communities in relation to the conservation and sustainable use of their lands, territories and resources.<sup>49</sup> Indigenous peoples and traditional communities have the right to the conservation and protection of the environment and the productive capacity of their lands, territories and resources, and to receive assistance from States for such conservation and protection.<sup>50</sup> States must comply with the obligations of consultation and consent with respect to the establishment of protected areas in the lands and territories of indigenous peoples and traditional communities, and ensure that they can participate fully and effectively in the governance of such protected areas.<sup>51</sup>

53. Fourth, States must ensure that indigenous peoples and traditional communities affected by extraction activities, the use of their traditional knowledge and genetic resources, or other activities in relation to their lands, territories or resources fairly and equitably share the benefits arising from such activities.<sup>52</sup> Consultation procedures should establish the benefits that the affected indigenous peoples and traditional communities are to receive, in a manner consistent with their own priorities. Finally, States must provide for effective remedies for violations of their rights (framework principle 10), and just and fair redress for harm resulting from any activities affecting their lands, territories or

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<sup>46</sup> Ibid., arts. 6, 15 and 17.

<sup>47</sup> See United Nations Declaration on the Rights of Indigenous Peoples, arts. 19, 29 (2) and 32. See also Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, arts. 6–7 (consent required for access to genetic resources and traditional knowledge).

<sup>48</sup> See ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 16; United Nations Declaration on the Rights of Indigenous Peoples, art. 10.

<sup>49</sup> See Convention on Biological Diversity, arts. 8 (j) and 10 (c).

<sup>50</sup> See United Nations Declaration on the Rights of Indigenous Peoples, art. 29 (1).

<sup>51</sup> See ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 15 (1).

<sup>52</sup> Ibid., art. 15 (2); Convention on Biological Diversity, art. 8 (j); Nagoya Protocol, art. 5; United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, art. 16 (g).

resources.<sup>53</sup> They have the right to restitution or, if this is not possible, just, fair and equitable compensation for their lands, territories and resources that have been taken, used or damaged without their free, prior and informed consent.<sup>54</sup>

### **Framework principle 16**

**States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.**

#### *Commentary*

54. The obligations of States to respect, protect and fulfil human rights apply when States are adopting and implementing measures to address environmental challenges and to pursue sustainable development. That a State is attempting to prevent, reduce or remedy environmental harm, seeking to achieve one or more of the Sustainable Development Goals, or taking actions in response to climate change does not excuse it from complying with its human rights obligations.<sup>55</sup>

55. Pursuing environmental and development goals in accordance with human rights norms not only promotes human dignity, equality and freedom, the benefits of fulfilling all human rights. It also helps to inform and strengthen policymaking. Ensuring that those most affected can obtain information, freely express their views and participate in the decision-making process, for example, makes policies more legitimate, coherent, robust and sustainable. Most important, a human rights perspective helps to ensure that environmental and development policies improve the lives of the human beings who depend on a safe, clean, healthy and sustainable environment — which is to say, all human beings.

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<sup>53</sup> See United Nations Declaration on the Rights of Indigenous Peoples, art. 32 (3).

<sup>54</sup> Ibid., art. 28.

<sup>55</sup> See Paris Agreement, eleventh preambular para.



## **Section III: Sample Provisions of Environmental Constitutionalism**

### **A. Substantive Environmental Rights**

#### **Argentina**

Part I, Chapter 2, Article 41: “All residents enjoy the right to a healthy, balanced environment which is fit for human development and by which productive activities satisfy current necessities without compromising those of future generations .. .”

#### **Belarus**

Section 2, Article 46: “Everyone is entitled to a wholesome environment and to compensation for loss or damage caused by violation of this right.”

#### **Belgium**

Title II, Article 23(4): “Everyone has the right to lead a life worthy of human dignity ... [including] the right to enjoy the protection of a healthy environment.”

#### **Brazil**

Title VII, Chapter VI, Article 225: “All persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to a healthy life . . . .”

#### **Bolivia**

Article 33: “Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.”

#### **Cameroon**

Preamble: “[E]very person shall have a right to a healthy environment.”

Part 12, Article 65: “The Preamble shall be part and parcel of this Constitution.”

#### **Chile**

Chapter 3, Article 19(8): “All have ‘The right to live in an environment free from contamination.’”

#### **Congo-Brazzaville**

Title II, Article 35: “Each citizen shall have the right to a healthy, satisfactory, and sustainable environment and the duty to defend it. The State shall strive for the protection and the conservation of the environment.”

#### **East Timor**

Part II, Title III, Article 61(1): “All have the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations.”

#### **Egypt**

Article 69: “All individuals have the right to a healthy environment.”

#### **Indonesia**

Section 10A, Article 28H(1): “Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care.”

#### **Kenya**

Chapter 42: “Every person has the right to a clean and healthy environment, which includes the right – (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70” (allowing any person to apply to a court for redress of damage to the environment).

### **Mali**

Title I, Article 15: “Every person has the right to a healthy environment.”

### **Morocco**

Article 31: “The State, the public establishments and the territorial collectivities work for the mobilization of all the means available to facilitate the equal access of the [citizens] to conditions that permit their enjoyment of the right ... to the access to water and to a healthy environment.”

### **Mozambique**

Part II, Chapter 1, Article 72: “All citizens shall have the right to live in ... a balanced natural environment.”

### **Norway**

Section E, Article 110b: “Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved.”

### **Paraguay**

Part I, Title II, Chapter 1, Section 2, Article 7: “Everyone has the right to live in a healthy, ecologically balanced environment.”

### **Russian Federation**

Chapter 2, Article 42: “Everyone shall have the right to a favorable environment, reliable information about its condition, and to compensation for the damage caused to his or her health or property by ecological violations.”

### **Rwanda**

Article 49: “Every person has a right to a clean and healthy environment.”

### **Senegal**

Title II, Article 8: “The government of Senegal guarantees to all citizens the fundamental individual liberties, economic and social rights, as well as collective rights. These liberties and rights include ... the right to a healthy environment.”

### **Seychelles**

Chapter 3, Part I, Article 38: “The State recognises the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment .. .”

### **South Africa**

Section 24: 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 –

1. (i) prevent pollution and ecological degradation,
2. (ii) promote conservation; and

3. (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

### **South Sudan**

Article 41(1): “Every person or community shall have the right to a clean and healthy environment.”

Article 41(3): “Every person shall have the right to have the environment protected for the benefit of present and future generations, through appropriate legislative action and other measures that: (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources while promoting rational economic and social development so as to protect genetic stability and bio-diversity.”

### **Spain**

Title I, Chapter 3, Article 45(1): “Everyone has the right to enjoy an environment suitable for the development of the person .. .”

### **Sudan**

Chapter 11(1): “The people of the Sudan shall have the right to a clean and diverse environment.”

### **Ukraine**

Chapter 2, Article 50: “Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right.”

### **Venezuela**

Title III, Chapter 9, Article 127: “Every person has a right to individually and collectively enjoy a life and a safe, healthy and ecologically balanced environment.”

## **B. Procedural Environmental Rights**

### **Eritrea**

Chapter 2, Article 8(2): “The State shall work to bring about a balanced and sustainable development throughout the country, and shall use all available means to enable all citizens to improve their livelihood in a sustainable manner, through their participation.”

### **Ethiopia**

Chapter 10, Article 92(3): “People have the right to full consultation and to the expression of views in the planning and implementations of environmental policies and projects that affect them directly.”

### **Finland**

Chapter 2, Section 20: “The public authorities shall endeavor to guarantee ... for everyone the possibility to influence the decisions that concern their own living environment.”

### **France**

Charter of the Environment, Article 7: “Everyone has the right, subject to the conditions and within the limits defined by the law, to have access to the information relating to the environment held by the public authorities.”

### **Georgia**

Chapter 2, Article 37(5): “A person shall have the right to receive complete, objective and timely information on the state of his or her working and living environment.”

## **Kazakhstan**

Section II, Article 31(2): “Officials are held accountable ... for the concealment of facts and circumstances endangering the life and health of the people.”

## **Montenegro**

Article 23: “Everyone shall have the right to a sound environment. Everyone shall have the right to receive timely and full information about the status of the environment, to influence the decision-making regarding the issues of importance for the environment, and to legal protection of these rights.”

## **Mozambique**

Article 81: “1. All citizens shall have the right to popular action in accordance with the law, either personally or through associations for defending the interests in question. 2. The right of popular action shall consist of: (a) the right to claim for the injured party or parties such compensation as they are entitled to; (b) The right to advocate the prevention, termination or judicial prosecution of offences against the public health, consumer rights, environmental conservation and cultural heritage.”

## **Paraguay**

Part I, Title II, Chapter 1, Section 2, Article 8: “A law will define and establish sanctions for ecological crimes. Any damage to the environment will entail an obligation to restore and to pay for damages.”

## **Zambia**

Section 302: “(o) the people shall have access to environmental information to enable them to preserve, protect and conserve the environment.”

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## **Bolivia**

Title II, Chapter 1, Article 342: “It is the duty of the State and the population to conserve, protect and use natural resources and the biodiversity in a sustainable manner, as well as to maintain the equilibrium of the environment.” Article 346: “The natural assets are of public importance and of strategic character for the sustainable development of the country.”

## **Brazil**

Chapter 6, Article 225: “Everyone has a right to an ecologically balanced environment, which is a public good for the people’s use and is essential for a healthy life. The Government and the community have a duty to defend and preserve the environment for present and future generations.”

## **Dominican Republic**

Chapter 4, Article 17; Chapter 6, Article 67; Title IX, Chapter 1, Article 194: “The formulation and execution, through the law, of a plan of territorial ordering that assures the efficient and sustainable use of the natural resources or the Nation, in accordance with the need of adaption to climate change, is [a] priority of the State.”

## **Ecuador**

Article 71 and Articles 72–4: “Nature, or Pachamama, where life is reproduced and created, has the right to integral respect for her existence, her maintenance, and for the regeneration of her vital cycles, structure, functions, and evolutionary processes.”

## **Eritrea**

Chapter 2, Article 8(2): “The State shall work to bring about a balanced and sustainable development throughout the country, and shall use all available means to enable all citizens to improve their livelihood in a sustainable manner, through their participation.”

Chapter 2, Article 8(3): “[T]he State shall be responsible for managing all land, water, air and natural resources and for ensuring their management in a balanced and sustainable manner.”

### **Ghana**

Chapter 21, Article 211(1): “All public lands in Ghana shall be vested in the President, on behalf of, and in trust for, the people of Ghana.”

Article 213: “Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, watercourses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President, on behalf of, and in trust for, the people of Ghana.”

### **Luxembourg**

Article 11.2: “The State guarantees the protection of the human and natural environment, working to establish a sustainable balance between nature conservation, especially its capacity for renewal, and satisfying the needs of present and future generations ... It promotes the protection and welfare of animals.”

### **Namibia**

Chapter 11, Article 95(1): “The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at ... maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future.

### **Nepal**

Part IV, Section 35(5): “Provision shall be made for the protection of the forest, vegetation and biodiversity, its sustainable use and for equitable distribution of the benefit derived from it.”

### **Niger**

Section 2, Article 149: “The exploitation and the administration of the natural resources and of the subsoil must be done with transparency and taking into account the protection of the environment, [and] the cultural heritage as well as the preservation of the interests of present and future generations.”

### **Nigeria**

Part II, Article 20: “The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.”

### **Switzerland**

Section 4, Article 73: “Sustainable Development. The Confederation and the Cantons shall endeavor to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population.”

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