

INTER-AMERICAN COURT OF HUMAN RIGHTS

Amicus Curiae Brief

**Re: Request for an Advisory Opinion Presented by the Republic of Colombia
concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on
Human Rights**

Presented by

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I. Statement of Amici

1. The Inter-American Court of Human Rights (“Court” or “IACHR”) has a robust history with amicus curiae briefs, receiving over 500 briefs since the creation of the Court in 1979.¹ Pursuant to Article 44 of the Rules of Procedure of the Inter-American Court of Human Rights, and by request of the Court, the creators of this brief respectfully submit the following amicus curiae brief for consideration by the Court in the request for an advisory opinion submitted by the Republic of Colombia (“Colombia”).

II. Presentation of argument

2. Any brief submitted to the Court should “contribute to the progressive development of international human rights”. This brief will meet that broad expectation by providing the Court with additional information pertaining to Colombia’s request for an advisory opinion that the Court may not have been introduced to otherwise. After a thorough analysis of previous case law from the Inter-American Commission on Human Rights, we suggest that a broad interpretation of extraterritorial jurisdiction is supported by the Commission and exists when citizens of another state are subjected to either the authority *or* control of the offending state or its agents. Additionally, we argue that Colombia’s request unnecessarily limits the doctrine of extraterritorial jurisdiction in the context of environmental human rights violations to instances where the state party causing the harm and state party of the alleged victim(s) are both parties to a separate environmental treaty. Finally, this brief will touch upon issues that were not raised by Colombia, but nonetheless warrant a thoughtful consideration by the Court given the trajectory of international financing of megaprojects with extraterritorial implications by mega-wealthy individuals and private enterprises, including state-owned enterprises, and the potential negative impacts on human rights associated with this volatile but growing source of project finance. The pending construction of the inter-ocean Nicaraguan Grand Canal megaproject will be used as a timely case study to illustrate the potential

¹ Francisco J. Rivera Juaristi, *The Amicus Curiae in the Inter-American Court of Human Rights (1982-2013)*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488073.

implications of the Court's response to Colombia's request for an advisory opinion regarding a state's exercise of extraterritorial jurisdiction in an environmental context.

III. Introduction to Case Study

3. Because the Court does not support mere “academic speculation”² regarding questions presented to the Court, the advisory opinion requested by Colombia must have a practical effect in its application of human rights law. The approach of this brief will follow the Court's guideline and will not be purely academic or theoretical. Considering the number of human rights violations that need to be addressed throughout the world, it is easy to see that there is no time to waste on hypotheticals when there are actual pressing issues waiting in the wings.

4. This amicus brief will provide answers to the questions raised by Colombia through an analysis of a relevant case study, the proposed construction of the Nicaragua Grand Canal and Development Project (“Grand Canal” or “Canal”). The Grand Canal project is a mega-infrastructure project (“megaproject”³) that aims to rival the Panama Canal by creating a canal through the southern part of Nicaragua to allow for the quick transit of goods from Europe to Asia. The canal would span across 170 miles of Nicaragua (almost three times the length of the Panama Canal) and would connect the Atlantic Ocean to the Pacific Ocean intersecting through Lake Nicaragua. Beyond the creation of a canal, the Grand Canal project as a whole will encompass the construction of 6 accompanying projects: two ports on each end of the canal, the creation of a free trade zone, vacation resorts, an international airport, as well as the development of necessary roads needed for construction and transportation to the canal area.⁴

5. The Grand Canal project first came to be through the primary investments of Wang Jing, a Chinese billionaire who is the CEO and Chairman Beijing Xinwei, a Chinese

² ICourtHR, *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9. Para. 16.

³ The use of the term “megaproject” in this brief will mean any large-scale development, engineering project, or major infrastructure project that exceeds 1 Billion USD in project funding.

⁴ HKND Group, *Project Introduction*, <http://hknd-group.com/portal.php?mod=list&catid=36> (last visited Jan. 6, 2017).

telecommunications company.⁵ The construction of the Grand Canal will be completed by a subsidiary company of Xinwei, Hong Kong Nicaragua Development Group (HKND), of which Jing is also the Chairman and CEO.⁶ In 2012, the Nicaraguan parliament passed a new law, Law 800, which granted the legal approval from the Nicaraguan government to construct the Canal.⁷ In subsequent government meetings, the Authority of the Grand Inter-Ocean Canal of Nicaragua granted exclusive rights to HKND to construct the Grand Canal and the six related projects previously mentioned.⁸ During the approval process, the Nicaraguan government included special benefits for the contractors hired by HKND who are tasked with building the canal, including, according to one source, a guarantee that there would be no criminal punishment for a breach of contract.⁹ The exclusive rights granted to HKND also extend to the subsequent management and operation of the canal, airport and resorts once construction is completed.¹⁰

6. The construction of the canal will introduce additional third party actors and foreign companies into Nicaragua and the Wider Caribbean Region (WCR)¹¹ as HKND has partnered with China Railway Construction Corporation, XCMG (a Chinese government owned construction company), SBE (a Belgian engineering consultant firm), and MEC Mining from Australia to assist in the development and construction of the Grand Canal.¹² As the involvement of multinational companies increases during the planning and construction of the Grand Canal, Nicaragua, via its agents, will expand its scope of involvement into numerous channels beyond the maritime construction associated with the canal.

⁵ Beijing Xinwei Telecom Technology Co., LTD, *About Xinwei* (Mar. 8, 2010) <http://www.xinwei.com.cn/en/about/leader.html>.

⁶ HKND Group, *Company Profile*, <http://hknd-group.com/portal.php?mod=list&catid=30> (last visited Jan. 6, 2017).

⁷ HKND Group, *Supra* note 5.

⁸ *Id.*

⁹ Pablo Fonseca Q., *Nicaragua Constructs Enormous Canal, Blind to its Environmental Cost*, *Scientific American* (Feb. 11, 2015), available at <http://www.scientificamerican.com/article/nicaragua-constructs-enormous-canal-blind-to-its-environmental-cost/>.

¹⁰ *Id.*

¹¹ The Wider Caribbean Region encompasses 28 island and continental countries that have coasts in the Caribbean Sea and the Gulf of Mexico.

¹² HKND Group, *Project Partners*, <http://hknd-group.com/portal.php?mod=list&catid=38> (last visited Oct. 1, 2016).

7. It is important to note that construction on Grand Canal has not started and there is currently no official start date for construction to begin. In 2015, the original projection for the duration of construction was five years. As of the writing of this brief, construction on the canal has yet to begin and it is likely that the projected end date of 2020 may be now considered a hopeful start date, if the Grand Canal project is even built at all. As of 2015, the viability of the project as a whole is questionable due to the intense nature of the construction and financial struggles suffered by Jing. Section IV of this brief speaks to this issue by outlining the potential pitfalls that could arise from the uncharted issue of privately funded megaprojects and human rights.

8. The broad overview of the Grand Canal project provided above is not the Court's first introduction to the project. In March 2015, at the 150th session of the Inter-American Commission on Human Rights ("Commission"), the Commission heard about the possible human rights violations that indigenous groups in Nicaragua, specifically indigenous communities in the Rama and Kriol territories, could suffer if construction began on the Nicaraguan Grand Canal.¹³ The human rights violations brought before the Commission primarily focused on the lack of consultation that the indigenous communities were afforded in the proposal and discussion phase of the Grand Canal project. This amicus brief will go beyond this narrow example of potential violations on human rights that could occur during the construction of the Grand Canal and will speak more generally to the array of human rights violations that can stem from the construction of a megaproject in an environment as interconnected as the Wider Caribbean Region.

IV. Extraterritorial jurisdiction

9. The first question presented in Colombia's request for an advisory opinion seeks to clarify the scope of a state's jurisdiction over individuals that are outside of the state's

¹³ Organization of American States, *Report on the 150th Session of the IACHR* (May 13, 2014), available at <http://www.oas.org/es/cidh/prensa/docs/report-150.pdf>.

traditional boundaries, known as extraterritorial jurisdiction.¹⁴ In light of what Colombia is seeking to accomplish with its request for an advisory opinion, the phrase extraterritorial jurisdiction could easily be exchanged for extraterritorial accountability or extraterritorial obligation, as the desired answer to this question is meant to define the responsibilities of a state that causes harm to surrounding states through the construction and maintenance of a megaproject under Article 1(1) of the American Convention on Human Rights, also known as the Pact of San José. Colombia seeks to have the applicability of extraterritorial jurisdiction clarified in regards to a state's environmental responsibility, specifically in a situation where outlying islands or archipelagos of other states can be impacted by the actions of a single state or a state's agents.

10. Four qualifying conditions were placed on this question in an attempt to narrow the scope of the application of extraterritorial jurisdiction, and these conditions can easily be applied to the Grand Canal case study in order to judge their relevance to a real world example. The cumulative conditions to test the existence of extraterritorial jurisdiction would be met (1) if the party in question is located in a State that is a member of an environmental treaty of which the offending state is also a member, (2) if the aforementioned treaty exists, it creates an area of functional jurisdiction, (3) an area of functional jurisdiction exists under a treaty in which all member states are obliged to reduce pollution, and (4) there is a connection between any environmental damage caused and human rights that are threatened by that environmental damage.
11. In an environment as interconnected as the Wider Caribbean Region, it is reasonable to see why Colombia is so invested in defining the responsibility of nearby states, as well as ensuring that Colombia's outlying islands, and the Colombian citizens who live on these islands, are protected. There is clearly a focus, and in Colombia's view, an impending importance to have this area of law clarified in order to allow for quick and purposeful action when an issue presents itself. The first step in analyzing Colombia's request is to judge whether Colombia's interpretation of a state's responsibility under the concept of

¹⁴ Though sometimes erroneously used synonymously, extraterritorial jurisdiction (the act of a government exerting its authority beyond its borders) is differentiated from extraterritoriality (the status of being exempt from a government's local authority).

extraterritorial jurisdiction would be consistent with the Court's previous case law. The issues raised in the four qualifying conditions placed on the threshold question will be analyzed as a second step due to the unique and specific topics that they present.

a. The Court's view on extraterritorial jurisdiction

12. The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have heard numerous cases on the role of extraterritorial jurisdiction as a means to hold states accountable for human rights violations. The precedence established in the following cases illustrates the Court's history of recognizing a state's responsibility under extraterritorial jurisdiction for the sake of protecting human rights. The cases presented below show that the issue of extraterritorial jurisdiction most frequently arises in the context of a state's ability to hold a state's agent accountable for their actions during an international conflict or war. But, armed conflict or wartime issues are not the only situations where extraterritorial jurisdiction can be deemed acceptable. The statements of law from the cases cited below are broad enough to be applied beyond military conflicts and are clearly applicable to the issues raised by Colombia. The conclusion reached by the analysis set forward below suggests that the Court should answer Colombia's first question in the affirmative and find that a person is subject to the jurisdiction of a state, even if the person is not in the territory of that state, when the state or its agents have exercised authority or power outside of the state's boundaries.

i. *Coard et al. v. United States* – Establishing state responsibility in extraterritorial jurisdiction

13. In *Coard et al. v. United States* ("*Coard*"), a case heard by the Inter-American Commission on Human Rights, Grenadian nationals who were arrested and detained by United States forces challenged the authority of the United States' actions in Grenada in 1983 and claimed that the actions taken by the U.S. forces violated the obligations set out in the American Declaration of the Rights and Duties of Man (the Bogota Declaration). The key issue relevant to this analysis is whether U.S. forces acting in Grenada established an area of the United States' extraterritorial jurisdiction in Grenada, outside

of the traditional boundaries of the U.S., and therefore triggered the responsibility of the U.S. to “uphold the protected rights of any person subject to its jurisdiction” and comply with the Bogota Declaration.¹⁵

14. The Commission found that, under certain circumstances, jurisdiction can be established through “conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad”.¹⁶ In addition to acknowledging that acts taken by a state’s agent could establish jurisdiction, the Commission expanded on what it viewed as a state’s responsibility for protecting fundamental human rights guaranteed by the Bogota Declaration by stating that, “individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction.”¹⁷

15. In addition to the holding given in the Commission’s own words, the ideas presented by the Commission were supported in an accompanying footnote by a quote from Theodor Meron, explaining that “[w]here agents of the state, *whether military or civilian*, exercise power and authority (jurisdiction or de facto jurisdiction) over persons outside national territory, the presumption should be that the state’s obligation to respect the pertinent human rights continues” (emphasis added).¹⁸ The holding from this case establishes the Commission’s view of extraterritorial jurisdiction that is pertinent to the issues raised by Colombia as it defines extraterritorial jurisdiction as the mechanism that ensures a State is held responsible for actions it commits outside of its territorial and political boundaries against citizens of another state.

¹⁵ *Id.*

¹⁶ *Coard et al. v. the United States*, Case 10.951, Report No. 109/99, September 29, 1999.

¹⁷ *Id.*

¹⁸ *Id.* citing Theodor Meron, “*Extraterritoriality of Human Rights Treaties*” 89 A.J.I.L. (1995) 78, 81.

ii. *Alejandro v. Cuba* – finding extraterritorial jurisdiction without geographic conditions

16. The opinion in *Coard* is beneficial to Colombia’s argument, and provides an example of the Inter-American Commission on Human Rights’ willingness to find in favor of the application of extraterritorial jurisdiction, but it is not the only case law from this Court that has established this precedent. In *Alejandro v. Cuba* (“*Alejandro*”), the Commission was tasked with deciding whether unarmed American civilian pilots who were shot down and killed by the Cuban Air Force while flying in international airspace were within Cuba’s extraterritorial jurisdiction. This task was made more difficult due to the fact that the pilots, and the location where the pilots died, had no connection to Cuba through geography or citizenship.
17. In order to find that there were ramifications under domestic Cuban human rights laws for the actions taken by the Cuban Air Force, the Commission had to look outside of a typical tangible connection to Cuba. The Commission found that the application of extraterritorial jurisdiction does not stem from “the nationality of the alleged victim or his presence in a particular geographic area” but is instead whether “the state observed the rights of a person subject to its authority and control”.¹⁹ Therefore, in *Alejandro*, the connection between the pilots and Cuba was established when the agents of the Cuban Air Force exerted their authority over the American pilots at the moment the planes were shot down.²⁰ This is a very broad interpretation of extraterritorial jurisdiction and sets a low standard for future cases to meet this requirement as geography is no longer a key requirement in establishing extraterritorial jurisdiction.
18. Although the standard of “authority and control” as a two-word concept was mentioned numerous times by the Commission in *Alejandro*, when the Commission applied this standard to the facts of the case, the Commission used only the phrase “under their authority” when describing the relationship between the victim pilots and the Cuban Air Force. This purposeful phrasing seems to open a door to the idea that, in finding the

¹⁹ *Id.*

²⁰ *Alejandro et al. v. Cuba*, Case 11.589, Report No. 86/99, September 29, 1999.

presence of extraterritorial jurisdiction, a person may not need to be subjected to both the authority and control of the offending state. This use of the single word “authority” can have a much broader interpretation, and therefore widen the scope of the area of extraterritorial jurisdiction of a state, compared to the requirement that a party must be subject to the authority and control of a state. Parsing the definitions of each word, there is a recognized difference between the concept of authority and the concept of control, even if these words are often used synonymously and together. Authority refers broadly to the “power or right to give orders, make decisions, and enforce obedience”²¹ whereas control refers more narrowly to the “power to influence or direct people’s behavior or the course of events”.²² While concepts of authority and control may not be severable in most situations, this caveat can be used to expand the boundaries of extraterritorial jurisdiction beyond specific situations in which a state exerted control over individuals to situations where an entire area or subset of a given population has been subjected to the authority of a state. It follows from this reasoning that the phrase “authority and/or control”, instead of “authority and control”, could be used in future disputes when trying to establish extraterritorial jurisdiction. This distinction between authority and control, and its unique application to the environmental issues of the Grand Canal case study is discussed below in subsection (b).

iii. Differentiating from the ruling in the petition of Victor Saldaño

19. While the two previous cases provided examples of the Commission’s willingness to recognize the extraterritorial jurisdiction of a state as a means to protect human rights, it is just as important to recognize the Court’s limitations on what is not extraterritorial jurisdiction by providing an analysis of situation where the Commission found that extraterritorial jurisdiction did not exist.

20. Victor Saldaño, an Argentine national, was sentenced to death in the United States after he was found guilty of murder in the U.S. state of Texas. After his conviction, his mother, Lidia Guerrero, filed a petition with the Commission stating that Argentina had

²¹ “Authority”, *Oxford English Dictionary*, Oxford University Press.

²² “Control”, *Oxford English Dictionary*, Oxford University Press.

an obligation under the American Declaration on the Rights and Duties of Man and the Pact of San José to exert its extraterritorial jurisdiction over Saldaño to prevent his execution in the U.S.²³ Conceptually, this is an inverse application of the extraterritorial jurisdiction applied in *Coard* and *Alejandre*. In the previous two cases, the onus of extraterritorial jurisdiction fell on the state causing the harm outside of its territorial boundary. In the petition to save Victor Saldaño from being executed in the U.S., Guerrero's argument was based on the fact that, since Saldaño was an Argentinian citizen facing execution outside of Argentina's territorial boundaries, Argentina had the responsibility to exert its extraterritorial jurisdiction over Saldaño and ensure that he was provided with the same human rights as he would have been afforded in Argentina, which would have prevented Saldaño from being sentenced to death.

21. Once again, the Commission broadly affirmed the concept of extraterritorial jurisdiction, especially in light of treaty obligations, stating that it is wrong to assume that the "term 'jurisdiction' in the sense of [a state's obligation under the Pact of San José] is limited to or merely coextensive with national territory".²⁴ The Commission reiterated its view that "a state party to the [Pact of San José] may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory".²⁵
22. But, even with the Commission acknowledging the existence of a state's rights, and obligations, to exert extraterritorial jurisdiction in order to preserve human rights, the petition to the Commission was rejected and the foundation of the argument was found to be based on a misinterpretation of previous case law. The Commission found that the "mere fact that the alleged victim is a national of Argentina cannot, in and of itself, engage that state's responsibility for the allegedly wrongful acts of agents of another state performed wholly within their own national territory."²⁶ The differentiating factors in the petition of Victor Saldaño included (1) that the actions that the U.S. would be

²³ Report No. 38/99, Victor Saldaño, (Argentina) March 11, 1999.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

taking against Saldaño would occur wholly within the territorial boundary of the U.S., and (2) that there was no evidence that could sufficiently show that Argentina was exerting any control or authority over Saldaño, which therefore prevented any establishment of Argentina's extraterritorial jurisdiction.

b. Applying the law to the Grand Canal case study

23. The purpose of this amicus brief is not to simply restate the relevant case law applicable to the questions presented by Colombia. Applying the law set forth in the previous subsections to the Grand Canal case study will help to illustrate the impact of the Court's opinion to a relevant set of facts. From the case law analysis above, there are three threshold questions that can be deduced from the Commission's holdings that must be answered in order to determine if the finding of extraterritorial jurisdiction is appropriate in any given case: (1) what authority and/or control is being applied to the party in question, (2) who is exerting the authority and/or control, and (3) where is the authority and/or control taking place?
24. The answers to these fundamental questions are even more important in the Grand Canal case study as the answers are not as straightforward, compared to the facts in *Coard* or *Alejandre*, due to the difficulty in tracing the source – and diffusion – environmental damage. Additionally, the identity of who is acting as the state agent is not as clearly defined as it would be in a typical military application of extraterritorial jurisdiction.

i. What is authority and/or control in an environmental context?

25. Before it can be established who is exerting the authority and/or control, and whether this authority is taking place outside of a state's territory, the definition of authority and control has to be put in an environmental context to see if it is actually occurring. In an environmental scenario, the authority and control exhibited by the state in question over the citizens of another state may not always be as cut and dry as the traditional definition of authority and control in a wartime context. But, that does not mean that authority and control cannot exist in a setting where actions taken by the actors of one state have caused such oppressive environmental damage that it manifests itself as a type of

authority and control. Preventing native populations from fishing for sustenance or engaging in longstanding cultural activities as a result of pollution or environmental damage directly caused by another state is its own form of control that has the potential to cause an extraterritorial impact on a state that can be just as significant as a military operation.

26. Although the ruling in *Alejandre* established that the location of the harm within a state's area of control is not a necessary requirement for establishing a state's extraterritorial jurisdiction, there was still an easily traceable event at the crux of the case as there was no dispute that the Cuban Air Force shot down the American pilots. The authority and control of the state agents and the effect of the actions in *Alejandre* was direct. The issue Colombia has raised involves a more convoluted process for establishing authority and control. How does one prove that the negative impacts of pollution or decreased fish populations are directly traceable to a single construction project or the direct actions of one party, particularly when they may be coupled with the additive or synergistic effects of other sources, including climate change? The most difficult aspect of establishing action and control in an environmental context will be balancing a liberal approach to finding a connection between a singular project and an individual's suffering, while enforcing a reasonable cut-off point to claims that can only weakly establish proximate cause. It will be the role of the Court to make a determination of proximate cause and establish the bounds, both physical and intangible, that establish standards for this type of dispute. It is unlikely that a quantitative boundary could ever be established to enforce such a limitation, as such a boundary would vary for each project that is found to cause harm and the boundary could unfairly exclude victims who have suffered actual harm from seeking justice.

27. Finally, the previous opinions of the Commission allude to the fact that the idea of authority and control may not always be understood to mean that the authority itself is exercised directly over the citizens suffering the harm. As the Commission explained its opinion regarding the petition for Victor Saldaño, "a state party [...] may be responsible under certain circumstances for the acts and omissions of its agents *which produce*

effects or are undertaken outside that state's own territory" (emphasis added).²⁷ This inclusive stance on including not only any direct actions, but also any related effects that stem from direct actions, seems to provide the best foundation for recognizing that negative environmental effects can be considered a state's authority and control for the purpose of establishing extraterritorial jurisdiction.

28. The effects that would derive from the acts of Nicaragua and its state agents would include the negative environmental consequences that would arise during the construction of the canal itself, including the increase of sedimentation during construction that in turn deprives the sea of oxygen and results in the death of marine life and marine vegetation²⁸, but also the effects that result from the operation of the canal, including the introduction of invasive species that are transported by ships from around the world.²⁹ As the wealth of scientific information regarding the construction of the canal has shown, the potential environmental impact would be damaging not only to the sea, but also to the surrounding land. The construction of the canal would remove or destroy over 4,000 square kilometers of rainforest and wetlands, damaging the ecosystem not only in Nicaragua but also surrounding states.³⁰ The projected path of the canal would also dissect the Mesoamerican Biological Corridor (which spans from Mexico to Panama) in half, preventing animals and critical waterways from having an uninterrupted path to travel freely within Central America.³¹

29. The effects that would derive from the acts of Nicaragua and its state agents would include the negative environmental consequences that would arise during the construction of the canal itself, including the increase of sedimentation during construction that in turn deprives the sea of oxygen and results in the death of marine life

²⁷ *Supra* note 23.

²⁸ Jorge A. Huete-Perez, et al. *Scientists Raise Alarms about Fast Tracking of Transoceanic Canal through Nicaragua*, *Environmental Science and Technology*, American Chemical Society (2015), available at <http://pubs.acs.org/doi/pdf/10.1021/acs.est.5b00215>.

²⁹ *Id.*

³⁰ Chris Kraul, *Nicaragua Canal: A Giant Project With Huge Environmental Costs*, *Yale Environment* 360 (May 5, 2015), available at http://e360.yale.edu/feature/nicaragua_canal_a_giant_project_with_huge_environmental_costs/2871/.

³¹ *Id.*

and marine vegetation³², but also the effects that result from the operation of the canal, including the introduction of invasive species that are transported by ships from around the world.³³ As the wealth of scientific information regarding the construction of the canal has shown, the potential environmental impact would be damaging not only to the sea, but also to the surrounding land. The construction of the canal would remove or destroy over 4,000 square kilometers of rainforest and wetlands, damaging ecosystems not only in Nicaragua but potentially in neighboring states.³⁴ The projected path of the canal dissects a critical segment of the Mesoamerican Biological Corridor (which spans from Mexico to Panama), frustrating international legal agreements to which Nicaragua is a party to ensure a continuous connection of forest within and between the nations of the region.³⁵ Moreover, marine and coastal impacts could spill over into the rich nearshore waters of much of the Central America, one of the world's most important refugia for nesting sea turtles, as well as other commercially valuable marine species, relied upon by the region's indigenous and traditional peoples for subsistence, commerce and ecotourism.³⁶

30. In clarifying the definition of what can be considered authority and control in any environmental context, including the Grand Canal, it is also important to address the role of motive, or lack thereof. Although authority and control in the context of environmental damage may lack the same level of motive of a state's action in a military context, the Court should view the authority equally, regardless of the incidental nature of the control. In any context, even if the negative impact of environmental damage to surrounding states is unintended, there will always be a purposeful act committed by the

³² Jorge A. Huete-Perez, et al. *Scientists Raise Alarms about Fast Tracking of Transoceanic Canal through Nicaragua*, *Environmental Science and Technology*, American Chemical Society (2015), available at <http://pubs.acs.org/doi/pdf/10.1021/acs.est.5b00215>.

³³ *Id.*

³⁴ Chris Kraul, *Nicaragua Canal: A Giant Project With Huge Environmental Costs*, *Yale Environment* 360 (May 5, 2015), available at http://e360.yale.edu/feature/nicaragua_canal_a_giant_project_with_huge_environmental_costs/2871/.

³⁵ *Id.* See also Ankersen, Thomas T., *The Mesoamerican Biological Corridor: A Model Legal Framework for an Integrated Regional System of Protected Areas*, 9 *University of Oregon Journal of Environmental Law and Litigation* 499 (1994).

³⁶ Ankersen, Thomas T., *Turtles without Borders: The International and Domestic Law Basis for the Shared Conservation, Management, and Use of Sea Turtles in Nicaragua, Costa Rica, and Panama*. 18:1 *Journal of International Wildlife Law and Policy* 1-62 (2015)(with G. Stocks, F. Paniagua, & S. Grant).

offending state that triggered the resulting impact.³⁷ The state causing harm has purposefully exerted its authority and control the moment any project is commenced.

ii. Where is the alleged authority and/or control taking place?

31. Colombia's request for an advisory opinion provided numerous examples of how it believes that any environmental damage in the Wider Caribbean Region would result in human rights violations for people who live on the Archipelago of San Andres, Providencia and Santa Catalina and who depend on the local environment for food, cultural heritage, and a source of income. Although some of the most substantial environmental harm could take place within Nicaragua, the canal could carry the damaging effects well beyond the territorial boundaries of Nicaragua. Collectively the Wider Caribbean Region is made up of 28 countries that are located within, or border the Caribbean Sea, Gulf of Mexico and southern Atlantic Ocean, so it is reasonable to assume that many countries within this area could suffer some negative environmental effects from the construction and operation of the Grand Canal, though the intensity of the effects will likely vary based on any number of factors. For the sake of this analysis, the impact on Colombia, and its citizens who reside on the Archipelago of San Andres, Providencia and Santa Catalina, will be the primary focus in order to provide a narrowly tailored example.

iii. Who is exerting authority and/or control?

32. Once the meaning of authority and control has been defined in an environmental context, and the question of where there authority is being exerted has been answered, the final component in establishing extraterritorial jurisdiction is finding who is exercising the

³⁷ This declaration is supported by international law in Chapter II, Article 23 of the *United Nations Draft Article on the Responsibility of States for Internationally Wrongful Acts*, which outlines when an action can be attributed to the conduct of a state. Article 23 provides an exception for any consequences of a state's action that are the result of *force majeure*, but this exception cannot be applied if "the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it". In applying this concept to the Grand Canal case study, Nicaragua's construction of the canal would become the act that invokes any subsequent unforeseen environmental consequences, thereby disqualifying Nicaragua from claiming the exception. See United Nations, *Responsibility of States for Internationally Wrongful Acts* (2001), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

authority and control. In establishing responsibility, either the state itself or its agents can be found to be exerting authority and control. Applying the rationale presented by the quote from Meron, and endorsed by the Commission via its presence in the Commission's opinion in *Coard*, there is a suggestion that the agents of the state do not have to be only government or military agents, but can also be merely citizens of a state that may not be bound by the same rules as military or other sanctioned agents.³⁸

33. In building from this lower threshold and applying the concept of agents to the Grand Canal case study, there is a viable argument that the definition of a state's agent should even be extended to include corporations due to the legal concept of corporate personhood offered throughout the world, even though this idea was not explicitly referenced by the Commission.³⁹ This is particularly important as applied to the case study as the Grand Canal is funded, and will be owned, by Wang Jing, an individual with no official ties to the government of Nicaragua. Beyond the Grand Canal, it is important to leave this avenue of state responsibility open as privately invested megaprojects are likely to become commonplace as individual fortunes continue to grow at a rate that can support privately funding megaprojects.

34. From the specific facts of the case study, there is little doubt that HKND and the parties associated with building the canal would be considered agents of Nicaragua. The Nicaraguan government has endorsed the Grand Canal project and offered its legal support of the project by passing new laws that cater to the acts of HKND.⁴⁰ The Nicaraguan government has also been vocal in its belief that the Grand Canal will help to boost the Nicaraguan economy and generally be a beneficial project for Nicaragua⁴¹,

³⁸ *Supra* note 16, 18.

³⁹ In Panama's Request for an Advisory Opinion in April 2014, the Inter-American Court of Human Rights found that corporations are not entitled to human rights, as human rights are only a right for natural persons. But, in the application of corporate personhood in this scenario is not applying human rights to a corporation, but rather this scenario would seek to hold a corporation accountable for violating the human rights of a natural person.

⁴⁰ HKND Group, *Project Background*, <http://hknd-group.com/portal.php?mod=list&catid=36> (last visited Jan. 6, 2017).

⁴¹ Eldiario.es, *Unos 242 expertos anuncian su apoyo al proyecto del canal de Nicaragua*, (Oct. 12, 2015) available at http://www.eldiario.es/economia/expertos-anuncian-apoyo-proyecto-Nicaragua_0_461254904.html (*English translation available at http://hknd-group.com/portal.php?mod=view&aid=341*).

projecting that Nicaragua could become the world's third fastest growing economy and that over 400,000 Nicaraguans could be lifted above the nation's poverty line.⁴²

35. Applying the legal concept of *respondeat superior*,⁴³ a connection can also be established through the chain of authority associated with the construction of the canal. Because the Nicaraguan government is exercising its authority over HKND and its contractors, via laws and regulations regarding the construction, HKND itself is under the control of Nicaragua. It follows that any actions taken by HKND have been sanctioned by Nicaragua and are only one degree away from being carried out by Nicaragua itself. If HKND is subject to the authority and control of Nicaragua, and authority and control established through the actions of HKND, then the Grand Canal project remains under the authority and control of the Nicaraguan government – and its agent – HKND.

iv. Does extraterritorial jurisdiction apply in the Grand Canal case study?

36. From the preceding analysis, it is clear that under the current legal standards created by the Commission, the potential for ill effects suffered by the surrounding states caused by the construction and maintenance of the Nicaragua Grand Canal could conceivably amount to an exercise of extraterritorial jurisdiction on the part of Nicaragua. The responsibility of upholding the human rights of people under the extraterritorial jurisdiction of the offending state would therefore apply, granting any parties who suffer human rights violations as a result of the construction of the canal the ability to seek an equitable remedy and damages, as well as provisional measures, for the abuses. This conclusion is reached and sufficiently supported by the Commission's own broad case law regarding the applicability of extraterritorial jurisdiction, thus rendering an analysis of the four qualifying conditions placed on the applicability of extraterritorial jurisdiction by Colombia somewhat unnecessary.⁴⁴ If a situation is in its broadest form is found to

⁴²Michael S. Doyle, *Nicaragua's Grand Canal: A Case Study in Political and Economic Culture*, *Global Advances in Business Communication* (Vol. 5, Iss. 1, Art. 5), available at <http://commons.emich.edu/cgi/viewcontent.cgi?article=1058&context=gabc>.

⁴³ The legal concept that holds that a party is responsible for acts of their agents, translated from Latin as "let the master answer".

⁴⁴ IACHR, *Request for Advisory Opinion concerning the interpretation of Article 1(1), 4(1) and 5(1)*

meet a legal standard, there is little need to continue to refine and narrow the facts of a situation to conform to an arbitrary set of specific qualifiers that will limit the applicability of the case law in future disputes.⁴⁵ But, in order to provide a thorough analysis of the first question presented by Colombia, a brief analysis of the qualifying limitations is provided below to examine its applicability to a real world scenario, such as the Grand Canal, that was not offered in the initial request for an advisory opinion.

37. The specific conditions to test the existence of extraterritorial jurisdiction offered by Colombia, and their application to the Grand Canal case study must be addressed together due to the cumulative nature of the conditions. Combining the qualifiers into a single statement that uses facts from the case study to enhance readability, the question presented is:

Does extraterritorial jurisdiction exist if a Colombian citizen has his/her human rights violated by pollution stemming from the actions of another state-party, such as Nicaragua, if Colombia and the state-party are both members of Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (“Cartagena Convention”), an environmental treaty that creates functional jurisdiction and requires members of the treaty to reduce pollution?

38. As it has been established in this brief, the existence of a treaty is not a threshold issue that must be present in order for extraterritorial jurisdiction to exist. But, the existence of a treaty that places a human rights responsibility on member states does not in and of itself create extraterritorial jurisdiction either. The key to establishing extraterritorial jurisdiction is through the actions of the state and its agents, rather than meeting the requirements of an arbitrary checklist. From the facts of the case study, Colombia could clearly support and add weight to its claim that Nicaragua is exerting extraterritorial jurisdiction by pointing to the violation of rights outlined in the Cartagena Convention but this Court’s adoption of this approach could unnecessarily narrow the application of extraterritorial jurisdiction and potentially preclude a justified application of

Of the American Convention on Human Rights, March 14, 2016. Para. 96.

⁴⁵ *Id.*

extraterritorial jurisdiction that would have been appropriate under the broader interpretation.

c. Suggestion to the Court

39. The purpose of this amicus brief would not be complete without offering the Court a conclusion, based on empirical evidence, as to what the Court's answer should be to the first question asked in Colombia's advisory opinion. In the simplest of terms, the Court should answer Colombia's first question in the affirmative and support any appropriate application of extraterritorial jurisdiction where a person's human rights have been violated due to environmental harm caused by the actions of a State, when that harm manifests outside the state. In supplying an answer to Colombia, the Court must consider what it wishes to achieve with this advisory opinion and evaluate the precedent it seeks to create.

40. By answering the question within the bounds of the specific situation presented by Colombia, the opinion of the Court may become so narrow that it serves no purpose outside of the specific goals Colombia seeks to accomplish. This brief promotes a more broad interpretation of the law not only for its more universal application, but also for the belief that permitting extraterritorial jurisdiction in environmental situations, without the additional requirement of shared treaties and state obligations, will in turn provide more protection to vulnerable parties who are the most likely to suffer from human rights violations caused by environmental damage. Moreover, requiring state-parties to be parties to another treaty in order to establish extraterritorial jurisdiction might chill the parties' enthusiasm for entering into treaties which would create extraterritorial jurisdiction where it would not otherwise exist.

V. Private Financing: an important and relevant issue Colombia did not raise

41. The case study used throughout this brief is unique for many reasons, but most importantly, the Grand Canal case study presents a unique issue that is likely to become commonplace in the near future: private funding of so-called "megaprojects" that could previously have only been constructed through multilateral institutional funding, such as

the World Bank Group. This is an issue relevant to the Court in regards to the request for an advisory opinion sought by Colombia because of the potential extraterritorial impact of these megaprojects on the environment, and therefore human rights. As discussed briefly in Section III, private funding of megaprojects not only makes it more difficult to find who is exerting authority and/or control when determining whether extraterritorial jurisdiction exists, but also adds to the overall risk of human rights violations occurring as there can be a relative lack of oversight on privately funded projects. There is an opportunity for the Court to use the situation presented in Colombia's request for an advisory opinion (though admittedly somewhat outside the scope of the original brief) as an opportunity to fill the void in international human rights law that allows under-regulated privately financed megaprojects to escape rigorous social and environmental impact scrutiny and accountability. By acknowledging the undeniable connection between the application of extraterritorial jurisdiction, human rights violations caused by environmental damage and the source of funding, the Court can acknowledge this jurisdictional shortcoming that has the potential to have a profound effect on human rights.

a. Individual funding of megaprojects and the impact on human rights

42. Due to the size and scope of megaprojects, such as the Grand Canal, the clear question regarding regulation is not “if”, but rather, “how much” in order to prevent injustices against vulnerable countries and indigenous populations that are most often affected by the construction of a megaproject. Although it has not always been the case, a growing shift in the source of funding for megaprojects has made the implementation of regulations on investors increasingly difficult, if not impossible for some projects. This shift in the source of funding can be linked to the shift in the distribution of global wealth that has allowed individuals to amass a level of wealth previously held only by nations. Currently, there are more individual billionaires in the world than there has ever been before, totaling 2,473 as of 2015.⁴⁶ The total net worth of all the billionaires in the world is 7.7 trillion USD, an amount that is “larger than the [Gross Domestic Product] of

⁴⁶ Alex Morrell, *There are more billionaires than ever before — and they're worth a total of \$7.7 trillion*, Business Insider (Aug. 8, 2016), <http://www.businessinsider.com/more-billionaires-than-ever-before-2016-8>.

France, the United Kingdom, Germany, or Japan.”⁴⁷ Specifically, the number of Chinese nationals investing in megaprojects is not surprising considering that, as of 2015, China had more billionaires than the U.S. for the first time (with 596 Chinese billionaires, compared to 537 American billionaires).⁴⁸

i. Limited external controls – a disrupter with negative consequences

43. Because of how quickly foreign investment has become a major player in funding global megaprojects, a comparison can be made to a disrupter or new technology that is able to emerge in the market relatively unfettered before regulations and safety standards are demanded by the public and implemented through governmental policies. The disruptors that can best be analogized to the foreign investments discussed in this brief include Bitcoin (financial transactions)⁴⁹, Spotify (music streaming)⁵⁰, and Uber (taxi service)⁵¹. All of these companies revolutionized the status quo of the industries they serve, but concerns have been raised over financial and safety issues associated with each respective technology. This same revolution is happening in the funding of megaprojects, but instead of hurting the traditional sources of funding and competing investors, the lack, or inadequacy, of regulation will affect individuals, the environment, and related human rights.

44. Just because the source of funding for megaprojects has evolved over time to include individual financiers, it does not mean that the standards used to ensure third-party oversight and regulation should be any different. A working paper from the Department of Economic and Social Affairs of the United Nations regarding the Agenda for

⁴⁷ *Id.*

⁴⁸ Charles Riley, *China now has more billionaires than U.S.*, CNN (Oct. 15, 2015), <http://money.cnn.com/2015/10/15/investing/china-us-billionaires/>.

⁴⁹ Bitcoin is a currency that is not tied to any nation. Bitcoin users are offered no financial protection should the Bitcoin currency ever fail, and the trading of Bitcoin currency is not subject to any government regulations. If Bitcoin were to ever become a globally used currency, the belief is that national markets and economies would suffer irreparable harm.

⁵⁰ Spotify allows users to stream unlimited music for a monthly fee. Record companies and artists object to this business model and seek to have increased regulation on streaming as the royalties received from this service are far lower than from traditional means of purchasing music.

⁵¹ Uber circumvents city restrictions on taxis and taxi licenses allowing users to receive rides from unregulated individuals. The argument made by taxi unions is that Uber needs to be regulated by local governments in order to ensure that Uber drivers are required to have insurance, as well as limiting the number of drivers on the road in order to keep the taxi market competitive.

Sustainable Development, found that the fiscal impact of a “badly designed PPP [Public-Private Partnership] of any type [including megaprojects]” results in “significant risks for the public in terms of reduced coverage, poor quality of service, or contingent fiscal liabilities.”⁵² These risks speak only to the financial risks of public and private partnerships in megaprojects. The negative impact on human rights and the environment as a result of PPP and blended finance megaprojects include a disregard for indigenous communities’ land and the destruction of fragile ecosystems, all issues that Colombia seeks to control through the application of extraterritorial jurisdiction.

ii. Susceptibility to loss of funds, abandoned projects

45. It is tempting to project that the number of billionaires will continue to grow, and that the fortunes of these incredibly wealthy individuals will only get larger, but individual fortunes are much more unpredictable and unstable compared to the wealth of a nation or multilateral lending organization. While the sheer number of billionaires may stay the same or continue to increase, there is no guarantee that the same billionaires of today will be billionaires tomorrow. This creates a problem in the context of the construction of megaprojects because if a project funded solely by an individual investor runs out of money, the project can potentially be left incomplete until more money is acquired, or even worse, the project could be indefinitely abandoned without ever being completed. Either situation can leave the local community in limbo and wreak havoc on the environment.
46. While this issue seems like a distant problem that could be dismissed as an unlikely worst case scenario, this issue has already occurred during the construction of the Grand Canal, highlighting the very real issue of volatility in the fortunes of private investors. The personal wealth of Wang Jing, the private investor behind the Grand Canal, decreased from \$10.2 billion to \$1.1 billion in 2015.⁵³ Within just four months, Wang went from being one of the 200 richest people in the world to losing 84% of his net

⁵² DESA Working Paper No. 148 ST/ESA/2016/DWP/148 *available at* <https://sustainabledevelopment.un.org/content/documents/2288desaworkingpaper148.pdf>.

⁵³ Jill Mao & Blake Schmidt, *This Chinese Billionaire Has Lost More Than Glasenberg in 2015*, Bloomberg (Oct. 1, 2015), <http://www.bloomberg.com/news/articles/2015-10-02/china-billionaire-with-canal-dream-confronts-biggest-loss-of-15>.

worth due to losses in the stock market.⁵⁴ Though it is only speculative, it is likely that Jing's substantial loss in individual wealth is the cause behind the sudden standstill on all fronts of the Grand Canal project.

47. The Grand Canal provides a timely example of the big picture issue of investor follow-through and the obligation that should be placed on individuals privately financing megaprojects. This issue is critical in protecting the environment, and the human rights of the people impacted by the construction of a project, as an unfinished project has the potential to cause greater harm than a properly finished and maintained megaproject that has been the subject of the environmental and social scrutiny required by multinational lenders. This issue is likely to impact the meaning of "authority and control", because even if a state's agent simply abandons a project, any ongoing destruction or environmental impact that results from an unfinished project should still be considered an exercise of authority and control by the state and its agent.

iii. Introduction of third-party nationals and state-owned enterprises

48. Xinwei, the Chinese company funding the Nicaraguan Grand Canal megaproject, has received over \$2.1 Billion dollars of funding from China Development Bank (CDB)⁵⁵, a bank fully owned and operated by the Chinese government.⁵⁶ The CDB was created in order to facilitate funding of large-scale projects that promote the objectives of the Chinese government.⁵⁷ Immediate issues that arise when evaluating Xinwei's connection to the CDB is that CDB is a state-owned bank, and that the goal of the CDB is to promote the objectives of the Chinese government. Clearly, the objectives of the Chinese government may not always align with the objectives of the megaproject as a whole, the objectives of the country where the megaproject is being constructed, or even the objectives of neighboring countries that may be impacted by the construction of the

⁵⁴ *Id.*

⁵⁵ Global Construction Review, *Who exactly is it behind Nicaragua's \$40bn canal?*, (Jan. 15, 2014), available at <http://www.globalconstructionreview.com/companies/who-exactly-it-behind-nicaraguas-40bn-canal/>

⁵⁶ Adina Matisoff, *China Development Bank's overseas investments: An assessment of environmental and social policies and practices*, Friends of the Earth, available at http://www.foe.org/system/storage/877/2b/2/2245/China_Development_Banks_overseas_investments_-_An_assessment_of_environmental_and_social_policies_and_practices.pdf

⁵⁷ *Id.*

megaproject.

49. The issues listed above are important, but the issue that should raise the biggest red flag is that until recently, the CDB had no specific policy or environmental guidelines for financing the construction of megaprojects. In addition to having no specific policy for environmental issues that arise during the construction of megaprojects until recently, CDB did not have any policies that addressed the issues of human rights in megaprojects (including a dispute process for indigenous people) or even a requirement that CDB funded projects comply with international law. The CDB now requires that borrowers show environmental compliance and that the projected plan will meet the applicable environmental protection requirements, but enforcement of these policies remains questionable,⁵⁸ and they have not been tested against international standards.
50. Without transparency into the workings of the CDB and other state-owned enterprises, or a track record of consistent application of the corporate environmental and social responsibility rules, the Court should look very seriously at whether private investors who are funded by a SOE or other private actor will actually comply with the requirements placed on them as a responsible investor. Although it is obviously beyond the jurisdiction of the Court to change the banking regulations of a foreign-owned national bank, it is within the power of the Court to find that any source of foreign investment that does not have adequate and transparent self-policing regulations, or any foreign investment that lacks enforcement power behind established regulations, should be held to international human rights norms, both procedural and substantive. It is in this way that human rights law can fill the void that has arisen in megaprojects funded by foreign private investments and state owned enterprises.

VI. Conclusion

51. The preceding analysis and examples illustrate that in light of the Commission's previous case law, the IACHR should find that the extraterritorial jurisdiction exists in

⁵⁸ Paulina Garzon, *Legal Manual on Chinese Environmental and Social Guidelines for Foreign Loans and Investments: A Guide for Local Communities*, Centro De Derechos Economicos y Sociales, (March 2015).

terms of a state's environmental responsibility to citizens of states that are outside of a state's territorial boundary. The issues where Colombia seeks the Court's opinion, including the presented scenario where member states of a treaty have obligation to reduce pollution, more than meet the Court's own standard of a scenario where extraterritorial jurisdiction is present. Beyond the issues presented in Colombia's request for an advisory opinion, this brief also presented a set of issues relating to the source of funding and possible lack of regulation and transparency that also play a role in establishing extraterritorial jurisdiction that should all be considered by the Court. The Court is presented with the unique opportunity to fill a void in international law that, if implemented as suggested in this brief, would have a positive impact on human rights.

Date: January 14, 2017

Respectfully submitted,



Honor Humphrey

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Thomas T. Ankersen

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